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THE DEVELOPMENT OF JUDICIAL REVIEW  
OF LEGISLATION AND  
IRISH CONSTITUTIONAL LAW  
1929-1941

VOLUME 1 OF TWO VOLUMES

BY

GERARD WILLIAM HOGAN

THESES SUBMITTED FOR THE  
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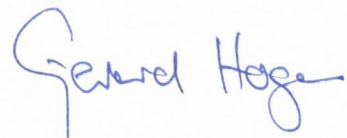
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## SUMMARY

The years between 1929 to 1941 were momentous ones for Irish constitutional law, yet to date the striking developments which took place during this period have not been sufficiently explored by either lawyers or historians. This thesis does not pretend to attempt a comprehensive historical account of these developments, but instead seeks to examine certain key events which took place during this period.

The major conclusions of this thesis are that by the mid-1930s the Constitution of the Irish Free State of 1922 was doomed and that its demise had been facilitated by the manner in which Article 50 of that Constitution had been judicially interpreted. The drafting of a new Constitution was therefore necessary. While Mr. de Valera remained overall political control, he was content to leave the detailed drafting to a gifted team of elite civil servants. The broad horizons of this team ensured that the Constitution transcended the narrow political, civic and religious ethos then prevailing and this in turn has enabled the Constitution to thrive in the very different Ireland of the year 2000. While the extent to which the drafting team influenced the content of the new Constitution must remain to some extent a matter of conjecture, it seems impossible to avoid the conclusion that many of the important new and innovative features of the Constitution were the spontaneous product of the thinking of John

Hearne, the key member of the team. Moreover, such limited evidence as there is suggests that Hearne (at least) intended that Article 40.3.1 the Constitution would protect unenumerated as well as the rights specifically enumerated elsewhere in the Constitution. If, this is correct, then this suggests that the drafters intended to protect fundamental rights via the vehicle of Article 40.3 and it would seem to follow that the reasoning in *Ryan v. Attorney General* was no accidental by-product of the actual phrasing of Article 40.3.1.

The major conclusion of the thesis is that the frequently made assertion that the drafters never intended a vigorous system of judicial review of legislation is, in fact, incorrect. If it had been otherwise, certain of the drafting team - Hearne included - would not have been prominent advocates of a special Constitutional Court. Nor would the drafting team have agonised over the details of the very innovative Article 26 procedure and they surely would not have sought to make the sharp distinction which they did make between Articles 40 to 44 on the one hand and Article 45 on the other.

Standard research methodology has been employed. The major constitutional cases from this period have been examined in detail; frequent reference is made to parliamentary debates, books and learned journals and extensive use has been made of important archival material.

## ACKNOWLEDGEMENTS

Most of the preliminary research for this thesis has been done in the Berkeley Library, Trinity College, Dublin; the Archives Department of University College, Dublin and the Public Record Office. I cannot sufficiently thank Ms. Elizabeth Gleeson (Berkeley Library); Dr. Seamus Helverty (of the UCD Archives Department) and Ms. Catriona Crowe of the Public Records Office and their respective staff for their unfailing courtesy and assistance.

To others a very large debt of gratitude is also owed. In the first place, I must thank my hard-pressed supervisor, Professor William Binchy, with whom I have had many profitable and enjoyable conversations. My Head of Department, Gerry Whyte, kindly arranged a period of sabbatical leave in the academic year 2000-2001 to enable me to complete this work. My colleagues, Eoin O'Dell and Dr. Hilary Delany, also provided much needed encouragement and assistance.

Outside of the Law School, Trinity College, Dublin, I must particularly thank Professor David Gwynn Morgan of University College, Cork for his many insights. My thanks are also due to the following who provided information, assistance and encouragement: P.J. Connolly S.C., Mr. Justice Costello, Chief Justice Finlay, Mr. Justice Geoghegan, the late Professor Robert Heuston, Chief Justice Ronan



Keane, Professor Dermot Keogh, Professor Barry McAuley, Michael McDowell S.C., Chief Justice O'Higgins, Professor W.N. Osborough and Dr. T.K. Whitaker. One of my greatest regrets is that I did not get to speak with the late Dr. Maurice Moynihan prior to his death in August 1999. Dr. T.K. Whitaker had kindly arranged an interview with Dr. Moynihan for me, but, by the time I done sufficient research work and was ready to interview that great civil servant, his medical condition was such that the interview could not take place.

I have thus far thanked those who specifically assisted me with this thesis. But I also realise that I owe an even greater debt of gratitude to the Law Schools of the three Universities with whom I have had the great good fortune to have had associations with. From my days as an undergraduate the academic staff of the Law Faculty of University College, Dublin encouraged my interest in constitutional law and, in this regard, I hope I may be permitted to single out Professor James Casey, Tom Cooney, Arnaud Cras, the late Professor John Kelly, James O'Reilly SC and Dr. Mary Redmond. At the University of Pennsylvania Professor C. Edwin Baker fostered my interest in US Constitutional Law and Professor Virginia Kerr gave me a special insight into the workings of the US Supreme Court. Finally, I owe almost everything to my colleagues at the Law School, Trinity College, Dublin who have been a constant source of support and encouragement ever since I joined the academic staff in October 1982.

It remains only to thank my own parents and my own family for remarkable perseverance and encouragement: my wife Karen and children, Hilary, Hugh and Emmet. If a thesis can be dedicated, it is to them. It is also dedicated in memory of my beloved late son Niall (1992-1994).

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**VOLUME 1**  
**THE DEVELOPMENT OF JUDICIAL REVIEW**  
**OF LEGISLATION AND**  
**IRISH CONSTITUTIONAL LAW 1929-1941**

**CHAPTER 1:**

**INTRODUCTION**

On August 10, 1922, Professor Felix Frankfurter of the Harvard Law School (and later a very distinguished justice of the US Supreme Court) wrote to his good friend Lionel Curtis, a senior British civil servant who had been heavily involved in the 1921 Treaty negotiations with a query about the draft Irish Free State Constitution which had been published earlier that June. In the course of that letter, Frankfurter observed that:

“To a student of constitutional law - at least American law - the most arresting provision in the Irish Free State Constitution is Article 64 giving the High Court jurisdiction over the law of any law having regard to the provisions of the Constitution - the familiar American doctrine of judicial review. I write to trouble you for such information as you can give as to the purpose of Article 64. Was it urged by the Irish or by Great Britain and why by either? What part did American experience play in the



proposal....The development is of vital significance. Of course I do not want any of this for publication and will respect any confidence which you may care to impose.”

Curtis then passed on the letter to Hugh Kennedy, then Law Officer to the Provisional Government:

“The enclosed is from a friend of mine, Felix Frankfurter, of Harvard University. Can you supply me with materials for an answer? The writer is, I believe, the recognised authority on constitutional questions and it is important that any information should be based on first hand authority.

One would gather from the telegrams this morning that Collins’s death has come as a stunning blow to Dublin. You will miss Mick’s presence terribly and so shall we here. But he would be the first to tell you that the cause for which he stood was too big to depend on the shoulders of any one man. I think a good many of us would feel the same if Mr. Lloyd George were cut off. Yet other people would step into the gap and fill his place and as England would go on, so Ireland will go on. There are people who can fill vacant places.”

Although Kennedy clearly received the letter from Curtis and its enclosure<sup>1</sup>, it never seems to have been replied to. This is not altogether surprising, since, as can be gleaned from the second part of the letter from Curtis, the fledgling Provisional Government had just suffered a devastating blow following the assassination of Michael Collins, the Commander-in-Chief of the Provisional Forces on August 22, 1922 and all attention in Government circles was naturally focussed on bringing the Civil War (which had broken out in June of that year) to an end. But even if Kennedy could have devoted sufficient time to reply to Professor Frankfurter's letter, one suspects that even he - one of the architects of the Free State Constitution - would have found it difficult to give a ready answer to these questions.

The question posed is still as beguiling as ever: despite the fact that both the Irish Free State Constitution and the Constitution of Ireland expressly provided for judicial review of legislation by the High Court and Supreme Court, it is still not clear why such a step was taken. And although judicial review plays a prominent role in modern Irish constitutional law - and, indeed, has had a decisive influence on the development of modern Irish society and its politics - different views have been expressed as to whether such developments had ever been either foreseen

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<sup>1</sup> It may be found in the Kennedy papers in University College, Dublin: UCD P.4/1645.

or intended by the drafters of either the 1922 or 1937 Constitutions.

In addition, of course, little has been written from a legal perspective on the momentous constitutional developments which took place during this period of the infancy of the Irish State. Not only that, but key decisions of the Supreme Court during this period in cases such as *The State (Ryan) v. Lennon*<sup>2</sup> and *Re Offences against the State (Amendment) Bill, 1940*<sup>3</sup> have all but been glossed over by historians.<sup>4</sup> Moreover, despite Professor Keogh's trailblazing account of the drafting of Article 44 of the Constitution<sup>5</sup>, nearly all of the other aspects of the drafting of the 1937 Constitution have hitherto remained shrouded in obscurity.

This thesis seeks to shed some light on the possible answers to these questions. It does so in the first instance by charting the development of selected aspects of Irish constitutional law from 1929 until 1941. It had been originally hoped that the thesis would cover developments from 1922 until about 1950, but considerations of space have meant that this simply was not possible within the

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<sup>2</sup> [1935] IR 170.

<sup>3</sup> [1940] IR 470.

<sup>4</sup> In fairness, Professor O'Halpin does make passing reference to this important episode in *Defending Ireland: The Irish State and its Enemies* (Oxford, 1999) at 203.

<sup>5</sup> Keogh, "The Irish Constitutional Revolution: An Analysis of the Making of the Constitution" in Litton ed., *The Constitution of Ireland 1937-1987* (Dublin, 1987)



prescribed word limit. It accordingly became necessary to select a shorter time period and, even within that time period, to choose as between the number of topics examined. The period of time selected therefore runs from the passage of the Constitution (Amendment (No. 16) Act 1929 to the Second Amendment of the Constitution Act 1941.

In essence, the thesis seeks to explain the reasons for the downfall of the 1922 Constitution; to describe the experience of the Courts with major cases dealing with Article 2A of that Constitution in the 1930s; to examine the circumstances in the years from 1934 to 1937 which led to the new Constitution; to explain the thinking of Mr. de Valera and his drafting team in relation to key issues such as fundamental rights and judicial review of legislation; to describe the first major litigation involving the Constitution in 1939-1940 and to conclude with an examination of the thinking behind aspects of the Second Amendment of the Constitution Act 1941.

The broader constitutional history of the Irish Free State from 1922 until 1937 is, of course, well known and it is not at all proposed to duplicate this historical work here. Any thesis which attempted to deal comprehensively with these issues would have to run to several volumes. Accordingly, the thesis does not deal directly with what might be termed the political dimensions of these

developments (e.g., the vote on the Treaty<sup>6</sup>; the progressive evolution of Dominion status and the Statute of Westminster 1931<sup>7</sup>; the Governor-General Crisis of 1932<sup>8</sup> and the subsequent dismantling of the Treaty in the 1932-1937 period following the accession of Mr. de Valera to power in 1932<sup>9</sup>). Nor does the thesis even deal directly with the drafting as such of either the Constitution of the Irish Free State (which, of course, pre-dates the period under discussion) or the Constitution of Ireland. However, in the latter case, some attempt to is made to explore aspects of the drafting of the Constitution so far as this relates to the role of the fundamental rights provisions and the role of the courts and judicial review of legislation. It should also be noted that considerations of space and the imposed word limit have also meant that certain very important issues have not been examined: thus, for example, there is no account here of the debates in 1937 concerning the role of the President or the role of women or the extent to which the Constitution was a "Catholic" Constitution.

Chapter 2 sets the scene for the developments which are the subject matter of the latter chapters. As this chapter focuses on the manner in which the 1922 Constitution was

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<sup>6</sup> See, e.g., Garvin, *1922: The Birth of Irish Democracy* (Dublin, 1996).

<sup>7</sup> See, e.g., Harkness, *The Restless Dominion* (New York, 1970).

<sup>8</sup> See, e.g., McMahon, "The Chief Justice and the Governor-General Controversy in 1932" (1982) 17 *Irish Jurist* 146.

<sup>9</sup> See, e.g., O'Sullivan, *The Irish Free State and its Senate* (London, 1940).



undermined, first, by judicial interpretation and subsequently, by legislative action, it is necessary first to set out the background to Article 50 of that Constitution (dealing with the power to amend the Constitution) and to consider how this was judicially interpreted during the 1920s. The draft Article 50 had been amended during its passage through the Dail in order to provide that the Constitution could be amended by ordinary legislation for an initial eight year period. Although the intention of the opposition spokesmen who first moved the amendment was that the Oireachtas should have the necessary flexibility to make appropriate (mainly technical) changes to the Constitution without having to go to the expense and inconvenience of a referendum, this change subsequently proved to be a form of legal Trojan horse which led to the complete undoing of the Constitution. Thus, the old Court of Appeal in its final ever judgment in May 1924 in *R. (Cooney) v. Clinton*<sup>10</sup> held that the effect of Article 50 was such that during the currency of this eight year period it was "difficult to see how, during the period of eight years, any Act passed by the Oireachtas can be impeached as ultra vires so long as it is within the terms of the Scheduled Treaty."<sup>11</sup> The Court further rejected the argument that an Act of the Oireachtas could only amend the Constitution if it expressly so declared this as its objective. This was taken a step further when Hanna J.

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<sup>10</sup> [1935] IR 247 (The case was belatedly reported).

<sup>11</sup> *Ibid.*, 247.



held in *Attorney General v. M'Bride*<sup>12</sup> that the Constitution could be implicitly amended by an Act of the Oireachtas. This paved the way for one of final steps in the disintegration of that Constitution, as the Oireachtas then passed the Constitution (Amendment No. 16) Act 1929 which extended the eight year period for another eight years. This in turn enabled the Fianna Fail Governments of the 1930s to dismantle the entire Treaty settlement through a series of radical constitutional amendments which did not as a result require to be put to a referendum.

Chapter 3 deals with the major constitutional decisions of the early 1930s, in particular the seminal Supreme Court decision in *The State (Ryan) v. Lennon*. This chapter describes in detail the celebrated Blueshirt cases from 1933 to 1936 in which the High Court and Supreme Court were confronted with fundamental constitutional issues arising from the insertion in 1931 of Article 2A in the Free State Constitution. This provision allowed for the establishment of military courts (from whose decisions there was no right of appeal) to deal with para-military offenders and this chapter chronicles the extent to which the courts were willing to tolerate the erosion of fundamental liberties in the interests of public security. In this chapter the conclusion is reached that while the courts were prepared to control the operation of Article 2A on orthodox and traditional grounds (such as error on the face of the

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<sup>12</sup> [1928] IR 451.

record etc.), they were not willing - with the important exception of Kennedy C.J. - to go the next step and actually invalidate the critical constitutional amendments. In short, these were orthodox judges schooled in the traditional British judges who were - as yet - still uncomfortable with the wider possibilities offered by judicial review of legislation and adherence to normative constitutional standards protecting fundamental rights.

Chapter 4 deals with the drafting of the Constitution during the 1934-1937 period. The first section of the chapter seeks to demonstrate how influential the work of the 1934 Constitution Committee actually was and how the technical legal parameters of the new Constitution closely followed the recommendations of this Committee. The argument is advanced that the legal draftsmen of the new Constitution learnt from the mistakes and failures of the 1922 Constitution and, by extension, seeks to demonstrate why the 1937 Constitution proved to be a such a success in comparison with the 1922 document. The second half of the chapter charts the major steps in the drafting and enactment of the Constitution, commencing with John Hearne's preliminary drafts in 1935 and discusses some of the major personalities involved who had an input into the drafting process. The conclusion is reached that while de Valera at all stages retained ultimate political control and was actively involved in respect of some of the more controversial Articles (such as, e.g., Article 44), the drafting team had a significant role in the design and

content of the Constitution. De Valera was well served by a talented drafting team whose broad-mindedness and liberal disposition enabled them to produce a document which transcended the cultural values of Ireland of the 1930s and to ensure that the Constitution is still robust and resilient in the very different Ireland which obtained sixty-three years later.

Chapter 5 confronts the fundamental question at the heart of this thesis: to what extent did the drafters intend that judicial review of legislation would be a potent weapon in the judicial armoury and that legislation would frequently be tested for compatibility with the Constitution's fundamental rights guarantees. In his seminal work, *Fundamental Rights in Irish Law and Constitution*<sup>13</sup>, Professor Kelly maintained that Mr. de Valera had never really contemplated that the power of judicial review would be used to curb the power of the Oireachtas and review decisions of the Executive and that he had simply intended the fundamental rights provisions to act as mere "headlines" to the Legislature.

This Chapter reviews afresh all the available evidence and the conclusion is reached that Professor Kelly understated - perhaps even significantly understated - the extent to which judicial review of legislation had been envisaged by the drafters. From the perspective of the language and

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<sup>13</sup> Dublin, 1967.



structure of the Constitution it is apparent that the potential for judicial review of legislation and the protection of individual rights was enhanced by the present Constitution by contrast with the 1922 document. There now seems little doubt but that these changes were intentional, even if the drafters could not, of course, have anticipated the full extent of the judicial activism which would subsequently come to pass. As far as the Dail Debates are concerned, while it is true that Mr. de Valera was suitably ambiguous on occasion, there is also significant evidence from these debates which is inconsistent with Professor Kelly's thesis. Finally, it is contended that the files from both the Public Record Office and the de Valera papers (to both of which, of course, Professor Kelly did not have access) themselves clearly demonstrate that the drafters were anxious to reinforce the powers of judicial review of legislation.

Chapter 6 deals in depth with the first two major decisions under the new Constitution, *The State (Burke) v. Lennon* and *Re Article 26 and the Offences against the State Bill, 1940*.<sup>14</sup> In the first part of the Chapter the tense aftermath of Gavan Duffy J.'s remarkable judgment is surveyed. The second part of the Chapter deals with the introduction of the Offences against the State (Amendment) Bill 1940 and the circumstances in which the Bill came to be referred to the Supreme Court. The

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<sup>14</sup> [1940] IR 470.

suggestion - which was tentatively hinted by Professor Beth (albeit later withdrawn) - that the composition of the Court on that reference was somehow manipulated in order to secure a result favourable to the Bill is refuted. However, the conclusion is reached that the Bill was only upheld by a narrow majority; that this in itself must have come as a surprise to the Government and that the very fact that a Bill of this kind only narrowly survived challenge must have sent its own signal that the Constitution had, indeed, endowed the judiciary with potent powers which might well be used to rebuff the other organs of government in more settled times.

Chapter 7 deals with the background to the Second Amendments of the Constitution Act 1941. This Chapter first describes the establishment of the 1940 Constitution Review Committee and its functioning. The rest of the Chapter seeks to demonstrate how certain key amendments in matters relating to the "one judgment" rule, the finality of the Supreme Court's determination following Article 26 references and habeas corpus were all prompted, directly or indirectly, by the Supreme Court's decision on the 1940 Bill. The argument is also advanced that the fact that such care was taken in respect of these amendments is in itself evidence that the drafters fully understood the importance of the judicial review mechanism.



Chapter 8 is a short concluding chapter which seeks to recapitulate the major arguments already advanced in the thesis.

Finally, a word about sources. In addition to the usual sources such as law reports, books, articles in learned journals and newspapers, extensive use has been made of certain archival material. All the available files relating to the drafting of the 1937 Constitution contained in the Public Record Office have been consulted<sup>15</sup> and extensive use has also been made of the de Valera papers which are now deposited with the Archives Department in University College, Dublin.<sup>16</sup> In a small number of instances reference is made to confidential sources. In all such cases the sources concerned were well placed to volunteer the information or make the suggestions which they did and it is felt that their confidence is worthy of respect.

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<sup>15</sup> These are designated as "S" files from the Department of the Taoiseach, e.g., S. 9848

<sup>16</sup> These are designated with either the "UCD" or "UCD P" prefix, e.g., UCD 1082/6.

## CHAPTER 2

### THE UNDOING OF THE CONSTITUTION OF THE IRISH FREE STATE

#### *Introduction*

It has been written that:

“The Irish Free State Constitution was unique. Ostensibly it created an Irish constitutional monarchy, but by force of will the Provisional Government ensured that key republican values were written into constitutional law for the first time, including popular sovereignty, parliamentary control of the war power, and entrenched civil rights.”<sup>1</sup>

However, at the time that Constitution was introduced, the legal system was in a state of crisis. The Civil War was raging and a form of martial law prevailed. The reaction of the courts to the habeas corpus applications brought during the Civil War demonstrated that the judges were either unwilling or unable to provide effective protection of the

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<sup>1</sup> Ward, *The Irish Constitutional Tradition, Responsible Government and Modern Ireland, 1782-1992* (Dublin, 1994) at 187.

fundamental rights of the population.<sup>2</sup> There probably could not have been a more inauspicious time in which to introduce the novelties of a written Constitution with protections for fundamental rights along with the power of judicial review of legislation. At all events, the courts were (with few exceptions) unwilling to subject the exercise of far-reaching and draconian executive and legislative powers to any searching scrutiny during the entire period of the Irish Free State's existence from 1922-1937.

Prior to 1922 there had been, of course, no Irish constitutional law to speak of. The "political and legal constitutional studies in this Country" had in practice been "limited to the British Constitution and the working of the British Parliament"<sup>3</sup>, of which the doctrine of parliamentary sovereignty was - and which, despite erosion by the twin influences of European Union law and the Human Rights Act 1998, still remains - its most striking feature. Accordingly, Articles 65 and 66 of the 1922 Constitution which vested the High Court (and, on appeal, the Supreme Court) with express powers of judicial review of

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<sup>2</sup> See, e.g., *R. (Childers) v. Adjutant General, Provisional Forces* [1923] 1 IR 5 and *R. (Johnstone) v. O'Sullivan* [1923] 1 IR 13. See generally, Hogan, "Hugh Kennedy, the Childers Habeas Corpus Application and the Return to the Four Courts" (hereafter "Hogan Four Courts") in Costello ed., *The Four Courts: 200 Years* (Dublin, 1996) at 177-219; Keane, "'The Will of the General': Martial Law in Ireland, 1535-1924" (1990-1992) 25-27 *Irish Jurist* 151.

<sup>3</sup> Foreword by Chief Justice Kennedy to Kohn, *The Constitution of the Irish Free State* (London, 1932) at xii.



legislation<sup>4</sup> represented a radical break with the previous British tradition. Indeed, these provisions may be thought to represent the coping stone of the entire constitutional experiment - at least, so far as the "republican" element of that Constitution<sup>5</sup> was concerned, for unless this power to adjudicate on issues of constitutionality was to be exercised with at least some frequency, the fundamental rights provisions would be thereby undermined.

In the event, the 1922 Constitution did not prove - in this respect, at least - to be a success. In the period between 1922 to 1937, there were only two occasions in which this power was actually exercised<sup>6</sup> and a combination of circumstances conspired to ensure that the power of judicial review never played the significant role that the drafters of the Constitution had evidently intended. There were essentially two reasons for this. First, the legal culture was largely unreceptive and inhospitable. Unfamiliarity with the concept of judicial review led the judiciary to give the personal rights guarantees of the new

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<sup>4</sup> *I.e.*, the power to invalidate a statute on the ground that it contravened a provision of the Constitution. This was completely unknown in the British system.

<sup>5</sup> *I.e.*, in contrast to those features which were either inspired by previous British constitutional practice (e.g., the rules as to parliamentary privilege in Articles 18 and 19) or which established the institutions of the State in a manner which roughly paralleled the Westminster model (e.g., the Executive Council based on the principle of collective responsibility contained in Article 51).

<sup>6</sup> *R. (O'Brien) v. Governor of the North Dublin Military Barracks* [1924] 1 IR 32; *ITGWU v. TGWU* [1936] IR 471.



Constitution of the Irish Free State a highly restricted ambit. As Professor Kelly perceptively observed:

"The judges [of this period] were used to the idea of the sovereignty of parliament, and notions of fundamental law were foreign to their training and tradition. The effect of these clauses in the 1922 Constitution was thus minimal."<sup>7</sup>

Secondly, the manner in which the language of Article 50 of the Constitution was judicially interpreted effectively set at naught the possibility of the evolution of any significant constitutional jurisprudence. This, in turn, served to create the impression that these guarantees counted for little and that the power of judicial review of legislation would seldom (if ever) be exercised. This process reached its apotheosis with the decision of the Supreme Court in *The State (Ryan) v. Lennon*.<sup>8</sup>

In that case - which will be discussed at greater length both later in this Chapter and in Chapter 3 - a majority of the Court held that, subject to the provisions of the Scheduled Treaty, there were no limits to the power of the Oireachtas to amend the 1922 Constitution, thereby setting at naught (should the legislature so see fit) the fundamental rights guarantees. In effect, the *Ryan* majority

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<sup>7</sup> *Fundamental Rights in the Irish Law and Constitution* (Dublin, 1967) at 16-17.

<sup>8</sup> [1935] IR 170.

represented a combination of Austinian positivist thinking, which, taken together with a somewhat rigid method of constitutional interpretation, resulted in the emasculation of the Constitution, thereby leaving a virtually all powerful Oireachtas and Executive Council. In contrast, the 1937 Constitution was to represent a conscious break with this majority thinking in that it emphasised the sovereignty of the people via the referendum process, rather than the sovereignty of parliament. Furthermore, the 1937 Constitution, with its frequent appeals to inalienable fundamental rights, sought to re-inforce the personal rights of the citizens and not (as with the 1922 experience) leave them entirely at the mercy of the Oireachtas. In both these respects, the 1937 Constitution may be said to have endorsed the constitutional theories so vigorously expounded by Kennedy C.J. in his dissenting judgment in *Ryan* and which will be examined in greater detail in the next Chapter.<sup>9</sup>

However, the constitutional history of the first five years or so of the Irish Free State does not fall within the within the scope of this thesis. Accordingly, we are not here concerned with major issues such as the drafting of the Irish Free State Constitution<sup>10</sup>; the courts and the

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<sup>9</sup> See Chapter 3, pages 106-123, *infra*.

<sup>10</sup> See generally, Curran, *The Birth of the Irish Free State* (Alabama, 1980) at 200-218; Akenson and Fallin; "The Irish Civil War and the Drafting of the Irish Free State Constitution" (1970) 5 *Eire-Ireland* 10-26 (No.1); 42-93 (No.2); 28-70 (No. 4); Farrell, "The

Civil War<sup>11</sup>; the reform of the judiciary and the courts structures and the establishment of the new High Court and Supreme Court in June 1924<sup>12</sup>; the collapse of the Boundary Commission<sup>13</sup> nor the experience of the Irish Free State with appeals to the Privy Council.<sup>14</sup> Instead, our only major concern with the constitutional history of the Irish Free State prior to the accession to power of Mr. de Valera in March 1932 is to trace the sequence of events, which ultimately led to the collapse of the 1922 Constitution during the 1930s. To that end, we have to commence with an examination of the power of amendment, which was contained in the 1922 Constitution. It is, therefore, in its treatment of this somewhat mundane matter that this thesis essentially begins.

### *Article 50 of the 1922 Constitution*

One of the innovatory features of the 1922 Constitution was that it provided that future amendments would have

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Drafting of the Irish Free State Constitution" (1970) 5 *Irish Jurist* 115-140; 343-356; (1971) 6 *Irish Jurist* 111-135; 345-359.

<sup>11</sup> See Hogan, *Four Courts*, *loc.cit.*, and Keane, *loc.cit.*

<sup>12</sup> See generally, Hogan, "Chief Justice Kennedy and Sir James O'Connor's Application" (1988) 23 *Irish Jurist* 144 at 152-158,

<sup>13</sup> See generally, Hand ed., *Report of the Irish Boundary Commission 1925* (Shannon, 1969); Hand, "MacNeill and the Boundary Commission" in Martin and Burne eds., *Eoin MacNeill, Scholar Revolutionary* (Shannon, 1973); Mansergh, "Eoin MacNeill - A reappraisal" (1974) 73 *Studies* 140 and Lee, *Ireland 1912-1985: Politics and Society* (Cambridge, 1985) at 140-150.

<sup>14</sup> See generally *Moore v. Attorney General* [1935] IR 472; Ward, *op.cit.*, 231-233; Towey, "Hugh Kennedy and the Constitutional



to be subjected to a referendum. Article 50 of the 1922 Constitution as enacted provided that:

"Amendments of this Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas, but no such amendment, passed by both Houses of the Oireachtas, [after the expiration of a period of eight years from the date of the coming into operation of this Constitution,] shall become law, unless the same shall, after it has been passed or deemed to have been passed by the said two Houses of the Oireachtas, have been submitted to a Referendum of the people, and unless a majority of voters on the register, or two-thirds of the vote recorded, shall have been cast in favour of such amendment. [Any such amendment may be made within the said period of eight years by way of ordinary legislation and as such shall be subject to the provisions of Article 47 hereof.] "

As we shall now see, the vital words in brackets were added at the last minute during the course of the Dail Debates. However, had the drafters' original intentions in this regard been fulfilled, the path of constitutional development in the 1920s and 1930s would surely have taken a different route. In particular, the radical constitutional changes of the 1930s (such as the abolition

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Development of the Irish Free State 1922-1923" (1977) 12 *Irish Jurist* 355.



of the oath and the office of Governor General and the end of the appeal to the Privy Council) might not have been possible had each amendment been subject to the referendum process and which would have required a majority of voters on the register or two-thirds of the voters who actually voted.<sup>15</sup> However, as just mentioned, a last-minute alteration to the text of Article 50 allowed of amendments by ordinary legislation during an initial eight year period from the date the Constitution came into force, i.e., until December 6, 1930. As Chief Justice Kennedy (himself a member of that Constitution's drafting committee) was later to explain:

"It was originally intended, as appears by the draft, that amendment of the Constitution should not be possible without the consideration due to so

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<sup>15</sup> It will be noted that this was a far more restrictive requirement than that required of amendments to the present Constitution, as Article 47.1 merely requires a majority of the votes actually cast at that referendum. Indeed, the 1937 Constitution would not have been passed had it been required to satisfy the conditions stipulated by Article 50 of the 1922 Constitution. As O'Sullivan, *The Irish Free State and its Senate* (London, 1940) observed (at 502):

"Under Article 62 of the [1937 Constitution] only a bare majority of those actually voting was required, and so the new Constitution had been enacted by the people. But if the conditions laid down in Article 50 had been incorporated in Article 62 it would have been decisively rejected."

But it might be said that the original version of Article 50 was unrealistic in its rigidity and set an unfairly high (and, indeed, arbitrary) threshold requirement in respect of the majority required

important a matter affecting the fundamental law and framework of the State, and the draft provided that the process of amendment should be such as to require full and general consideration [sc. by means of referendum]. At the last moment, however, it was agreed that a provision be added to Article 50, allowing amendment by way of ordinary legislation during a limited period so that drafting or verbal amendments, not altogether unlikely to appear necessary in a much debated text, might be made without the more elaborate process proper for the purpose of more important amendments. This clause was, however, afterwards used for effecting alterations of a radical and far-reaching character, some of them far removed in principle from the ideas and ideals before the minds of the first authors of the instrument."<sup>16</sup>

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in respect of a referendum, especially when that Constitution had itself never been adopted by referendum.

<sup>16</sup> Foreword to Kohn, *The Constitution of the Irish Free State* (London, 1932) at xiii. Cf. his comments in dissent on this point in *The State (Ryan) v. Lennon* [1935] IR 170 and the observations of Murnaghan J. (who was also a member of the 1922 drafting committee) by way of rejoinder (at 244):

"I am ready to conjecture that when Article 50 was framed it was not considered probable that any such use of the power would be made as has been made, but the terms in which Article 50 is framed does authorise the amendment made and there is not in the Article any express limitation which excludes Article 50 itself from the power of amendment."



As we shall presently see, the eight year clause - originally intended simply to cover minor and technical amendments - ultimately proved to be the means whereby the entire 1922 Constitution was undone.<sup>17</sup>

The last minute amendment to which Kennedy referred took place during what amounted to a Committee Stage debate on the draft Constitution by the Third Dail sitting as a Constituent Assembly. During the debate on Article 50<sup>18</sup> the Minister for Home Affairs (Kevin O'Higgins T.D.) the Government moved an amendment, which would have allowed amendments by means of ordinary legislation for a five-year period:

"It is realised that in all the circumstances of the time, this Constitution is going through with what

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<sup>17</sup> As FitzGibbon J. later remarked in *The State (Ryan) v. Lennon* [1935] IR 170, 234:

"The framers of our Constitution may have intended 'to bind man down from mischief by the chains of the Constitution' but if they did, they defeated their object by handing him the key of the padlock in Article 50."

In more recent times, a former Chief Justice, writing extra-judicially, has expressed the same view regarding the effect of Article 50: see O'Higgins, *The Constitution and the Courts* in Lynch and Meenan eds., *Essays in memory of Alexis FitzGerald* (Dublin, 1987) at 125-6:

"The repressive measures which became necessary [during and immediately after the Civil War] against those whose actions threatened the State and the maintenance of law and order, required a duration or continuance which was, at first, not apparent. This in turn exposed an internal weakness in the [1922] Constitution - a weakness which subsequently, and perhaps inevitably, led to its collapse."



would, if the circumstances were otherwise, be considered undue haste. It is realised that only when the Constitution is actually at work will the latent defects that may be contained in it show themselves, and it would be awkward to have changes in the Constitution - changes about which there might be unanimity in the Dail and in the Senate - if it were necessary to go to a referendum and to get the majority of the voters on the register to record their votes in favour of such amendment. That would be a cumbersome process and very often it might be out of all proportion to the importance of the amendment we might wish to make. If the Article were to stand as it is in the text of this Draft Constitution we would have, for the slightest amendment, to go to the country and go through all the elaborate machinery of a referendum. Now we are providing by this Government amendment that for five years there can be changes by ordinary legislation in the Constitution, and after that time the Referendum will be necessary to secure a change. The only provision is that while we are stating that amendments may be made by ordinary legislation, the provisions of Article 46 will apply, which provisions enable a certain proportion of the Senate to call for a Referendum and in the case a Referendum would have to be held."<sup>19</sup>

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<sup>18</sup> Originally Article 49.

This amendment was warmly welcomed by prominent opposition deputies, including Johnson<sup>20</sup> and Gavan Duffy.<sup>21</sup> Johnson, however, pressed for a longer period because he thought it obvious "that constitutional matters will not be in the minds of the people if [pressing] legislative demands are being attended to in the Parliament."<sup>22</sup> The Minister agreed to this suggestion and, accordingly, the five-year period was subsequently extended at Report Stage to eight years.<sup>23</sup> The suggestion that the Constitution might be amended by ordinary legislation for a short transitional period probably made a good deal of sense at the time. After all, a written Constitution with judicial review was a complete novelty and given the inauspicious circumstances in which it had come to be

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<sup>19</sup> 1 *Dail Debates*, Col. 1237 (October 5, 1922).

<sup>20</sup> Thomas Johnson (1872-1963) was a TD from 1922-1927 and leader of the Labour Party. During this period - prior to the entry of Fianna Fail to the Dail in August 1927 - Johnson was leader of the opposition. For a profile of Johnson, see Gaughan, "Thomas Johnson, 1887-1963" (Kingdom Books, 1980.)

<sup>21</sup> Gavan Duffy said (1 *Dail Debates* at 1238):

"I wish to congratulate the Minister very heartily on the amendment which he has proposed which, I think, is an excellent one, and goes a long way to meet certain objections."

But Gavan Duffy was subsequently quickly alive to the implications of the defective drafting of Article 50: see 4 *Dail Debates* Cols. 418-419 (July 10, 1923).

<sup>22</sup> 1 *Dail Debates* at 1238.

<sup>23</sup> 1 *Dail Debates* at 1748-9 (October 19, 1922).

drafted and debated, it was reasonable that the Oireachtas should retain the power to make amendments without the necessity for a referendum. Moreover, it was clear from the tenor of the Minister's speech ("latent defects", "slightest amendment") that it was intended that this transitional power would be used to remedy what amounted to drafting errors or to make a number of technical changes.

Unfortunately, however, no one foresaw at the time the amendment was accepted by the Dail that this power could be used to undermine the Constitution in three significant ways. First, there was the possibility (which was ultimately accepted by the courts) that during this transitional period the Constitution could be implicitly amended by ordinary legislation which was in conflict with it. Secondly, there was nothing to prevent conditional or even temporary amendments of the Constitution which were made contingent on other events (such as a Government order bringing an amendment into force for a temporary period), so that, especially in the latter years of its life, it was not always easy to determine what the current text of the Constitution actually was. Finally, there was the prospect that the eight year period might itself be extended by the Oireachtas, so that the Constitution would be rendered entirely vulnerable to legislative abrogation. This is what ultimately happened and which led to the complete undermining of the Constitution.



## *The "implicit amendment" problem*

The implicit amendment problem was first raised in the Dail by Gavan Duffy during the debate on the Public Safety (Emergency Powers) Bill, 1923. This Bill was an emergency measure designed to provide for the continuation of the internment power for a further six months following the cessation of Civil War hostilities in May 1923. When Gavan Duffy moved an amendment designed to make clear that the 1923 Act should not be construed as an implicit amendment of the Constitution, it was ruled out of order by the Ceann Comhairle on the following grounds:

"The statement that anything contained in an Act of the Oireachtas which may be found to contravene the terms of certain Articles of the Constitution shall be void and of no effect is simply a statement of fact. If the words on the Paper were accepted by the Committee, and if a new section were accordingly added to the Bill, the new section would not, in my judgment, effect any alteration in the Bill. The words suggested to be added to the Bill are not, therefore, an amendment." <sup>24</sup>

Gavan Duffy then made a forceful submission in reply:

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<sup>24</sup> 4 *Dail Debates* at 418 (July 10, 1923).

"I quite accept the proposition that when the Dail passed Article 50 it had not the remotest intention of suggesting that the Legislature might amend the Constitution without legislation ad hoc; that it might amend the Constitution by passing an ordinary law. The effect of the words which we use when we speak of amending the Constitution by ordinary legislation may be to enable a Government or its Legal Adviser to argue, and enable a Court to hold, that in any case where a Statute of this Oireachtas offends the Constitution as originally passed, so much of the Statute as offends that original Constitution must be interpreted as an amendment of the Constitution under Article 50. That would be a flimsy way of getting over a difficulty, but one knows not what will be the Government or who its Law Adviser, or who the Judges, when this Act comes to be interpreted, and it is certainly open to argument by a slim lawyer that an Act which appears to offend against our Constitution must have been intended by the Oireachtas to amend the Constitution, in view of the fact that Article 50 says we may amend the Constitution within eight years by way of ordinary legislation. If that be so, and if it be possible for a Judge to decide that any Act which we pass, not intending to amend the Constitution, does in fact amend it, because it happens to contravene it, and because the Oireachtas cannot be supposed to wish to contravene the Constitution, then I submit it is

necessary in a Statute of this kind to state beforehand that we do not intend to amend the Constitution by this statute. There has been no hint of any official intention to amend the Constitution in introducing this measure. I submit, in these circumstances, in the face of the words "ordinary legislation" whereby we are entitled to amend the Constitution under Article 50, if we intend to maintain that Constitution, it is necessary to make our intention clear in a Bill of this kind."<sup>25</sup>

The Ceann Comhairle did not, however, alter his ruling, saying:

"We must assume that the Constitution is a fundamental matter in connection with which all legislation passed in this Dail must be construed. If we departed from that in our rulings here, it would be difficult to know where we would be going."<sup>26</sup>

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<sup>25</sup> *Ibid.*, 418-420.

<sup>26</sup> *Ibid.*, 420. Ironically, this Act was the only item of legislation enacted by the Oireachtas which was found to be unconstitutional during the lifetime of the Irish Free State: see *R. (O'Brien) v. Military Governor of North Dublin Union Internment Camp* [1924] 1 IR 32. This, however, was on the purely technical ground that the measure had not complied with the requirement contained in Article 47 that if a law were to have immediate effect, it must contain the necessary declaration that its immediate entry into force was required for the purposes of the preservation of peace and order. There was no opportunity to argue the "implicit amendment" doctrine, since the purported law had not complied with the pre-conditions to its entry into force. The matter was immediately rectified by the passage of the Public Safety



However, Gavan Duffy's worst fears about the unintended effect of Article 50 quickly came to pass. In May 1924 shortly before the new courts contemplated by the 1922 Constitution were established following the entry into force of the Courts of Justice Act 1924 the Court of Appeal arrived at precisely this conclusion. In *R. (Cooney) v. Clinton*<sup>27</sup> the applicant had been sentenced in April 1923 by the Free State Army Council to ten years' penal servitude for the unlawful possession of ammunition. It was common case that this sentence imposed by the military authorities could no longer have any legal validity following the cessation of military hostilities after the end of the Civil War.<sup>28</sup> The respondents argued, however, that the continued detention of the applicant had been validated by section 3(1) of the Indemnity Act 1923 which provided that:

".....every sentence passed....before the passing of this Act by any such military tribunal shall be deemed to be and always to have been valid and to be and always to have been within the lawful jurisdiction of the tribunal."

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(Emergency Powers)(No. 2) Act 1923 which did contain the requisite declaration.

<sup>27</sup> [1935] IR 247 (this case was belatedly reported in the wake of *The State (Ryan) v. Lennon*).

<sup>28</sup> Which the parties had agreed for this purpose was August 1, 1923.

Accordingly the only issue before the Court was whether this sub-section of the Indemnity Act was unconstitutional, since this provision "if valid, affords a complete answer to the application for the writ."<sup>29</sup> Kennedy, as Attorney General, appeared for the respondents and, although the report of the hearing before the Court of Appeal is sketchy, he was clearly at pains in his submissions to defend the constitutionality of the Act on the merits and not falling back on the argument that the Act had operated as an implicit amendment of the Constitution:

"...this was [valid] legislation under the Constitution. It did not amend the Constitution; it purported to be an Act within the Constitution."<sup>30</sup>

He also appears to have contended that the Court of Appeal had, in fact, no jurisdiction either to interpret the Constitution or to pronounce on the constitutionality of an Act of the Oireachtas.<sup>31</sup>

O'Connor M.R. rejected the constitutional challenge by opting for the "implicit amendment" theory:

"Reliance was placed on Articles 6, 70 and 72 of the Constitution. These Articles declare the inviolability of

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<sup>29</sup> [1935] IR 247, 246.

<sup>30</sup> *The Irish Times*, April 10, 1924.

<sup>31</sup> See the comments of the President of the Executive Council at 7 *Dail Debates*, Col. 2022 (June 6, 1924)(discussed below).

the subject except in accordance with law; provide that no one shall be tried save in due course of law and that extraordinary courts shall not be established; and that the military courts shall not have jurisdiction over the civil population save in time of war.

This may raise a grave constitutional question. but I am far from saying that under the Constitution as it stood at the date of the passing of the Indemnity Act there was not power in the Oireachtas to pass such an Act without an amendment of the Constitution. It is, however, quite unnecessary to consider any such question, having regard to the power conferred on the Oireachtas by Article 50 to amend the Constitution. This Article says that amendments of the Constitution within the terms of the Scheduled Treaty may be made by the Oireachtas. It then says that no such amendment shall be made after the expiration of eight years unless it is submitted to a Referendum of the people as therein provided and it goes on to say that "any such amendment may be made within the said period of eight years by way of ordinary legislation." It is difficult to see how, during the period of eight years, any Act passed by the Oireachtas can be impeached as ultra vires so long as it is within the terms of the Scheduled Treaty. It was urged that any Act of Parliament purporting to amend the Constitution should declare that it was so intended, but I cannot



accede to the argument in view of the express provision that any amendment made within the period may be made by ordinary legislation."<sup>32</sup>

The thinking underlying the Court of Appeal decision appears to have been that the Constitution had been enacted merely by way of ordinary legislation and that it had no particular special status. In effect, therefore, that

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<sup>32</sup> *Ibid.*, 246-247. In *The State (Ryan) v. Lennon* [1935] IR 170, 241 Murnaghan J. said that the courts had no jurisdiction to review the legality of a duly enacted amendment to the Constitution which was otherwise within the terms of the Scheduled Treaty, adding that this view was "that stated by O'Connor M.R." in *Cooney*. These comments of Murnaghan J. seem referable only to the general power of the courts in relation to the Constitution, as opposed to the separate question of whether any post-1922 Act of the Oireachtas which was in conflict with that Constitution must be taken to have implicitly amended it. Cf. the subsequent comments of O Dalaigh C.J. in *McMahon v. Attorney General* [1972] IR 69, 101 where, acknowledging the validity of the "omnibus technique" of constitutional amendment (considered below) adding that the effect of this was that:

"during the existence of Saorstát Éireann it was at no time possible to challenge, as being unconstitutional any ordinary legislation passed by the Oireachtas of Saorstát Éireann."

However, it should be noted that in *Conroy v. Attorney General* [1965] IR 411 the Supreme Court rejected the submission (without giving reasons) that insofar as there was an inconsistency between the Constitution of 1922 and the Road Traffic Act 1933 the former must have to be taken to have been implicitly amended by the latter. In *Laurentiu v. Minister for Justice, Equality and Law Reform* [2000] 1 ILRM 1 Keane J. reserved the question of whether an Act of the Oireachtas of the Irish Free State which was inconsistent with the 1922 Constitution must be taken to have amended it. This was said in the context of a challenge to the constitutionality of section 5 of the Aliens Act 1935 and since this provision was found by a majority of the Court to be inconsistent with the present Constitution and it was not necessary for the Court to consider the pre-1937 state of affairs.

Court was applying traditional common law principles whereby if there is a conflict between the earlier law (the Constitution) and the later law, the later law prevails having regard to the *lex posterior* principle.

To modern eyes, the response of the Court of Appeal appears ponderously legalistic and, even making every allowance for what was then the entirely novel character of a written Constitution with a power of judicial review, the comments of O'Connor MR seem almost deliberately calculated to undermine the potential of that Constitution. As Kohn was later to observe:

"It would patently be subversive of all legal order if the interpretation of the Constitution were in effect made subject to the entire statute law of the first sixteen years, possibly even of a longer period if the operation of the provisional mode of amendment is further extended."<sup>33</sup>

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<sup>33</sup> Kohn, *op.cit.*, 256. Cf. the comments of Marshall C.J. in *Marbury v. Madison* 1 Cranch 137 (1803):

"If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must decide which of these conflicting rules governs the case. This is of the very essence of the judicial duty. If, then, the courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the



Writing in 1929, O'Brian had been equally trenchant on this point. While he conceded that the "implicit amendment" issue was still open<sup>34</sup> he argued forcefully that:

"Nevertheless, it would seem probable, to judge by the cases involving the validity of laws which have already come before the courts, that the Courts do not consider that any such intention is implied in every Act of the Oireachtas and the decisions in these cases seem to indicate that if this point does, at some time, come before the High Court, the Court will hold that ordinary Acts of the Oireachtas are presumed to be passed subject to the existing provisions of the Constitution, unless an intention to amend that instrument is clearly and explicitly made manifest. To hold otherwise would be to create an impossible situation. If every Act passed now were to imply an intention to amend the Constitution wherever that amendment is contravened, every such implied amendment would, after the 6th December 1930, become rigid and could only be altered by

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case to which they both apply. Those then who controvert the principle that the Constitution is to be considered in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written Constitutions."

<sup>34</sup> Although this presumably was on the basis that the old Court of Appeal had no jurisdiction authoritatively to interpret the Constitution as it had purported to do in *Cooney*.



means of a Special Act of the Oireachtas, ratified by a Constitutional Referendum."<sup>35</sup>

These criticisms have found favour with the modern Supreme Court. Thus, in *Laurentiu v. Minister for Justice, Equality and Law Reform*<sup>36</sup> Barrington J. doubted the correctness of *Cooney* insofar as the "implicit amendment" doctrine was concerned:

"But if one looks at Article 50 of the Irish Free State it seems quite clear that the Article uses the term 'ordinary legislation' to distinguish amendments which may, for a limited period, be made by the Oireachtas itself from amendments which must be submitted to the people by way of referendum. To derive from this distinction a doctrine that the Constitution could be amended by ordinary legislation which need not even be expressed to be a constitutional amendment showed scant respect to the Constitution. It also assumed that the Oireachtas had so little respect for the Constitution that they would amend it without thinking of what they were doing. It also had the practical disadvantage that one could not find out what the Constitution of the Irish Free State provided

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<sup>35</sup> O'Brian, *The Irish Constitution* (Dublin, 1929) at p. 148.

<sup>36</sup> [2000] 1 ILRM 1.

without reading the whole body of statute law passed since 1922.”<sup>37</sup>

At all events, the comments of O'Connor M.R. in *Cooney* were shortly thereafter raised in the Dail when Deputy MacEoin asked whether in the light of these comments it was proposed to introduce legislation to amend Article 50 of the Constitution "to ensure its interpretation in accordance with the intention of the Constituent Assembly." The President of the Executive Council (W.T. Cosgrave T.D.) replied that the Court of Appeal was not the competent authority to define the interpretation of the Constitution and that the Attorney General on behalf of the Government had refused to adopt the view that the Public Safety Act had amended the Constitution by implication. Mr. Cosgrave continued:

"...the late Court of Appeal was not competent to define the interpretation of the Constitution. The late Attorney General on behalf of the Government refused to submit the question as to whether the Public Safety Act was constitutional or otherwise, and

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<sup>37</sup> *Ibid.*, 29. In *Laurentiu* a majority of the Supreme Court held that power to deport aliens contained in s. 5(1)(e) of the Aliens Act 1935 was unconstitutional and contravened Article 15.2.1 (which provides for the exclusive legislative power of the Oireachtas) since the sub-section did not contain any "principles and policies." Although Barrington J. was in his dissent, one of the majority judges, Keane J. also discussed the question of whether the 1935 Act could be taken to have implicitly amended the 1922 Constitution (assuming an inconsistency between the two), but did

though pressed by the Court, refused to adopt this view that the Public Safety Act amended the Constitution though not purporting to do so expressly. The late Attorney General had advised the Government that the Constitution could not be amended incidentally but that any amendment by legislation must be by legislation directed expressly to that purpose.

Certain of the judges in the late Court of Appeal...were reluctant to recognise the position of Dail Eireann as a Constituent Assembly and pressed upon the late Attorney General to argue that the Constitution was itself an ordinary statute and subject to an amendment by an ordinary statute. The late Attorney General in open Court had unequivocally declined to argue this point or submit any contention founded upon it."

When the Labour leader, Deputy Johnson, then suggested that the matter be clarified, perhaps by way of constitutional amendment, the President continued by saying that this was unnecessary as:

"I fear that that would be implying that there was some foundation for the contention that it would be

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not find it necessary to offer a concluded view on the question of whether *Cooney* had been correctly decided.



possible to amend the Constitution by legislation not expressly directed to that purpose."<sup>38</sup>

Another variant of this problem arose in *Attorney General v. McBride*<sup>39</sup> where the issue was whether section 3 of the Public Safety Act 1927 constituted a valid amendment of the Constitution. Unlike the earlier legislation at issue in *Cooney*, the 1927 Act purported expressly to amend the Constitution, albeit in an unusual fashion. This section provided that:

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<sup>38</sup> 7 *Dail Debates*, Col. 2022-3 (June 7, 1924). The President's references to the late Court of Appeal and the late Attorney General are to the fact that the new courts had just been established and the first Attorney General, Hugh Kennedy, had just been nominated as Chief Justice. It was, indeed, a nice question as to whether the Court of Appeal had jurisdiction to interpret the Constitution or to rule on the validity of Acts of the Oireachtas. Article 73 provided that until new courts were established in the Irish Free State, the existing courts should continue and should "continue to exercise the same jurisdiction as heretofore." Of course, immediately prior to the date of the coming into force of the new Constitution in December 1922 the "old" courts enjoyed no jurisdiction to pronounce on the interpretation of that Constitution, still less to declare laws to be invalid for constitutional inconsistency. On the other hand, during the transitional period between 1922-1924 the "old" courts had frequently examined the constitutionality of legislation and had given (apparently) authoritative interpretations of the Constitution without protest: see, e.g., *R. (O'Brien) v. Military Governor, North Dublin Union* [1924] 1 IR 32. This argument has parallels in respect of the jurisdiction of the "old" Supreme Court carried over by Article 58 of the 1937 Constitution to exercise the special jurisdiction to examine the constitutionality of Bill as provided for by Article 26 of the Constitution pending the formal establishment of the "new" courts by the Courts (Establishment and Constitution) Act 1961: see Kelly at pp. 1178-1179 and *Sullivan v. Robinson* [1954] IR 207 and *Eamonn Andrews Productions Ltd. v. Gaiety Theatre Ltd.* [1973] IR 295.

<sup>39</sup> [1928] IR 451.

"Every provision of this Act which is in contravention of any provision of the Constitution shall, to the extent of such contravention, operate and have effect as an amendment for so long only as this Act continues in force such provision of the Constitution."

The 1927 Act was enacted in the immediate aftermath of the assassination of the Minister for Justice, Kevin O'Higgins T.D., on July 10 of that year. Much of this Act anticipated later provisions of the Offences against the State Act 1939 and Part III and Part IV allowed for the establishment of special courts consisting of officers of the Defence Forces and invested with swingeing powers. Parts III and IV were patently at variance with the original terms of the Constitution, as Article 70 provided in relevant part that:

"No person shall be tried save in due course of law and extraordinary courts shall not be established, save only such Military Tribunals as may be authorised by law for dealing with military offences against military law."

Despite the highly charged atmosphere which prevailed in the Dail at the time, several Deputies raised the question of whether the unorthodox - if convenient - nature of section 3 represented a valid form of constitutional amendment. Captain Redmond protested that while he had

no difficulties with the merits of the Bill, he did object to this method of amendment:

"We have in this State, fortunately or unfortunately, a written Constitution and if it is proposed to introduce and pass Bills with a section such as this - shall I call it a portmanteau section - then certainly our Constitution, for what it has been worth, will stand for very little in the future. My view is that, as we have a written Constitution, the only proper way to amend that Constitution is by express and specific legislation, showing in every detail how the Constitution is to be amended."<sup>40</sup>

In this Deputy Johnson supported him:

"If this section is passed in its present form it certainly weakens the claim that was made that the Constitution is, in fact, a superior document and that all legislation which was passed within the period of eight years as in subsequent years would be invalid if contravening the Constitution...I strongly urge that we should not introduce into the Bill a section of this kind which makes it - if perchance anything in this Bill is a contravention of the Constitution - an amendment of the Constitution, although we have no intention or may have no intention of amending the

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<sup>40</sup> 20 *Dail Debates* 1147 (July 29, 1927).



Constitution. We do not know whether this amends the Constitution. If it does, then the Constitution is amended. That, surely, is no way to treat the Constitution."<sup>41</sup>

To this the President rather lamely replied:

"This amendment to the Constitution must be read in the light of the first section. The necessary amendment which this Bill makes to the Constitution is not in the nature of an ordinary amendment to the Constitution. This Bill has a limited life, it is necessary for the circumstances of the time. It is clear on the face of the Bill and in the section that the Constitution is amended by reason of the measure and I do not think that the section calls for any explanation other than that."<sup>42</sup>

In *McBride*, the defendant had been arrested on suspicion of having being engaged in the murder of Kevin O'Higgins.<sup>43</sup> Following his arrest the Gardai applied to the District Court for an order pursuant to section 16 of the 1927 Act detaining his for seven days on the ground that

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<sup>41</sup> *Ibid.*, 1150.

<sup>42</sup> *Ibid.*, 1153. Section 1(2) of the 1927 Act - referred to by the President - provided that it should continue in force "for five years from the passing thereof and shall then expire."

<sup>43</sup> The defendant was, in fact, Sean McBride, then a leading member of the IRA, but later a T.D. between 1948-1957 and Minister for Foreign Affairs, 1948-1951.

this was necessary and desirable for the proper investigation of the offence. This application was refused by District Judge Little on two grounds:

i. That section 16 constituted an alteration or amendment of the rights of the citizen guaranteed by Article 6 of the Constitution and, as the formalities of the Constitution as to amendment thereof had not been complied with, the enactment was null and void.

ii. That the 1927 Act did not operate retrospectively in respect of any offence committed prior to the passing of the Act.

While Hanna J. ultimately quashed the District Judge's decision not to grant the detention order, he was clearly troubled by the first issue, namely, whether the 1927 Act had operated as a valid amendment of the Constitution. Hanna J. first accepted that the 1927 Act would have been unconstitutional were it not for the amending provision:

"It is not disputed that section 16 is an alteration or amendment of Article 6 of the Constitution. If the amendment has not been carried out according to the legal formula, it is an infringement of the Constitution. The effect of this new provision is, in substance, that, on the mere suspicion of an officer of the Garda Siochana, a person may find himself

arrested, and, as a result, detained for several days, without charge or trial, without being able to make any defence, and without the grounds of suspicion being revealed to him Further, without trial, or provision for making a defence, where an Executive Minister is satisfied that there is ground for suspicion, an order from the Executive Minister may detain him for a further period of two months, not to exceed in all a period of three months from arrest. To legally curtail in any way the inviolable right of personal liberty given by the Constitution, the terms of the Constitution must be complied with."<sup>44</sup>

Counsel for the Attorney argued that section 3 complied with the provisions of Article 50 and was, therefore, a valid amendment of the Constitution. Hanna J. accepted, but with considerable reluctance, that such a provision could constitute a valid amendment:

"This clause purports to be a discharge of the obligation thrown upon the Oireachtas by Article 50. The question arises: is it a sufficient compliance in law with Article 50 to insert in an Act of Parliament in vague and general terms, a clause such as this a drag-net - without specifying either any Article, or part of the Article, of the Constitution that is to be amended or whether in fact any amendment is made?

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<sup>44</sup> [1928] IR 451,455.



The Constitution is a sacred charter, not to be lightly, vaguely or equivocally tampered with. But this s. 3 leaves the subjects of the State, who have rights under the Constitution and rights to exercise against amendments of the Constitution, in the dark as to what is really altered in the Constitution, instead of enlightening them as to any change in their status. An 'omnibus' amendment of this kind is contrary to the spirit of Article 50, if not to the letter. The rights of the people should not be obscured by the facile pen of the parliamentary draftsman. The matter has not been fully argued before me; but, having regard to the wording of Article 50, that the amendment can be made by way of 'ordinary legislation', I feel compelled, but with great hesitation, to come to the conclusion that section 3 comes within that term; but it is a precedent which should not be followed. The question as to whether a temporary amendment of the Constitution for a period of five years can be made has not been argued.

The result of this part of my judgment is that the contention that the Public Safety Act, so far as it amends Art. 6, is null and void, has not been sustained."<sup>45</sup>

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<sup>45</sup> [1928] IR 451, 456. Cf. the comments of O'Brian, *op.cit.*, 147 who, while recognising the exceptional circumstances apparently

Hanna J. concluded that he felt compelled - "but with great hesitation" - having regard to the wording of Article 50 "to come to the conclusion that this s.3 comes within that term" but "it is a precedent that should not be followed." As we shall see, this judicial advice was not subsequently heeded.

The other decision around this time in which the implicit amendment doctrine was canvassed was *Lynham v. Butler (No.2)*.<sup>46</sup> Here the plaintiff challenged the constitutionality of sections 2 and 4 of the Land Act 1923 on the ground that it conferred judicial powers on the Land Commission. While all members of the Supreme Court<sup>47</sup> rejected the constitutional arguments on the merits, FitzGibbon J. clearly signaled his acceptance of the "implicit amendment" argument:

"It appears to me that even upon the assumption that they are repugnant to the Constitution, it is at least arguable that they are valid as amendments of

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necessitating a measure of this kind, nonetheless deplored this method of constitutional amendment:

"This undefined Amendment of the Constitution made it almost impossible for any body, other than a Court of Law, to say with any certainty how many provisions of the Public Safety Act, 1927 contravened the Constitution, and consequently where the Constitution was to be considered as amended. A vague and general amendment such as this undoubtedly tends to lower the Constitution in the eyes of the nation."

<sup>46</sup> [1933] IR 74.

the Constitution 'by way of ordinary legislation' within the meaning of Article 50. I am not prepared to accept without further argument the view that the Constitution cannot be amended unless the Statute containing the amendment is expressly described as 'An Act to amend Article -- of the Constitution' and in my opinion it may well be that, upon the principle *leges posteriores priores abrogant*, any enactment of the Constitution, clearly inconsistent with the Constitution, passed within the period during which amendment of the Constitution is permitted, should be construed as an amendment *pro tanto*, especially where, as in the present case, there is a direct reference to the material provisions of the Constitution, and it cannot be suggested that the Oireachtas has legislated with regard to them by inadvertence."<sup>48</sup>

Here, at least, the principle of implied repeal is confined to rational parameters where the Oireachtas has at least considered the question of possible constitutional inconsistency. However, even FitzGibbon J.'s tentative formulation of the doctrine still did not meet the fundamental objection to the doctrine, namely, that the 1922 Constitution was no simple statute, but was clearly designed to be a higher law against which ordinary legislation was required to be measured.

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<sup>47</sup> Kennedy C.J., FitzGibbon and Johnston JJ.



## *The Constitution (Amendment No. 10) Act 1928*

In June 1928 the Oireachtas considered the Constitution (Amendment No. 10) Bill 1928. The object of this Bill was to remove the referendum and initiative provisions of Articles 47 and 48 of the Constitution and also to effect some minor changes in Article 50 itself. But before considering the implications of these changes, it is necessary to say something first about the Referendum and the Initiative. These provisions appear to have inspired by the post-War Constitutions on continental Europe and were designed to foster "an active association of the people with law-making"<sup>49</sup> and to provide a "valuable safeguard"<sup>50</sup> for minorities.

Prior to the enactment of the Constitution (No. 10) Act, a referendum might be held in any of three possible circumstances. First, Article 47 permitted a referendum to be held in respect of a Bill other than a Money Bill or a Bill declared to be necessary for the immediate preservation of public peace, health or safety if demanded by either three-fifths of Seanad Eireann or by a petition signed by not less than one twentieth of the voters on the electoral roll. Secondly, Article 50 required a referendum to be held in respect of a Bill to amend the

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<sup>48</sup> [1933] IR 74, 112.

<sup>49</sup> Kohn, *op.cit.*, 238.

<sup>50</sup> O'Sullivan, *op. cit.*, 229.

Constitution once the eight year period had expired. Finally, Article 50 permitted - but, of course, did not require - a referendum in respect of a Bill to amend the Constitution which took place within the original eight years.

The Initiative was a continental device which the 1922 Constitution Committee had evidently borrowed from the Swiss model.<sup>51</sup> Article 48 provided that in relevant part that:

“The Oireachtas may provide for the Initiation by the people of proposals for laws or constitutional amendments. Should the Oireachtas fail to make such provision within two years, it shall on the petition of not less than seventy-five thousand voters on the register, of whom not more than fifteen thousand shall be voters in any one constituency, either make such provisions or submit the question to the people

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<sup>51</sup> Kohn, *op.cit.*, commented (at 242) that the Initiative proposals “went further than those of almost any of its Continental models in enabling an extra-parliamentary system of legislation to be set up.” Kohn was not enamoured of the Initiative, describing it (at 244) as:

“subversive of the authority of Parliament, destroyed the coherence of representative government, and substituted crude voting under the influence of demagogic agitation for the deliberative methods of an elected Assembly.”

O’Sullivan, *op.cit.*, likewise observed (at 229) that “no tears need have been shed over the disappearance of the Initiative” which is a “constitutional device quite unsuited to Ireland in its present stage of political development.”



for decision in accordance with the ordinary regulations governing the Referendum.”

As it happens, the Oireachtas never regulated the procedure governing the procedure for the presentation of a petition for an initiative. However, on May 3, 1928 Fianna Fail sought leave of the Dail to present a petition for an Initiative to amend the Constitution in order to abolish the Oath.<sup>52</sup> Following a protracted debate<sup>53</sup>, the Dail adjourned a consideration of the petition, but further discussion of this was forestalled by the decision of the Government to introduce Constitution (Amendment No. 10) Act 1928.<sup>54</sup> The effect of this measure was to delete Articles 47 and 48 and to effect (what seemed) a minor amendment to Article 50. In short, the initiative was abolished and the referendum retained only in respect of Bills to amend the Constitution. However, the change made

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<sup>52</sup> 23 *Dail Debates* at Cols. 806-807.

<sup>53</sup> 23 *Dail Debates* at Cols. 1498-1531 (May 16, 1928); 1898-1929 (May 23, 1928); 2519-2547 (June 1, 1928).

<sup>54</sup> Over the fervent protests of the opposition, the Dail passed the appropriate resolution under Article 47 that the immediate passage of the Bill was necessary for the “preservation of the public peace, health or safety”: see 24 *Dail Debates* at Cols. 1758-1851 (June 28, 1928). This meant that the Government thereby avoided the possibility of the a referendum being demanded under Article 47 itself by either a resolution of three-fifths of the Senate or by a petition signed by one twentieth of the voters. The resolution that the immediate passage of the Bill was necessary for public peace and order was simply a colourable device to circumvent the possibility of a referendum under Article 47 and it would have been interesting to see how the courts would have reacted to a challenge to the validity of the Constitution (Amendment No. 10) Act 1928 had the opposition sought to challenge the measure on this ground.



to Article 50 meant that the referendum was no longer optional during the transitional period: henceforth, during the transitional period a Bill to amend the Constitution took effect once it was passed by both Houses and duly signed into law. This latter change seemed a minor one as at the time of the enactment of the 1928 Act, the eight year transitional period had only eighteen months to run. Nevertheless, as O'Sullivan observed:

"The whole situation was transformed, however, by the action of the same Government in the following year (1929), when a Bill was passed extending the eight years' period to sixteen years."<sup>55</sup>

In the Dail Debate on the Constitution (Amendment No. 10) Bill, the Government made it clear that they considered that Article 50 was too restrictive. As the Minister for Finance (Mr. E. Blythe TD) explained:

"[Deputy de Valera argued] that changes were now being made and that in a year or in a couple of years the provision enabling the Constitution to be amended by ordinary legislation would lapse and that the main procedure laid down in Article 50 would become operative, and that because of the rigidity of that procedure it would become impossible for a party

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<sup>55</sup> O'Sullivan, *op.cit.*, 230.

which had a definite majority support in the country to amend the Constitution.

We do not believe that the procedure for amending the Constitution should be so rigid as that. We believe that the period during which the Constitution can be amended by ordinary legislation ought to be extended and that, perhaps, even after whatever some extended period might be fixed, some new procedure other than that laid down in the Constitution should be devised, some procedure that would make it easier to amend the Constitution that it would be in the main provision of Article 50 came into operation....We do not want a rigid Constitution which cannot be amended, though we think there are arguments in favour of having a procedure for amending the Constitution which makes it somewhat more difficult or at any rate requires greater space of time to elapse than the enactment of ordinary legislation.”<sup>56</sup>

The Minister was followed by the President of the Executive Council (W.T. Cosgrave TD) who gave the following guarantee in response to Mr. De Valera:

“I unquestionably give the guarantee that it is our intention within a two-year period to extend or amend at any rate that Article of the Constitution which will

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<sup>56</sup> 24 *Dail Debates* at Cols. 884-5 (June 20, 1928).

not make it necessary for a majority Referendum to take place in order to effect an amendment of the Constitution.”<sup>57</sup>

It seems a fair inference that the very rigidity of Article 50 with its weighted majority was possibly the principal reason why both the Government and Opposition were anxious not to allow the original deadline of December 1930 to expire.<sup>58</sup>

#### *Constitution (Amendment No. 16) Act 1929*

At all events, the Government duly honoured its commitment and on March 13, 1929 the Dail debated the second stage of the Constitution (Amendment No. 16) Bill 1928. The object of this Bill was to extend the eight year transitional period for a further eight years from December 1930 until December 1938. While the debate in the Dail was perfunctory, the Bill subsequently passed all stages in

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<sup>57</sup> *Ibid.*, 896.

<sup>58</sup> Cf. the comments of the Minister for Industry and Commerce (Deputy McGilligan) in the Seanad on the Amendment No. 10 Bill (10 *Seanad Debates* at 839)(July 4, 1928):

“People here should not consider that they are in the position of the Americans with regard to their Constitution. We have not a Constitution in its final form, and they should not imagine that the mould of the Constitution is the final shape of the Constitution....We intend to allow a longer period in which amendments to the Constitution can be made by ordinary legislation. People have not had full time to consider the final form of the Constitution, and to experience what are the good points in the Constitution and what are the evil points.”



the Seanad without debate. It seems extraordinary that a Bill with such radical implications should pass through the Oireachtas virtually without comment. Introducing the Bill, the President of the Executive Council said:

"The object of this Bill is to lengthen the time within which amendments of the Constitution may be effected by means of legislation. I hope people will not be shocked by the introduction of it."<sup>59</sup>

Replying on behalf of the opposition, Mr. de Valera T.D. commented that:

"As it is an extension of time and we hope to see it availed of to make changes which will see the Constitution as one which will be more satisfactory to the Irish people, we will not object to it."<sup>60</sup>

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<sup>59</sup> 28 *Dail Debates* at Col. 1315. The draft speech prepared for President Cosgrave - which for some reason he never delivered in the Dail - also contained the following passage (S. 4469/16):

"When the Constitution was drafted it was realised that it was by no means a perfect instrument and that a reasonable period of time should be allowed within which its provisions could be altered by ordinary legislation. This was done by means of Article 50 and experience since that date has shown the wisdom of this provision."

It is somewhat curious that there does not appear to be anything further about the background to this legislation in the archival material.

<sup>60</sup> *Ibid.*, Col. 1317. This may be contrasted with Mr. de Valera's subsequent unwillingness to extend the time period specified in Article 51 of the 1937 Constitution for transitional amendments from three years to eight years: see 68 *Dail Debates* at Cols. 287-

The only other Deputy to contribute to the debate, Mr. T.J. O'Carroll T.D.<sup>61</sup>, made comments which were later to prove prophetic:

"In agreeing with the Second Reading of this Bill, I only want to say that if the Government or Governments who will be in power for the next eight years are as prolific in amendments as the Government which has been here for the last seven years, there will not be much of the original Constitution left at the end of the eight years."<sup>62</sup>

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9 (June 10, 1937). The difference was, of course, that - so far as Mr. de Valera was concerned - the new Constitution was inherently more likely to be satisfactory to the Irish people.

<sup>61</sup> Parliamentary leader of the Labour Party in the Dail 1927-1932 following Tom Johnson's loss of his Dail seat in the second 1927 general election.

<sup>62</sup> *Ibid.* Writing shortly before this Bill was actually introduced in the Dail - and before any radical changes had been made to the Constitution by means of ordinary legislation - O'Brien had commented (*op.cit.*, 130) that:

"The foresight of the Constituent Assembly in making it possible for the Oireachtas to amend the Constitution during the first eight years, by way of ordinary legislation, has on the whole been justified."

He went on to warn, however, of the dangers which this flexible power of amendment actually posed:

"This power of the Oireachtas was intended to be and is purely transitory. Nevertheless, it might have been wider if the Constituent Assembly had copied, in this respect, the precedent of the American Constitution makers and inserted a provision that the Fiftieth Article could not itself be amended within the eight years. This would have removed, still further, the possibility of the Oireachtas abusing the powers given to it by that Article, by extending that power

The Bill later passed all stages in the Dail<sup>63</sup> and Senate<sup>64</sup> without any other debate or comment of any kind.

### *Article 2A*

On October 14, 1931 the President of the Executive Council introduced the Constitution (Amendment No. 17) Bill into the Dail. Following bitter parliamentary exchanges, the Bill was signed into law. This Amendment effected the most radical amendments of the Constitution to date, since it introduced a new Article 2A. This, in reality, was little more than a variation of a radical Public Safety Act which was incorporated into the Constitution. Section 2 of the new Article 2A provided that:

"Article 3 and every subsequent Article of this Constitution shall be read and construed subject to the provisions of this Article and, in the case of inconsistency between this Article and the said Article

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indefinitely as it now can do, thereby making the Irish Constitution a Flexible Constitution."

<sup>63</sup> *Ibid.* at Col. 1825.

<sup>64</sup> 10 *Seanad Debates* at 46 (Second Stage); 225 (Committee); 456 (Report) and 531 (Report Stage)(April 10, 1929). Introducing the Bill, in one single sentence President Cosgrave explained that it was a Bill to extend the 8 year period for a further 8 years. Not one other word was uttered by a Senator during the entirety of the Bill's passage through the Upper House.



3 or any subsequent Article, this Article shall prevail."<sup>65</sup>

This device used with Article 2A was similar to that employed with the Public Safety Act 1927, save that at least the former provision had been given - however artificially - constitutional status. They were both, however, open to the objection that the provisions of the Constitution were effectively contingent on the making of executive orders bringing these amendments or quasi-amendments into force. This was illustrated in the case of Article 2A, since it was brought into force; later suspended and subsequently brought into force once again.

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<sup>65</sup> In contemporary times the Supreme Court has re-emphasised the radical impacts effected by Article 2A. In *The State (McCarthy) v. Lennon* [1936] IR 485 a majority of the Supreme Court held that Article 2A had abrogated the applicant's common law rights against self-incrimination. In *In re National Irish Bank Ltd.* [1999] 1 ILRM 321 the Court held that the situation had been significantly altered following the enactment of the Constitution which prohibited the admission in a criminal trial of a confession extracted under statutory compulsion. Barrington J. stressed (at 349-350) the difficulties which the former Supreme Court had encountered in *McCarthy*:

"At the time of the enactment of the 17th Amendment to the Constitution of the Irish Free State the Oireachtas was in a position to amend the Constitution without reference to the people. The Oireachtas was, for the time being, in the position of a sovereign Parliament. Article 2A was to prevail over subsequent provisions of the Constitution in the event of an inconsistency between it and them. There was no point therefore in appealing to such inconsistency between it and them. The Judges were virtually in the same position as Judges under the British Constitution. It was simply a question of working out what Parliament meant from what Parliament said."

The validity of Constitution (Amendment No. 16) Act 1929 was ultimately challenged in the great case of *The State (Ryan) v. Lennon*<sup>66</sup>, which will be examined at somewhat greater length in the next chapter. A few months before the decision in *Ryan's* case, Hanna J. had also given some consideration to this question in his judgment in *The State (O'Duffy) v. Bennett*<sup>67</sup>. This case concerned the jurisdiction of the Constitution (Special Powers) Tribunal to try Eoin O'Duffy (the former Garda Commissioners) in respect of various offences, including sedition and membership of an unlawful organisation. Although the Divisional Court largely found for O'Duffy<sup>68</sup>, Hanna J. did observe that:

"...an express power to amend the Constitution of the Saorstát is contained in Article 50 of the Constitution which has been already, itself, amended by the Constitution (Amendment No. 16) Act 1929 extending the time for amending the Constitution by ordinary legislation from eight years to sixteen years; and there have been many amendments of the Constitution. Accordingly, it was within the power of the Legislature to pass the Act and insert in the Constitution the

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<sup>66</sup> [1935] IR 170.

<sup>67</sup> [1935] IR 70.

<sup>68</sup> This case will also be considered in some detail in the next chapter.

Article we are considering. It is put definitively and unequivocally into the Constitution.”<sup>69</sup>

At all events, this issue was fully examined in *Ryan’s* case. In this case four prisoners challenged the legality of their detention and sought orders of prohibition restraining the Constitution (Special Powers) Tribunal from proceeding to try them in respect of a variety of offences, including attempting to shoot with intent to murder and unlawful possession of firearms, which applications were first dismissed by a unanimous Divisional High Court<sup>70</sup> and, subsequently, by a majority of the Supreme Court.<sup>71</sup> It was conceded on behalf of the Attorney General that the Constitution (Amendment No. 17) Act 1931 was inconsistent with the Constitution as originally enacted. The Attorney could scarcely have done otherwise, for as Sullivan P. stated:

“It authorises the exercise of judicial power by persons who are not judges appointed in the manner provided by the Constitution, contrary to Article 64, and it sanctions the trial of a person on a criminal charge without a jury, contrary to Article 72, in cases not coming within the exceptions mentioned in that Article. It follows that if the Act is valid it must be

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<sup>69</sup> [1935] IR 70, 95.

<sup>70</sup> Sullivan P., Meredith and O’Byrne JJ.

<sup>71</sup> FitzGibbon and Murnaghan JJ., Kennedy C.J. dissenting.



so as an 'amendment' of the Constitution authorised by Article 50."<sup>72</sup>

As this question in turn depended on whether Article 50 itself had been validly amended by Constitution (Amendment No. 16) Act 1929, Sullivan P. then went to consider whether this amendment was itself valid. Having stated that a constitutional statute such as this should receive a liberal interpretation, the President continued:

"I cannot accept the view that the word 'amendment' when used in reference to an Act of Parliament, is, as Mr. Costello suggested, limited in its meaning to the removal of faults, corrections in matters of detail but not of substance. I think the ordinary and natural meaning of the word when so used includes alterations of any kind. It will not, I think, be disputed that where the word 'amend' occurs in the title of a statute....its usual if not invariable meaning is 'alter' in the widest sense of the word and I think that we have on the face of the Constitution itself an indication that the word 'amend' is used in that sense."<sup>73</sup>

Sullivan P. then gave examples of other provisions of the Constitution - such as Article 38 and Article 73 - in which

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<sup>72</sup> *Ibid.*, 175-176. FitzGibbon J. made comments to similar effect: [1935] IR at 220.

<sup>73</sup> *Ibid.*, 177-178.

the power to amend was used in this sense. He then continued:

"I am, therefore, of opinion that Article 50 conferred upon the Oireachtas the power to amend and later the Constitution by way of ordinary legislation passed within a period of eight years from the date on which the Constitution itself came into operation, and that, in the absence of any indication in the statute of an intention to the contrary, the power so conferred is unrestricted, and authorises the alteration of any Article of the Constitution, including Article 50 itself."<sup>74</sup>

Meredith J. rejected the applicant's argument, largely because he conceived that their argument was entirely reliant on an extra-constitutional principle:

"It could not be contested that the change of eight to sixteen years was in the nature of an amendment, but it was urged that it was not competent for the Oireachtas itself to enlarge the authority delegated or entrusted to it by the people. That argument asserts a legal principle, adopted in the form of a principle of constitutional law, which looks outside the four corners of the Constitution itself, and, accordingly, this Court has no authority to pay regard to it in

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<sup>74</sup> *Ibid.*, 178.

exercising its jurisdiction under Article 65. The power of amendment conferred by Article 50 is, in terms, general. Power to amend Article 50 itself could have been expressly excepted, but it was not. This Court cannot then declare an amendment of Article 50 itself to be invalid on a principle extraneous to the Constitution."<sup>75</sup>

The other member of the Divisional High Court - O'Byrne J. - had been himself a member of the Constitution's drafting committee, but he did not agree that Article 50 should bear the restrictive interpretation contended for:

"It will be noted that the Article as enacted contemplates all amendments to the Constitution within the terms of the Scheduled Treaty and does not exclude Article 50 itself. It is not unusual in Constitutions to exclude from amendments the amending power or to provide that it may only be altered in some special way. This was not done in the case of our Constitution, and, accordingly, I am of opinion that the power of amendment extends to Article 50 in the same way and to the same extent as it extends to every other Article of the Constitution."

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<sup>75</sup> *Ibid.*, 179. Meredith J. subsequently admitted that even "inviolable provisions" of the Constitution - such as the position of the judiciary - could be amended in this way, but such was "the devastating effect of Article 50."



On appeal, however, the Supreme Court was divided on this question. It may be convenient to turn first to the reasoning of the majority judges, FitzGibbon and Murnaghan JJ.

FitzGibbon J. first rejected the argument that the power to amend the Constitution should be confined to circumstances where the amendment effected an "improvement" of the Constitution. If this construction were correct, then the validity of an amendment would depend upon the decision of the High Court that it effected such an improvement, so that:

"...the Judges and not the Oireachtas would be made the authority to decide upon the advisability of any particular amendment of the Constitution, and this would involve a direct contravention of the principles [of the separation of powers]."<sup>76</sup>

The judge then turned to consider the wider question of whether the power to amend the Constitution included the power to amend Article 50 itself. While he observed that "however undesirable it may appear to some" that the Oireachtas should have the power to extend the period during which the Constitution might be amended by ordinary legislation, nevertheless "if this be the true

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<sup>76</sup> *Ibid.*, 223.

construction of Article 50, this Court is bound to give effect to that construction."<sup>77</sup>

The judge continued by noting that whereas both the Constituent Act and Article 50 contained restrictions on the power of amendment - they both precluded amendments which were in conflict with the terms of the Treaty - the *expressio unius* principle came into play, suggesting that no further restrictions on the power to amend were thereby intended:

"It is conceded that there is no express prohibition against amendment of Article 50 to be found in the Constitution. It is not unusual to find that Constitutions or Constituents Acts impose such restrictions upon the legislative bodies set up by them, and the omission of any such restriction in regard to amendments of Article 50 is at least a negative argument that Dail Eireann as a Constituent Assembly did not intend to impose any such restriction upon the Oireachtas. This negative argument is supported by the fact that both the Constituent Act and Article 50 itself do contain an express restriction upon the powers of the Oireachtas to amend the Constitution, and it is a legitimate inference that, when certain restrictions were expressly imposed, it was not intended that certain

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<sup>77</sup> *Ibid.*, 224.

other undefined restrictions should be imposed by implication."<sup>78</sup>

FitzGibbon J. then emphasised the fact that it was Dail Eireann sitting as a Constituent Assembly which had created the Oireachtas and had limited its powers in particular ways:

"Therefore the supreme legislative authority, speaking as the mouthpiece of the people, expressly denied to the Oireachtas the power of enacting *any* legislation, by way of amendment of the Constitution or otherwise, which might be 'in any respect repugnant to any of the provisions of the Scheduled Treaty' and it reiterated this prohibition in Article 50, which empowered the Oireachtas to make *'amendments of this Constitution with the terms of the Scheduled Treaty.'*

It is further observed that this power to make amendments is limited to 'amendments of this Constitution', and that the Constituent Assembly did not confer upon the Oireachtas any power to amend the Constituent Act itself.

These express limitations, imposed by the mouthpiece of the people upon the legislative powers of the

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<sup>78</sup> *Ibid.*.



Oireachtas which it set up, support the view that the Oireachtas was intended to have full power of legislation and amendment outside the prohibited area, and as there was no prohibition against amendment of Article 50, I am of opinion that Amendment No. 10 in 1928, and Amendment No. 16 in 1929, were within the powers conferred upon the Oireachtas by the Constituent Act."<sup>79</sup>

FitzGibbon J. concluded by noting that the Constitutions of other jurisdictions often contained express restrictions upon the power of the Legislature to amend the amendment power itself<sup>80</sup> so that it followed that:

"Our Constituent Assembly could in like manner have exempted Article 50 from the amending powers conferred upon the Oireachtas, but it did not do so, and in my opinion the Court has no jurisdiction to read either into the Constituent Act or into Article

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<sup>79</sup> *Ibid.*, 226-227. Emphasis in the original. FitzGibbon J. added that an amendment of Article 50 by the deletion of the words "within the terms of the Scheduled Treaty" would be "totally ineffective", as effect was given to those words by the Constituent Act itself, "which the Oireachtas has no power to amend."

<sup>80</sup> He instanced section 152 of the South Africa Act 1909 which provided that no "repeal or alteration of the provisions contained in this section...shall, be valid" unless the Bill embodying such an amendment to the amending power itself shall have been passed in a particular way or by a specified majority. Article V of the US Constitution also contained certain restrictions on the power of amendment of certain clauses of Article I prior to 1808.

50 a proviso excepting it, and it alone, from these powers."<sup>81</sup>

Murnaghan J. spoke in similar terms and concluded that:

"....the terms in which Article 50 is framed does authorise the amendment made and there is not in the Article any express limitation which excludes Article 50 itself from the power of amendment. I cannot, therefore, find any ground upon which the suggested limitation can be properly based. It must also be remembered that in this country the Referendum was an untried political experiment and it cannot be assumed that the Referendum should be capable of alteration or removal. I feel bound by the words of Article 50, which allows amendment of the Constitution as a whole, of which Article 50 is declared to be a part."<sup>82</sup>

While this line of argument was "simple in its logic and devastating in its implications"<sup>83</sup> and while the sympathy

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<sup>81</sup> [1935] IR 170, 227.

<sup>82</sup> *Ibid.*, 244. It may be noted that in *Moore v. Attorney General for the Irish Free State* [1935] IR 472,481 (decided in June 1935, some six months after *Ryan*) Viscount Sankey L.C., delivering the advice of the Privy Council, accepted that counsel for the petitioners had correctly conceded that "Amendment No. 16 was regular and that the validity of these subsequent amendments could not be attacked on the ground that they had not been submitted to the people by referendum."

<sup>83</sup> O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms" (1999) 4 *Journal of Civil Liberties* 48, 58.

of most modern commentators is with the dissenting judgment of Kennedy C.J., it is nonetheless difficult dogmatically to assert that the majority were wrong on this point.

### *The dismantling of the 1922 Constitution*

Ryan's case gave the imprimatur to a development which was already gathering speed, namely, the wholesale dismantling of the 1922 Constitution by ordinary legislation. Had this decision been otherwise, every amendment after December 1930 would have had to have been by way of referendum. We can only conjecture how the electorate would have responded to referenda on such topics as Article 2A and the abolition of the oath<sup>84</sup>, the appeal to the Privy Council<sup>85</sup>, the Senate<sup>86</sup>, the Governor General and all references to the Crown in the Constitution<sup>87</sup>. In this respect, it must be recalled that Article 50 of the 1922 Constitution required for a valid amendment of the Constitution either *a majority of the voters on the*

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<sup>84</sup> Constitution (Removal of Oath) Act 1933.

<sup>85</sup> Constitution (Amendment)(No.22) Act 1933.

<sup>86</sup> Constitution (Amendment)(No. 24) Act 1936. For the background to the abolition of the Seanad, see O'Sullivan, *The Irish Free State and its Senate* (London, 1940) at 446-469. O'Sullivan argued (at 468) that the real reason for the abolition of the Senate was that Mr. de Valera "knew it would reject his quasi-republican Constitution for which he had no mandate from the people."

<sup>87</sup> Constitution (Amendment) (No. 27) Act 1936. For the background to this legislation, see Sexton, *Ireland and the Crown 1922-1936: The Governor-Generalship of the Irish Free State* (Dublin, 1992) at 163-170.



register<sup>88</sup> or two-thirds of the votes recorded. These conditions are far more stringent than apply in the case of referenda on constitutional amendments under the present Constitution, where Article 47.1 simply requires a majority of the voters who actually voted. Indeed, the stringency of this requirement can be gauged by the fact that if this rule were to have been continued after 1937, quite a number of amendments would have fallen, including the divorce amendment and the referenda on the Single European Act and the Maastricht and Amsterdam Treaties, not to speak of the enactment of the Constitution itself.<sup>89</sup> While the Government would have probably secured a majority of the voting electorate had referenda on all of the above topics taken place, whether any given referendum would have satisfied the more stringent requirements of Article 50 must be open to doubt. Undoubtedly, had the result in *Ryan's* case gone the other way, it would have had huge implications for the constitutional changes of the 1930s which were otherwise facilitated by the fact that the Constitution could be so easily changed.<sup>90</sup>

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<sup>88</sup> This makes the percentage required to carry the Bill contingent on the actual turn-out. Thus, for example, in a 70% turnout, the majority for the Bill would need to approach 72% in order to constitute a majority of the voters on the register.

<sup>89</sup> See O'Sullivan, *The Irish Free State and its Senate* (London, 1940) at 502-3.

<sup>90</sup> Cf. the comments of Donaldson, *Some Comparative Aspects of Irish Law* (Duke, 1957) at 146-7 in respect of the aftermath of *Ryan's* case:

Which, then, of these differing judicial views was correct? In the first place, the Court of Appeal in *Cooney* was clearly wrong to hold that the Constitution could be implicitly amended by ordinary legislation during the eight year period. It is true that the Constitution of the Irish Free State was enacted by means of ordinary legislation by Dail Eireann sitting as a constituent assembly, but it was not an ordinary piece of legislation. Quite apart from the provisions entrenched by the Treaty, the whole tenor of the Constitution presupposed that it would have a higher legal status than that of ordinary legislation. If it were otherwise, Article 65 would not have expressly empowered the High Court with the power of judicial review of legislation. The entire fallacy underlying the judicial reasoning in this case was that it invested the Constitution with the same status as that of ordinary legislation. Moreover, had the December 1930 deadline remained unchanged, one would have had the curious situation inasmuch as constitutional amendments could only take effect by means of referendum, yet the repeal after that date by subsequent ordinary legislation of an Act which had impliedly amended the Constitution during the initial eight year period would have had the effect of

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"One can only speculate on what would have happened if the original eight-year period had not been extended, for it is possible that the constitutional amendments of the 1930s would not have been accomplished so easily if the referendum procedure had been applied to them."



restoring the Constitution to its original position, i.e., the Constitution would thus have been amended without the necessity for a referendum. The unacceptability of such a conclusion merely highlights the absurdities inherent in the implicit amendment doctrine.

It is, perhaps, somewhat less easy to say that *McBride* was wrongly decided. Although this elliptical method of amendment was clearly at variance with the spirit of Article 50, it is more difficult to contend that the Oireachtas should not have been in a position to say that where there was a conflict between the Constitution and ordinary statute law, the latter should prevail, even if this meant that the Constitution was *pro tanto* amended. However, it would clearly have been open to Hanna J. to hold that Article 50 clearly did not sanction amendments which were uncertain in their scope. In addition, it also seems clear that Article 50 did not sanction amendments which were purely temporary in duration.

On the other hand, the Supreme Court was probably correct in its conclusion in *Ryan* that, subject to the entrenched provisions safeguarded by the Treaty, the Oireachtas had a full power of amendment of the Constitution by ordinary legislation during the initial eight year period. It followed that, as Article 50 did not fall within these entrenched provisions, it itself could also be amended. It is also worth recalling that *Ryan's* case involved express amendments to the Constitution: there



was no question here of any amendments by implication. It is certainly true that - as both Kennedy C.J. and FitzGibbon J. were to observe - the power of amendment contained in Article 50 was employed in a manner not foreseen by the drafters, but that is not in itself a reason for holding that the Oireachtas did not have the power to amend this provision by ordinary legislation prior to the expiration of the original eight year period.

At all events, the drafters of the 1937 Constitution clearly learnt from this experience. While the 1937 Constitution allowed for amendments by way of ordinary legislation during a transitional period, the drafters were careful to include safeguards not found in the 1922 Constitution. First, the transitional period was much shorter - 3 years from the date the first President entered office<sup>91</sup> - and even then the President was entitled to require, following consultation with the Council of State, that the amendment be submitted to referendum if he were of opinion that the proposal was "of such a character and importance that the will of the people thereon ought to be ascertained by Referendum before its enactment into law."

Secondly, the combined effect of Articles 46.3 and Article 46.4 was to rule out all forms of implicit amendments and

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<sup>91</sup> Article 51.1. The first President (Dr. Douglas Hyde) entered office on 25 June 1938 and so the transitory period expired on June 25, 1941.

to prevent a repetition of cases such as *Cooney* and *McBride*:

"3. Every such Bill shall be expressed to be 'An Act to amend the Constitution.'

4. A Bill containing a proposal or proposals for the amendment of the Constitution shall not contain any other proposal."

Had Article 50 of the 1922 Constitution contained a provision similar to that contained in Article 46.3, the Court of Appeal could not have reasoned as it did in *Cooney*. Likewise, had Article 50 contained the safeguard found in Article 46.4, the Public Safety Act 1927 could not have purported to amend the Constitution indirectly by means of legislation containing other substantive proposals which were not in themselves directly intended to effect amendments to the Constitution. In short, Article 46.3 precludes the enactment of the type of drag-net amendment clause contained in s.3 of the 1927 Act.

Thirdly, the entire tenor of the present Constitution is to exclude contingent or temporary amendments. If the Constitution is amended, that amendment is permanent unless and until it is subsequently repealed or varied in another referendum.

Finally, Article 51.1 contained the type of crucial type of safeguard which Article 50 lacked and which, as we have seen, ultimately led to the demise of the 1922 Constitution. It provided that:

"Notwithstanding anything contained in Article 46 hereof, any of the provisions of this Constitution, exceptions the provisions of the said Article 46 and this Article may, subject as hereafter provided, be amended by the Constitution, 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."<sup>92</sup>

Thus, Article 51.1 prevented any further extensions of time beyond the original three year period, since unlike Article 50 of the 1922 Constitution, it precluded the

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<sup>92</sup> The drafters had at all stages been conscious of this point. In the very first complete draft of the new Constitution (submitted by John Hearne on 22 October 1935)(UCD P 1029), the (draft) Article 50 had provided:

"The Oireachtas may amend any Articles of this Constitution with the exception of the Articles relating to fundamental rights...and this Article by way of ordinary legislation expressed to be an amendment of the Constitution.

The Articles relating to fundamental rights....and this Article shall not be amended by the Oireachtas unless and until the Bill containing the proposed amendment or amendments of any such Article, after it has been passed by Dail Eireann and before being presented to the President for his assent, shall have been submitted to a Referendum of the people and either the votes of a majority of the voters on the register or two thirds of the votes recorded shall have been cast in favour of such amendment or amendments.



amendment of the amendment provisions themselves by means of ordinary legislation. After June 25, 1941, the Constitution became a rigid one and could only be amended by means of a referendum. If there was any single provision which contributed to the success of the present Constitution, it was this. The relative rigidity of the Constitution thus gave it stability and permanence, thus enabling it to take root within the political and legal system - an opportunity which was denied to the Constitution of the Irish Free State. Although there were two relatively minor amendments enacted during the transitional period<sup>93</sup>, some thirty five years would elapse before the next amendment (and the first to be enacted by means of a referendum) - Third Amendment of the Constitution Act 1972 - was enacted. The fact that such a long period of time would elapse during which there was no constitutional change whatever is in its own way a tribute to the stability of the political and legal system which the Constitution had itself created.

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<sup>93</sup> The First Amendment of the Constitution Act 1939 (enacted in September 1939) extended the meaning of "time of war" for the purposes of the emergency provisions of Article 28.3.3 and the Second Amendment of the Constitution Act 1941 (discussed at length in Chapter 7) effected a series of miscellaneous amendments, including the provision for the "one judgment rule", the immutability of decisions given pursuant to the Article 26 reference procedure and a series of changes to habeas corpus procedure.

CHAPTER 3:  
THE SUPREME COURT AND THE BLUESHIRTS,  
1933-1936

*Introduction*

As we have just seen, the decision of the Supreme Court in *The State (Ryan) v. Lennon*<sup>1</sup> ultimately led to the entire downfall of the Irish Free State Constitution and paved the way for the enactment of the present Constitution. However, it is worth pausing here to examine that decision - the first major constitutional law decision of the Supreme Court - in some depth. The decision not only raises a host of novel and difficult issues - including the validity of two separate constitutional amendments, whether any provisions of the Constitution of the Irish Free State had been placed beyond the amending power of the Oireachtas, the role of natural law and the response of the courts to extreme legal measures, and the nature of the sovereignty of the Irish Free State - but it is also notable for two judgments - from Kennedy C.J. and FitzGibbon J. - of extraordinary virtuosity and power. The practical dimensions of this case could not have been more important:

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<sup>1</sup> [1935] IR 170. For contemporary comment, see Hood Philips, "Ryan's Case" (1936) 52 *LQR* 241; Jennings, "The Statute of Westminster and Privy Council Appeals" (1936) 52 *LQR* 173 and Anon. "The Amendment of the Saorstát Constitution" (1935) 69 *ILTSJ* 55.

"...the bill of rights provisions of the Constitution, the document to which Kennedy had contributed so notably, were to be virtually swept away by the Supreme Court itself three years later in *The State (Ryan) v. Lennon*. Kennedy was an isolated dissident as FitzGibbon and Murnaghan in judgments redolent of Austinian positivism proclaimed the courts powerless in the face of executive and legislative intent on enacting draconian 'law and order' measures."<sup>2</sup>

*Ryan's* case was also a great favourite of the late Professor John Kelly who, in his own inimitable fashion, used to describe this case as a "desert island" case, so that if one were the proverbial castaway forced to choose a limited selection of cases to read for intellectual stimulation and enjoyment, this certainly would be one of them.

To understand the complex constitutional background to this case, it is important to draw attention to some of the key provisions of the Constitution of the Irish Free State. Article 70 of the 1922 Constitution had originally provided in relevant part that:

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<sup>2</sup> Keane, "The Voice of the Gael: Chief Justice Kennedy and the Emergence of the New Irish Court System 1921-1936" (1996) 31 *Irish Jurist* 205, 223.



"..extraordinary tribunals shall not be established, save only such Military Tribunals as may be authorised by law for dealing with military offences against military law."

Against the backdrop of Civil War of 1922-3 and the continued disturbed conditions which prevailed thereafter, this guarantee was not, unfortunately, a very realistic one.<sup>3</sup> Throughout the 1920s the Oireachtas found itself forced to pass a variety of Public Safety legislation providing either for a power of internment or, alternatively, for trial by standing military tribunal. Despite the fact that such swingeing legislation generally rested uneasily with the solemn guarantees (ranging from Article 6 (personal liberty) to Article 70) contained in that Constitution, as we have seen, the constitutionality of such legislation was upheld in a series of cases, chiefly on the remarkable ground that during the initial eight year period following the entry into force of the Constitution, any legislation enacted by the Oireachtas which was found in conflict with the Constitution had the effect, *ipso facto*, of amending that Constitution, whether on a permanent<sup>4</sup> or temporary basis.<sup>5</sup>

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<sup>3</sup> As Dodd J. put it - speaking of the enactment of the Constitution in 1922 - what "was supposed to herald an era of settled government turned out to be the harbinger of unrest and rebellion": *R. (O'Connell) v. Military Governor of Hare Park* [1924] 2 IR 104, 115.

<sup>4</sup> *R. (Cooney) v. Clinton* [1935] IR 245 (decided in 1924, but belatedly reported).

<sup>5</sup> *Attorney General v. M'Bride* [1928] IR 451.

We have already seen how these developments came about as a result of a last-minute alteration to the text of Article 50 which allowed of amendments by ordinary legislation during an initial eight year period from the date the Constitution came into force, i.e., until December 6, 1930.<sup>6</sup> As Chief Justice Kennedy (himself a member of that Constitution's drafting committee) was later to explain:

"It was originally intended, as appears by the draft, that amendment of the Constitution should not be possible without the consideration due to so important a matter affecting the fundamental law and framework of the State, and the draft provided that the process of amendment should be such as to require full and general consideration [sc. by means of referendum]. At the last moment, however, it was agreed that a provision be added to Article 50, allowing amendment by way of ordinary legislation during a limited period so that drafting or verbal amendments, not altogether unlikely to appear necessary in a much debated text, might be made without the more elaborate process proper for the purpose of more important amendments. This clause was, however, afterwards used for effecting alterations of a radical and far-reaching character, some

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<sup>6</sup> This consisted of an addition of the following words at the very end of Article 50:

"Any such amendment may be made within the said period of eight years by way of ordinary legislation."

of them far removed in principle from the ideas and ideals before the minds of the first authors of the instrument.”<sup>7</sup>

The eight year clause - originally intended simply to cover minor and technical amendments - ultimately proved to be the means whereby the entire 1922 Constitution was undone.<sup>8</sup>

### Article 2A

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<sup>7</sup> Foreword to Kohn, *The Constitution of the Irish Free State* (London, 1932) at xiii. Cf. his comments in dissent on this point in *The State (Ryan) v. Lennon* [1935] IR 170, 216-219 and the observations of Murnaghan J. (who was also a member of the 1922 drafting committee) by way of rejoinder (at 244):

“I am ready to conjecture that when Article 50 was framed it was not considered probable that any such use of the power would be made as has been made, but the terms in which Article 50 is framed does authorise the amendment made and there is not in the Article any express limitation which excludes Article 50 itself from the power of amendment.”

<sup>8</sup> See generally 1 *Dail Debates* at 1748-9 (October 14, 1922). As FitzGibbon J. later remarked in the Supreme Court in *Ryan* [1935] IR 170, 234:

“The framers of our Constitution may have intended ‘to bind man down from mischief by the chains of the Constitution’ but if they did, they defeated their object by handing him the key of the padlock in Article 50.”

As it happened, FitzGibbon J. had been a T.D. (representing Dublin University) during the period 1922-1924 immediately before his appointment directly to the Supreme Court and, thus, had been a member of the Constituent Assembly which had approved the amendments to Article 50.



Faced with the growing threat of political conflict from both the IRA and other groups<sup>9</sup>, by early Autumn of 1931 the then Cumann na Gael Government decided that stern new legislative measures were necessary in advance of the general election which was but a few months away. Despite the grand promise of Article 73 that no extraordinary courts would be created, the unfortunate reality of political life almost a decade later was that the

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<sup>9</sup> For the nature of these threats, see O'Halpin, *Defending Ireland: The Irish State and its Enemies* (Oxford, 1999) at 77-80; O'Sullivan, *The Irish Free State and its Senate* (London, 1940) at 256-265. The threats were certainly perceived as very real ones by the Government and so, for example, the then Minister for Justice (James Fitzgerald-Kenney TD) wrote in September 1931 to Chief Justice Kennedy directing him not to arrange for a formal opening of the re-constructed Four Courts lest an attempt be made to blow up the building. The Minister explained (UCD, P4/1058 (3)-(4)) that:

"...the political situation in the country is far worse than the public knows. The forces making for anarchy are stronger than men dream of. I have endeavoured to wake the country up; but I have been very careful to understate rather than overstate my case. We are taking all possible precautions to see that the Four Courts are not blown up or otherwise destroyed some night. I believe that they will prove adequate. But I would prefer that such an attempt would not be made entailing as it would a potentiality of a huge destruction of public property. A formal opening would be a direct incentive to the making of an attempt to wreck the building and if there be a formal opening an attempt of this nature will inevitably be made.

We are confident that we are strong enough to defeat lawlessness in this State. But we are going to have a terrible winter. No advantage can be derived from shaking a red rag in the face of a raging bull. These are considerations that I dare say are quite new to you but I am sure that you will appreciate them."

jury system had more or less broken down.<sup>10</sup> Accordingly, on October 14, 1931 the President of the Executive Council introduced the Constitution (Amendment No. 17) Bill into the Dail. This Bill was subsequently signed into law "in the teeth of bitter and indignant criticism from Mr. de Valera and his supporters."<sup>11</sup> This Amendment effected the most radical amendments of the Constitution to date, since it introduced a new Article 2A. This, in reality, was little more than a variation of a radical Public Safety Act which was incorporated into the Constitution. Section 2 of the new Article 2A provided that:

"Article 3 and every subsequent Article of this Constitution shall be read and construed subject to the provisions of this Article and, in the case of inconsistency between this Article and the said Article

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See Hogan, "Hugh Kennedy, the Childers Habeas Corpus Application and the Return to the Four Courts" in Costello ed., *The Four Courts: 200 Years* (Dublin, 1996) 177, 214.

<sup>10</sup> Halpin, *op.cit.*, 79 observed that one effect of Article 2A was that the "virtual immunity conferred on those engaged in acts of defiance against the State by the failure of the jury system was now gone." O'Sullivan, *op. cit.*, catalogued (at 255-261) a long list of outrages associated with jury intimidation by the IRA and its associates and then concluded that by 1931 "trial by jury had broken down." On the other hand, Regan, *The Irish Counter-Revolution 1921 - 1936* (Dublin, 1999) concludes (at 289, 290) that the outrages in question "were not exceptional in the broader context of the post-civil war Free State" and that the:

"hysteria and speed with which the [Article 2A] Bill was introduced and processed through the Dail protected it from protracted criticism from the opposition benches, which would have exposed further the exaggerated picture of a disturbed country Cosgrave and his Government painted."



3 or any subsequent Article, this Article shall prevail.”<sup>12</sup>

This device was open to the objection that the provisions of the Constitution were effectively contingent on the making of executive orders bringing these amendments or quasi-amendments into force. This was illustrated in the case of Article 2A, since, as we shall see, it was brought into force; later suspended and subsequently brought into force once again. At all events, there was no doubt as to the radical and draconian character of Article 2A: it provided for a standing military court<sup>13</sup> (from which there was to be no appeal<sup>14</sup>) which was empowered to impose

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<sup>11</sup> Kelly, *Fundamental Rights in Irish Law and Constitution* (Dublin, 1967) at p. 272.

<sup>12</sup> In contemporary times the Supreme Court has re-emphasised the radical character of Article 2A. In *The State (McCarthy) v. Lennon* [1936] IR 485 (discussed below) a majority of the Supreme Court held that Article 2A had abrogated the applicant's common law rights against self-incrimination. In *In re National Irish Bank Ltd.* [1999] 1 ILRM 321 the Court held that the situation had been significantly altered following the enactment of the present Constitution, as Article 38.1 prohibited the admission in a criminal trial of a confession extracted under statutory compulsion.

<sup>13</sup> The then President of the Executive Council (W.T. Cosgrave TD) informed the Dail in the course of the debate on Article 2A that the two judges of the Supreme Court had intimated to him that they would resign if they were required to preside over a non-jury court: 40 *Dail Debates* at Col. 45 (October 14, 1931).

<sup>14</sup> Article 2A did not, however, have the effect of preventing judicial review of the Tribunal's decision: see, e.g., *The State (O'Duffy) v. Bennett* [1935] IR 70; *The State (Hughes) v. Lennon* [1935] IR 128 (discussed below). In contrast to Article 2A, the Offences against the State Act 1939, s.44 confers the same right of appeal from conviction in the Special Criminal Court to the Court of Criminal Appeal as a person convicted on indictment in the Central Criminal Court.



any penalty (including the death penalty) in respect of any offence, even if such a penalty was greater than that provided by the ordinary law! In *The State (O'Duffy) v. Bennett*<sup>15</sup> (which, as we have seen, was a prohibition application decided a few months before *Ryan's* case) Hanna J. did not mince his words about the nature of Article 2A:

“In considering the creation of this new Tribunal under Article 2A, this Court must recognise that there are times when the Legislature may legitimately clip the wings of the individual freedom and liberty of thought and action and when the civil population must, for the general good, submit to strict discipline by having their national character set aside even though no one can see the ultimate benefits or evil to which it may ultimately lead. The Constitution contemplated martial law (Article 6) as known to the common law as exercised in most countries, but martial law depends on a state of war or armed rebellion as a matter of fact so as to be capable of being tested by the Courts of the land. But this Act goes beyond the original Constitution inasmuch as no Court can question whether as a matter of fact it is necessary or expedient that this power should be put into force. That decision lies in the hands of the Executive Council of any Government that may be in power, and

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<sup>15</sup> [1935] IR 70.

if improperly used it might possibly become, as was said of the Star Chamber, a potent and odious auxiliary of a tyrannous administration.”<sup>16</sup>

Having then described the amendment as creating “a kind of intermittent martial law under the harmless name of a constitutional amendment”, Hanna J. continued:

“As to trials by the Tribunal of offences which are within their jurisdiction, there is no provision that they are to be conducted according to law. This would be impossible with a lay tribunal. There is no legal member provided for the Court nor have they any legal advice or Judge Advocate allocated to them by the Article. Their decision, involving as it may, life, liberty or property, is that of three (possibly two) laymen without any knowledge of criminal or other law, and no knowledge or experience of the laws of evidence according to the common law. Are they any more than three jurymen, doing their best to decide fairly between the prosecution, which is always in the hands of able and educated counsel, and on the other hand, the accused, who are frequently uneducated and undefended peasants? There is no provision for giving the accused legal assistance. Now, any Judge of experience and knowledge recognises the difficulty of holding the balance in such cases. These provisions

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<sup>16</sup> *Ibid.*, 86.

blot out of the Constitution, with reference to the offences in the Article, the rights as to legal trial preserved by Article 70 of the Constitution, which enacts that no one shall be tried save in due course of law and that extraordinary courts shall not be established and the jurisdiction of the military Tribunals shall not be extended or exercised over the civil population save in time of war, and also the provisions of Article 72 that no person shall be tried on any criminal charge without a jury. Those who have no legal experience, or little experience, think that criminal law, and the law of evidence as to criminal offences, are simple and clear, whereas, in fact they are most technical and difficult. The decisions of the Court of Criminal Appeal on such subjects as accomplices, corroboration, evidence of previous statements or character, the admissibility of statements made to the police, the doctrine of reasonable doubt, *mens rea* and other technical matters shows how easily this small and inexperienced lay Tribunal could go astray and pass a conviction and sentence that would not stand the slightest legal consideration.....Undoubtedly, this Tribunal has great powers, especially in respect to sentence within its jurisdiction - powers beyond those of any constitutional Court in this State. For example, there is no limit upon its sentence, either as to length of imprisonment, or as to any of the cases in which it could give sentence of death, and it could, in any case, if it thought it expedient or necessary, deported



or flog convicted persons or order the forfeiture or destruction of their property.”<sup>17</sup>

At all events, the coming into operation of Article 2A “succeeded in [its] immediate aim of curbing political violence, providing a relatively peaceful climate in the months leading up to the momentous general election of February 1932.”<sup>18</sup>

As is well known, the results of that election produced a Fianna Fail Government, albeit one dependent on Labour support. Despite rumours of a threatened Army coup<sup>19</sup>, the handover of power was completely successful. The new incoming de Valera administration was sensitive to the concerns of the Treaty supporters and assuaged them by, for example, appointing a former Cumann na Gael supporter (and future Supreme Court judge), James Geoghegan as Minister for Justice.<sup>20</sup> However, de Valera

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<sup>17</sup> *Ibid.*, 97-98.

<sup>18</sup> Halpin, *op.cit.*, 79.

<sup>19</sup> O’Halpin, *op.cit.*, 80-81; Regan, *op.cit.*, 291-295; Manning, *The Blueshirts* (Dublin, 1970) at 17-19.

<sup>20</sup> As Manning, *op.cit.*, noted (at 18-19):

“The only real surprise was the appointment of James Geoghegan as Minister for Justice. All the other Cabinet members had been founder members of the party, but Geoghegan had been elected for the first time in 1930 and previously been a Cumann na nGaedheal supporter. This point was immediately noted by the IRA which disapproved vehemently of his appointment. But de Valera, by appointing to probably the most sensitive of all departments a man who had not taken part in the Civil War and who had not been involved in the controversies of the previous decade, could

had won his electoral victory with tacit IRA support and O' Sullivan thus describes the immediate aftermath of the election of the new Government:

"The Dail met on the 9<sup>th</sup> March [1932], the composition of the Executive Council was approved, and the Ministers received their appointment from the Governor General. Immediately those formalities had been concluded, the Minister for Justice [James Geoghegan] and the Minister for Defence [Frank Aiken] proceeded straight to Arbour Hill Barracks, where Republicans who had been sentenced by the Military Tribunal were imprisoned. The Minister for Defence spent some time in the cell of Mr. George Gilmore, who was serving a sentence of five years' penal servitude...All these prisoners were released on the following day...On the 18<sup>th</sup> March the Government issued an Order suspending the operation of Article 2A of the Constitution. The effect of this was that the Military Tribunal came to an end, and the Order lapsed which had declared the Irish Republican Army to be an unlawful organisation."<sup>21</sup>

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immediately demonstrate that his government was not about to embark on a series of reprisals and vendettas."

<sup>21</sup> O'Sullivan, *op.cit.*, 295. The order in question was the Constitution (Suspension of Article 2A) Order 1932. As Kelly, *Fundamental Rights, op.cit.*, observed (at 272) this Order:

"did not, of course, repeal the Constitution (Amendment No. 17) Act and it may be surmised that Mr. de Valera did not wish to deprive himself altogether of so powerful a weapon."

Subsequently Fianna Fail had a resounding success at the snap January 1933 General Election where it obtained an overall majority and it could now govern without Labour support.

The political mood of the country was, however, increasingly bitter. The Army Comrades Association had been formed in the wake of the 1932 General Election. It was originally an unobtrusive organisation designed to promote the welfare of ex-Army officers, but under new leadership and re-organisation in late 1932 and 1933 its objectives changed. During the snap 1933 General Election it sought to protect the pro-Treaty supporters from attack by IRA supporters<sup>22</sup> and to organise by wearing the distinctive blueshirt. It underwent another re-organisation in June 1933, when the mercurial General O'Duffy, the former Garda Commissioner, took over the organisation and re-named it the National Guard.<sup>23</sup> When O'Duffy planned a major march towards the gardens of Leinster House in August 1933, the Government decided to

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<sup>22</sup> Manning, *op.cit.*, 48-53.

<sup>23</sup> Manning, *op.cit.*, 73-76. Following the amalgamation of Cumann na Gael and the Centre Party in September 1933, it was announced that the National Guard was to be re-formed as an organisation within the Fine Gael Party and that its name would be changed to the Young Ireland Association: Manning, *op. cit.*, 94. For the circumstances in which the Young Ireland Association changed its name to the League of Youth following a banning order in December 1933, see below.



re-activate Article 2A and promptly banned the march.<sup>24</sup> While the Blueshirt threat finally fizzled out in subsequent two to three years, the Fianna Fail Government was also finally forced to take action against the IRA. By late 1933 members of the IRA were appearing before the Military Tribunal<sup>25</sup> and it suffered the ultimate indignity of being suppressed under Article 2A in June 1936.<sup>26</sup> The fact that Article 2A had been opposed by Fianna Fail in opposition but (following a period of suspension) employed by them on their return to power gave rise to the following bitterly sarcastic comments of FitzGibbon J. in *The State (Ryan) v. Lennon* when he described Article 2A as:

“...an enactment which appears to have received the almost unanimous support of the Oireachtas for we have been told that those of our legislators by whom it was opposed most vehemently as unconstitutional and oppressive, when it was first introduced, have since completely changed their opinions, and now accord it their unqualified approval. It is true that even a unanimous vote of the Legislature does not decide the validity of a law, but it is some evidence that none of those whose duty it is to make the

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<sup>24</sup> Manning, *op.cit.*, 85-88; Halpin, *op.cit.*, 117.

<sup>25</sup> According to statistics supplied by the Mr. de Valera in the Dail, 513 persons were convicted by the Military Tribunal during the period from September 1, 1933 to February 5, 1935, of which 357 were Blueshirts and 138 were members of the IRA: 54 *Dail Debates* at Col. 1759 (February 13, 1935).

<sup>26</sup> Halpin, *op.cit.*, 124-126.

laws see anything in it which they regard as exceptionally iniquitous, or as derogating from the standard of civilisation which they deem adequate for Saorstát Éireann.”<sup>27</sup>

But before examining the decision in *Ryan* in some detail, it is worth pausing to consider the series of important High Court and Supreme Court decisions concerning Article 2A leading up to that decision.

### *The O’Duffy habeas corpus application*

In the first of these, *Re O’Duffy*<sup>28</sup>, was decided at the height of the Blueshirt crisis. General O’Duffy had been arrested, along with two others, as he sought to address a major Blueshirt rally in Westport.<sup>29</sup> In the High Court O’Byrne J. directed the release of the applicants under the habeas corpus provisions of Article 6 of the Irish Free State Constitution. Saying that Article 2A had simply

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<sup>27</sup> [1935] IR 170, 235.

<sup>28</sup> [1934] IR 550.

<sup>29</sup> The meeting was formally one of the first public meetings of the League of Youth, as the Blueshirts were now formally described. The Young Ireland Association (as it had been known since September 1933) had just been banned under Article 2A on December 8, 1933. Fine Gael then dissolved the Young Ireland Association and re-constituted it as the League of Youth. In order to forestall a possible new banning order, it immediately then commenced High Court proceedings seeking a declaration that the League of Youth was a lawful organisation. The Attorney General then applied to have the proceedings struck out on the ground that they were vexatious and frivolous, but Johnson J. refused to

enlarged the grounds upon which an applicant might be arrested, but that there was no other inconsistency between Article 2A and Article 6, O'Byrne J. concluded that:

“General O’Duffy was arrested because he was proceedings or attempting to proceed into Westport or because he was attempting to speak while wearing a blue shirt. That is the only reasonable inference to be drawn from the facts as I find them and I cannot give any real weight to the averment in the affidavit of Superintendent Murray that at the time he first saw General O’Duffy and these other men that he suspected them of some unlawful association, and that when he subsequently arrested them - about three-quarters of an hour afterwards - he did so by reason of that suspicion. I am not prepared to accept that, and I do not accept it as a true explanation or as an accurate statement of fact.

So far as Sullivan<sup>30</sup> is concerned, I am of opinion that there is no evidence before me as to how, why, by

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do so, holding that the action raised major constitutional issues: see *Blythe v. Attorney General* [1934] IR 266.

<sup>30</sup> Captain John L. O’Sullivan was “one of the best known blueshirts in Cork” and had been an unsuccessful candidate at the 1933 General Election. He was subsequently sentenced by the Constitution (Special Powers) Tribunal to five years’ imprisonment for his part in the burning down of the house of P.S. Murphy, a Fianna Fail T.D. It was, however, widely believed that he had attempted to prevent the arson attack, but that out of loyalty to



whom, in what circumstances, or for what reason, he was arrested, and so far as his case is concerned it appears to me that the respondents have completely failed to make any case for the legality of his arrest. So far as O'Duffy is concerned, I am also satisfied that his detention is illegal, first, because I am not satisfied that he was arrested for any offence mentioned in section 13 of the Article, and secondly, because the provisions of sub-section 3 of the same section were not complied with. In all the circumstances, I am of opinion that the detention of these two men is illegal and that relief by way of habeas corpus ought to be granted.”<sup>31</sup>

While this was a major reverse for the Government, much worse was to come in the new year.

On January 1, 1934 O'Byrne J. granted a conditional order of prohibition directed to the Tribunal requiring it to show cause on the issue as to whether it had jurisdiction to hear certain charges against O'Duffy which it was proposing to hear on the following day.<sup>32</sup> On the following day, the President of the Tribunal announced, following an

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his colleagues he failed to tell the full story at his trial: see Manning, *op.cit.*, 181.

<sup>31</sup> [1935] IR 550, 570.

<sup>32</sup> O'Duffy had been served with the new summonses two days after his release on habeas corpus. He was charged with five counts: two related to membership of the Young Ireland Association (under its various names); two alleged incitement to

application in that behalf by counsel for the Attorney General, that it was adjourning the hearing of the charges to avoid a clash between the civil and the military courts. He claimed, however, that the Tribunal had full jurisdiction under Article 2A to try O'Duffy on all charges and that the Tribunal was not an inferior court or tribunal to which prohibition would lie.<sup>33</sup>

Following a lengthy hearing in late January, the Divisional High Court gave judgment in late March 1934. All three members of the Court (Sullivan P., Hanna and O'Byrne JJ.) were agreed that the Tribunal was an inferior body to which prohibition would lie and, while all were further agreed that the Tribunal lacked jurisdiction in respect of the attempted murder and sedition charges, a majority (Sullivan P. and O'Byrne J.) decided that the Tribunal had jurisdiction to try O'Duffy in respect of the two unlawful membership charges.<sup>34</sup>

While all three members of the Court expressed their distaste for the Tribunal in their judgments, on the all important issue of whether judicial review would lie O'Byrne J. said:

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murder Mr. de Valera and the other account alleged seditious libel.

<sup>33</sup> *The Irish Independent*, January 3, 1934.

<sup>34</sup> Hanna J. dissented on this point: he felt that the Tribunal had no jurisdiction whatever in respect of any of the charges.

"...the jurisdiction of the Tribunal as a Court or Tribunal for the trial of criminal or quasi-criminal offences is confined to the matters set out in the Appendix to the Article. It is only necessary to refer to that Appendix for the purpose of seeing how strictly limited that jurisdiction is. I am, accordingly, of opinion that the Tribunal is an inferior Court for the purposes of prohibition."<sup>35</sup>

While O'Byrne J. acknowledged that "within the limits of its jurisdiction, the Tribunal has extensive and possibly unprecedented powers", he rejected the argument advanced by the Attorney General that the very existence of such powers indicated that the Tribunal was not an inferior court:

"In my opinion this argument is based upon a misconception of the meaning of that term. That the jurisdiction of the Tribunal is limited, and strictly limited, cannot be questioned or denied and that it is, accordingly, subject to prohibition seems to me to be established by the clearest authority. The extensive and drastic nature of the powers of the Tribunal within the limits of its jurisdiction, so far from being an argument in favour of the proposition that the Tribunal is subject to prohibition, seems to me the clearest reason why this Court should restrict it to the

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<sup>35</sup> [1935] IR 70, 117-118.



clear limits of its jurisdiction and thereby prevent it from using such powers in cases not committed to it by the Oireachtas.”<sup>36</sup>

The Court also rejected the argument that the “ouster clause” contained in section 6(5) of Article 2A prevented the High Court from granting prohibition. This provided that:

“No appeal shall lie from any order, conviction, sentence or other act of the Tribunal, and the Tribunal shall not be restrained or interfered with in the execution of its jurisdiction or powers under this Article by any Court not shall any proceedings before the Tribunal be removed by certiorari to any Court.”

But Sullivan P. observed that:

“The restraint or interference with the Tribunal contemplated and prohibited by the sub-section is restraint or interference with the Tribunal ‘in the execution of its jurisdiction or powers under this Article’ and the sub-section can manifestly have no application to a case like the present where a prohibition is sought on the ground that the Tribunal

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<sup>36</sup> *Ibid.*, 118.

is entertaining proceedings which are not within its jurisdiction or powers under the Article.”<sup>37</sup>

The Court then went on to find for O’Duffy on the major issue, namely, whether the Tribunal had jurisdiction in respect of the non-scheduled offences, attempted murder and seditious libel. These offences were not scheduled to Article 2A. Accordingly, for the Tribunal to have had jurisdiction, it was necessary by virtue of clause 7 to that schedule for an Executive Minister to have certified that “to the best of his belief the act constituting such offence was done with the object of impairing or impeding the machinery of government or the administration of justice.” Under the then prevailing Rules of Court - Order 84, rr. 249 and 250 of the Rules of the Supreme Court, 1905 - a respondent could show cause in two ways. If the respondent wished to rely on a new fact not disclosed in the applicant’s affidavit, he was required by Rule 249 to show cause by filing an affidavit. Rule 250 provided that the respondent could otherwise show cause by filing a notice of motion asking that the conditional order be discharged, but in those circumstances he undertook the burden of “satisfying the Court that on the facts stated in the prosecutor’s affidavit the conditional order should be discharged.”<sup>38</sup>

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<sup>37</sup> *Ibid.*, 78.

<sup>38</sup> *Ibid.*, 74, per Sullivan P.

In *O'Duffy* the respondents elected to show cause by notice of motion under Rule 250, but that motion also sought to tender the certificate of the Minister showing jurisdiction for the purposes of Article 2A in respect of the non-scheduled offences. A majority of the Court, however, would not allow the respondents to prove jurisdiction in this way, even though the certificate was actually produced in Court.<sup>39</sup> In the words of Sullivan P.:

“In the present case the Attorney General has elected to show cause by serving a notice of motion and filing an affidavit of service. Having done so, he is not entitled to rely on any matter of fact which is not stated in Eoin O’Duffy’s affidavit. The notice of motion in so far as it purports to rely on any such matter of fact is irregular and inoperative to bring such matter to the notice of the Court and so much of the said notice as refers to such matters should be struck out.”<sup>40</sup>

As there was no certificate properly in evidence before the Court, it followed that the Tribunal lacked jurisdiction in respect of those charges. In any event, it was clear that even if the Court could have looked at the certificate

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<sup>39</sup> See [1935] IR at 112, per Hanna J. Hanna J. was unwilling to adopt the views of Sullivan P. and O’Byrne J. on this procedural point “as it was a matter of extreme technicality.” In the event Hanna J. did consider the Minister’s certificate as tendered and held it to be bad on its face as duplicitous and uncertain: see [1935] IR at 112-115.



irregularly tendered for this purpose, the summonses in respect of these offences would have been quashed on certiorari as being bad on their face, since they did not show on their face that the "Tribunal has any jurisdiction to entertain the third, fourth or fifth charges set forth in the summonses."<sup>41</sup> The second *O'Duffy* case represented "the most serious reverse of all", but it was, in fact, "a vitally important legal decision which safeguarded the individual from the possible tyranny of the executive."<sup>42</sup> In the event, *O'Duffy* does not appear ever to have been tried by the Constitution (Special Powers) Tribunal.<sup>43</sup>

#### *The State (Hughes) v. Lennon*

*O'Duffy* was quickly followed by the decision of another Divisional High Court in *The State (Hughes) v. Lennon*.<sup>44</sup> Captain Hughes was a "prominent Dublin Blueshirt"<sup>45</sup> who had been sentenced on June 1, 1934 to two years' imprisonment by the Constitution (Special Powers) Tribunal

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<sup>40</sup> *Ibid.*, 74.

<sup>41</sup> *Ibid.*, 85, per Sullivan P. See the judgment of O'Byrne J. to like effect, [1935] IR at 126-127.

<sup>42</sup> O'Sullivan, *The Irish Free State and its Senate* (London, 1940) at 339.

<sup>43</sup> This may possibly because he appealed against so much of the majority decision which had ruled in favour of the Tribunal on the membership charges. The appeal was not proceeded with and was eventually struck out on the same day that the Supreme Court gave judgment in *The State (Ryan) v. Lennon*: see [1935] IR at 127.

<sup>44</sup> [1935] IR 128.

<sup>45</sup> Manning, *op.cit.*, 130.

in respect of four offences, three of which were non-scheduled.<sup>46</sup> Although the trial of Hughes had commenced in mid-May 1934 (i.e., some two months after the decision in *O'Duffy*), it does not seem that much had been learnt from that experience. The order of the Tribunal reciting that Hughes had been convicted of the charges did not recite the fact the requisite certificates had been given in respect of the non-scheduled offences, but instead simply stated that Hughes had been adjudged “guilty of all the offences charged.”

The Divisional Court (Sullivan P., Meredith and Hanna JJ.), applying the principles enunciated in *O'Duffy*, concluded that the conviction orders in respect of the three non-scheduled offences were bad as they did not show jurisdiction on their face. As the Tribunal had simply pronounced the applicant guilty in respect of all four charges, the conviction was not severable “and that the absence of jurisdiction to convict on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> charges vitiates the entire conviction and sentence.”<sup>47</sup> Nor did the ouster clause of Article 2A protect the Tribunal

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<sup>46</sup> The gist of the alleged offences appeared to be that Captain Hughes had agreed to pay one Garda McNamara money in return for certain confidential information. The first three counts alleged offences under the Prevention of Corruption Act 1906 and the Official Secrets Acts 1911-1920. The final count alleged offences under the Treasonable Offences Act 1925. Only the latter offence was a scheduled offence for the purposes of Article 2A.

<sup>47</sup> [1935] IR 128, 147, per Sullivan P.

from orders of certiorari where its own convictions were bad on their face<sup>48</sup>, so that in the words of Meredith J.:

“In the net result I am of opinion that this Court has a useful, a salutary, control, at the door of the entrance to, and the door of exit from, the proceedings of the Tribunal, but not such a control as would hamper the Tribunal in the discharge of its very difficult and responsible duties.”<sup>49</sup>

The decision in *Hughes* represented the most serious reverse of all, since many of the Tribunal’s convictions related to non-scheduled as well as scheduled offences and in the light of this decision such convictions were now liable to be set aside on certiorari. The Divisional Court’s decision was given on July 20 (the day after an identically composed Divisional High Court had reserved judgment after four days of oral argument in *The State (Ryan) v.*

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<sup>48</sup> Meredith J. said (at 152) that he could find nothing in Article 2A that:

“would justify the rejection of the application in the present case of the long line of authorities that decide that the insertion of a no-certiorari clause in an Act establishing an inferior Court does not prevent a conviction which is bad on its face being quashed on certiorari and that the conviction is bad on its face if it does not show jurisdiction. The Legislature must be taken to have inserted the no-certiorari clause with full recognition of how such clauses are, according to settled authority construed in the case of statutes establishing inferior Courts and, as this Tribunal has been held to be an inferior Court, the Legislature must be taken to have known that it was an inferior Court.”

<sup>49</sup> [1935] IR 128, 153.



*Lennon*). It quickly became clear that the decision in *Hughes* had implications for all prisoners then in custody on foot of conviction orders made by the Constitution (Special Powers) Tribunal, as some four days later the Government was obliged to release the 37 (mainly IRA) prisoners then in custody pursuant to such orders.<sup>50</sup>

### *The State (Ryan) v. Lennon*

The validity of both Constitution (Amendment No. 16) Act 1929 and Constitution (Amendment No. 17) Act 1931 were the key issues in *The State (Ryan) v. Lennon*. In this case the four applicants had been arrested on April 22, 1934 and were charged with the attempted murder of a rate collector and other serious public order offences.<sup>51</sup> They were detained in custody pending their trial before the Constitutional (Special Powers) Tribunal. Their trial began on May 31, 1934 where the applicants pleaded not guilty. The trial was adjourned to June 12, 1934 to enable the applicants to prepare their defence, but on June 11, 1934 counsel for the applicants applied to O'Byrne J. for conditional orders of habeas corpus challenging the legality of their detention and sought orders of prohibition restraining the Constitution (Special Powers) Tribunal from proceeding to try them in respect of these offences.

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<sup>50</sup> *The Irish Times*, July 25, 1934.

Their applications were heard in late July by the same Divisional High Court (Sullivan P., Meredith and O'Byrne JJ.) which had just heard the *Hughes* case and which immediately thereafter was to hear argument in *The State (Quinlan) v. Kavanagh*<sup>52</sup> The judgments of the Divisional High Court in *Ryan* dismissing the applications were delivered on July 25. The applicants then applied to the Supreme Court to hear the appeal in vacation. As the Attorney General vigorously opposed any grant of bail pending the appeal, the Court agreed to do so. The appeal in *Ryan* was heard on August 7, 8, 9, 10, 14 and 17 and the appeal in *Quinlan* was heard on August 14, 15 and 17. The applicants in *Quinlan* were released on *habeas corpus* at the conclusion of the appeal. The appeal in *Ryan* was subsequently dismissed by a majority of the Supreme Court on December 19, 1934<sup>53</sup> and judgments stating reasons in *Quinlan* were delivered on the same day.

The offences with which the applicants in *Ryan* were charged had their origins in the Economic War. When Mr. de Valera's Government defaulted on the payment of the Land Annuities to the British Government, retaliatory tariffs

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<sup>51</sup> *The Irish Times*, April 24, 1934.

<sup>52</sup> This Divisional High Court was certainly kept busy during the month of July 1934. The Court heard the *Hughes* application on July 4, 5, 6, , 9, 10, 11 and 12 and judgments were delivered on July 20. It heard the *Ryan* application on July 16, 17, 18 and 19 and judgments were delivered on July 25. It finally heard the application in *Quinlan* on July 23 with judgment delivered on July 25.

<sup>53</sup> FitzGibbon and Murnaghan JJ., Kennedy C.J. dissenting.

on cattle and other Irish exports were then imposed by the British. This led to a slump in cattle prices which disproportionately affected the larger farmer interests in the south and midlands. These farmers were generally Fine Gael supporters and their sons were often Blueshirt activists. The larger farmers reacted adversely to the farming crisis with many of them refusing to pay agricultural rates, a tactic which was actively encouraged by the Blueshirts.<sup>54</sup>

To counter these tactics, large forces of police were drafted in:

“to protect the bailiffs who were seizing cattle and goods from the farms of those who refused to pay. In many cases local farmers co-operated to frustrate the bailiffs by having stock and goods removed to a neighbouring farm or hidden away from the arrival of a bailiff. In other instances, roads and railways lines were blocked and telegraph wires cut, either to prevent the bailiff and his force getting to the farms or to prevent the goods from being removed from the area. Sometimes also, local farmers and Blueshirts would form a human barrier in an attempt to prevent the seizures. These activities led to numerous clashes and further difficulties arose when the bailiffs attempted to

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<sup>54</sup> Manning, *op.cit.*, 130-134. It may be noted that the applicants in the last of the Blueshirt cases, *The State (McCarthy) v. Lennon*



dispose of the seized goods in order to raise the amount owing for the rates.”<sup>55</sup>

This was the backdrop to the offences with which Ryan and three applicants were charged. Three horses were seized from farmers, (including Jack Harty, the third named applicant) for non-payment of rates and were put up for sale at an auction by Superintendent Muldoon in Thurles on April 12, 1934. There were about “three hundred farmers present, many of them wearing blueshirts”, as well as “about thirty Gardai and twelve detectives.”<sup>56</sup> As the third horse was led in:

“...a continuous din was kept up and the owner Jack Harty, Ballyvoneen, stated that the bridle was his and proceeded it to take it off the horse. Two Guards rushed towards the animal, but Harty succeeded in pulling the bridle away. At this stage, a portion of the crowd approached the rate collector, James Kinnane, who was struck several blows. Mr. Kinnane drew a revolver and immediately caught hold of him and put the revolver back in his pocket. There were cries of ‘We’ll see this is your last seizure.’

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[1936] IR 485, had been charged before the Tribunal with cutting telegraph wires.

<sup>55</sup> Manning, *op.cit.*, 131.

<sup>56</sup> *The Irish Press*, April 12, 1934.

The crowd afterwards marched to the main street where they were addressed by Colonel Jerry Ryan. It was announced that a victimisation fund was being opened. Three other horses were produced on which the farmers mounted. They then rode through the main town followed by a cheering crowd.”<sup>57</sup>

Following a subsequent armed attack on Kinnane’s house, Colonel Ryan<sup>58</sup> was then arrested by Superintendent Muldoon on April 22 and charged before a special court on April 24.<sup>59</sup> A similar fate befell the other three applicants and, as we have seen, their cases made their way to the Tribunal.

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<sup>57</sup> *Ibid.* On other occasions, these farm seizures and auctions gave rise to serious violence, as happened in Marsh’s Yard in Cork in August 1934 when Special Branch officers fired on unarmed Blueshirt protesters, killing one Michael Lynch as he was trying to hide from the fusillade of bullets. This gave rise to Hanna J.’s celebrated judgment in *Lynch v. Fitzgerald (No.2)* [1938] IR 382.

<sup>58</sup> Ryan (1891-1960) had been a senior figure in the mid-Tipperary Brigade of the IRA during the War of Independence and took the Treaty side during the Civil War. In 1934 he was then a member of the Fine Gael National Executive (see Manning, *op. cit.*, 130). He had previously been a member of the IRA Organisation, a pro-treaty secret republican organisation within the Defence Force and had played a minor role in the Army Mutiny in March 1924 (see Regan, *op.cit.*, 185) after which he resigned his commission. Having failed to get elected in the 1933 general election, Ryan went on to be a Fine Gael Deputy for Tipperary North Riding from 1937-1944 and a Senator from 1948-1954. As shrewd an observer as Nicholas Mansergh described Ryan “as a soap box orator of some merit”, having heard him speak on a Fine Gael platform in Thurles with W.T. Cosgrave T.D. on June 28, 1937 a few days before the 1937 general election and the plebiscite on the new Constitution: see “Some Diary Entries” in Mansergh ed., *Nationalism and Independence and Selected Irish Papers* (Cork University Press, 1996) at 127.

<sup>59</sup> *The Irish Times*, April 25, 1934.

*The validity of Constitution (Amendment No. 17) Act 1931*

As we have already seen<sup>60</sup>, in the High Court it was conceded on behalf of the Attorney General that the Constitution (Amendment No. 17) Act 1931 was inconsistent with the Constitution as originally enacted.<sup>61</sup> It followed that if this Act was valid, it could only be so as an amendment to the Constitution which was authorised by Article 50. As this question in turn depended on whether Article 50 itself had been validly amended by Constitution (Amendment No. 16) Act 1929, the Divisional High Court then went to consider whether this amendment was itself valid. Again, the manner in which Sullivan P. and Meredith and O'Byrne JJ. rejected the arguments that the power to amend in Article 50 should be confined in some way or that Article 50 should itself fall outside the amendment power has already been noted.<sup>62</sup>

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<sup>60</sup> Chapter 2, page 59, *supra*.

<sup>61</sup> See the comments of Sullivan P., [1935] IR 170, 175-176. In the Supreme Court FitzGibbon J. made comments to similar effect: [1935] IR at 220.

<sup>62</sup> [1935] IR 170, 177-178 (Sullivan P.); 179 (Meredith J.); 181 (O'Byrne J.). Meredith J. subsequently admitted that even "inviolable provisions" of the Constitution - such as the position of the judiciary - could be amended in this way, but such was "the devastating effect of Article 50." See Chapter 2, pages 60-63 *supra*.



From this judgment the applicants appealed to the Supreme Court which dismissed the appeals by a majority.<sup>63</sup> These judgments are, however, notable for the range of issues which they traverse. The first key issue facing the Court on appeal, however, was whether the Oireachtas had an unlimited power of amendment of the Constitution during the transitory period. The Court was divided on this question and it may be convenient to turn first to the reasoning of the majority judges, FitzGibbon and Murnaghan JJ.

While the majority judgments have already been extensively analysed in the previous chapter from the standpoint of Article 50<sup>64</sup>, *Ryan's* case also raised issues of enormous importance, including the fundamental character of the 1922 Constitution, the nature of the sovereignty of the Irish Free State and whether the fundamental rights guarantees contained therein were, in fact, immune from radical change. Accordingly, it is necessary to re-trace our steps briefly before analysing these new issues.

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<sup>63</sup> One measure of the importance of the case is that the applicants were represented by no less than seven counsel, while the respondents (led in person by Attorney General Maguire) had six counsel. The legal teams thus included a future Chief Justice (Conor Maguire), a President of the High Court (George Gavan Duffy), four future ordinary Supreme Court judges (Lavery, Martin Maguire, Geoghegan and Haugh); two future High Court judges (Overend and Casey), as well as a former Attorney General (J.A. Costello) who would later become Taoiseach in the 1948-1951 and 1954-1957 Inter-Party Governments.

<sup>64</sup> Chapter 2 at pages 64-67, *supra*.

As we have already seen in the previous chapter, FitzGibbon J. first rejected the argument that the power to amend the Constitution should be confined to circumstances where the amendment effected an "improvement" of the Constitution. He then considered the wider question of whether the power to amend the Constitution included the power to amend Article 50 itself. While he observed that "however undesirable it may appear to some" that the Oireachtas should have the power to extend the period during which the Constitution might be amended by ordinary legislation, nevertheless "if this be the true construction of Article 50, this Court is bound to give effect to that construction."<sup>65</sup> He continued by noting that whereas both the Constituent Act and Article 50 contained restrictions on the power of amendment - they both precluded amendments which were in conflict with the terms of the Treaty - the *expressio unius* principle came into play, suggesting that no further restrictions on the power to amend were thereby intended.<sup>66</sup>

FitzGibbon J. then emphasised the fact that it was Dail Eireann sitting as a Constituent Assembly which had created the Oireachtas and which had limited its powers in particular ways.<sup>67</sup> He concluded by noting that other

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<sup>65</sup> *Ibid.*, 224.

<sup>66</sup> *Ibid.*.

<sup>67</sup> *Ibid.*, 226-227. FitzGibbon J. added that an amendment of Article 50 by the deletion of the words "within the terms of the Scheduled Treaty" would be "totally ineffective", as effect was



Constitutions often contained express restrictions upon the power of the Legislature to amend the amendment power itself<sup>68</sup>, so that it followed that:

“Our Constituent Assembly could in like manner have exempted Article 50 from the amending powers conferred upon the Oireachtas, but it did not do so, and, in my opinion. the Court has no jurisdiction to read either into the Constituent Act or into Article 50 a proviso excepting it, and it alone, from these powers.”<sup>69</sup>

From these judgments the Chief Justice delivered a remarkable and vigorous dissent. Kennedy C.J.’s dissent on this point contains echoes of his later natural law argument:

“The Third Dail Eireann has, therefore, as Constituent Assembly, of its own supreme authority, proclaimed its acceptance of and declared, in relation to the Constitution which it enacted, certain principles, and

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given to those words by the Constituent Act itself, “which the Oireachtas has no power to amend.”

<sup>68</sup> He instanced section 152 of the South Africa Act 1909 which provided that no “repeal or alteration of the provisions contained in this section...shall, be valid” unless the Bill embodying such an amendment to the amending power itself shall have been passed in a particular way or by a specified majority. Article V of the US Constitution also contained certain restrictions on the power of amendment of certain clauses of Article I prior to 1808.

<sup>69</sup> [1935] IR 170, 227. As we have already seen, Murnaghan J. spoke in similar terms: [1935] IR 170, 224.



in language which shows that beyond doubt that they are stated as governing principles which are fundamental and absolute (except as expressly qualified) and, so, necessarily immutable. Can the power of amendment given to the Oireachtas be lawfully exercised in such a manner as to violate these principles which, as principle, the Oireachtas has no power to change? In my opinion there can be only one to that question, namely, that the Constituent Assembly cannot be supposed to have in the same breadth declared certain principles to be fundamental and immutable, or conveyed that sense in other words, as by a declaration of inviolability, and at the same time to have conferred upon the Oireachtas power to violate them or to alter them. In my opinion, any amendment of the Constitution, purporting to be made under the power given by the Constituent Assembly, which would be a violation of, or inconsistent with, any fundamental principle so declared, is necessarily outside the scope of the power and invalid and void.”<sup>70</sup>

To digress slightly we may note that by the date of the delivery of the judgments in *Ryan* in December 1934 the blueshirt campaign had all but come to an end and the movement was quickly thereafter to disintegrate:

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<sup>70</sup> *Ibid.*, 209.

“The legal victories won over the government, the rallies and the reorganisation now counted for little, as the movement set about its own self-destruction.”<sup>71</sup>

Colonel Ryan was ultimately convicted by the Tribunal and sentenced to nine months’ imprisonment for the attack on the home of the rate collector.<sup>72</sup>

### *Celebrated dissent of Kennedy C.J.*

Kennedy C.J.’s dissent in this case has proved to be influential. It was at the heart of the famous decision of the Indian Supreme Court in *Kesavandra v. State of Kerala*<sup>73</sup>, where it was frequently cited - generally with approval - in the diverse judgments of the 13 member Supreme Court bench running to 566 printed pages. In this case a majority of that Court held that the “essential features” of the Indian Constitution were beyond the amending power of that Constitution. The majority then went on to hold that a constitutional amendment which sought to immunise the constitutionality of legislation from challenge on the ground that it did not give effect to the

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<sup>71</sup> Manning, *op.cit.*, 177.

<sup>72</sup> *The Irish Press*, February 8, 1935.

<sup>73</sup> [1973] AIR 1461. See generally, Gwynn Morgan, “The Indian Essential Features Case” (1981) 30 *ICLQ* 307 and Whelan, “Constitutional Amendments in Ireland: The Competing Claims of Democracy” in Quinn, Ingram and Livingstone, *Justice and Legal Theory in Ireland* (Dublin, 1995).

Directive Principles of Social Policy contained in Article 37 of the Indian Constitution.<sup>74</sup>

Similar thinking has prevailed in some continental jurisprudence. Thus, in the first major case in which it invalidated a Federal statute, the *Southwest State Case*<sup>75</sup>, the German Constitutional Court said that "a constitution reflects certain overarching principles and fundamental decisions to which individual provisions of the Basic Law are subordinate." The Court added by way of an *obiter dictum* that German constitutional law protects certain suprapositivist norms, so that a constitutional amendment which violated these "overarching principles and fundamental decisions" would be itself void.<sup>76</sup>

*Chief Justice Kennedy and natural law principles*

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<sup>74</sup> A provision which itself is clearly modelled on Article 45 of our own Constitution. In *Gandhi v. Raj Narain* (1975) ASC 2299 the "essential features" doctrine was applied by Indian Supreme Court to invalidate a constitutional amendment which was designed to interfere with a pending appeal to that Court.

<sup>75</sup> (1951) 1 *BVerfGE* 14. Here legislation providing for the compulsory amalgamation of three small Lander into the amalgamated Land of Baden-Wurttemberg was found to be unconstitutional on the ground that it violated fundamental principles of democracy and federalism.

<sup>76</sup> The nearest that the Constitutional Court has come to applying these principles is the *Klass* case (1970) 30 *BverfGE* 1, where the dissenting members of the Court considered that amendments to Article 10 of the Basic Law (protecting the "inviolability" of the posts and telegraphs were themselves void on the ground they violated these "overarching principles.")



*Ryan's* case is also justly famous for the fact that the Chief Justice Kennedy was willing to invalidate a constitutional amendment by reference to natural law or higher law principles. In contrast to the language of the personal rights provisions of Articles 40, 41, 42 and 43 of the present Constitution - where, on one view, at least, there is almost an open invitation to the judiciary to apply natural law reasoning - it must be said that the Chief Justice in his references to the natural law had "to pull his antecedent principles out of the air, so to speak".<sup>77</sup> However, Kennedy C.J. stressed that the Constitution was subject to the certain immutable limitations:

"The Constituent Assembly declared in the forefront of the Constitution Act (an Act which it is not within the power of the Oireachtas to alter, or amend or repeal) that all lawful authority comes from God to the people, and that it is declared by Article 2 of the Constitution that 'all powers of government and all authority, whether legislative, executive or judicial, in order to be lawful under the Constitution, must be capable of being justified under the authority thereby declared to be derived from God. From this it seems clear that, if any legislation of the Oireachtas (including any purported amendment of the Constitution) were to offend against that acknowledged ultimate Source from which the legislative authority has come through the

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<sup>77</sup> Kelly, *The Irish Constitution* (Dublin, 1994) at 676.

people to the Oireachtas, as, if, for instance, it were repugnant to the Natural Law, such legislation would be necessarily unconstitutional and invalid, and it would be, therefore, absolutely null and void and inoperative. I find it very difficult to reconcile with the Natural Law actions and conduct which would appear to be within the legalising intendment of the provisions of the new Article 2A relating to interrogation. I find it impossible to reconcile as compatible with the Natural Law the vesting in three military servants of the Executive, power to impose as punishment for any offence within the indefinite, but certainly extensive, ambit of the Appendix, the penalty of death, whenever these three persons are of opinion that it is *expedient*. Finally, the judicial power has been acknowledged and declared (and the acknowledgment and declaration remain) to have come from God through people to its appointed depositary, the judiciary and the Courts of the State. While they can fulfill that trust, dare any say that the Natural Law permits it, or any part of it, to be transferred to the Executive or their military or other servants.”<sup>78</sup>

The two majority judges responded to this issue in slightly different ways. It brought forth in FitzGibbon J. a withering, contemptuous response, full of savage and biting

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<sup>78</sup> [1935] IR 170, 204-5.

irony. He noted first that the appellants had argued that there are:

“certain rights, inherent in every individual, which are so sacred that no legislature has authority to deprive him of them. It is useless to speculate upon the origin of a doctrine which may be founded in the writings of Rosseau, Thomas Paine, William Godwin and other philosophical writers, but we have not to decide between their theories and those of Delolme and Burke, not to mention Bentham and Locke, upon what Leslie Stephen described as a ‘problem which has not yet been solved, nor are even the appropriate methods definitely agreed upon’ as we are concerned, not with the principles which might or ought to have been adopted by the framers of our Constitution, but with the powers which have actually been entrusted by it to the Legislature and Executive which it set up.”<sup>79</sup>

He then went on to reject the argument that the Constitution, like its American counterpart on which it was to some degree modeled, had attempted to enshrine fundamental principles, since the American experience had been founded upon historical considerations which did not obtain in the case of the Irish Free State:

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<sup>79</sup> *Ibid.*, 230-1.



"I can find no justification for the inference which the counsel for the appellants ask us to draw from the provisions of the American Declaration of Independence and the Constitution founded thereon, or from the fact that some of these provisions have been embodied in other Constitutions, including our own, that the rights thereby secured are universal and inalienable rights of all citizens in all countries or even in the Saorstat which, we have been assured, was, or is, our ought to be, Gaelic and Catholic, attributes to either of which few other States can claim a title, while there is no other which can even suggest a claim to both. There is no ground for surprise, therefore, that this State should, as the Chief Justice has said, 'point new ways' in its 'pioneer Constitution draftsmanship' or that it should prefer to secure liberty and justice to its citizens by the simple processes of Amendment No. 17 in preference to the complicated British and American machinery of an independent judiciary, trial by jury and *habeas corpus*.

I cannot presume, either, that rights and privileges which the inhabitants of England have always enjoyed, either by virtue of their common law...or under the provisions of special statutes, are also indigenous to the citizens of this Gaelic and Catholic State in the sense in which the American colonists claimed them as their birthright by virtue of *their* status as British subjects - a status which I understand to be

repudiated by our legislators - or that our national conceptions of liberty and justice must necessarily coincide with those of citizens of any other State.”<sup>80</sup>

FitzGibbon J. continued by harking back to the all-embracing power of amendment in Article 50:

“Unless, therefore, those rights appear plainly from the express provisions of our Constitution to be inalienable and incapable of being modified or taken away by legislative act, I cannot accede to the argument that the Oireachtas cannot alter, modify or repeal them. The framers of the Constitution may have intended ‘to bind man down from mischief by the chains of the Constitution’, but if they did, they defeated their object by handing him the key of the padlock in Article 50.”<sup>81</sup>

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<sup>80</sup> *Ibid.*, 233-4.

<sup>81</sup> *Ibid.*, 234. As Hood Phillips remarked, *loc.cit.*, 242-3, this case confirmed that there are no:

“fundamental laws or ‘natural rights’ in the Constitution of the Irish Free State whatever continental observers who read that document may have thought.”

The reference to “continental observers” is, of course, to Kohn’s *Constitution of the Irish Free State* (London, 1932). Kohn had, of course, been heavily influenced by the thinking of Kennedy. The two had become friendly and the Chief Justice had written the foreword to Kohn’s masterly work: see generally Hand, “A re-consideration of a German study (1927-1932) of the Irish Constitution” in Bieber and Nickel eds., ii., *Das Europa der zweiten Generation: Gedachtnisschrift fur Christoph Sasse* (Baden-Baden, 1981).

But this remarkable judgment had yet to reach its apotheosis. FitzGibbon J. next surveyed the Constitutions as diverse as those of Poland and Mexico, demonstrating the extraordinary lengths to which to such provisions protected fundamental liberty and then continued:

“But the fact that the Constitutions of other countries prohibit such invasions of the rights of liberty and property and such extraordinary innovations in the methods of administering justice in criminal cases as have been introduced by Amendment No. 17 affords no ground for condemning as unconstitutional in *this* country, or as contrary to any inalienable rights of an Irish citizen, an enactment which appears to have received the almost unanimous support of the Oireachtas, for we have been told that those of our legislators by whom it was opposed most vehemently as unconstitutional and oppressive, when it was first introduced, and now accord it their unqualified approval.<sup>82</sup> It is true that even a unanimous vote of the Legislature does not decide the validity of a law, but it is some evidence that none of those whose duty it is to make the laws see anything in it which they regard as exceptionally iniquitous, or as derogating from the standard of civilisation which they deem,

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<sup>82</sup> This, of course, is an intentionally ironic reference to the fact that while Fianna Fail in opposition had vehemently opposed Article 2A and suspended it as soon as they came into Government in March 1932, they were forced to re-introduce it in



adequate for Saorstát Éireann. Indeed, it possible that our Constituent Assembly may have followed too slavishly the constitutional models of other nationalities, and that, just as the constitutional safeguards of Freedom of Speech, Trial by Jury, Security of the Person and Property were only introduced into the Constitution of the United States by way of amendment a year after the original Constitution had been adopted, so the amendments of our Constitution which have been enacted during recent years, whereby these and similar safeguards have been minimised or abrogated, more truly represent our national ideals. If this be so, we find the Briton's conception of liberty and justice set forth in his Magna Charta and his Bill of Rights; those of the American in his Declaration of Independence and his Constitution; while those of the Gael are enshrined in Amendment No. 17 (which is to prevail in case of inconsistency, over everything in the Constitution, except Articles 1 and 2) and subsequent amendments. However this may be, I can find no justification for a declaration that there was some 'spirit' embodied in our original Constitution which is so sacrosanct and immutable that nothing antagonistic to it may be enacted by the Oireachtas."<sup>83</sup>

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1933: see generally O'Sullivan, *The Irish Free State and its Senate* (London 1940) at 334-335.

<sup>83</sup> [1935] IR 170, 235-6. FitzGibbon J. quoted two American decisions at State court level to illustrate this point, including the following quotation from *Walker v. Cincinnati* 21 Ohio 41:

The judgment of the other majority judge - Murnaghan J. - was only somewhat more muted. While he acknowledged that the "extreme rigour" of the provisions of Article 2A passed "far beyond anything having the semblance of legal procedure" and that the "judicial mind is staggered at the very complete departure from legal methods in use in these courts"<sup>84</sup>, he evinced no sympathy whatever for the natural law arguments of the appellants:

"...it is sought to be established that many Articles of the Constitution are so fundamental as to be incapable of alteration and that the true meaning of the word 'amendment' in Article 50 of the Constitution does not authorise any change in these fundamental Articles or doctrines. It has to be admitted that the Constitution itself does not segregate as fundamental specified Articles or doctrines, nor does it in terms make any distinction between the different classes of Articles. At most, certain Articles such as Article 8, by which freedom of conscience is guaranteed, and Article 9, by which the right of public meeting is guaranteed subject to certain safeguards, may be said to secure what may, in the sphere of ethics and politics, be

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"Courts cannot nullify an Act of the State Legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution where neither the terms nor the implications of the instrument disclose any such restriction."

<sup>84</sup> [1935] IR 170, 237-8.

regarded as fundamental rights. These Articles are not, however, those which have been said to have been weakened; and, in reference to other Articles which are alleged to be fundamental, the only criteria which the appellants can suggest is that the Court should undertake the responsibility of deciding in any set of circumstances which Articles which are alleged to have been fundamental. Before the Court should seek to assume such a power it is, in my opinion, necessary that the Court should find a very stable foundation for such an exercise of jurisdiction. If we regard closely the substance of the matter it is plain that, after the eight years period, proposed amendments of the Constitution were to be submitted to the people for approval and were to become law only if they had been accepted by the requisite majority of the voters entitled to vote. This direct consultation of the people's will does indicate that all matters, however fundamental, might be the subject of amendment. On the other hand the view contended for by the appellants must go to this extreme point, viz., that certain Articles or doctrines of the Constitution are utterly incapable of alteration at any time, even if demanded by an absolute majority of the voters.”<sup>85</sup>

While the dissent of Kennedy C.J. is often cited as the foundation of the modern Irish jurisprudential natural law

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<sup>85</sup> *Ibid.*, 240.



tradition, one cannot help but wondering whether such reliance may be misplaced. It would seem to have little in common with the specifically religiously inspired version of the natural law which is most closely associated with the views of O'Hanlon J. in the general context of the abortion debate<sup>86</sup>: certainly, there does not appear to be anything in the Ten Commandments or the Sermon on the Mount or even in the writings of St. Thomas Aquinas which even remotely addresses matters such as the mode of a criminal trial or the need for such trials to be in the hands of an independent judiciary in times of peace. Nor does it seem to have much in common with contemporary secular versions of natural law or substantive due process, since the starting point for this strand of jurisprudence - ostensibly, at least - is the actual wording of the Constitution. In any event, as Murnaghan J. perceptively anticipated in his own judgment, this modern version of natural law jurisprudence recognises the ultimate supremacy of the Constitution and, crucially, the capacity of the People to amend the Constitution by referendum in any way that they deem fit.<sup>87</sup>

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<sup>86</sup> For this debate, see O'Hanlon, "Natural Rights and the Irish Constitution" (1993) *Irish Law Times* 8; Murphy, "Democracy, Natural Law and the Irish Constitution" (1993) *Irish Law Times* 81; O'Hanlon, "The Judiciary and the Moral Law" (1993) *Irish Law Times* 129 and Twomey, "The Death of Natural Law" (1995) *Irish Law Times* 270.

<sup>87</sup> See, e.g., *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1; *Hanafin v. Minister for Environment* [1996] 2 IR 321 and *Riordan v. An Taoiseach* [1999] 4 IR 325.

The reality is that Kennedy C.J.'s dissent on the natural law issue - magnificent though it was - must really be regarded as a personal judicial response to an extreme and draconian constitutional amendment which had been enacted almost by a legislative sleight of hand without the sanction of the electorate in the manner in which the Constitution had originally intended.<sup>88</sup> This dissent also reflected a sharp clash in judicial attitude. Kennedy had clearly hoped for:

"[T]he creation of an indigenous legal system [and] for the development of a vibrant constitutional law, augmented by judicial review of legislation...This profound clash in judicial attitude - between what might conveniently be described as the enthusiastic

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<sup>88</sup> In the preface to Kohn's Constitution of the Irish Free State (London, 1932) Kennedy (who had himself been a member of that Constitution's drafting committee) had explained:

"It was originally intended, as appears by the draft, that amendment of the Constitution should not be possible without the consideration due to so important a matter affecting the fundamental law and framework of the State, and the draft provided that the process of amendment should be such as to require full and general consideration [sc. by means of referendum]. At the last moment, however, it was agreed that a provision be added to Article 50, allowing amendment by way of ordinary legislation during a limited period so that drafting or verbal amendments, not altogether unlikely to appear necessary in a much debated text, might be made without the more elaborate process proper for the purpose of more important amendments. This clause was, however, afterwards used for effecting alterations of a radical and far-reaching character, some of them far removed in principle from the ideas and ideals before the minds of the first authors of the instrument."



nationalism of Kennedy C.J. and the pessimistic scepticism of FitzGibbon J. - ultimately came to a head publicly in cases such as [Ryan].”<sup>89</sup>

The key question is whether Kennedy C.J. would have taken the same view had Article 2A been approved by way of referendum. As that question was not before the Court, we can only speculate on the answer. However, given Kennedy C.J.’s own beliefs about the nature of popular sovereignty, it would have been surprising if he felt that the courts had jurisdiction in this regard. In other words, it is likely that he would have adopted the approach taken by a later Supreme Court in a trilogy of cases in the 1990s whereby the Court affirmed the supremacy of popular sovereignty as the key principle of the Constitution, so that there are (almost) no limits to the people’s right to amend that document by way of referendum. As Hamilton C.J. said in *Re Article 26 and the Information (Termination of Pregnancies) Bill*<sup>90</sup> in response to the argument that the people’s power of amendment at a referendum did not extend to violating fundamental natural law principles:

“From a consideration of all of the cases which recognised the existence of a personal right which was not specifically enumerated in the Constitution, it is manifest that the Court in each such case had

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<sup>89</sup> Hogan, “Chief Justice Kennedy and Sir James O’Connor’s Application” (1988) 23 *Irish Jurist* 144, 156.

<sup>90</sup> [1995] 1 IR 1.



satisfied itself that such personal right was one which could be reasonably implied from and guaranteed by the provisions of the Constitution, interpreted in accordance with its ideas of prudence, justice and charity. The courts, as they were and are bound to, recognised the Constitution as the fundamental law of the State to which the organs of the State were subject and at no stage recognised the provisions of the natural law as superior to the Constitution. The People were entitled to amend the Constitution in accordance with the provisions of Article 46 of the Constitution and the Constitution as so amended by the Fourteenth Amendment is the fundamental and supreme law of the State representing as it does the will of the People.”<sup>91</sup>

Similar views may be found in the various judgments of the Supreme Court in *Hanafin v. Minister for Environment*<sup>92</sup>. In an echo of his comments for the Court in the *Information Bill* reference, Hamilton C.J. observed:

“No organ of State is entitled to review or interfere with the will of the people as expressed in their votes cast in a referendum to consider a proposal for the amendment of the Constitution because the will of the people as so expressed is binding on all organs of the State, as it is the fundamental right of the people to

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<sup>91</sup> *Ibid.*, 43.

decide all questions of national policy via the referendum process. While the judicial arm of government is not entitled to interfere with the right of the people to cast their votes at a referendum or with the results of the referendum, it is entitled to intervene in order to protect the rights of the citizens to exercise freely their constitutional right to vote if the constitutional rights of the citizens in regard thereto are violated by any body or individual. The will of the people as expressed in a referendum providing for the amendment of the Constitution is sacrosanct and if freely given, cannot be interfered with. The decision is theirs and theirs alone.”<sup>93</sup>

Likewise, in *Riordan v. An Taoiseach (No. 1)*<sup>94</sup> (where the plaintiff had challenged, *inter alia*, the 15<sup>th</sup> Amendment of the Constitution Act 1996 providing for divorce) Barrington J. was emphatic on this question:

“There can be no question of a constitutional amendment properly placed before the people and approved by them being itself unconstitutional....A proposed amendment to the Constitution will usually be designed to change something in the Constitution and will therefore, until enacted, be inconsistent with the existing text of the Constitution, but once approved

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<sup>92</sup> [1996] 2 IR 321.

<sup>93</sup> *Ibid.*, 425.

<sup>94</sup> [1999] 4 IR 325.

by the people under Article 46 and promulgated by the President as law, it will form part of the Constitution and cannot be attacked as unconstitutional.”<sup>95</sup>

While these judgments acknowledge the supremacy of the Constitution and the referendum process, one wonders what the contemporary judicial reaction might be if the electorate were by referendum to sanction an alteration of fundamental constitutional values in a manner which was positively hostile to ordinary human rights standards? In a sense this is but a variation of the problem which confronted the Supreme Court in *Ryan*. However, once the court was satisfied that the referendum was duly passed it seems that it could have no concern with its merits, save, of course, that the courts would probably strive to place the most benign interpretation possible on the provision in question. In this regard, it is interesting that neither the Indian or German Constitutions provide for the referendum process for constitutional amendments. If these Constitutions had provided for the supremacy of popular sovereignty as the key constitutional value - as appears to be the case with the Irish Constitution - perhaps, then, the doctrine of “essential features” or “supra-positivist” norms would not hold sway.

### *Ryan’s case and the sovereignty of the Irish Free State*

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<sup>95</sup> *Ibid.*, 339.



The other major question addressed in *Ryan* concerned the nature of the sovereignty of the Irish Free State. While by any standards the Irish Free State was an independent, sovereign State at the time of its establishment, the Sinn Fein negotiators had been forced following the 1921 Treaty negotiations to accept an unusual abridgement of that sovereignty in that the then Oireachtas was precluded from enacting legislation which was in conflict with that Treaty. This was provided for in section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922:

“The said Constitution shall be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland set forth in the Second Schedule hereto annexed...which are hereby given the force of law, and if any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State (Saorstát Éireann) shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty.”

Article 50 of the Constitution provided that any amendments to the Constitution had to be “within the terms of the Scheduled Treaty.” Following Mr. de Valera’s

accession to power in March 1932, he immediately set about dismantling those elements of the Constitution (such as the Oath of Allegiance, the appeal to the Privy Council and the Governor-General) to which he was so resolutely opposed. This was done in the first instance by the Constitution (Removal of Oath) Act 1933. As the provision for the Oath of Allegiance had been incorporated in Article 4 of the Treaty, as well as in Article 17 of the Constitution, it would not have sufficed simply for the Oireachtas to have attempted to delete Article 17.<sup>96</sup> The 1933 Act therefore took the opportunity to delete section 2 of the 1922 Constitution Act; the reference in Article 50 to "within the terms of the Scheduled Treaty" and purported to deprive the High Court and Supreme Court of their jurisdiction under Articles 65 and 66 to declare a constitutional amendment invalid on the ground that it was inconsistent with the Scheduled Treaty.

The Supreme Court was agreed in *Ryan* that the Oireachtas had no power whatever to amend the terms of the Constituent Act and the Scheduled Treaty, although, of course, there was no suggestion that Article 2A violated the terms of the Scheduled Treaty.<sup>97</sup> But a further

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<sup>96</sup> None of the earlier constitutional amendments - however radical - had attempted unilaterally to alter the provisions of the Treaty.

<sup>97</sup> Cf. the comments of Murnaghan J. (at 241):

"The only limitation specified in the text of Article 50 itself is that the amendment of the Constitution must be within the terms of the Scheduled Treaty. This limitation is emphasized



extraordinary dimension of the *Ryan* case is that the Supreme Court completely ignored the 1933 Act - which had been in force for over a year<sup>98</sup> - and treated section 2 of the 1922 Act as if it had not been amended! There is simply no other precedent for a court purporting to ignore and treat a constitutional amendment as a complete nullity.

A further complication was provided by the Privy Council's decision some six months later in June 1935 in *Moore v. Attorney General of the Irish Free State*.<sup>99</sup> Here the issue was whether the Constitution (Amendment No. 22) Act 1933 - which had purported to abolish the right of appeal from the Supreme Court to the Privy Council was valid. As this right of appeal was held to have been protected by the Treaty<sup>100</sup>, the Judicial Committee was

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by the Constituent Act itself, which provides that if any amendment of the Constitution is in any respect repugnant to any of the provisions of the Scheduled Treaty it shall to the extent only of such repugnancy be absolutely void and inoperative. This conception of the power of amendment as entertained by the framers of the Constitution of the Constitution does not at all accord with the limitation now attempted to be put forward. As a matter of construction I am satisfied that the power of amendment extends to any limits other than those specified in the Article and in the Constituent Act, and it is not argued that the Act of 1931 is in any way inconsistent with the Scheduled Treaty."

<sup>98</sup> The 1933 Act became law on May 3, 1933.

<sup>99</sup> [1935] IR 472.

<sup>100</sup> Article 2 of the Treaty provided that the position of the Irish Free State "in relation to the Imperial Parliament and Government...shall be that of the Dominion of Canada" and the "law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State." In *Performing Right Society v.*



thus confronted directly with the issue of whether the Oireachtas had power to amend the Constitution in a manner inconsistent with the Treaty. The Statute of Westminster 1931 had provided that a Dominion Parliament had power to abrogate an enactment of the Imperial Parliament. Although the Irish Free State had never purported to legislate by reference to the Statute of Westminster, Viscount Sankey L.C. held that the Constitution (Amendment No. 22) Act was valid. As he pithily put it:

“The simplest way of stating the situation is that the Statute of Westminster gave to the Irish Free State a power under which they could abrogate the Treaty, and that, as a matter of law, they have availed themselves of that power.”<sup>101</sup>

In so doing, the Privy Council held that the Irish Free State derived its authority from an Act of the Imperial Parliament and rejected the contrary views expressed in *Ryan*. Of course, in more recent times the Supreme Court has re-affirmed the views expressed in *Ryan*'s case to the view that the Constitution of 1922 derived its authority from an Act of Dail Eireann and not from an Act of the

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*Bray Urban District Council* [1930] IR 509 the Privy Council held that Article 2 of the Treaty specifically ensured the right to petition the Judicial Committee for leave to appeal, because the right was part of the law, practice and constitutional usage then governing the relationship of the Crown and of the Imperial Parliament to the Dominion of Canada.

<sup>101</sup> [1935] IR 472, 486-7.

Imperial Parliament.<sup>102</sup> While this conclusion is understandable having regard to the overall Irish political culture, it is not at all without its difficulties. As Lenihan has convincingly argued:

“The view in *Ryan’s* case also involves accepting that the British Parliament no longer had the power to legislate for Ireland after the establishment of the First Dail in 1919. This would mean that legislation passed by the British Parliament between 1919 and 1922 was not carried over into the new legal order, contrary to the presumed purpose behind Article 73 of the 1922 Constitution, which provides that subject to the Constitution and to the extent that they are not inconsistent therewith, the laws in force in Saorstát Eireann at the date of the coming into force of the Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amendment by enactment of the Oireachtas.”<sup>103</sup>

*The extraordinary language of FitzGibbon J.*

It remains, penultimately, before concluding our examination of the decision in *Ryan* to consider the extraordinary

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<sup>102</sup> *Re Article 26 and Criminal Law (Jurisdiction) Bill 1976* [1977] IR 129, 146-7, per O’Higgins C.J.

<sup>103</sup> Lenihan, “Royal Prerogatives and the Constitution” (1989) 24 *Irish Jurist* 1, 10.

language used by FitzGibbon J. at the conclusion of his judgment:

"The last contention of Mr. Overend [counsel for the applicants], that every person who accepted citizenship of the Irish Free State when it was first established, or at any subsequent date, did so upon the faith of an undertaking, express or implied, on the part of the State, embodied in the Constitution, that no alteration of the Constitution to his detriment would thereafter be made, is so manifestly untenable upon any ground of law or principle, that I mention it only to show that it has not been overlooked.

Equally unfounded is the suggestion that the power of amendment introduced in Article 50 should be treated by analogy to a proviso in small print at the end of a fraudulent prospectus, or to a condition on the back of a railway ticket handed to an illiterate traveler. Such arguments show the desperate straits to which the appellants have been reduced. Article 50 seems to me to occupy its appropriate place, at the end of the group of clauses which deal with the creation, composition, and powers of the Legislature, and every person who became a citizen must be presumed to have accepted citizenship upon the terms therein set forth.



Fortunately, it can never again be suggested that the Saorstat has obtained citizens by false pretences, now that the Oireachtas has promulgated, *urbi et orbi*, to Czechoslovak and the Mexican, to our kinsmen in the United States of America and, above all, to our fellow-countrymen in Northern Ireland, whose co-operation we profess to desire, as well as all those who seek or acquire, or have thrust upon them, rights under our new Irish Nationality and Citizenship Act, Amendment No. 17 as an integral part of our Constitution, setting forth in the clearest language, in the forefront of that document, the conditions under which liberty is enjoyed and justice may be administered in 'this other Eden demi-Paradise, this precious stone, set in the silver sea, this blessed plot, this earth, this realm, this' Saor Stat."<sup>104</sup>

It can be stated with confidence that this is the most remarkable language ever to be found in a judgment of the Irish Supreme Court and it is hard to see how it would not have given considerable offence.<sup>105</sup> In this respect,

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<sup>104</sup> *Ibid.*, 236-7. The parody is, of course, from Shakespeare's *Richard II*.

<sup>105</sup> See Hogan, "Chief Justice Kennedy and Sir James O'Connor's Application" (1988) 23 *Irish Jurist* 144, 156:

"FitzGibbon J.'s judgment is remarkable for its sustained invective and sarcasm, largely directed at the new State and its institutions."

An "old friend" wrote of FitzGibbon J. following his retirement in (1938) 72 *Irish Law Times and Solicitors' Journal* 324 that he had

our judges have followed the English tradition which is, of course, that "personal attacks are politely concealed."<sup>106</sup> Of course, FitzGibbon J.'s final peroration has a majestic eloquence which lifts it beyond the boorish petulance sometimes seen in dissents in the US Supreme Court.<sup>107</sup> Of course, great cases and profound issues often call out for memorable language and quite often it is the use of such language which contributes to elevating the decision into the ranks of the truly great. This is certainly true of the famous dissenting judgments of Holmes J. and Brandeis J. in the post-World War I American free speech cases<sup>108</sup> and of Lord Atkin's celebrated dissent in *Liversidge v. Anderson*<sup>109</sup>.

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not adopted a "die-hard attitude when the Irish Free State began its chequered career." That is doubtless so, but his judgment in *Ryan* cannot be interpreted otherwise than displaying considerable unhappiness with the post-1922 state of affairs. However, it is interesting to note that FitzGibbon J. wrote to de Valera in May 1937 immediately after the publication of the draft Constitution with constructive suggestions regarding Article 26 of the Constitution. De Valera immediately responded with a warm personal letter, assuring him that his concerns would be taken into account, which indeed they were, see S. 9856.

<sup>106</sup> Blom-Cooper and Drewery, *Final Appeal - A Study of the House of Lords in its Judicial Capacity* (London, 1972) at 86-7.

<sup>107</sup> See, e.g., Rehnquist J.'s dissent in *United Steelworkers of America v. Weber* 443 US 193 (1979) where (at 222) he denounced the majority judgments saying that:

"by a *tour de force* reminiscent not of jurists such as Hale, Holmes and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language...legislative history and uniform precedent."

<sup>108</sup> See, e.g., Lewis, *Make No Law: The Sullivan case and the First Amendment* (Random House, 1991) at 67-89.

<sup>109</sup> [1942] AC 406. For the fascinating account of how Lord Atkin's remarks caused him to be cold-shouldered by his fellow Law Lords,



If *Ryan's* case effectively heralded the collapse of the 1922 Constitution, since it established that, the terms of the Scheduled Treaty aside, there were no legislative barriers to amendments of that Constitution, that process was completed by *Moore's* case. In the wake of the Privy Council's interpretation of the Statute of Westminster in that case the Oireachtas was now free to dismantle the Treaty as well. Writing shortly afterwards in the *Law Quarterly Review*, Hood Phillips thought that it followed that the Oireachtas was free to repeal "ex post facto Article 65 and part of Article 66 of the Constitution which give the Courts their power to review legislation."<sup>110</sup> Yet, unbeknownst to him, events were already moving decisively in a different direction. As we shall see in the next chapter, in May 1934 Mr. de Valera had established a top-level Committee whose task was to examine the existing Constitution with a view:

"to ascertaining what Articles should be regarded as fundamental, on the grounds that they safeguard democratic rights, and to make recommendations as to steps which should be taken to ensure that such

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see the late Professor Heuston's definitive account: "Liversidge v. Anderson in Retrospect" (1970) 86 *LQR* 33.

<sup>110</sup> Hood Phillips, *loc.cit.*, 244.



Articles should not be capable of being altered by ordinary processes of legislation.”<sup>111</sup>

The recommendations of this Committee were to form the nucleus of the drafts for the present Constitution, which work began in earnest a few months after the Supreme Court’s judgment in *Ryan*.<sup>112</sup> As shall also see, in a memorandum to his fellow committee-members, the Secretary of the Department of Justice admitted that “in form” Article 2A was “grotesque as an Article of the Constitution. It must go” and the Committee’s recommendations anticipated the present provisions of the Constitution relating to the Special Criminal Court. The Committee also recommended the re-introduction of the referendum procedure. Further lessons from *Ryan* and the entire Article 2A experience were clearly learnt by the drafters of the new Constitution, as during the three year transitory period during which the Constitution could be amended by ordinary legislation, Article 51 was careful to ensure that the referendum provisions of Article 46 and the three year period itself were beyond the reach of ordinary legislation. This was a vital step in ensuring the stability and success of the new Constitution, since it ensured that, thereafter, a referendum would be necessary to effect constitutional change. And so thus, the practical

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<sup>111</sup> S 2979.

<sup>112</sup> Hogan, “The Constitution Review Committee of 1934” in O’Muircheartaigh ed., *Ireland in the Coming Times: Essays to Celebrate TK Whitaker’s 80 Years* (Dublin, 1997) at 342.

lessons of *Ryan* having being learnt and as the endless debates over the Treaty and the 1922 Constitution were effectively ended by the new Constitution, the practical significance of this remarkable decision began to wane. But even if its practical significance is nowadays slight, *Ryan's* case raises profound jurisprudential issues about the nature of law and constitutional change and it produced remarkable and interesting judgments.

### *The State (Quinlan) v. Kavanagh*

One other set of remarkable judgments was delivered on December 19, 1934, namely, those in *The State (Quinlan) v. Kavanagh*. Quinlan, a member of the Fine Gael National Executive<sup>113</sup>, was charged with four others with firearms offences and publishing threatening letters. The applicants duly presented themselves to members of the Gardai at various Garda stations in Co. Cork following a statutory demand in that behalf whereupon they were taken into custody pending trial. This was a companion case to *Ryan* and the Divisional High Court dismissed it on that basis.<sup>114</sup> On appeal, the Supreme Court agreed that *Ryan's* case governed the appeal so far as the prohibition application was concerned. However, it transpired that the custody in which the applicants had been detained was wholly illegal and habeas corpus was duly granted.

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<sup>113</sup> Manning, *op,cit.*, 175.



Following their arrest, the applicants had been taken to Dublin where they were lodged in Mountjoy Prison. Although the Governor of the Prison averred in his affidavit that the prisoners had been detained pursuant to an order of the Tribunal<sup>115</sup>, it transpired that there was no such order. Instead, the applicants were purportedly detained by committal orders signed by the Secretary of the Minister for Defence<sup>116</sup>:

“without even the purported authority of an order of the Constitution (Special Powers) Tribunal, much less of any Court of Law, or of any person or body shown to possess such authority under Article 2A or any statute. Counsel for the State tried for a time to stand over these documents but ultimately recognised that the ground was untenable. No legal basis for this attempted extension of departmental or civil service authority over the citizen was shown to us. If there were any, no doubt we should have been shown it. The order of

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114 [1935] IR 249, 251, per Sullivan P.

115 *Ibid.*, 259, per Kennedy C.J.

116 This prompted FitzGibbon J.’s biting comments in *Ryan*, [1935] IR 170, 231:

“When a written Constitution declares that the ‘liberty of the person is inviolable’ but goes on to provide that ‘no person shall be deprived of his liberty *except in accordance with law* then, if a law is passed that a citizen may be imprisoned indefinitely upon a *lettre de cachet* signed by a Minister or, as we have seen [in *Quinlan*], even by a Minister’s clerk, the citizen *may* be deprived of his ‘inviolable’ liberty, but, as the deprivation will have been ‘in accordance with law’ he will be as devoid of redress as he would have been under the regime of a French or Neapolitan Bourbon.”



31<sup>st</sup> of May 1934 has no mention of or reference to committal to prison. Thus, the only cause formally offered by the respondents against making absolute the conditional order of habeas corpus absolutely vanished.”<sup>117</sup>

Counsel for the State then sought to justify the detention by reference to regulations which had been made by the Minister for Defence under Article 2A designating places of detention and imprisonment. It transpired, however, that these regulations had not even been published and the following extract from the judgment of Kennedy C.J. demonstrates the Kafkasque nature of the arguments to which counsel for the respondents were reduced in attempting to justify the continued detention of the applicants:

“The Court asked for a copy of the regulations to which he referred. None could be supplied. Neither party before the Court had a copy. Enquiry at the Law Library elicited the information that no copy had been supplied to the Law Library and apparently their existence was unknown. The Court then enquired of counsel for the State whether if the Court sent a messenger to the Stationery Office or the Government Sales Shop for Official Publications, a copy could be

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<sup>117</sup> [1935] IR 249, 262, per Kennedy C.J. Murnaghan J. was equally scathing, describing (at 267) the purported committal order as “entirely worthless.”

purchased, which we were prepared to do immediately. The answer was that a copy could not be procured in that way, because the document was not on sale and could not be purchased either by the public or even for our own official use. We then asked whether the document was not in print and whether printed copies could not be supplied for the use of the Court. The answer by State counsel was that the regulations had not been printed and that the Court would not be furnished with a full copy of the regulations in print or in any other form, but that counsel proposed to hand to the Court certified typed copies of extracts from regulations containing those parts of the regulations upon which they intended to rely and base their argument and they declined to allow the Court to see any other part of the regulations or to consider them as a whole with reference to the intended argument. It is difficult to speak with restraint of such a proceeding. It is questionable, indeed, if one should speak of it with restraint. It is an affront to the Court. To permit it would be travesty of justice and, for my part, I reject an argument so offered as incapable in law of being entertained in any court of justice.”<sup>118</sup>

The Court then went on to conclude that, in any event, Article 2A did not on its proper construction authorise the

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<sup>118</sup> *Ibid.*, 263.

detention in the absence of an actual order of the Tribunal.<sup>119</sup>

*The State (McCarthy) v. Lennon*

Although there were still telegraph wire cutting incidents in the first half of 1935<sup>120</sup>, by mid-1935 "the campaign of violence with which the Blueshirts had been associated had all but come to an end."<sup>121</sup> It was appropriate, in a way, that the last Article 2A case to come before the courts arose from telegraph wire cutting incidents in Co. Cork in June 1935. Following McCarthy's arrest, he was cautioned under s.15 of Article 2A, and, faced with this statutory demand, he accordingly incriminated himself. This incriminating statement "was substantially the only evidence offered to the Military Tribunal by way of proof of the charges against McCarthy."<sup>122</sup> However, it was sufficient to warrant his conviction on the wire-cutting charges and he was duly sentenced to 18 months imprisonment. Some months later he sought habeas corpus and certiorari to quash the convictions.

Section 15 of Article 2A - which was the statutory antecedent of the present s.52 of the Offences against the State Act 1939 - provided that any person so arrested

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<sup>119</sup> *Ibid*, 270-271, per Murnaghan J.

<sup>120</sup> Manning, *op.cit.*, 181.

<sup>121</sup> Manning, *op.cit.*, 181.

<sup>122</sup> [1936] IR 485, 494, per Kennedy C.J.



might be required to give a true and accurate account of their "movements and actions during any specified period". The failure to answer such questions or the giving of answers which were "false, incomplete, inaccurate or misleading" constituted an offence triable by the Tribunal and, following conviction, shall be liable "to suffer such punishment as the Tribunal shall think proper to inflict."<sup>123</sup> Article 2A was silent on the issue of whether a statement made pursuant to such a statutory demand was admissible in evidence and it was argued that the Tribunal exceeded its jurisdiction in acting on the basis of such a statement.

A Divisional High Court<sup>124</sup> evidently thought little of the point and dismissed the application in an unreserved judgment. On appeal, this was upheld by a majority of the Supreme Court (FitzGibbon and Murnaghan JJ.), with Kennedy C.J. dissenting. Albeit to a lesser extent than in *Ryan's* case, these judgments again demonstrate the gulf which existed between the creative legal imagination of Kennedy C.J. as compared with the orthodox positivism of FitzGibbon and Murnaghan JJ.

Murnaghan J. noted prior to the adoption of Article 2A the privilege against self-incrimination had been carried over as an embedded feature of the common law by Article 73 of the Irish Free State Constitution. But section

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<sup>123</sup> By contrast, the maximum penalty under s.52 of the 1939 Act for failure to answer is six months' imprisonment: see s.52(2).

<sup>124</sup> Sullivan P., Hanna and O'Byrne JJ.

2 of Article 2A had declared that insofar as there was any conflict between the provisions of any other part of the Constitution and Article 2A, the latter should prevail. He then referred to the provisions of section 15 of Article 2A and concluded that:

"It is thus, by the Constitution so amended, made an established doctrine that the police have a right to interrogate in the circumstances contemplated by Article 2A. It may be argued by those who support such an amendment of the Constitution that it is justified by the maxim *salus populi suprema lex*. ...If it were legitimate to narrow the provisions of Article 2A by importing from the pre-existing law the rule that no one is bound to incriminate himself, one would hesitate to interpret Article 2A according to the full extent of the language used; but to import such a rule would be to override the specific provision found in [section 2].

But the interpretation of section 15 is made even more clear from the provisions found in section 16...of the same Article under which a person who fails or refuses to give the account required, or who gives an account which is incomplete, false or misleading, is guilty of an offence triable by the Tribunal, which Tribunal can inflict any penalty, even the penalty of death. This, in my opinion, is the state of affairs enacted by the will of the people through their

constitutional representatives, and the Courts of Justice have no authority to introduce rules of interpretation which would nullify the decision of the people....It is also impossible for a Court to hold that the Constitution is contrary to natural justice.”<sup>125</sup>

Kennedy C.J. in dissent was characteristically forthright:

“If Parliament wishes to suspend the application of that principle [against self-incrimination] I look for an express repeal of it. There is no trace in the Constitutional Amendment of a purpose of using a prisoner’s extorted answers in evidence in any Court for any purpose. It seems to me that explanation of the particular amendment is obviously forthcoming in an eagerness to facilitate police investigation. Why, then, invent for it an indirect and veiled purpose, the eradication of a fundamental and deeply rooted principle of the administration of the criminal law....The State has failed to justify the basing of the prosecution and conviction on the alleged report of extorted answers of the accused during a secret interrogation by the police, as to the mode and circumstances of which indeed we have no particulars.”<sup>126</sup>

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<sup>125</sup> [1936] IR 485, 506-507.

<sup>126</sup> *Ibid.*, 496.



Although the majority judgment in *McCarthy* was approved by the Court of Criminal Appeal in one post-1937 decision - *People v. McGowan*<sup>127</sup> - concerning the potential admissibility of a statement made under s.52 of the Offences against the State Act 1939, it has now been thoroughly disavowed by the modern Supreme Court in *Re National Irish Banks Ltd.*<sup>128</sup> Barrington J. stressed that *McCarthy* had turned on the language of Article 2A and that the Court of Criminal Appeal in *McGowan* had simply compared s.52 of the 1939 Act with s. 15 of Article 2A without advertent:

“to the fact that Article 2A of the Constitution of the Irish Free State overrode all subsequent articles of that Constitution, whereas s.52 of the Offences against the State Act 1939 is governed by the present Constitution. Moreover, it quotes from *Cross on Evidence* without advertent to the fact that *Cross* was referring to the British Constitution where parliament is supreme, whereas statutes of the Oireachtas are subject to the Constitution and must be interpreted in the light of it.”<sup>129</sup>

Barrington J. concluded by disapproving of the reasoning of the majority in *McCarthy*:

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<sup>127</sup> [1979] IR 45.

<sup>128</sup> [1999] 1 ILRM 321.

"The decision in *The State (McCarthy) v. Lennon* is not a safe guide for any person seeking to establish the rights of the citizen under the Irish Constitution. That decision was based on an interpretation of a provision deriving from Article 2A, which Article was designed to by-pass all the constitutional guarantees contained elsewhere in the Constitution. The fact therefore that s.52 of the Offences against the State Act may be almost identical in wording with s.15 of Part III of the Schedule to Article 2A of the Constitution is of little relevance. The important distinction is that s.15 was intended to be above constitutional challenge while s.52 is subject to the Constitution. It appears to me that the better opinion is that a trial in due course of law requires that any confession admitted against an accused person in a criminal trial should be a voluntary confession and that any trial at which an alleged confession other than a voluntary confession were admitted in evidence against an accused person would not be a trial in due course of law within the meaning of Article 38 of the Constitution and that it is immaterial whether the compulsion or inducement used to extract the confession came from the executive or from the legislature."<sup>130</sup>

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<sup>129</sup> *Ibid.*, 357.

<sup>130</sup> *Ibid.*, 359.

It is thus clear that in *National Irish Banks* another great dissent of Kennedy C.J. was recognised as correctly stating the law. Indeed, the Supreme Court has now gone further than Kennedy C.J. ever dared to go by holding that Article 38.1 of the Constitution precludes the Oireachtas from ever making a confession extracted by statutory compulsion admissible in evidence in a subsequent criminal prosecution.

*The judicial record in respect of Article 2A*

What, then, was the record of the High Court and Supreme Court during "these years of the great test" between 1933-1935? Writing about *Ryan's* case, Quinn has commented:

"What this case shows above all else is that the text is not necessarily the most vital variable in determining whether a constitution will be made effective or not. What matters most is the conceptual apparatus of the courts. Clearly, although the seeds of judicial activism were present in the Constituent Act [of 1922] and in the text of the 1922 Constitution and although the first glimmer of a shift away from the dogma of parliamentary supremacy was also present in the text, the judiciary of the day lacked the mental apparatus to see this and to run with it.

One thing is for sure. If Fascism took root in Ireland (there was a small Fascist party in Ireland in the 1930s)



the Free State courts would have brought no normative resistance to bear.”<sup>131</sup>

Quinn is certainly correct in his observations about the vital importance of a judicial conceptual apparatus.<sup>132</sup> However, is it correct to say that, judged by the experience of 1933-1935, no normative resistance would have been brought to bear by the courts in respect of measures taken by an executive determined to subvert the democratic nature of the Constitution?

The picture seems more complex than that painted by Quinn. It is worth reminding ourselves that, despite the drastic character of Article 2A and the supposed timidity of the courts in the face of such draconian legislation, during the height of the crisis - from the winter of 1933 through to the summer of 1934 - the Government had lost three Article 2A cases in a row, each one with more serious consequences than the last. Indeed, at the date of the commencement of the appeal in the Supreme Court in *The State (Ryan) v. Lennon* on August 7, 1934 there was no

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<sup>131</sup> Quinn, “Judicial Activism under the Irish Constitution: Issues and Perspectives - From Natural Law to Popular Sovereignty”, paper delivered at the University of San Sebastian Summer School July 2000 at p. 17.

<sup>132</sup> As Kelly noted in *Fundamental Rights in the Irish Law and Constitution* (Dublin, 1967) at 16-17:

“The judges were used to the idea of the sovereignty of parliament, and notions of fundamental law were foreign to their training and tradition. The effect of these clauses in the 1922 Constitution was thus minimal.”

person in custody pursuant to a conviction order of the Tribunal, *precisely* because of these court decisions.<sup>133</sup> But what these trilogy of cases show - and taken together with the subsequent decisions in *Ryan* and *Quinlan* - is that while judges such as Sullivan P., Hanna J., Meredith J., O'Byrne J. and Murnaghan J. were willing to control the operation of Article 2A on orthodox and traditional grounds (such as error on the face of the record etc.) and were even willing to adopt a highly technical approach in order to do so<sup>134</sup>, they were not willing - unlike Kennedy C.J. - to go the next step and actually invalidate the critical constitutional amendments. In short, these were orthodox judges schooled in traditional British legal thinking who were - as yet - still uncomfortable with the wider possibilities offered by judicial review of legislation and adherence to normative constitutional standards protecting fundamental rights.

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<sup>133</sup> There were, however, a relatively small number of persons who were in custody awaiting trial before the Tribunal. These included the four applicants in *Ryan* and the five applicants in the companion case of *The State (Quinlan) v. Kavanagh* [1935] IR 249 whose Supreme Court appeal was heard at the same time. The applicants in *Quinlan* were, however, immediately released on *habeas corpus* at the conclusion of their appeal on August 17, 1934: see [1935] IR at 261-262. This order only related to their custody pending trial (which was held to be unlawful) and the Court refused to grant prohibition in respect of the pending charges. Quinlan (who was a member of the Fine Gael national executive) was later convicted by the Tribunal and sentenced to nine months' imprisonment: *The Irish Press*, December 6, 1934.

<sup>134</sup> See, e.g., the approach of Sullivan P. and O'Byrne J. in *Hughes* to the issue of the manner of proof of the necessary certificate giving the Tribunal jurisdiction under Article 2A.



But even at the constitutional level there were some signs of normative resistance. First, nearly all of the Article 2A cases prompted vigorous protest and striking language even from those judges who were prepared to uphold the Article 2A amendment.<sup>135</sup> Secondly, the Supreme Court in *Ryan* had indicated that any unilateral amendment of the Treaty by the Oireachtas was invalid and all members of the Court had simply treated the provisions of ss. 2 and 3 of the Constitutional (Removal of Oath) Act 1933 (which purported to amend the Constitution so as to enable the Oireachtas to amend the Treaty by legislation) as if it were a nullity. Whatever one's views of the Treaty, it at least provided for safeguards for the democratic institutions and for minorities. Perhaps the real test of normative resistance would have been whether the courts would have been prepared to act on the principles enunciated in *Ryan* and invalidate a constitutional amendment - such as, e.g., the abolition of the oath or the appeal to the Privy Council - which had passed by a freely elected Oireachtas but which contravened the Treaty. For some reason, however, the courts were never actually put to that ultimate test.

Finally, the real clue as to the thinking of the majority of the judiciary may be found in both the judgment of Meredith J. in *Hughes* and that of Murnaghan J. in *McCarthy*. Both laid stress on the fact that Article 2A - however draconian - was enacted by an Oireachtas which

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<sup>135</sup> See, e.g., Murnaghan J.'s description of the detention warrants in *Quinlan* as being "utterly worthless."



was democratically responsible and that the judiciary had no right to flout the people's wishes by frustrating the operation of Article 2A. This point was well made by Meredith J. in *Hughes*:

"The Tribunal was clearly established for the purpose of dealing more effectively than the ordinary courts, and in particular, the Central Criminal Court, are capable of doing with an extraordinary situation which makes the administration of justice peculiarly difficult. Consequently the Tribunal is a practical compromise between military efficiency and ordinary and desirable methods of administering justice. Such a compromise is naturally distasteful - extremely distasteful - but the Legislature has recognised that it may be necessitated by circumstances and has strictly limited its existence to the continuance of the necessitating circumstances. The alternative to such a compromise would doubtless be something more unwelcome."

It was for that reason that Meredith J. counseled against an unduly technical approach to judicial review of the Tribunal<sup>136</sup> and, in the end, agreed only somewhat

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<sup>136</sup> He said (at 148):

"At the outset it may be said that if the orders and convictions of the Tribunal are to be parsed with the same minuteness and be interfered with on the same technical grounds as in the case of the orders and convictions of magistrates' Courts, and other such inferior Courts, then the Tribunal might as well close down at once."

reluctantly with his judicial colleagues in their approach towards review.<sup>137</sup> Those who had experienced the dark days of 1922-1923 when the Government had felt compelled to sanction illegal executions in order (as they saw it) to safeguard the State from collapse at the hands of anti-democratic forces knew only too well how "unwelcome" any alternative to Article 2A might have to be. In short, the approach of the judiciary during these difficult years was to uphold the right (subject to certain minimum legal constraints) of the people (as freely expressed through their Oireachtas representatives) to sanction military trial for para-military and cognate offences in circumstances where the ordinary jury system had all but broken down.<sup>138</sup> Viewed from this perspective it might be said

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<sup>137</sup> Meredith J. concluded (at 152-153):

"At first, also, I inclined to the view that the matter was very technical and not of much substance, where jurisdiction could in fact have been shown to exist in truth. But I do not think that on the authorities it is open to regard the matter in this light, and no doubt the obligation to show jurisdiction on the face of the order has a salutary effect, and it is not by any means a burdensome requirement. Attention to the matter will only assist the Tribunal in keeping within their jurisdiction. For these reasons I concur in the decision arrived at by the President."

<sup>138</sup> Meredith J. was provided with some further graphic experience of this latter point when presiding over the trial in the Central Criminal Court of several persons charged with the murder of a landlord's agent in Edgeworthstown. The crime was a particularly wanton and shocking one and it was believed to have been carried out by members of the IRA. At the close of the prosecution case, the foreman of the jury indicated that they wished to return a "not guilty" verdict. Meredith J. protested that it was quite a "serious thing" to come to that decision before the accused went into the witness box and were cross-examined by the prosecution. The jury, however, insisted on

that the judiciary were themselves so attached to democratic values and the rule of law that they made the "distasteful" choice of allowing the Oireachtas to give the Government the powers it needed - or thought it needed - to preserve the democratic basis of the State from attacks from both left and right. In the end, one can argue that Article 2A worked: by 1937 the Blueshirts had disintegrated and the IRA were demoralised and outmanoeuvred. Which of us can now say that the judiciary of the Free State made the wrong choice?

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returning the not guilty verdict and Meredith J. said that he would like the jury to know "that he quite understood the position they were in and that he agreed with their findings." See *The Irish Independent*, December 11, 1935 and O'Sullivan, *op.cit.*, 438.



## CHAPTER 4

### TOWARDS A NEW CONSTITUTION 1934-1937

*The parlous state of the 1922 Constitution in the mid-1930s*

By the mid-1930s the Constitution of the Irish Free State was "a things of shreds and patches."<sup>1</sup> Even during the ten years of the Cosgrave administration, innovative articles such as Articles 47 and 48 providing for the referendum and the initiative had been deleted; the period for extending the Constitution had been extended from 8 years to 16 years and the guarantees of personal liberty and trial by jury had been debased by the insertion of Article 2A. In the few short years of the de Valera administration the oath had been removed; the appeal to the Privy Council had been abolished; the references to the limitations imposed by the Scheduled Treaty deleted and by 1936 both the Senate and the office of Governor-General had been abolished and all references to the Crown had been deleted. Such was the state of disarray

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<sup>1</sup> Donaldson, "Some Comparative Aspects of Irish Law" (Duke, 1957) at 153.

that the time for a new Constitution had come. On this occasion Mr. de Valera was determined that such a new Constitution would acquire a legitimacy by reason of its popular enactment by the people in a referendum and that it would not suffer (what for many) was the unpalatable constraint of the 1922 Constitution, i.e., that the power of amendment was made subject to the terms of the Treaty.

### *The establishment of the Constitution Committee*

Much of the groundwork in respect of the new Constitution was done in the first instance by the 1934 Constitution Committee.<sup>2</sup> Although the Committee's Report proved to be particularly influential in this regard, it appears to have been hitherto largely overlooked by historians.<sup>3</sup> While it may be surmised that Mr. de Valera had toyed for some time with the idea that a new

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<sup>2</sup> S. 2979. See generally Hogan, "The Constitution Review Committee of 1934" in O'Muircheartaigh ed., *Ireland in the Coming Times: Essays to Celebrate T.K. Whitaker's 80 Years* (Dublin, 1997).

<sup>3</sup> Cf. the comments of Lee, *Ireland 1912-1985: Politics and Society* (Cambridge, 1989)(at 202):

"Much remains to be uncovered about the planning and the drafting of the Constitution, including not least the roles of John Hearne, the legal adviser to External Affairs, and of Maurice Moynihan....Any verdict on the genesis, content, or consequences of the Constitution must be even more provisional and subjective than normal historical judgments."

The work of the 1934 Committee was clearly appreciated by Faughnan in his seminal article, "The Jesuits and the Drafting of the Irish Constitution" (1988) 26 *Irish Historical Studies* 79, although, as its title suggests, this essay has a different focus. The work of the Committee is briefly alluded to by Ward, *The Irish*

Constitution was necessary to replace the Constitution of the Free State, the initial impetus for the establishment of the Committee resulted from an opposition amendment which had been put down in respect of the Constitution (Amendment No. 24) Bill, 1934. This Bill proposed to abolish the existing Seanad, but the amendment sought to ensure in the wake of such abolition that certain provisions of the Constitution could no longer be amended by ordinary legislation unless a General Election had intervened in the meantime.<sup>4</sup> While the proposed amendment was rejected by the Government, Mr. de Valera availed of the opportunity to explain his attitude to fundamental rights:

"This [1922] Constitution was framed originally under exceptional circumstances. There were certain Articles in the Constitution which were forced upon the people of the country. There are certain Articles

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*Constitutional Tradition: Responsible Government and Modern Ireland 1782-1992* (Dublin, 1994) at 239.

<sup>4</sup> The amendment, which was in the name of W.T. Cosgrave, J.A. Costello and Patrick McGilligan, sought to amend Article 50 of the 1922 Constitution by providing that no ordinary law amending the Constitution passed by the Oireachtas in respect of:

"Articles 6, 7, 8, 9, 18, 19, 24, 28, 43, 46, 49, 50, 61, 62, 63, 64, 65, 66, 68, 69, 70 shall become law until after a General Election shall have been held and a Resolution approving of such amendment shall have been passed by Dail Eireann on the recommendation of the Executive Council first elected after such General Election."

The background to this proposed amendment is discussed in O'Sullivan, *The Irish Free State and its Senate* (London, 1940) at 363-65. The author comments at (364) that the opposition was concerned that Mr. de Valera's real object "was to establish himself



which represent democratic ideals, in so far as a thorough examination by people who have had experience of administration goes, are consistent with practical government. These Articles ought, with all possible speed, be examined, and be made as lasting as it is possible got anything to be made lasting, in a Constitutional way, without the danger of a cast-iron Constitution which, as I said, is always a temptation to revolution."<sup>5</sup>

Mr. de Valera returned to this subject a few days later:

"If we agree in this House that a selected number of Articles guaranteeing fundamental rights are to be preserved, if we decide, for their preservation, that they cannot, for example, be changed by the Dail except by a specified majority or on approval by the people by way of Referendum, I believe that an alteration of the Constitution embodying that will be effective....To meet the views of those who fear that either this Dail or a subsequent Dail might ignore these fundamental rights in the Constitution, I propose at a later stage, when this examination shall have been completed, to indicate certain articles and bring them in a simple measure with safeguards by which they cannot be changed by a simple majority."<sup>6</sup>

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as a dictator behind the facade of single-chamber parliamentary government."

<sup>5</sup> 52 *Dail Debates*, Col. 1249 (May 17, 1934).

<sup>6</sup> 52 *Dail Debates* Col. 1877-8 (May 25, 1934).

The Constitution Committee had, in fact, been established on the previous day by oral direction of Mr. de Valera and their task was to examine the Constitution:

"with a view to ascertaining what Articles should be regarded as fundamental, on the ground that the safeguard democratic rights, and to make recommendations as to steps which should be taken to ensure that such Articles should not be capable of being altered by the ordinary processes of legislation."

The Committee consisted of four senior civil servants: Mr. Stephen Roche, Secretary, Department of Justice; Mr. Michael McDunphy, Assistant Secretary, Department of the President of the Executive Council<sup>7</sup>; John Hearne, Legal Adviser, Department of External Affairs and Philip O'Donoghue, Assistant to the Attorney General. The composition of the Committee was in itself significant, as the latter three members were subsequently to play a pivotal role in the drafting of the new Constitution.<sup>8</sup>

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<sup>7</sup> i.e., corresponding to the present Department of the Taoiseach.

<sup>8</sup> The drafting committee for the Constitution itself consisted of McDunphy, Hearne and O'Donoghue, together with Mr. de Valera's private secretary Maurice Moynihan who took Roche's place on that Committee: see Fanning, "Mr. de Valera writes a Constitution" in Farrell, ed., *De Valera's Constitution and Ours* (Dublin, 1988) at 39. See also Keogh, "Church, State and Society". *loc.cit.*, at 106. The detailed drafting of the new Constitution does not appear to have commenced until the late summer "when the 1934 Committee was reconstituted, albeit on a more informal basis. One major change had been made. Roche's place had been taken by Maurice Moynihan..." see Faughnan, *loc.cit.* at 80.

### *The Committee's terms of reference*

The Committee set about its work with impressive speed. It held ten meetings in all, commencing on May 28th and submitting its final report to Mr. de Valera on July 3rd, 1934. At its second meeting on May 29th the Committee decided that its report "should take the form of an entirely new Constitution", although it was not proposed "to present a finished draft, that being considered a matter for the Parliamentary Draftsman."<sup>9</sup> The Committee observed that it was at first intended to limit the new Constitution to matters "relating to fundamental rights", but it was found that "the insertion of others, e.g., those relating to Parliament etc. was essential if a complete Constitution were to result." The Committee's minutes then set out briefly in a Schedule the reasons "for the proposed inclusion or exclusion of the various Articles of the present Constitution, with other relevant notes."

At the third meeting, however, it became clear that this plan was too ambitious and it was agreed that the Committee should confine itself to the original terms of reference, as "it was now clear that what the President wanted was not a new Constitution..."<sup>10</sup> McDunphy had confirmed this in a separate memorandum dated May 31,

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<sup>9</sup> Minutes of second meeting, May 29, 1934.

<sup>10</sup> Minutes of third meeting, June 1, 1934.



1934 which was circulated between the second and third meetings:

"Subsequent to [2nd meeting of the Committee] of 29th May it became clear as a result of pronouncements by the President and of conversations which individual members of the Committee had with him, that what he really wanted was not a new Constitution, but

(a) a selection within the framework of the present Constitution of those Articles which should be regarded as fundamental; and

(b) a recommendation as to how these should be rendered immune from alteration by ordinary legislation.

The President himself had already created a precedent which should serve as a guide in regard to (b).

In Constitution (Amendment No.24) Bill, 1934...which provides for the abolition of the Seanad as a constituent House of the Oireachtas, he has provided in respect of Article 63 (The tenure of Office of the Comptroller and Auditor General) and Article 68 (the tenure of Offices of Judges) as follows:-

"Notwithstanding anything contained in any other Article of this Constitution, a Bill for legislation to amend this Article in relation to the passing of the said resolution shall not be introduced in Dail Eireann unless or until the amendment proposed by such Bill has been approved by a resolution of Dail Eireann for the passing of which not less than four-sevenths (exclusive of the Chairman or presiding member) of the full membership of Dail Eireann shall have voted."

This memorandum is clearly of great interest, since it indicates that although Mr. de Valera had not yet as of this date finally determined to introduce a new Constitution, the idea had plainly crossed his mind. As it happened, the first formal instructions to draft the heads of a new Constitution were only given to John Hearne almost a year later in April 1935<sup>11</sup>, but, as will be seen, the 1934 Committee's report proved to be enormously influential when it came to the drafting of the new Constitution.

McDunphy's memorandum is also significant in that it indicates that Mr. de Valera was still in two minds on the amendment process. In his speech to the Dail on May 25, 1934 he had mentioned the possibility that the fundamental rights provisions of the Constitution might only be amended either by way of referendum or by means of a special Dail majority, but this memorandum suggested a preference at this time for the latter safeguard.

The outline of the Committee's conclusions were already visible by its third meeting on June 1st, 1934. The Committee had at this stage abandoned the suggestion to sketch the outlines of a new Constitution, but instead agreed that it should now proceed along the lines indicated by Mr. de Valera. Having spent the first two meetings examining the text of the existing Constitution, the Committee appears to have reached broad agreement on which the Articles should be regarded as fundamental. The lengthy minutes of the 3rd meeting record in summary form the views of the Committee on practically every provision of the Constitution. McDunphy then prepared a first draft on June 9th which closely follows these minuted views.

### *The Roche memorandum*

This draft was further discussed by the Committee at its next three meetings<sup>12</sup>. In the meantime, Mr. Stephen Roche, the Secretary of the Department of Justice, had prepared a memorandum<sup>13</sup> for circulation to other members of the Committee. While the memorandum chiefly dealt with the topic of Article 2A, Roche first took the opportunity to express his views on the issue of constitutional change:

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<sup>11</sup> Keogh, *loc.cit.*, 8; Ward, *op.cit.*, 240.

<sup>12</sup> June 18th, June 19th and June 20th, 1934.

<sup>13</sup> The memorandum was dated June 14th, 1934 and was immediately circulated to other members of the Committee.



"I believe that in a unitary State with full adult suffrage the idea of a written Constitution, not capable of alteration by a majority of the elected representatives of the people is unsound in theory and dangerous in practice. It is unsound in theory *because no Parliament (whether it calls itself a Dail or a Constituent Assembly or any other name) and no generation* has any right to bind future Parliaments or future generations. ...That is the theoretical side. The practical side is that majorities will have their way, anyhow, and if they can't have it "constitutionally", or only after great delay, then they will (and quite rightly) have it "unconstitutionally.'"

The italicised words were underlined by McDunphy, who commented in the margins: "not rigidly - but a Constituent Assembly should have some authority of an exceptional kind." While Roche did not expressly address the question of amendment by means of a referendum, it seems a fair inference from the tenor of his remarks that he was generally against it.<sup>14</sup>

Roche then continued thus in a manner which suggests that he was strongly opposed to the idea of judicial review of legislation:

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<sup>14</sup> See below for his proposed addendum to Article 65 of the 1922 Constitution which would have required any constitutional challenge to be brought within three months of the date of the enactment of the law in question.

"I believe that what this country wants at present and probably will continue to want for many years is a strong Executive, not liable, so long as it has the support of the people, to be delayed, hampered and humiliated at every step by long arguments in the Courts, or by propaganda of a threatening and seditious type. A Government should not allow itself to be insulted.

Further, I believe that the doctrines of 'judicial independence' and 'the separation of the functions' are being overdone and that the Courts have been given or have assumed a position in our civic life to which they are not entitled. There was a time in England when the Judges' job was to save the people from an irresponsible Executive; it may be necessary, in turn, for a responsible Executive to save the people from irresponsible Judges."

McDunphy placed a question mark in the margin beside the reference to "irresponsible Judges" and then commented:

"A 'strong' Executive could conceivably be a real danger instead of a blessing. Something more than 'strength' is essential."

Roche continued by making comments on a number of specific Articles of the Constitution. These remarks are of exceptional interest to any constitutional historian, since

they contain the genesis of a number of innovatory provisions of the present Constitution.

"With particular reference to Article 2A, I agree that, *in form* that Article is grotesque as an Article of the Constitution. It must go.<sup>15</sup> On the other hand, so long as we keep to the idea of a 'normal' written Constitution, with all sorts of snags and pit-falls for the Executive, we must have something, somewhere, on the lines of Article 2A. What I have done in my draft is to split the task into two parts, viz.:

- (a) The declaration of an 'emergency period' and
- (b) The measures which may be taken by the Executive once an emergency period has been declared.

I have put part (a) in the Constitution and left part (b) to be dealt with by ordinary legislation with the proviso that such legislation shall not be subject to the ordinary constitutional limitations. I see no other way of making adequate provision without overloading the actual Constitution with details."

Roche then went to on to sketch out a scheme whereby the bringing into force of such legislation would be contingent on the consent of the judiciary voting in secret



ballot. He added that he had taken this approach "mainly because he gathered from the President [de Valera] that he was anxious, for obvious and weighty reasons, to get some form of judicial, or, at least, non-political sanction for such a declaration." We see here for the first time the outlines of what subsequently emerged as Article 28.3.3 of the present Constitution, whereby during the currency of a State of Emergency the Oireachtas is freed from the ordinary constitutional constraints. It is significant, however, that Article 28.3.3 follows the main features of Roche's model.<sup>16</sup> As we shall see presently, following further discussion, the Committee ultimately agreed to a further related proposal, namely, that in addition to the emergency powers provisions, provision should be made for the establishment of special courts where the ordinary courts proved to be inadequate for this purpose<sup>17</sup>.

Following the circulation of the McDunphy main draft report and the Roche memorandum, the Committee spent its next three meetings working on these documents.<sup>18</sup> The McDunphy draft was more or less complete by the 8th meeting, "various textual amendments being agreed upon." There is only one significant feature of this first draft which did not find its way into the final report, namely,

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<sup>15</sup> McDunphy noted in the margins of his copy: "I agree."

<sup>16</sup> Save that the emergency is declared only following the passage of resolutions by both Houses of the Oireachtas.

<sup>17</sup> Roche then proceeded to make a number of comments about other specific Articles. His views on Articles 64 and 65 are discussed below.

<sup>18</sup> Held respectively on June 27th, 28th and 29th, 1934.

the issue of the amendment process itself. On this vital question the McDunphy draft stated as follows:

"The Committee are in favour of requiring that there must be a popular vote in a referendum in favour of any change in any of these fundamental Articles before such change can become law, except where a dissolution has occurred subsequent to the submission of the proposal in favour of the Bill. In such case it should be competent for the Executive Council appointed by the new Dail to secure by ordinary legislation the enactment of the proposed amendment in the form in which it was submitted to or, in the case of any alteration, agreed to, by the Dail prior to the General Election."

These comments are significant because, in the events that happened, Committee never reported on Part II of its terms of reference (i.e. on the question of the manner of constitutional amendment). McDunphy noted in hand on the cover of the Committee's file:

"No action was taken on Part II of the Committee's terms of reference. The matter gradually became one of Government Policy and was dealt with on that basis."

Whatever reservations Roche may have had about the referendum process, it seems nonetheless fair to infer



from this (admittedly draft) passage that the other members of the Committee were in favour of this method of amendment. Since these three members of the Committee were later to form the nucleus of the group who drafted the 1937 Constitution, it is scarcely surprising that the referendum option was the one chosen. With the exception of a transitory three year period<sup>19</sup> Article 46 provided that the Constitution could henceforth only be amended by way of referendum. While this rigidity has certain disadvantages, this choice was ultimately to prove to be an enlightened one which ensured durability and continuity; guarded against ephemeral change and re-inforced popular sovereignty. Indeed, as already noted, if there was one single change which ensured the success of the present Constitution, it was this.

The eight meeting also considered Roche's proposals in relation to Article 2A and the matter was ultimately referred to him to revise in the light of the discussion." Roche's revised draft - prepared overnight - was then discussed at the 9th meeting on June 29th where it

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<sup>19</sup> Article 51 had provided that any provision of the Constitution (other than Article 46 and Article 51) might be amended by means of ordinary legislation for a period of three years from the date on which the first President took office. The First Amendment of the Constitution Act 1939 and the Second Amendment of the Constitution Act 1939 were enacted by means of ordinary legislation during this transitional period which expired on June 25, 1941. But even during this transitional period the President had a discretion to require that any such proposal be submitted to a referendum before it was enacted into law: see generally, Kelly, *op.cit.*, 1167-1170.



appears to have suffered heavy revisions.<sup>20</sup> However, the revised draft had contained a most important new suggestion:

"5. In addition and apart from 'emergency' periods and 'emergency' legislation, the proposed Article (or else an addendum to one of the 'judicial power' Articles) should authorise the enactment of special legislation as part of our permanent judicial machinery for the trial by special courts of persons accused of crime, as regards whose trial the ordinary Judge or Justice certifies at any stage of the proceedings, that it is desirable in the interests of justice that the trial be removed to a special court.

6. As regards this last suggestion we desire to point out, as against the obvious objections to Special Courts, that the ordinary Courts have been unable, in the past, to deal effectively with certain forms of crime, and that there is perhaps no optimism to hope for any permanent improvement in that respect. The choice appears to lie therefore between the alternatives of

(a) allowing such forms of crime to go unpunished,

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<sup>20</sup> The revised draft contained in the Public Record Office is very heavily annotated and lines have been drawn through several paragraphs.

(b) declaring a 'state of emergency' every time for the purpose of setting up a special court such crimes occur,

(c) making permanent provision for a Special Court on the lines indicated in para. (5) above.

As between these alternatives we recommend the last mentioned, mainly because we feel that its adoption will provide a remedy for outbreaks of disorder which would otherwise necessitate the formal declaration of a 'state of emergency' with inevitable damage to the national credit."<sup>21</sup>

Here we see the first time the clear outline of what ultimately was to become Article 38.3 of the Constitution<sup>22</sup>, which permits of the establishment by law of special courts quite independently of any declaration of emergency under Article 28.3.3.

The minutes of the 9th meeting record that Roche's revised scheme was further examined and that while the

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<sup>21</sup> A line has, however, been drawn in manuscript through these paragraphs and they do not feature in the final report.

<sup>22</sup> Article 38.3.1 provides that:

"Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order."

principle was agreed on "it was decided to set it out in a different form." McDunphy was deputed to do this and "prepare for final consideration the text of the whole of the Committee's terms of reference." The final version of the draft Report was circulated by McDunphy on the following Monday, July 2nd and the report "on part I of their terms of reference" was "approved and signed by all four members of the Committee as an unanimous report" at the 10th and final meeting on July 3rd. The final version of the Report was then presented to President de Valera by Roche later that day.

### *The Committee's Report*

The Report consisted of an Introduction and seven Appendices<sup>23</sup>. The Introduction recited the terms of reference and indicated the subsequent lay-out of the Report. Appendix A contained the text of the Articles regarded as fundamental by the Committee and "to the extent and with such modifications as are recommended in this Report, be rendered immune from easy alteration." In those cases where amendments to such constitutional provisions were proposed, the Committee indicated that:

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<sup>23</sup> The contents of Appendices B and C are dealt with below. Appendix D contained extracts from foreign Constitutions dealing with freedom of assembly, Appendix E contained extracts from foreign Constitutions dealing with the annual assembly of parliament, Appendix F contained extracts from foreign Constitutions dealing with the declaration of war, Appendix G contained an excerpt of a letter from the Secretary of the Department of Education dealing with free primary education and Appendix H contained the text of Article 36 of the Constitution.



"we have confined ourselves to indicating the nature of the changes suggested and our reasons therefor. We have assumed that it is not our function to submit drafts of articles as so revised."

The full version of the Appendix A is too long to permit of reproduction here. The following Articles were, however, regarded as fundamental by the Committee:

Article 6: The liberty of the person (including habeas corpus)

Article 7: Inviolability of the Dwellings of Citizens

Article 8: Freedom of Conscience

Article 9: Right of Free Expression of Opinion and Peaceable Assembly<sup>24</sup>

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<sup>24</sup> The Committee recommended that Article 9 be amended so as to make it clear that:

"..laws may be passed, and police action taken, to prevent or control open-air meetings which might interfere with normal traffic or otherwise become a nuisance or danger to the general public. We understand that legislation on these lines has been delayed by reason of doubts as to whether such legislation could be validly enacted in view of the present wording of the Article."

The Committee included in Appendix D copies of the relevant Articles dealing with freedom of assembly which were contained in the Constitutions of Belgium (1921), Czechoslovakia (1920), Denmark (1920), Estonia (1920), Germany (Weimar Constitution, 1919), Yugoslavia (1921) and Spain (1931).

## Article 18: Immunity of Members of the Oireachtas

Article 19: Privilege of Official Reports etc. of the Oireachtas<sup>25</sup>

## Article 24:

(a) Summoning and Dissolving the Oireachtas in the name of the King

(b) Holding of at least one session of the Oireachtas each year.<sup>26</sup>

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The Committee's recommendation was acted on, as Article 40.6.1.ii of the Constitution now provides by way of qualification of the right of the citizens to assemble peaceably and without arms that:

"Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas."

<sup>25</sup> The minutes of the 3rd meeting record that the Committee observed that Article 19 might be modified so as to secure that "objectionable pronouncements in Parliament may not be utilised outside for the purpose of inciting to violence or other breaches of the law." These comments - which, significantly, did not feature in the final Report nor were they acted upon in respect of the corresponding provisions (Article 15.12) - were probably made in the light of the deteriorating security situation at the time, with clashes between the IRA and the Blueshirts: see generally, O'Sullivan *op.cit.*, 342-344; 359-362.

<sup>26</sup> The Committee recommended that the requirements that there be at least one session of the Oireachtas each year (now contained in Article 15.7) and that the Dail should fix the date of re-assembly of the Dail following a general election should be

## Article 28

(a) Date of assembly of Dail Eireann after a general election.

(b) Duration of Parliament.

## Article 41: Presentation of Bills for the King's Assent<sup>27</sup>

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regarded as fundamental. The Committee examined the constitutions of Czechoslovakia (1920), Denmark (1915), Germany (Weimar Constitution, 1919), Yugoslavia (1921), Estonia (1920), Mexico (1917) and Poland (1921)(which were set out in Appendix E to the main Report) by way of comparative analysis of these questions and concluded:

"In other Constitutions (see Appendix E) the desired result is secured by providing:

(i) that Parliament shall meet on a specified date in each year, if not previously convoked, and/or

(ii) that if a certain proportion of the total members so require, Parliament must be convened within a specified time.

We recommend that an effective provision on the lines of (i) be substituted for the first sentence of Article 24. We also suggest for favourable consideration the insertion of an additional provision on the lines of (ii)."

Article 15.7 incorporates a modified version of (i), but no action was taken in respect of (ii).

<sup>27</sup> The Committee observed that the principle that "an Executive should have no power to delay the last formal stage of enactment of Bills which have been duly passed by Parliament through all legislative stages is fundamental." As "the trend of policy" was that it was not desirable "to make permanent the present machinery of assent", the Committee thought it desirable, if possible, to separate these two features of this Article into separate articles, so that "that relating to machinery of assent or promulgation [could be] left open to amendment by ordinary legislation."



Article 43: Non-declaration of Acts to be infringements of the law which were not so at the date of their commission.

Article 46: The raising and maintenance of an armed force<sup>28</sup>

Article 49: Participation in War<sup>29</sup>

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Article 25.1 of the Constitution now provides that, save for the special case of a Bill to amend the Constitution, a Bill passed by both Houses of the Oireachtas shall be presented by the Taoiseach to the President for signature.

<sup>28</sup> The Committee commented that "(a) the reference to the Treaty and (b) the limitation to the territory of the Irish Free State should be eliminated." The Committee added that the suggested amendment "in regard to (b) is a corollary to recent constitutional developments whereby the right of Saorstát Éireann to raise and maintain armed forces outside of its territory has been recognised."

<sup>29</sup> Article 49 provided that:

"Save in the case of actual invasion, the Irish Free State (Saorstát Éireann) shall not be committed to active participation in any war without the assent of the Oireachtas."

The Committee commented that:

"The restriction imposed by the word 'active' in reference to participation of the Saorstát in war should be further examined. This word was not in the draft of the Treaty before being submitted to the British Government in 1922. It is understood that it was inserted at the request of the British Government in conformity with the theory that once the King had declared war even though the actual declaration concerned Great Britain, it automatically involved the Dominions in the state of war created."

In view of these comments is not, surprising, therefore that the reference to "active participation" has been omitted in the present Constitution. Article 28.3.1 now provides that:

## Article 50: Amendments of the Constitution<sup>30</sup>

### Article 61:

(a) Central Fund etc.

(b) Appropriation of Public Money only in accordance with law.<sup>31</sup>

Articles 62 and 63: Comptroller and Auditor General - Tenure of Office

Articles 64,65,66, 68, 69: The Judiciary<sup>32</sup>

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"War shall not be declared and the State shall not participate in any war save with the assent of Dail Eireann."

<sup>30</sup> The Committee originally commented that:

"The subject matter of this Article, which has a direct bearing on Part II of our terms of reference, will be dealt with in a separate Report."

As we have already noted, the Committee ultimately never reported on Part II of its terms of reference.

<sup>31</sup> At its third meeting the Committee noted that the Department of Finance was to be consulted "as to whether this Article is fundamental." Mr. Roche, the Secretary of the Department of Justice wrote to J.J. McElligott, Secretary of the Department of Finance on June 2, 1934 requesting the urgent views of the Department as to whether Article 61 "or any other Article should be so regarded." The Department of Finance does not appear to have responded formally to this request, but in the final Report, the Committee observed that it understood "from informal conversations that the Department of Finance regard this Article as fundamental."

<sup>32</sup> The Committee's comments are dealt with below.

Article 70:

- (a) Provision for legal trials of civilians;
- (b) Trial of Military Offenders by Military Tribunals;
- (c) The extension of the authority of military tribunals to civilians in time of war and armed rebellion<sup>33</sup>.

Some specific comments of the Committee in relation to particular topics merit further consideration.

### *The Courts*

The Committee's comments in relation to the courts were particularly interesting. It first concluded that Article 64 - which provided, inter alia, that the judicial power "shall be exercised and justice administered in the public courts established by the Oireachtas by judges appointed in manner hereinafter provided" - was to be regarded as fundamental, subject to the following proviso:

"We suggest, however, that it should be carefully re-drafted so as to meet the present position in which judicial or quasi-judicial functions are necessarily performed by persons who are not judges within the strict terms of the Constitution, e.g., Revenue

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<sup>33</sup> The Committee noted that if its proposals in relation to the revision of Article 2A were to be adopted this might 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."



Commissioners, Land Commissioners, Court Registrars etc."<sup>34</sup>

Indeed, following a discussion of this very point at Committee's third meeting, Roche had put forward a sketch of a possible addendum to Article 64:

"Provided for the removal of doubts and for the more expeditious and economical administration of justice and transaction of public business, that nothing in this Article shall be deemed to render invalid any enactment, or any rule, order, or arrangement made under the authority of any enactment, whereby powers or duties (not being powers or duties of a judicial nature in connection with criminal trials) have been conferred or shall hereafter be conferred on an officer of any Court in relation to the business of the Court or any Board, Commission, or Tribunal (by whatever name known) or any member thereof."

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<sup>34</sup> The Committee had already noted at its third meeting that the provisions of Article 64 might need to be re-examined as far as its effect "on the exercise of quasi-judicial functions such as those exercised by the Land Commission, the Master of the High Court, etc. should be further considered." It may be noted that, a few years earlier, the constitutionality of the Land Commission's activities had survived challenge only following very elaborate judgments from the Supreme Court which attempted to essay a definition of what constituted a judicial power: see *Lynham v. Butler (No.2)* [1933] IR 74. In 1929 it had been held - but not, it is submitted, very convincingly - that an assessment of damages by the Master of the High Court did not represent the exercise of judicial power: see *Matheson v. Wilson* [1929] IR 134.

This draft proved to be very influential, since it clearly anticipates the present Article 37 which permits the Oireachtas to vest non-judicial personages with limited judicial powers in matters "other than criminal matters." Indeed, during the Dail Debates on the 1937 Constitution, Mr. de Valera had expressly acknowledged that such concerns had given rise to Article 37:

"There were questions about the Land Commission, as to whether functions were of a judicial character or not....So as not to get tied in the knot that judicial powers or functions could only be exercised by the ordinary courts established here, you have to have a provision of this kind."<sup>35</sup>

These questions also more recently troubled the Constitution Review Group<sup>36</sup> who wrestled with the problems thrown up by Article 37, but felt that since it could not devise a more satisfactory wording, it could not up with a recommendation for change:

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<sup>35</sup> 67 *Dail Debates*, Col. 1511-12.

<sup>36</sup> The Constitution Review Group was an expert, fifteen member body (of which the author was a member) which was established by the Government in 1995 to carry out a review of the Constitution and to make recommendations where constitutional change might be thought necessary or desirable. The 700 page report of the Review Group was published in July 1996 (Pn. 2632) and this Report has now been the subject of five separate progress reports by the All-Party Oireachtas Committee on the Constitution.

"The Review Group recognises that Article 37 as it stands is not wholly satisfactory. A majority of the Review Group considers, however, that, since experience has shown that there is no completely satisfactory answer to the problem raised and since there are great difficulties in formulating a different set of words which would deal adequately with these complex issues, Articles 34.1 and 37 should be retained in their present form."<sup>37</sup>

The Committee also agreed that the express powers of judicial review of legislation vested in the High Court by Article 65 was fundamental. No agreement could, however, be reached on two very interesting suggestions which had been discussed by the Committee. The first was whether:

"....the power of deciding the validity of laws, having regard to the provisions of the Constitution, should be vested

(a) in the Supreme Court alone, or

(b) in a special "Constitution" Court appointed or designated for that purpose, e.g., a combination of the Supreme and High Courts, or

(c) in the High Court with a right of appeal to the Supreme Court as at present."

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<sup>37</sup> *Op.cit.*, 155.



Had the suggestion that a special Constitutional Court might be established become public at that time, it would almost certainly have been regarded with deep suspicion by the judicial and legal establishments of the day. Hostility from the bar and bench had already killed off far more modest proposals for reform of court costume and dress in the 1920s<sup>38</sup> and radical, *avant garde* proposals of this kind would doubtless have met a similar fate.<sup>39</sup> However, irrespective of the merits of such a proposal in the context of a small, common law jurisdiction such as Ireland, the fact that it was seriously considered by the Committee (and, clearly, supported by some of its members) demonstrates that the members of the Committee must have had a very sophisticated understanding of the dynamics of constitutional law. It provides yet further evidence of the ability and remarkable open-mindedness of what one leading historian has described as the "meritocratic administrative elite" who were later to serve on the Constitution's drafting committee.<sup>40</sup>

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<sup>38</sup> See generally, Keane, "The Voice of the Gael: Chief Justice Kennedy and the Emergence of the new Irish Court System, 1921-1936", (1996) 31 *Irish Jurist* 205, 221-223; Garvin, "1922 - The Birth of Irish Democracy" (Dublin, 1996) at pp. 171-3; O'Sullivan, *op.cit.*, 533-4

<sup>39</sup> The Constitution Review Group considered a similar proposal, but rejected it.

<sup>40</sup> Keogh, "Church, State and Society" in Farrell, ed., *de Valera's Constitution and Ours* (Dublin, 1988) at 108. Keogh also observes (at 107) that the drafters:

"...were all people of wide culture. They were wholly free of the stridency associated with certain vociferous elements in the Irish Catholic Church in the 1930s. All...had broad

However, the suggestion that a Constitutional Court might be established clearly impacted on Mr. de Valera who admitted in the Dail Debates on the Constitution that he was wary of giving the powers of judicial review to the ordinary courts:

"This matter of the Constitution is going to be interpreted, ultimately, by the Courts. I know that in other countries courts are set up known, roughly, as constitutional courts, which take a broader view - I do not wish to be hurtful - which take a broader view, or not so narrow a view, as the ordinary Courts which, strictly interpreting the ordinary law from day to day, have to take. If I could get from anybody any suggestion of some court to deal with such matters other than the Supreme Court, I would be willing to consider it. I confess that I have not been able to get anything better than the Supreme Court to fulfil this function."<sup>41</sup>

As we shall see in later chapters, this suggestion had also clearly influenced the internal debate which took place in

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intellectual horizons. None were the victims of then fashionable ideological phobias."

<sup>41</sup> 67 *Dail Debates*, Cols. 53-4. (May 11, 1937). Indeed, the draft Constitution had originally proposed that the Supreme Court alone should have original jurisdiction in constitutional matters. However, in response to opposition suggestions, Mr. de Valera agreed to an amendment at committee stage whereby the power was transferred to the High Court with a right of appeal to the Supreme Court: 67 *Dail Debates*, Cols. 1492-5 (June 2, 1937).

1936-1937 among the drafting committee regarding the structure of judicial review of legislation which the Constitution subsequently put in place

The second suggestion was that the Constitution should contain a time limit within which the constitutionality of legislation might be challenged. This proposal had been first been put forward by Roche in his memorandum. He had suggested that Article 65 (which vested the High Court and Supreme Court with express powers of judicial review of legislation) should be amended by the addition of the following proviso:

"...but no question as to such validity shall be considered unless it is brought before the High Court for determination within three months after the enactment of such law."

He added:

"The idea is that we should get certainty as to what is the law and not be discussing in 1934 whether a law which has been in operation since 1925 is valid or not."

The Committee was ultimately to be divided on the question of a fixed time limit, but, like the constitutional court proposal, "thought it well...to place on record" that these suggestions had been put forward. McDunphy was,



however, clearly against the proposal, since he had commented on the margins of the Roche memorandum "I am afraid of this." Roche's proposal did not find its way into the corresponding provision - Article 34.3.2 - of the present Constitution and, indeed, by any standards, it would have to be rejected as unsound. Experience has shown that the constitutionality of most legislation cannot be tested on an *a priori*, abstract basis, but has to be judged by reference to the special circumstances of a particular litigant. The circumstances in which such a litigant may require to challenge the constitutionality of legislation affecting him adversely may not arise for many years or even decades after it has been enacted. Moreover, legislation which was valid at the date it was enacted may become unconstitutional by reason of changing circumstances, such as inflation, population movements and mortality tables.<sup>42</sup> In addition, where a Court upholds the validity of legislation in a case which depends on an appraisal of the prevailing scientific or other relevant expert evidence as to the effect of such legislation, it would seem unjust if this question could not be re-opened if new evidence were later to materialise.<sup>43</sup> At the same

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<sup>42</sup> See Kelly, *op.cit.*, 482. In *McMenamin v. Ireland* [1996] 3 IR 100 the Court identified a breach of the State's constitutional obligations in circumstances where the failure to revise the pension arrangements of District Judges provided for by the Courts (Superannuation Provisions) Act 1961 having regard to the fact that revised mortality tables and increasing judicial longevity in the subsequent 35-year period had rendered the 1961 superannuation calculations objectively unfair.

<sup>43</sup> This point was made by the Supreme Court in *Ryan v. Attorney General* [1965] IR 294 in dismissing a challenge to the constitutionality of the Health (Fluoridation of Water Supplies) Act

time, most constitutional lawyers would recognise that a procedure which provides for a swift and certain determination of the constitutionality of a particular law - which was the gist of Roche's proposals - might prove to be of great value<sup>44</sup>. And thus it may be that this proposal contained the germ of an idea which ultimately led to the present Article 26 of the Constitution (which had no counterpart in the 1922 Constitution) whereby the constitutionality of a Bill may be determined before it ever comes into law following a reference by the President to the Supreme Court.<sup>45</sup>

#### *Appendix B and the plan for a Special Criminal Court*

Appendix B contained the Committee's recommendations in relation to Article 2A which closely followed Roche's proposals for the establishment of special criminal courts (Scheme A) and declarations of emergency (Scheme B). The Committee clearly envisaged that the Special Criminal Court would be the first step in curbing civil disorder and that

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1960. In this case the available evidence strongly suggested that the fluoridation of water did not have the deleterious consequences apprehended by the plaintiff, but O'Dalaigh C.J. was careful to stress that "if in the future the scientific evidence available should be such as to warrant a different conclusion on the facts, the question of the validity of the Act could be re-opened."

<sup>44</sup> See Kelly, *op.cit.*, at 219.

<sup>45</sup> See generally Kelly, *op.cit.*, at 212-9. Of course, if the Supreme Court adjudges that the Bill or any portion thereof is unconstitutional, then the Bill falls in its entirety and the President must decline to sign it into law: Article 26.3.1.



the declaration of a state of emergency would be necessary in the final resort:

"What may be regarded as the first serious phase in the development of a grave state of disorder throughout the country is the failure of the ordinary Courts, either through intimidation of jurors and/or witnesses, or lack of civic spirit on the part of either or both, to secure the conviction of offenders, particularly in the case of offences of a seem-political nature. The resultant immunity of offenders from punishment leads inevitably to the spread of offences of this character, resulting sometimes in a serious situation with which the ordinary processes of law are unable to cope. We are of opinion that the development of a situation of this nature could in most cases be arrested by the application of suitable measures in the early stages, and we think that, to this end, the Constitution should contain a permanent provision to supplement the operation of the ordinary Courts."

In its introduction to the Report the Committee had anticipated its recommendations in relation to Scheme B, the declaration of emergency provisions:

"We are of opinion that Article 2A in its present form is not a proper one for retention in the Constitution. We suggest that it should be replaced by a single



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 a state of war, including, when necessary, the temporary suggestion of many Articles of the Constitution which under normal circumstances are rightly regarded as fundamental."

As we have noted, these recommendations clearly formed the basis for the present Article 38.3.1 and Article 28.3.3.

*Recommendations regarding language, education and jury trial*

The Committee dealt with three heterogeneous provisions dealing respectively with language (Article 4), education (Article 10) and the right to jury trial (Article 72) in Appendix C. In the case of Article 4 (which, unlike the present Article 8, provided that while Irish was the "national language", English was "equally recognised as an official language") the Committee observed that:

"While...this Article is not fundamental in the sense that it safeguards democratic rights, we recognise that from the National point of view, it is important because of the status which it gives to the Irish language. We realise, however, that in the course of time it may be found desirable to modify the

recognition which it accords to English as an equally official language throughout the State, and for that reason we are of opinion that the Article should be left open to change by ordinary legislation."

In relation to the guarantee contained in Article 10 that all citizens "have the right to free elementary education", the Committee recommended against including this in the fundamental list having first obtained the views of Seosamh O'Neill, then Secretary of the Department of Education<sup>46</sup> who adverted to possible difficulties to which this provision might give rise:

"(1) whether a small number of children, say, two, three, or four, living on an island, or at a long distance from a National School, could successfully claim the right to be transported daily to a National School; or to have a School established for their own use;

(2) whether the Article could be construed to put an obligation on the State not only to pay the teachers but also to build, equip and maintain schools, and provide free books and requisites for the schoolchildren."

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<sup>46</sup> O'Neill's letter of July 2, 1934 to the Committee was set out in Appendix G. Roche had written on June 15th, 1934 requesting O'Neill's views. As we shall see in Chapter 5, similar concerns were expressed in March and April 1937 by a number of Government Departments - including Finance, Lands and Education - about the corresponding provisions of Article 42.4 lest this provision be

While Article 42.4 still protects the right to free primary education, O'Neill's letter - and the Committee's evident support for his views - produced an important change. Article 42.4 provides that the State's duty is now only to "provide *for* free primary education" (as opposed to "provide free primary education") - a change which has somewhat diluted the extent of the State's obligations in this area.<sup>47</sup>

Somewhat surprisingly, the Committee also recommended against the inclusion of Article 72 - guaranteeing the right to jury trial - in the list of fundamental articles.<sup>48</sup> It noted that in England and America the jury system had been subjected "in recent years to very considerable criticism" and that "in our State it cannot even claim to be a spontaneous national growth." The Committee continued:

"With an Executive dependent on, and responsible to, a parliament elected on a full adult suffrage, and with judges whose independence is guaranteed by the Constitution which also forbids the setting up of

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subsequently interpreted so as to impose additional financial burdens on the State.

<sup>47</sup> This point was made by the Supreme Court in *Crowley v. Ireland* [1980] IR 102. Since *Crowley's* case, however, the trend has been in the opposite direction, as witness decisions such as *DB v. Minister for Justice, Equality and Law Reform* [1999] 1 IR 29; *TD v. Minister for Justice, Equality and Law Reform* [2000] 2 ILRM 321; *Sinnott v. Minister for Education*, High Court, October 4, 2000.

<sup>48</sup> Although the Committee noted with evident satisfaction that this Articles had not been included by the leaders of the Opposition in the list of fundamental articles referred to in their Dail motion.



extraordinary courts, the right to trial by jury has lost its original importance."

The Committee concluded that if they had included the Article in the list of fundamental articles, they would have recommended amendments designed to make it clear:

"(a) that the Article does not bind us to the present English system of requiring a jury of twelve and an unanimous verdict, and

(b) that when the Oireachtas has designated any particular offence as a 'minor offence', fit to be tried summarily, it shall not be open to a defendant to raise the point that the offence is so serious that it cannot reasonably be called a 'minor' offence and that the law declaring it to be triable summarily is therefore ultra vires Article 72 and invalid."

While these recommendations were ultimately not acted on - and, if anything, the new Constitution has strengthened and re-inforced the right to jury trial, the provisions of Article 38.3.1 and the Special Criminal Court notwithstanding - these recommendations again demonstrate the far-sighted character of the Committee's Report. It is true that the constitutionality of s.25 of the Criminal Justice Act 1984 - which majority jury verdicts in criminal cases - has been upheld by the Supreme Court in

*O'Callaghan v. Attorney General*<sup>49</sup>, but one leading commentator has found the reasoning in that case to be profoundly unconvincing and disappointing.<sup>50</sup> However, whatever the merits of the second recommendation<sup>51</sup>, the Committee correctly anticipated that this provision was likely to lead to the invalidation of legislation which incorrectly classified certain offences as "minor" one, capable of being tried summarily.<sup>52</sup>

Nevertheless, the entire tenor of the 1934 Report was essentially two fold. It first emphasised the necessity to protect fundamental rights via a written Constitution and a system of judicial review. It secondly stressed the desirability of maintaining continuity where possible with the existing 1922 Constitution. It is true that Mr. de Valera had always maintained that the 1922 Constitution contained fine features, but the Report clearly took the view that the better features of that Constitution should be retained,

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<sup>49</sup> [1993] 2 IR 17.

<sup>50</sup> Casey, "Interpretation of constitutional guarantees: an antipodean history lesson?" (1996) 31 *Irish Jurist* 102. As Casey so perceptively notes, the High Court of Australia's contrary conclusion in respect of an exactly parallel question in *Cheatle v. The Queen* (1993) 177 CLR 541 is more persuasive.

<sup>51</sup> As it happens, the *Report of the Constitution Review Group* recommended (at 143-4) against the establishment of a Constitutional Court on the grounds that it would lead to a complication of appellate structures and that it was undesirable that there should be a "proliferation of court structures in a small state where there should be maximum use of the existing courts."

<sup>52</sup> At least six major items of legislation have been found to be unconstitutional on this ground: see *The State (Sheerin) v. Kennedy* [1966] IR 379; *Re Haughey* [1971] IR 217; *Cullen v. Attorney General* [1979] IR 394; *Kostan v. Ireland* [1978] ILRM 12; *Desmond v. Glackin*



while at the same time paving the way for innovatory improvements. As will shortly be seen, the entire structure of the new Constitution was subsequently substantially built upon these recommendations. In sum, the Committee paved the way for the successful transition from the Constitution of 1922 to the present Constitution. Although the 1922 Constitution was by that stage close to total collapse, the Committee by its recommendations managed to salvage the best features of that document while coming up with new innovations thus leading the way to a new Constitution which has proved "resilient and robust and is still thriving in its sixth decade.

*1935: de Valera's instructions to John Hearne*

Although the preparations for the new Constitution can really be said to have begun with the report of the 1934 Constitution Review Committee, Mr. de Valera may still then have been in two minds on the necessity for a new Constitution, as distinct from radical revision of the Constitution of the Irish Free State. However, it would seem that by 1935 he had decided that the time had come for a new Constitution.<sup>53</sup> The first instructions for

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(No.2) [1993] 3 IR 67 and *Mallon v. Minister for Agriculture and Food* [1996] 1 IR 517.

<sup>53</sup> Professor Fanning has commented that "by August 1936 de Valera's mind had hardened against further tinkering with the 1922 Constitution. He now favoured a new Constitution...": see Fanning, *Mr. de Valera drafts a Constitution* in Farrell ed., *De Valera's Constitution and Ours* (Dublin, 1988) at 34, 36. But Professor Fanning does not give any source for his contention that the



the heads of a draft Constitution were given to the Legal Adviser in the Department of External Affairs, John Hearne, in late April 1935.<sup>54</sup>

It is clear from the earliest drafts of the Constitution that Mr. de Valera was anxious to ensure that any constitutional changes strengthened and protected the fundamental rights of the citizens. Not only was this a key concern of the 1934 Constitution Review Committee, but Hearne's first preliminary drafts of the new Constitution lay considerable emphasis on these objectives. His explanatory memorandum (dated 17th May 1935)<sup>55</sup> to accompany the draft Heads of a Constitution commenced by reciting de Valera's instructions:

"The preliminary Draft of Heads of a Constitution which accompanies this memorandum is based upon verbal instructions given by the President on Wednesday, April 30th and on Friday, 2nd May. In general, the instructions of the President were to prepare a draft of the Heads of a new Constitution for Saorstát Éireann. In particular, the draft was:

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decision had been made in August 1936 as opposed to a year earlier.

<sup>54</sup> A few months later Mr. de Valera, speaking at Ennis, gave his first public intimation of his plans when he announced that "before the present Government left office they would have an Irish Constitution from top to bottom": *The Irish Press*, July 1, 1935.

<sup>55</sup> UCD P. 1029/6.

A. to contain certain basic Articles guaranteeing fundamental rights;

B. 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;

C. to provide for the suspension of the said Articles during a state of public emergency only;

D. to contain machinery for effectively preserving public order during any such emergency;

E. to provide for the establishment of the office of President of Saorstát Éireann, the holder of which would fulfill all the functions now exercised by the King and the Governor General in internal affairs; and

F. to contain provision for the retention of the King as a constitutional officer in the domain of international relations."

The earliest draft heads of the fundamental rights provisions reflected these concerns. One early draft - entitled "Summary of the Draft Heads of the Constitution" - clearly shows Hearne's way of thinking. This draft Article 15 provided:

"1. Equality of all citizens before the law.

No titles of nobility to be conferred; but Orders of Merit may be created.

2. Where the Courts have decided in favour of a party to an action the decision of the Courts not to be nullified so far as that party is concerned by retrospective legislation.

3. Freedom of conscience.

4. Free expression of opinion.

5. Right to assemble peaceably and without arms.

6. Right to form associations and unions.

7. Laws may be passed to prevent or control meetings calculated to cause a breach of the peace or to be a danger to the general public. Open-air meetings to be subject to control so as not to interfere with normal traffic.

8. Liberty of the person inviolable. No person to be deprived of liberty save in accordance with law.

9. Dwelling not to be forcibly entered save in accordance with law."



The draft Article 16 dealt with the status of Religious Associations; Article 17 with the Family; Article 18 with Private Property; Article 19 with Parental Authority; Article 20 with Education and Article 21 with the Prosecution and Trial of Offences.

### *Hearne's draft of October 1935*

By the end of October 1935, Hearne's first preliminary draft was ready. Articles 38-42 of this draft was headed "Fundamental Rights", while Articles 43-45 dealt with the trial of criminal offences.<sup>56</sup> The fundamental rights provisions of the October 1935 draft largely corresponded to the corresponding provisions of the 1922 Constitution, save that three points of interest may be noted.

First, this draft repudiated the - quite unrealistic - guarantee which had been originally contained in Article 72 of the 1922 Constitution that "no extraordinary courts shall be established." In this respect Hearne drew on the earlier recommendations of the 1934 Committee inasmuch as the draft Article 43(b) provided that extraordinary tribunals "may be established under this Constitution to deal with a state of public emergency proclaimed under this Constitution."

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<sup>56</sup> UCD P. 1029/2. This division between the trial of offences on the one hand and fundamental rights on the other was to be maintained, as Article 38 of the Constitution is headed "Trial of Offences", whereas Articles 40-44 are headed "Fundamental Rights."

Secondly, the only conscious innovation in the fundamental rights provisions at this stage were contained in the draft Article 38 (which formed the basis for the present Article 40.1) which provided that:

“All citizens of Saorstát Éireann are equal before the law.”

Although this innovation was plainly modeled on the corresponding “equal protection of the laws” provision contained in the 14<sup>th</sup> Amendment of the US Constitution, the final version of Article 40.1 later was to attract controversy on the ground that it was intended to be subversive of women’s rights. The fact that a provision which had been so obviously intended by Hearne to be progressive and egalitarian was objected to on this ground in its own way affords evidence of the extent to which the entire constitutional project was so little understood.

Finally, it ought to be noted that Hearne’s draft was a largely secular one, in that it displayed almost none of the specifically Catholic influences to be found in the final version of the Constitution.<sup>57</sup> This may be illustrated by Hearne’s draft Preamble:

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<sup>57</sup> Cf. the comments of Keogh in “Church, State and Society” in Farrell ed., *De Valera’s Constitution and Ours* (Dublin, 1988) 103, 121:

“It is unfortunate that we have no record of John Hearne’s reaction to the flood of documentation from [McQuaid]. One

“In the Name of Almighty God, We, the Sovereign Irish People through our elected representatives assembled in this Dail Eireann 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 the 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.”

While this draft proved extremely influential - and clear echoes can be found of its declamatory style in the present Preamble - it is far less tendentious. The largely secular nature of Hearne's first drafts is important, since the working papers show that the provisions which were influenced by Catholic teaching were largely added on towards the end of the drafting process, either because they corresponded with Mr. de Valera's own personal wishes and political agenda or following representations from clerical or political sources. The basic point nevertheless remains true: the sub-structure of the Constitution was fundamentally liberal-democratic and secular in nature and the religiously-inspired provisions were subsequently superimposed upon this secular sub-structure.

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is tempted to speculate that he may have developed, as a consequence, a lifelong aversion to certain papal encyclicals.”



## *The impetus for a new Constitution*

Hearne's drafts appeared to have lain fallow for a period of months. However, speaking in the Dail in May 1936 on the Constitution (No. 24) Bill 1934 (which provided for the abolition of the old Senate), Mr. de Valera indicating his hope that a new Constitution would be presented to the House that Autumn.<sup>58</sup> The British Government were then informed in June 1936 "as a matter of courtesy" that a new Constitution would be introduced over the course of the following months and that this document would make no provision for either the Monarch or the Governor-General.<sup>59</sup> In August 1936 John Hearne produced drafts of

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<sup>58</sup> 62 *Dail Debates* at Col. 1199 (May 28, 1936).

<sup>59</sup> Mansergh, *The Unresolved Question: The Anglo-Irish Settlement and its Undoing, 1912-1972* (Yale, 1991) at 291-292. Some months after the removal of the Crown from the Irish Free State Constitution in the wake of the Abdication crisis in December 1937, the British Government protested on April 3, 1937 (somewhat belatedly, it might be thought) that this constitutional amendment amounted to a breach of the 1921 Treaty, but they also indicated that they were prepared to treat this change as not amounting to a fundamental change in the status of the Irish Free State. The Irish Government responded (S. 10494) on April 27, 1937 just before the publication of the new Constitution by saying that:

"with regard to a departure from the provisions of the Articles of Agreement mentioned in paragraph 2 of the UK Government's note, it need only be said that the evolution in the status of the members of the Commonwealth which has taken place since the Articles of Agreement were signed has been gradually replaced by legislation in the Irish Parliament based on a declared status of co-equality.

It is on the basis of these principles also that the new Constitution about to be presented to the people have been drawn up. The Articles of Association postulated control of

documents entitled "Plan of Fundamental Constitutional Law", "Constitution Bill 1936" and a "Foreign Relations Bill 1936."<sup>60</sup> The draft of latter Bill was intended to deal with matters such as the exercise of the treaty-making power and its wording substantially conforms to that of the present Article 29. As Hearne explained in an accompanying letter on August 6, 1936 to Joseph Walshe, the Secretary of the Department of External Affairs:

"The scheme of the draft [Foreign Relations] Bill follows the lines discussed with the President [de Valera] on the 4<sup>th</sup> instant. The references in the draft Bill to 'the Constitution' are references to the new Constitution, not to the Constitution of 1922. The new Constitution will contain the following fundamental declarations:

1. A Declaration that Eire is an independent sovereign (democratic) State,

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the Irish Parliament by the British Parliament until that situation was ended no approach to a final settlement between the peoples of the two countries could be made."

This diplomatic exchange set the scene for the ultimate British response to the new Constitution, for in a statement issued on December 29, 1937 (the date the Constitution came into force) that Government indicated - with a sense of almost weary resignation - that it was also "prepared to treat the new Constitution as not effecting a fundamental alteration in the position of the Irish Free State, in future to be described under the new Constitution as 'Eire' or 'Ireland' as a member of the British Commonwealth of Nations."

<sup>60</sup> UCD P. 1029/3.



A Declaration that all the internal and external prerogatives of the State vest in the people of Eire,

A Declaration of 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 and exercisable.”<sup>61</sup>

### *The composition of the Constitution Drafting Committee*

Work in earnest on the new Constitution resumed with the establishment of a drafting committee in September 1936. The personnel of this drafting Committee was identical to that of the 1934 Committee, save that Dr. Maurice Moynihan replaced Stephen Roche, the Secretary to the Department of Justice.<sup>62</sup> Moynihan also acted as Chairman of the Committee. The parliamentary draftsman, Arthur Matheson, was also centrally involved. Hearne had previously liaised with Matheson prior to the establishment of the drafting Committee, but thereafter contact between

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<sup>61</sup> It is of interest that at the end of August 1936 Hearne supplied a new version of the Foreign Relations Bill in which the State was described as “Poblacht na hEireann.”

<sup>62</sup> One can only speculate as to the reasons for this change of personnel. It may well have been that in his capacity as Secretary in the Department of Justice Roche was already over-burdened. However, a more likely explanation is that de Valera was not prepared to appoint someone like Roche to this key committee when Roche’s antipathy to written constitutions and judicial review must have already been well known. On the other hand, Moynihan had (in the words of an obituary in *The Irish Times*, August 28,



de Valera, the drafting Committee and Matheson appears to be relatively frequent.

It may be convenient at this stage to say something more about the individual members of the Committee.

### *John Hearne*

John Hearne was born in Waterford in 1893 and graduated from University College, Dublin with a B.A.. He later spent a number of years at Maynooth studying for the priesthood, but left to study at the King's Inns where he became a barrister-at-law.<sup>63</sup> He then served as assistant parliamentary draftsman from 1923 until 1929 when he became Legal Adviser in the Department of External Affairs. He had previously attended the Imperial Conference in London in 1926 as an adviser to Kevin O'Higgins. He later assisted Patrick McGilligan, then Minister for External Affairs at the London Conference on the Operation of Dominion Legislation in 1929 and later at the 1930 Imperial Conference. Hearne's contribution to the 1929 Conference has been summarised thus:

"J.J. Hearne....a skilled draftsman, had done an immense amount of legal preparation, drawing on a voluminous knowledge of British constitutional history:

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1999) an "unique acquaintance with de Valera's mode of thought and way with words."

<sup>63</sup> The basic biographical details are contained in an obituary article in *The Irish Times*, March 31, 1969.

the former 'Boy Orator' of the Redmondite Party, he had a clarity of style that was invaluable to those delivering his briefs."<sup>64</sup>

In 1932 de Valera became Minister for External Affairs (as well as President of the Executive Council) and, not surprisingly, Hearne quickly came to his attention. Hearne had a formidable knowledge of constitutional and international law and his papers for the Executive Council on complex matters such as the right of the Dominion Parliaments to legislate with extra-territorial effect were of extraordinary quality.<sup>65</sup> De Valera quickly singled out Hearne:

"to draw up a number of Bills, including those to abolish the Oath of Allegiance and to establish the rights of Irish nationality and citizenship. Maurice Moynihan adds: 'When Hearne provided drafts of these Bills, he included his conclusions regarding the constitutional implications of their introduction. He

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<sup>64</sup> Harkness, *The Restless Dominion* (New York, 1970) at 147. Testament to the younger Hearne's oratorical skills as a student debater at University College, Dublin is to be found in Meenan ed. *Centenary History of the Literary and Historical Society 1855-1955* (Tralee, 1956) where the "silver-tongued" Hearne was described as having had a "brilliant association with the L & H." As far as Hearne's later life is concerned, Keogh describes him as "reserved, highly intelligent and professional": see "Church, State and Society" in *De Valera's Constitution and Ours* (Dublin, 1988) at p. 106.

<sup>65</sup> S. 1983.

was pointing to the new for a new Constitution if these Bills were introduced.’”<sup>66</sup>

Hearne’s personal contribution to the design and drafting of the Constitution was, of course, enormous.<sup>67</sup> Practically every innovation bearing on the overall structure of the Constitution and the power of judicial review (Article 15.4, Article 26, Article 37 etc.) may be ascribed to his influence.

In 1939 both Hearne and Philip O’Donoghue were called to the Inner Bar as a special mark of honour in recognition of their work on the Constitution. Hearne was later made High Commissioner to Canada in 1939 and then served as Ambassador to the United States from 1950 until 1960. He retired to live in Dublin where he died in 1969.<sup>68</sup>

### *Maurice Moynihan*

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<sup>66</sup> Brian Kennedy, “John Hearne and the Irish Constitution” (1989) 24 *Eire-Ireland* 121, 123.

<sup>67</sup> On the coming into force of the Constitution on December 29, 1937, de Valera inscribed in his hand the following tribute on a printed copy of the Constitution (National Library of Ireland, MS 23,508):

“To Mr. John Hearne, Barrister at Law, Legal Adviser Department of External Affairs, Architect in Chief and Draftsman of this Constitution, as a Souvenir of the successful issue of his work and in testimony of the fundamental part he took in framing this the first Free Constitution of the Irish People.”

<sup>68</sup> *The Irish Times*, March 31, 1969.



Maurice Moynihan entered the civil service as assistant secretary in the Department of Finance 1925. Shortly after de Valera's accession to power in 1932, his brother Sean Moynihan was appointed Secretary to the Government. De Valera then invited Maurice Moynihan to be his private secretary, a position he held until his appointment in March 1937 as Secretary to the Government. He served as Secretary to the Government until 1961 when he was appointed Governor of the Central Bank. He retired as Governor in 1969 and died in August 1999.<sup>69</sup> Moynihan has been variously described as a "mild-mannered man of measured views"<sup>70</sup> as a "skilled drafter of official documents" with "exceptional" political antennae.<sup>71</sup>

### *Philip O'Donoghue*

Philip O'Donoghue had been made a District Justice in 1922 at the age of 26. Some seven years later he was appointed a Legal Assistant to then Attorney General, John A. Costello. In that capacity he served twelve Attorneys General until his retirement in 1959. Like Hearne he was called to the Inner Bar in 1939 in recognition of his role in the drafting of the Constitution. In 1965 he was appointed the Irish member of the European Commission of Human Rights and in 1971 he was appointed as a judge of the

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<sup>69</sup> For a further appreciation of Moynihan, see McMahon, "Maurice Moynihan (1902-1999) - Irish Civil Servant" (2000) 89 *Studies* 71.

<sup>70</sup> Keogh, "Church, State and Society" in *De Valera's Constitution and Ours* (Dublin, 1988) at p. 106.

European Court of Human Rights until his retirement in 1980. He died in February 1987.<sup>72</sup>

### *Michael McDunphy*

Michael McDunphy was a career civil servant who had been appointed an assistant secretary to the Government in 1922 at the age of 32. He remained in this position until November 1937 when he was appointed Secretary to the President, although he was called to the bar in 1928. His appointment as Secretary was doubtless in recognition of his work on the Constitution. McDunphy has been described as "solemn and highly principled to those who encountered him on his job", although "warm and thoughtful" with friends.<sup>73</sup> His appointment as the first Secretary to the President was warmly welcomed by *The Irish Times* which praised "his zeal and ability"; his continental contacts and his gift for languages.<sup>74</sup>

### *Progress during the autumn and winter 1936-1937*

Various drafts were prepared throughout the Autumn of 1936. One early draft appears to have been discussed at

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<sup>71</sup> McMahan, *loc.cit.*, 74.

<sup>72</sup> *The Irish Times*, February 25, 1987.

<sup>73</sup> Dunleavy and Dunleavy, *Douglas Hyde - A Maker of Modern Ireland* (University of California, 1991) at 393-4.

<sup>74</sup> *The Irish Times*, November 10, 1937.

Government meetings.<sup>75</sup> A summary of the draft heads of the Constitution was prepared on November 5, 1936<sup>76</sup> and an even fuller summary in the shape of Draft Heads of the Constitution appears to have prepared a few weeks thereafter.<sup>77</sup> These Draft Heads are interesting inasmuch as the first signs of specifically Roman Catholic thinking are contained in this draft, as the draft Article 17 provided:

“1. Guarantee of the constitution and protection of the family as the basis of moral education, social discipline and ordered society.

2. Protection of marriage. Divorce a vinculo to be prohibited.

3. Prohibition against attacks on purity, health and sacredness of family life.

Protection of maternity.”

Not surprisingly, the Abdication crisis occupied much of the drafters' time in December 1936<sup>78</sup>, but the first full draft

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<sup>75</sup> One of the early drafts is inscribed with the following words in Mr. de Valera's handwriting: "Drafts used in Cabinet discussions Oct. 20, 21, 22."

<sup>76</sup> Entitled "Summary of Main Provisions of the Constitution."

<sup>77</sup> Entitled "Summary of Draft Heads of the Constitution."

<sup>78</sup> Mr. de Valera availed of this opportunity to introduce legislation in the Dail (the old Senate having by this stage been abolished) which removed the Governor-General from the Constitution and with him virtually all trace of the Crown: see Constitution (Amendment No. 27) Act 1936. On the following day, the Executive Authority (External Relations) Act 1936 was passed. This latter Act



of the Constitution was ready on January 2, 1937.<sup>79</sup> The fundamental rights section<sup>80</sup> contained in this draft was closer in drafting style to the ultimate version of Articles 40-44. Four provisions in particular are worth noting. The draft Article 34 contains Hearne's re-working of the religion article, but at this juncture the provisions dealing with private property and education make their appearance for the first time.

The first part of the draft Article 35 dealing with the family appears to have been drafted by Hearne and here one finds echoes of elements of what subsequently became Article 41. However, the following draft sub-Articles dealing with the prohibition of divorce appear to have been added on<sup>81</sup> to Hearne's draft dealing with the family:

"4. No law shall be enacted providing for the dissolution a vinculo matrimonii of a valid consummated marriage.

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enabled "the organ used as a constitutional organ" (i.e., the British Crown) to be used for the purposes "of the appointment of diplomatic and consular agents and the conclusion of international treaties." These arrangements lasted until 1948 when the 1936 Act was repealed by the Republic of Ireland Act 1948. See generally, Kelly, *op. cit.*, 1133-1134. For the political background to these sensational developments, see O'Sullivan, *The Irish Free State and its Senate* (London, 1940) at 478-187; Mansergh, *The Unresolved Question: The Anglo-Irish Settlement and its Undoing, 1912-1972* (Yale, 1991) at 293-299 and Sexton, *Ireland and the Crown, 1922-1936* (Dublin, 1989) at 163ff .

<sup>79</sup> UCD P. 1049.

<sup>80</sup> On this occasion headed "Constitutional Guarantees."

<sup>81</sup> They are in a distinctly different type-face.

5. No person whose marriage has been dissolved under the civil law of another State shall be capable of contracting a valid marriage in E[ire] during the lifetime of the other party to the marriage so dissolved.

6. No law shall be enacted providing for the annulment of marriage save upon the following grounds, that is to say, either or both of the parties did not agree to enter into the marriage contract, or was not or were not free to enter, or did not freely enter the marriage contract, or that, under the law for the time being in force, the marriage was invalid in form.”

The draft Article 36 dealt with property rights:

“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 or forfeited to the State save under a lawful order of a court of competent jurisdiction or otherwise in accordance with law.

3. Bona vacantia as defined by law belongs to the State.”

Article 37 dealt with education:

“1. All citizens have the right to free elementary education.

2. 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 cult[ivation]<sup>82</sup> of moral and civic virtue, as well as the development of the physical and intellectual faculties.

3. The State shall maintain primary and secondary schools as well as institutes of higher education.

4. Professional degrees or diplomas shall not be granted except by institutions established or recognised for that purpose by the State.

5. Private schools may be established subject to inspection by authorised officers of the State.

6. In all schools and educational establishments for the instruction of young persons who have not



reached the age of eighteen years, the teaching of religion is compulsory for all pupils. The direction and control of such teaching is the province of the particular Church or religious communion to which the pupils concerned belong.”<sup>83</sup>

It seems clear that these drafts of these new clauses were prepared by Hearne following official instructions, i.e., that the unlike some of the other innovatory features of the Constitution (such as the Article 26 reference procedure or the equality before the law provision in Article 40.1) they probably were not spontaneously produced by Hearne or by the drafting Committee. Here again the simplicity and economy of style may be noticed and the draft of the property rights provision in particular seems more straightforward and less convoluted than the final version of Article 43.

#### *The role of McQuaid and Cahill and other clerical figures*

It is at this point that the drafting process appeared to enter its final and most concentrated phase. By mid-February 1937, the fourth pre-publication draft was ready.<sup>84</sup> At this stage, the Rev. Dr. John Charles McQuaid and, to a lesser extent, the prominent Jesuit, Fr. Edward Cahill, were

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<sup>82</sup> The text says “cult”, but this appears to be a mistake.

<sup>83</sup> The words “without prejudice to the supreme right of control reserved to the State educational authorities” appear immediately at the end of the draft Article 36.6., but a line has been crossed through these words.

also heavily involved in pressing de Valera on a variety of topics, mainly relating to the provisions dealing with the Family, Education, Private Property and Religion.<sup>85</sup> While the important questions of the extent to which the Constitution may be said to have been a "Catholic" Constitution and the related question of the extent to which de Valera's clerical advisers influenced the drafting of the Constitution fortunately fall outside the scope of the present thesis, we must now digress somewhat to examine briefly the role of clerical figures such as McQuaid<sup>86</sup> and Cahill<sup>87</sup> in the drafting process.

There seems little doubt but that McQuaid and - probably to a much lesser extent - Cahill were influential, but that influence is liable to be overstated. The distinguished historian, Professor Keogh, has given a number of separate assessments of the role of McQuaid and Cahill. Writing in 1987 Professor Keogh observed that:

"[Hearne and Moynihan] must be numbered among the figures who have most influenced the political and

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<sup>84</sup> UCD P. 1068.

<sup>85</sup> Keogh, "The Irish Constitutional Revolution: An Analysis of the Making of the Constitution" in Litton ed., *The Constitution of Ireland, 1937-1987* (IPA, 1987) 4. (Hereafter Keogh "Constitutional Revolution".) McQuaid's first letter to de Valera on the new Constitution appears to date from February 16, 1937: see Finola Kennedy, "Two Priests, the Family and the Irish Constitution" (1998) *87 Studies* 353, 358.

<sup>86</sup> See generally Cooney, *John Charles McQuaid - Ruler of Catholic Ireland* (Dublin, 1999).

<sup>87</sup> For an account of Cahill, see Finola Kennedy, *loc.cit.* and Faughnan, *loc.cit.*

complexity involved in handling the McQuaid papers relating to the drafting process. Many documents are undated and it is quite difficult to determine their respective influence on those who drafted the final document. The term 'co-maker' implies that the Archbishop enjoyed an equal share with de Valera. However, this is further to compound a fundamental misunderstanding of the drafting process" de Valera was not the 'other' author of the 1937 Constitution....If there was a single author of the 1937 Constitution then that author must have been John Hearne....Maurice Moynihan was also a significant force. McQuaid also played an important role in the whole process. That is not in dispute. But to suggest that he was 'co-maker' of the Constitution is simply not defensible."<sup>91</sup>

There are certainly aspects of Articles 41, 42 and 43 of the present Constitution which reflect McQuaid's influence and this may also be true in part of the Preamble. McQuaid also very nearly succeeded in persuading de Valera to adopt a formula in respect of Article 44 which came close to McQuaid's "one true Church" model of Church-State relations, but, as Professor Keogh has so ably demonstrated, he ultimately failed in this endeavour.<sup>92</sup>

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<sup>91</sup> Keogh, "Review Article: John Cooney's, *John Charles McQuaid, Ruler of Catholic Ireland*" (2000) 89 *Studies* 159, 161.

<sup>92</sup> Keogh, "Constitutional Revolution", *loc.cit.*, especially at 32-60.



But McQuaid's influence does not appear to have carried much further than this. For example, Cooney seems to hint that McQuaid was responsible for the equality clause in Article 40.1, but such a claim would not appear to be well founded. Cooney suggests that McQuaid appears "to have convinced de Valera that men and women did not have the equal rights to work of the same kind" and that this thinking "was reflected in Article 40.1." McQuaid had argued that:

"Men and women have equal right to appropriate work. The law of nature lays diverse on men and women. The completeness of life requires this diversity of function and of work. This is diversity and not an inequality of work. In the desire to cut out unfair discrimination against women, diversity of work is being constantly confused with inequality of work."<sup>93</sup>

The impression created by this argument is that McQuaid persuaded de Valera to include Article 40.1 in the Constitution, *precisely* so that the State could more readily discriminate against women on "diversity grounds." In fact, as we have seen, the idea that the fundamental rights provisions should contain a stand-alone equality guarantee originated with John Hearne, reflecting the latter's broadly egalitarian, liberal outlook. His earliest draft of the Constitution in May 1935 contained the following

equality clause which seems to have been clearly inspired by the corresponding provisions of the 14<sup>th</sup> Amendment of the US Constitution:

“All citizens are equal before the law.”

By late February 1937, however, the equality provision had been re-drafted and the draft Article 40.1 (then numbered as Article 38.2) read as follows:

“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.”

By the end of March, the proviso to Article 40.1 read thus:

“This shall not mean, however, that the State shall not in its laws have due regard to individual differences of capacity, physical and moral, and of social function.”

Hearne deleted the underlined words and replaced them with “paragraph shall not be held to mean” and

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<sup>93</sup> Cooney, *op.cit.*, at 102-103.

“enactments” respectively, so that by April 8 the proviso read:

“This shall not be held to mean that the State shall not in its enactments have due regard to individual differences of capacity, physical and moral, and of social function.”<sup>94</sup>

But contrary to what Cooney might be thought to have implied, these changes appear to have been prompted by concerns that without some form of qualifying clause, a bare statement of equality in Article 40.1 might lead to absurd results.<sup>95</sup> In fact, during the course of the Dail debates, de Valera went out of his way to deny opposition suggestions that this provision might facilitate discrimination against women on grounds of employment.<sup>96</sup>

In summary, therefore, although undoubtedly influential, McQuaid appears never quite to have been admitted to the charmed circle of persons who were centrally involved in the drafting of the Constitution.<sup>97</sup>

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<sup>94</sup> UCD P. 1079.

<sup>95</sup> 67 *Dail Debates* at 1608 (June 2, 1937).

<sup>96</sup> 67 *Dail Debates* at 1507 (June 2, 1937).

<sup>97</sup> As Keogh observed, “Constitutional Revolution”, *loc.cit.*, 66:

“Both [Hearne and Moynihan] must be numbered among the figures who have most influenced the political and administrative culture of the State. They helped to shape the Constitution in a way which neither Cahill nor McQuaid could have done.”



This appears to have been also true of Fr. Cahill, although Finola Kennedy has ably demonstrated the extent of the latter's influence.<sup>98</sup> Towards the end, however, Cahill appears to have become somewhat disillusioned with the final product as it emerged. Writing to de Valera on May 23, 1937 Cahill strongly objected to the use of the term "Church of Ireland" in the (now deleted) Article 44.1.3 on the basis that it constituted "an authoritative approval of a piece of lying propaganda." In the same letter Cahill urged further changes to the property rights provisions on the ground that:

"I believe that the individual aspect of private ownership is unduly stressed to the detriment of the counter-balancing or social aspect; and this fact, especially when taken in conjunction with the individualism, which is so deeply embedded in our jurisprudence, may (contrary to the manifest aim intended in the Constitution) render very difficult, if not impossible, the long-desired re-organisation of our economic and social regime in harmony with the Papal Encyclicals."<sup>99</sup>

Although these proved to be prescient comments (as the case-law on Article 43 "has long since broken loose"<sup>100</sup> of any specifically Catholic social teaching as an inspirational

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<sup>98</sup> Finola Kennedy, *loc.cit.*

<sup>99</sup> UCD P. 1095/2D. See also Faughnan, *loc. cit.*, at 96.

<sup>100</sup> Hogan, "The Constitution, Property Rights and Proportionality" (1997) 32 *Irish Jurist* 373, 396.

source), Cahill's views were not accepted. In the end, it seems that he was even further away than McQuaid from admission to the charmed circle of the key decision-makers which, at all times, remained that of de Valera and his drafting team.

### *March 1937 to April 1937*

Resuming our chronology of events, it will be noted that the Dail gave permission for a First Reading of the new Constitution on March 10.<sup>101</sup> A provisional draft was circulated on a highly restricted basis over the following days. Drafts of various sections had been re-worked by the Parliamentary Draftsman, Arthur Matheson, over the previous fortnight.<sup>102</sup> The first published draft was available on March 16, 1937 and was circulated to all Government Departments, the Revenue Commissioners and to selected persons, most notably Maguire P., Geoghegan J. and Gavan Duffy J. Observations were quickly received within the following seven to ten days, most notably from Finance, Justice, Lands, Education and the Attorney General's Office and also from Maguire P.<sup>103</sup> and Gavan Duffy J.<sup>104</sup> Following

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<sup>101</sup> 65 *Dail Debates* 1435-1439. It is of some interest that Mr. de Valera said (at Col. 1438) that he hoped that the draft Constitution would be circulated on April 7<sup>th</sup> and debated in the Dail on April 14<sup>th</sup>. Perhaps he did not then realise the extent of the re-drafting which the various revises would require, nor the difficulties which the discussions with the various Churches would involve.

<sup>102</sup> See, e.g., UCD P. 1082/2D, March 1, 1937 (re-draft of Article 10); UCD P. 1082/9E, March 4, 1937 (re-draft of Articles 23 and 26).

<sup>103</sup> Maguire P.'s comments were made in a letter to de Valera on March 23, 1937 (UCD P. 1082/8).



receipt of these observations, Mr. de Valera appointed Hearne, Moynihan, McDunphy and O'Donoghue "to examine the draft Constitution in detail in constant communication with him."<sup>105</sup> In reality, this was no more than a further intensification of the drafting process as considerable work was done during what appears to have been a hectic month in April 1937.<sup>106</sup>

The first revise was circulated on April 1.<sup>107</sup> A few minor changes were made to what ultimately became Article 40.1 and Article 40.3.1 and Article 40.3.2 in the draft of April 1. By April 8, the final draft corresponded exactly to the present version of Article 40.1 and Article 40.3.1 and Article 40.3.2. At about this time a distinction was also drawn for the first time between the fundamental rights provisions in Articles 40-44 and the Directive Principles of Social Policy in Article 45. The second revise was ready on April 10.<sup>108</sup> The third revise was ready by April 24 and the final text by April 26.<sup>109</sup> The draft Constitution was officially published on April 30. That night de Valera addressed the nation on Radio Eireann and copies of the

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<sup>104</sup> Gavan Duffy J. made frequent comments, see, e.g., comments of April 2, 1937 (UCD P. 1082/6) and of April 11, 1937 (UCD P. 1082/7A). Gavan Duffy J. had also submitted comments on the 1922 Constitution in February 1937 (UCD P. 1082/9A).

<sup>105</sup> S. 9715, memorandum of April 1, 1937.

<sup>106</sup> In a memorandum of June 1, 1947 (S. 9830) Dr. Moynihan admitted that the printing had taken place "under very abnormal conditions" and that the drafts were subjected "to considerable alteration necessitating many successive amendments of which it was not possible to keep a record."

<sup>107</sup> S. 9715.

<sup>108</sup> S. 10159.



draft Constitution were circulated to prominent persons, both here and abroad.

### *The Constitution in the Dail*

Following the publication of the draft Constitution, there then followed a debate in the Dail which commenced with the Second Reading on May 11 and concluded on May 13<sup>110</sup>. The Committee Stage commenced on May 25<sup>th</sup> and concluded on June 4<sup>th</sup><sup>111</sup>. There was then a re-committal to Committee on June 9, 10 and 14<sup>th</sup><sup>112</sup>. The Report and Final Stages took place on June 14<sup>th</sup><sup>113</sup> and the Constitution was thereupon approved by the Dail. The Dail was dissolved on the same day.

### *The plebiscite and thereafter*

The Constitution was approved by a majority of the voters in a plebiscite held on July 1 along with the general election.<sup>114</sup> As no steps were taken by the new Dail to bring the Constitution into force by means of a resolution passed under Article 62.ii, the Constitution came automatically into force on the day following the expiration of one hundred and eighty days after its approval by

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<sup>109</sup> S. 10160.

<sup>110</sup> 67 *Dail Debates* 29-163; 190-322; 325-469.

<sup>111</sup> 67 *Dail Debates* 941-1079; 1083-1142; 1160-1234; 1237-1310; 1322-1546; 1574-1643; 1650-1707; 1727-1793; 1847-1925.

<sup>112</sup> 68 *Dail Debates* 114-247; 258-306; 332-334.

<sup>113</sup> 68 *Dail Debates* 346-434.

<sup>114</sup> By 685,105 votes to 526,945: see *Iris Oifigiuil*, July 16, 1937.

plebiscite, i.e., December 29, 1937. The new Constitution was duly enrolled in the Supreme Court on February 18, 1938.<sup>115</sup>

### *The role and influence of the Drafting Committee*

What does this examination of the Report of the 1934 Constitution Committee and subsequent events tell us about the drafting of the 1937 Constitution? The drafting of the Constitution has been hitherto ascribed more or less exclusively to Mr. de Valera.<sup>116</sup> Of course, Mr. de Valera's pre-eminence as the political architect of the Constitution is beyond question, but it may be argued that historians have somewhat over-stated the extent to which he was personally involved in the drafting<sup>117</sup> and, perhaps, more

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<sup>115</sup> The Department of the Taoiseach considered that there was some urgency concerning the enrollment procedure, since an (unsigned) memorandum dated January 6, 1938 (S. 9557) prepared for Dr. Moynihan explained that:

"It may be the fact that we are being exceptionally careful in this matter but as it is most probable that sooner or later an effort will be made to upset the Constitution or at any rate part thereof, it is better to be sure than sorry."

<sup>116</sup> See, e.g., the comments of Professor Chubb, *The Government and Politics of Ireland* (Dublin, 1991) at 42:

"Bunreacht na hEireann was almost certainly de Valera's Constitution. He drafted it or supervised its drafting, clearing its principles with his government and taking advice from officials and others, including a number of the Catholic clergy."

See also Fanning, "Mr. de Valera drafts a Constitution" in Farrell, *op.cit.*, 32-45 for an expression of similar views.

<sup>117</sup> It is also beyond question that Mr. de Valera was personally involved in the drafting of some of the key clauses. Keogh notes, for example, in *Irish Constitutional Revolution, loc.cit.*, 29 that drafts



importantly, have under-estimated the extent to which he was influenced by his own drafting committee in which he had reposed so much trust.<sup>118</sup> Constitutional lawyers have been traditionally wary of attributing such a complete and exclusive influence to Mr. de Valera, mainly because the sophistication, style and general layout of the Constitution strongly suggested that its legal content and drafting must have been the work of very skilled lawyers and draftsmen.<sup>119</sup>

Brian Kennedy sought fairly to analyse the evidence on this vital question:

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of some of the amendments to Article 44 have been found in de Valera's own hand.

<sup>118</sup> However, Professor Keogh rightly acknowledges the central work of Hearne, Maurice Moynihan (then Secretary to the Government and Chairman of the drafting committee for the Constitution) and the other members of the drafting Committee in his seminal essay, *The Irish Constitutional Revolution, loc.cit.*, 465-66. It is, of course, clear from this essay that Mr. de Valera took a very keen interest in the draft and remained the ultimate arbiter of disputed points. The fact remains, however, that much of the sophisticated legal thinking evident in the Constitution must have come from de Valera's legal team and the 1934 Report provides corroborative evidence for this argument. Ward, *op.cit.*, also comments (at 239-240) that:

"de Valera himself took little part in the technical work of preparation but gave instructions to Hearne and responded to the numerous drafts that Hearne and his civil service associates presented."

<sup>119</sup> As Brian Kennedy, *loc.cit.*, (at 121) rhetorically asked:

"...how could [de Valera], albeit highly intelligent but with no formal training in legal matters, draft a comprehensive and fundamental document like a constitution?"



"C.S. 'Todd' Andrews asserted in *Man of No Property* that: 'Dev. was very proud of the Constitution. I heard him say that it was entirely the work of John Hearne... and that his own contribution amounted only to dotting the 'i's' and crossing the 't's.'<sup>120</sup> It would probably be nearer the mark to say that the preparation of the draft was almost entirely the work of John Hearne and, except for certain particularly sensitive parts, for example, the Preamble, the religious articles and the revision of the whole work, de Valera did not take an active role in its preparation."<sup>121</sup>

Brian Kennedy then disputes Professor Keogh's assertion that Hearne was "the main architect of the de Valera inspired draft"<sup>122</sup>:

"If we credit Hearne as 'architect' of the Constitution, we acknowledge him as having conceived the design, the content and the implementation of the Constitution. This, I feel, would be a misleading exaggeration.

When asked for his opinion, Maurice Moynihan...commented:

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<sup>120</sup> C.S. Andrews, *Man of No Property* (Dublin, 1982) at p. 233.

<sup>121</sup> Brian Kennedy, *loc. cit.*, 121-2.

<sup>122</sup> Keogh, *The Vatican, The Bishops and Irish Politics* (Cambridge, 1986) at pp. 207-8.

The Constitution was de Valera's. He conceived it. Hearne did the drafting and dotted the 'i's and crossed the 't's. De Valera was the main architect who inspired, dictated and supervised at every stage. Hearne was more his amanuensis than his architect. De Valera gave oral instructions to Hearne and these were put into legal language. Hearne knew Dev's line of thinking and he interpreted it into draft form. It is important not to over-estimate or under-estimate either de Valera or Hearne. They were a team in creating the Constitution."<sup>123</sup>

While this is a very fair assessment, this debate turns to some extent one what means by the concept of architect.

De Valera certainly had a clear vision of what he wanted: an autochthonous, republican Constitution in which the Crown would play no role and which reflected traditional nationalist thinking in areas such as language, religion and the family. Beyond that, de Valera probably had no fixed views and was content to permit Hearne (and, of course, the other members of the drafting team) to design and construct the Constitution. This, of course, is not to suggest that either Hearne or the drafting team had a free hand - they worked to instructions and de Valera had ultimate political control. There is also abundant

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<sup>123</sup> Brian Kennedy, *loc.cit.*, 122. Kennedy had the inestimable benefit of having interviewed Moynihan in January 1986 about the drafting of the Constitution, but the article was written just before the de Valera papers were released.

documentary evidence to show that the drafting team engaged in extensive dialogue with de Valera as they encountered particular difficulties<sup>124</sup> or as the drafting process itself was coming to an end in those busy months of March and April 1937.<sup>125</sup> De Valera's recorded comments on these issues demonstrate that, for a layman, he had an extraordinarily good grasp of the subtleties of constitutional law

Nevertheless, it seems impossible to avoid the conclusion that many of the important new and innovative features of the Constitution - such as, e.g., Articles 15.4, 26, 37, 40.1. and 40.3 - were the spontaneous product of Hearne's own thinking. It is also self-evident from the 1934 Report that its members (Roche excepted) were persons who were anxious to re-inforce constitutional protection, safeguard the supremacy of the Constitution via the referendum process and welcomed the prospect of vigorous judicial review of legislation to the point of suggesting the establishment of a special Constitutional Court. Not surprisingly, this thinking clearly influenced the drafting of the Constitution itself.

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<sup>124</sup> See, e.g., the discussion in late March 1937 regarding the hiving off of material contained in the original Article 43 into the new Article 45: see S. 9715.

<sup>125</sup> According to a memorandum (S. 9748) prepared by the Assistant Secretary to the Government (P. Kennedy) in December 1938 the Committee "were in constant touch with the President [de Valera]" and they had met "without a break, up to the end of April [1937], some of the sittings lasting until midnight or later."



The fact that the drafting Committee consisted entirely of pro-Treaty supporters<sup>126</sup> must, moreover, not only have helped to ensure continuity with the 1922 Constitution, but also, generally speaking, to have operated as a moderating force. In addition, Professor Keogh has further observed that the drafters:

"...were of a liberal disposition [and were] all people of wide culture. They were wholly free of the stridency associated with certain vociferous elements in the Irish Catholic Church in the 1930s. All...had broad intellectual horizons. None were the victims of then fashionable ideological phobias."<sup>127</sup>

De Valera was indeed fortunate in his drafting team, for if he did not have had the benefit of such a skilled and broad-minded committee, it is more than likely that both the content and the design of the Constitution would have suffered accordingly. In the hands of others, it is likely that the Constitution would have been fatally damaged through

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<sup>126</sup> Hearne was a Waterford Redmondite. As a student in University College, Dublin in 1919 Hearne had shared with James Dillon (later Minister for Agriculture) the role of defending the "old, unfashionable order" of the Irish Party and the pair were known as "the last frontiersmen of the Irish Party" see Manning, *James Dillon: A Biography* (Dublin, 1999) at page 27. Moynihan "supported the terms of the Treaty but said later that he kept his opinions to himself in his republican family": McMahan, *loc.cit.*, 72. It is difficult to believe that O'Donoghue would have been appointed a District Justice in 1923, still less that McDunphy would have been appointed Assistant Secretary in the Department of the President of the Executive Council in the same year, unless they were thought to have pro-Treaty sympathies.

<sup>127</sup> Keogh, *Church, State and Society*, *loc.cit.*, 106.

the influence of the confessional, right-wing, authoritarian thinking. While the Constitution contained some small elements of this thinking (e.g., the ban on divorce and, more arguably, the reference to the "special position" of the Catholic Church), the drafters also ensured that the Constitution contained at least as much of the thinking of Montesquieu and Paine as it did of Pius XI. The fact that the Constitution has not only survived but, indeed, thrived, in a totally different Ireland over sixty-three years later provides its own testament to the ability of the drafters to influence de Valera's thinking and to produce a document which transcended the cultural values of Ireland of the 1930s.

## CHAPTER 5:

### **“HEADLINES TO THE LEGISLATURE”?: THE DRAFTING OF THE CONSTITUTION AND JUDICIAL REVIEW OF LEGISLATION**

*Professor Kelly's thesis*

Perhaps the most intriguing question that can be asked about the drafting of the Constitution is this: to what extent did the drafters envisage that judicial review would flourish and that legislation would frequently be tested for its compatibility with the Constitution in general and the fundamental rights guarantees in particular? The conventional view is that the drafters had no such intention. In particular, Professor Kelly was firmly and consistently of the view that Mr. de Valera did not take seriously the power of judicial review and that he had simply intended the fundamental rights provisions of the Constitution to be mere "headlines" for the Oireachtas. Thus, writing in 1967, Kelly stated:



"It was plain, however, from the course taken by the debate in the Dail on the draft Constitution that Mr. de Valera did not really intend the fundamental rights provisions to have any greater effect in practice than the corresponding provisions of the former Constitution had. In the years 1932-1937 his Government had been caused some trouble by the attempts of Opposition lawyers to have the Constitution (Amendment No. 17) Act 1931 declared unconstitutional, and many parts of the Constitution debate show very clearly that the new Fundamental Rights Articles, so far from being intended to facilitate the challenging of legislation as unconstitutional, was meant to make this almost impossible. Abundant passages from Mr. de Valera's speeches show that the inclusion of these Articles was intended primarily as a statement of the powers of the legislature, and that the 'shackling' of the legislature, as he put it, by constitutional restrictions was intended by those Articles to be averted rather than effected. It is obvious, in reading the reports of the debate, that the Government was inviting the people to enact the Fundamental Rights Articles merely as 'headlines' for the Oireachtas; a situation in which judicial review of statutes in the light of these Articles was far from its mind."<sup>1</sup>

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<sup>1</sup> *Fundamental Rights in Irish Law and Constitution* (Dublin, 1967) at 18. Kelly later commented (at 20) that the idea of "judicial review of legislation in the light of constitutional declarations" had

At the time of writing in 1967 Kelly was responding to nothing less than a constitutional revolution which had shaken the legal system over the previous five years or so. Moreover, some of this jurisprudence appeared to rest on shaky foundations and this was especially true of the unenumerated personal rights doctrine which had been developed by Kenny J. in *Ryan v. Attorney General*<sup>2</sup>. This doctrine - the very coping stone of this constitutional revolution - had rested in large part on a comparison of the language of Article 40.3.1 with that of Article 40.3.2. As Article 40.3.1 commits the State to protect the fundamental rights of the citizens and as Article 40.3.2 provides that the State shall "in particular" protect the life, person, good name and property rights of every citizen, Kenny J. concluded, following a grammatical

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seemed "downright unreal" to Mr. de Valera. This appears to be a widely held view, see, e.g., Heuston, "Frances Elizabeth Moran" (1989) 11 *Dublin University Law Journal* 1, 9:

"From about 1960 the Irish judiciary has displayed a remarkable tendency towards innovation. A series of judgments of great power and originality began to interpret the Constitution in a way which would have astonished Mr. De Valera. Fundamental rights unknown in 1937 have been discovered beneath the formal language of the Constitution."

The same point was trenchantly made by the former Taoiseach (Dr. Garret FitzGerald TD) writing in *The Irish Times*, July 27, 1991:

"De Valera clearly never envisaged the process by which, for example, the courts from 1965 onwards were to proclaim as inherent in the Constitution some dozen personal rights concerning which that document is actually silent - limiting substantially by this process the legislative powers of the Oireachtas upon which de Valera had placed such emphasis."



construction of the relevant provisions, that the personal rights referred to in Article 40.3.1 were not confined to the rights which had been expressly enumerated in Article 40.3.2 or, for that matter elsewhere in the Constitution

The decision in *Ryan* set in motion a huge expansion of judicial power and paved the way for the recognition by the courts of approximately twenty or so unenumerated personal rights in the decades that followed.<sup>3</sup> While few have doubted the beneficial effects of the *Ryan* decision, serious questions have been raised about the very legitimacy of this jurisprudence.<sup>4</sup> Most commentators are sceptical of whether such a development had ever been intended or even contemplated by the drafters.<sup>5</sup> It is not surprising, therefore, that Kelly should have queried

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<sup>2</sup> [1965] IR 294.

<sup>3</sup> See generally, Kelly, *op.cit.*, at 745-789; Casey, *Constitutional Law in Ireland* (Dublin, 2000) at 394-449.

<sup>4</sup> Not least by Professor Kelly himself.

<sup>5</sup> See, e.g., the comments of Keane J. in *IOT v. B* [1998] 2 IR 321, 366:

“The ‘unenumerated rights’ doctrine did not emerge until nearly 30 years after the enactment of the Constitution. It may not have been within the contemplation of its framers that such a doctrine would emerge. However, whether or not such a development was envisaged, they cannot have contemplated that courts of local and limited jurisdiction should have such a role. So to hold would be to construe the relevant provisions of the Constitution in an unjustifiably literal and pedantic fashion and one which would be wholly at variance with the spirit, if not the precise wording, underlying those provisions which were clearly intended to assign to the High Court and this Court an exclusive role in the interpretation of the Constitution and the development of its associated jurisprudence.”



fundamental developments which appeared to rest on such slender foundations.

However, if we attempt to review afresh all the evidence which is now available, it seems difficult to avoid the conclusion that Kelly understated - perhaps even significantly understated - the extent to which judicial review of legislation had been envisaged by the drafters. Indeed, if all of the evidence now available had been available to Professor Kelly at the time he made his comments, it may be that he would have revised his opinions.<sup>6</sup> At all events, it will be seen that if one compares the two Constitutions, one finds that at almost every point, the potential for judicial review of legislation and the protection of individual rights was enhanced by the present Constitution by contrast with the 1922 document. There now seems little doubt but that these changes were

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<sup>6</sup> Writing in 1988 Professor Kelly expressed a similar view to what which he had written some twenty-one years, see "Fundamental Rights and the Constitution" in Farrell ed., *De Valera's Constitution and Ours* (Dublin, 1988) at p. 163:

"Even Mr. de Valera, though he entrenched this elaborate bill of rights in his Constitution, intended it to be primarily a set of 'headlines to the legislature' rather than a hurdle on which that legislature would frequently stumble and fall; his contributions to the Dail debate on the draft Constitution seem to me to show that he did not see himself as a calling into existence a sort of legal shredding-machine, which a later generation of lawyers and judges would use with devastating effect on the Acts of the sovereign Irish people's own parliament."

It is, perhaps, possible upon a close reading of this passage (especially in the first few lines) to detect a slight modification upon the views expressed in 1967.

intentional, even if the drafters could not, of course, have anticipated the full extent of the judicial activism which would subsequently come to pass.

The critical question, however, is whether Professor Kelly's analysis was correct. It is, perhaps, impossible to give a definitive answer to this question. All we can do is to survey the available evidence. That evidence now consists of three main sources: (a) the actual language and structure of the Constitution; (b) the Dail Debates in May and June 1937 on the Constitution in May and contemporary commentary thereon and (c) the travaux preparatoires of the Constitution. Of course, the latter - which consist mainly of files held in the Public Records Office and the de Valera papers in Archives Department in University College, Dublin - were simply not available in 1967 when Professor Kelly was writing on this topic. It may be convenient, therefore, to examine this evidence separately, commencing with the actual language structure of the Constitution.

### *The actual language and structure of the Constitution*

If one simply examined the actual structure and language of the Constitution, it would be hard to agree with the Kelly thesis. First, Article 34.3.2 confers on the High Court and Supreme Court an express power of judicial review of legislation and in this respect, the Irish Constitution went



further than many similar constitutions from that era.<sup>7</sup> Of course, it might, perhaps, be said in response that Article 65 of the Irish Free State Constitution contained a broadly similar provision which had proved to be ineffective and that de Valera had simply followed the 1922 experience safe in the knowledge that this clause was likely to prove to be a paper tiger.

Secondly, however, the procedure provided by Article 26 enables the President, following consultation with the Council of State, to refer Bills passed by both Houses of the Oireachtas to the Supreme Court so that their consistency with the Constitution may be determined. If de Valera had not really intended that the power of judicial review would be taken seriously, it seems strange

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<sup>7</sup> It is true that in the case of Czechoslovakian Constitution of 1920 "provision was made for a constitutional court which was to have the power to nullify any law which was repugnant to the Constitution." But even in this case "the implementation of the provision was delayed": see "Czech Republic" in Blaustein and Flanz, *Constitutions of Countries of the World* Vol. 5 (June 1993)(Oceana Publications). Although the Finnish Constitution of 1919 provided for a brief catalogue of fundamental rights with a rudimentary form of judicial review, in practice this proved largely ineffective: see generally Sheinin, "Incorporation and Implementation of Human Rights in Finland" in Sheinin ed., *International Human Rights Norms in the Nordic and Baltic Countries* (The Hague, Martinus Nijhoff, 1996)

Even the much admired German Weimar Constitution of 1919 did not provide for judicial review in this sense. In the words of Michalowski and Woods, *German Constitutional Law* (Ashgate, 1999) (at 3):

"The basic rights listed in the Weimar Constitution did not on the whole accord individual subjective rights, but were



that the Constitution would have contained such an elaborate and novel procedure which had no counterpart at all in the 1922 Constitution. In this regard, it may be noted that the very power to refer such Bills represents the President's principal discretionary function under the Constitution<sup>8</sup> and that, likewise, the Council of State's major role is to advise the President in this regard.

Thirdly, the power of judicial review contained in Articles 34 and 26 is re-inforced by the prohibition on the enactment of unconstitutional legislation contained in Article 15.4. and by the statement contained in Article 28.2 that the executive power of the State may only be exercised in a manner which is consistent with the Constitution itself. Article 15.4 provides:

"1. The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof.

2. Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof shall, but to the extent only of such repugnancy, be invalid."

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rather just general political statements that needed the enactment of statutory provisions to award individual rights."

<sup>8</sup> The other is the (never hitherto exercised) power contained in Article 13.2.2 to refuse a dissolution to a Taoiseach who has lost the support of a majority of the Dail.

Article 28.2 provides that:

“The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.”

Neither Article 15.4 nor Article 28.2 had any counterpart in the 1922 Constitution. Of course, it might be said that both Article 15.4 and Article 28.2 did no more than expressly state a principle which is in any event inherent in a system of judicial review where legislative enactments and executive action are subjected to examination for consistency with the higher law contained in the Constitution itself. Nevertheless, the plain language of Article 15.4 and Article 28.2 seems to re-inforce and complement the entire system of judicial review of legislative and executive action. If the drafters had never intended to take the power of judicial review seriously, it seems odd that the Constitution would have contained such novel provisions under-pinning the entire system of judicial review.

Finally, the preamble to Article 45 would seem to provide very strong evidence that the other fundamental rights provisions contained in Articles 40 to 44 were themselves intended to be taken seriously. Again, Article 45 represents a conspicuous novelty in that it expressly declares that one provision alone of the fundamental rights articles is to be non-justiciable:

“The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of these principles in the making of laws shall be the case of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.”

Not surprisingly, the very language of the opening words of Article 45 has been relied on by the Supreme Court in order to demonstrate that the provisions of Articles 40 to 44 were intended to be justiciable and to have legal effect. Two prominent examples suffice to illustrate this rather obvious point. In *Buckley v. Attorney General*<sup>9</sup> counsel for the State argued that “the exigencies of the common good” (a phrase contained in Article 43.2.2) were “peculiarly a matter for the Legislature” and whose judgment and decisions in this regard were “absolute and not subject to, or capable of, being reviewed by the courts.” This submission was forcibly rejected by O’Byrne J. in the following terms:

“We are unable to give our assent to this far-reaching proposition. If it were intended to remove this matter entirely from the cognisance of the courts, we are of opinion that it would have been done in express terms, as it was done in Article 45 with reference to the Directive Principles of Social Policy, which are



inserted for the guidance of the Oireachtas, and are expressly removed from the cognisance of the courts.”<sup>10</sup>

This point was also made by Walsh J. in *Byrne v. Ireland*<sup>11</sup> where he invoked the language of the preamble to Article 45 to demonstrate on an application of the principle, *exclusio unius, expressio alterius* that the other provisions of Articles 40 to 44 had full legal force:

“This express exclusion from cognisance by the courts of these particular provisions reinforces the view that the provisions of the Constitution obliging the State to act in a particular manner may be enforced in the courts against the State as such.”<sup>12</sup>

Likewise, as has frequently been observed, the language of Article 40.3.1 and Article 40.3.2 leads one to the conclusion

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9 [1950] IR 67.

10 *Ibid.*, 83.

11 [1972] IR 241.

12 *Ibid.*, 265. See also the comments of Kingsmill Moore J. in *Comyn v. Attorney General* [1950] IR 142, 160 to the effect that the real significance of Article 45 for the legal community lay:

“in the implication that the duties referred to in Articles 40 to [44] are real duties enforceable by the courts at least to the extent that any law which neglects or nullifies them can be declared invalid - as has been done.”

that “the general guarantee in sub-section 1 must extend to rights not specified in Article 40.”<sup>13</sup> It follows that:

“If Mr. de Valera truly intended that Article 40 would be no more than ‘general headlines for the legislature’ then he defeated his object by handing the courts a gilt-edged opportunity for taking an expansive view of the role of judicial review by drafting Article 40.3 in the way that has subsequently been done.”<sup>14</sup>

Measured against the actual text of the Constitution alone, it is hard to see the justification for the Kelly thesis.

### *The Dail Debates*

It is true that there is some evidence from the Dail Debates on the Constitution which supports the view that Mr. de Valera never seriously intended that the courts should test laws passed by the Oireachtas for compliance with the fundamental rights provisions of the Constitution. This emerges most notably from Mr. de Valera’s celebrated “headlines to the legislature” exchange with Deputy McGilligan at the Committee Stage:

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<sup>13</sup> *Ryan v. Attorney General* [1965] IR 294, 313. Professor Kelly fully agreed in *Fundamental Rights, op.cit.*, 42 that this analysis was “logically faultless.”

<sup>14</sup> Hogan, “Unenumerated Personal Rights: Ryan’s Case Re-Evaluated” (1990-1992) 25-27 *Irish Jurist* 95, 113.

"Mr. de Valera: You must give to the legislature the power of regulating the exercise of those rights in such a manner as to ensure that the exercise of those rights will not be contrary to the common good. That is absolutely necessary: you cannot avoid it, and you cannot tie yourself up by precluding the legislature from doing it. [Deputy McGilligan] may say: 'Then what is the good of your phrase here at all - the phrase about the right of the citizens to assemble peaceably? He may ask, 'What is its value?' I say that it is of value and that it is a general headline to the legislature.

Mr. McGilligan: Which they can neglect.

Mr. de Valera: Yes, unfortunately, they can.

Mr. McGilligan: And the Courts cannot interfere?

Mr. de Valera: Unfortunately - and the Deputy knows it quite well - we cannot provide by any Constitution against the possible abuse of its power by the legislature in future. It is vain to attempt to do it. All we can do is set headlines for the legislature, as we are doing here - headlines with regard to the things the legislature should aim at."<sup>15</sup>

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<sup>15</sup> 68 *Dail Debates* at Cols. 216-7 (June 10, 1937).



And, speaking at an earlier stage of the debate, Mr. de Valera had said:

“In future the Legislature will have to look after the public interest, as it is doing today. Are we going to shackle the Legislature in the future in a way in which it is not shackled today, and in which it would be most unwise to shackle it? We are providing for that freedom of action to work in the public interest and to safeguard the public interest in the future which the Legislature has today - that and no more...I think the Legislature ought to be enabled in its own judgment [what the public interest consists of] and not the courts. The courts have to interpret the laws. The courts have not placed upon them the responsibility that the Legislature has. The Legislature has the responsibility of working in the public interest and of seeing, in the passing of its laws, that the rights of the individual, and the rights of a community, as a community do not conflict. That is the duty of the Legislature; and what we want to see is that in future the Legislature will not be so restricted that it will not be able to function properly.”<sup>16</sup>

However, Professor Kelly also fairly acknowledged that Mr. de Valera had avoided giving an unequivocal answer on this question during the Dail Debates on the Constitution:

"In an earlier exchange [Mr. de Valera] had completely evaded the central question: were the Courts intended seriously to test legislation in the light of the fundamental rights Articles?

'If [Deputy John A. Costello] says 'they give such freedom to the legislature that the Courts will not be able to interfere with the legislature', I can only say that, as long as the legislature acts properly, the Courts ought not to interfere with the legislature; as long as it carries out the functions necessary for the life of the community, then the Courts ought not to interfere. For the Courts to interfere in such a case would be harmful and would be to the public detriment.'"<sup>17</sup>

But there is also significant textual evidence from the same Dail Debates - to which Professor Kelly did not refer in this context - which may be thought to point in the other direction. Thus, introducing the draft Constitution to the Dail on May 11, 1937, Mr. de Valera said that:

"with regard to Supreme Court, one of its principal functions will be the function of determining whether

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<sup>16</sup> 67 *Dail Debates* at Cols. 1784-6 (June 3, 1937).

<sup>17</sup> Kelly, *op.cit.*, 19-20, quoting from 67 *Dail Debates* at Col. 1614 (June 2, 1937).

Acts passed by the legislature are, in fact, repugnant to the Constitution or not."<sup>18</sup>

Indeed, a little earlier in the same speech Mr. de Valera had described the purpose and effect of Article 26 in a manner which can only suggest that he clearly contemplated active judicial review of legislation:

"If a law is enacted which is contrary to the Constitution, and if that law is held by the Supreme Court to be invalid, and if certain actions are taken or certain things done under that law, they might not be revocable. It is therefore advisable at the earliest possible stage to draw attention to the fact that the particular Bill is against the Constitution and to stop it in its course at least before it becomes law. That is the special function of the President...But it is not the President who decides whether it is against the Constitution or not. His function is simply one of causing the measure to be referred. It is an important power, and I think that some functionary or some institution in the State ought to have the power of reference and there should be no waiting until the measure becomes law. If the measure did become law, acts may be possibly done under it, and

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<sup>18</sup> 67 *Dail Debates* at Col. 54 (May 11, 1937).



then these acts may have consequences which are not always removable."<sup>19</sup>

These comments clearly suggest that the Article 26 power would have to be exercised at least from time to time by the President, but even the reference to the "irrevocability" of certain acts done on foot of an unconstitutional law provides further evidence to refute Kelly's thesis inasmuch as it tends to show that de Valera and the drafters anticipated that the courts would inevitably have occasion on at least some occasions to declare Acts of the Oireachtas (or, in the special case of Article 26, Bills passed by both Houses of the Oireachtas) to be unconstitutional.

Perhaps the fullest statement of Mr. de Valera's attitude to the fundamental rights provisions is to be found in his speech on the Second Stage. He commenced by saying:

"In this part [of the Constitution] we set down what are the rights which the individual and the family have as against the operation of *an otherwise all-powerful Parliament, the Oireachtas*, acting on behalf of the community and interested in the common good."<sup>20</sup>

While Mr. de Valera did not elaborate further, the italicised words again provide some evidence that the fundamental

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<sup>19</sup> 67 *Dail Debates* at Cols. 48-49.

rights provisions were intended to act as a check on the powers of an “otherwise all-powerful Oireachtas.” The rest of his Second Reading speech so far as it concerned fundamental rights sought to provide a justification for the existence of the clauses (“as far as is practicable”, “subject to public order and morality” etc.) which qualified these very rights.

The case against the qualifying clauses was subsequently well made by Deputy Rowlette during the debate on the Committee Stage:

“Where general principles appear, one finds that almost every one of them is qualified by following phrases. So that when attempting to interpret them one does not know what meaning is conveyed. That occurs over and over again. Instead of a clear statement as to the structure of the State and the right of individual citizens, we have a vague, indeterminate series of statements and sentences which to a great extent are opposed to each other and are almost contradictory.”<sup>21</sup>

But this very point had been anticipated by Mr. de Valera during his Second Stage speech:

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<sup>20</sup> 67 *Dail Debates* at Col. 61. Emphasis supplied.

<sup>21</sup> 68 *Dail Debates* at Col. 387 (June 10, 1937).

"These [fundamental rights] in order to be accurate, have to be expressed very carefully. You have the natural conflict between the rights of the individual and the rights of the community as a whole. You cannot make these statements in an absolute way....I think it was Deputy Costello in some public statement who suggested that the sanctified phrase 'The liberty of the individual is inviolable' is omitted. It is omitted, because in fact the liberty is not inviolable. Liberty may mean licence and licence has to be checked and curbed in the common interest. Therefore, instead of stating, as if it were an absolute thing, 'The liberty of the individual is inviolable' - which we all knew in fact was not so - it is stated in a way which can be defended and which is accurate; in other words, that if the liberty of the individual is interfered with it will be in accordance with law, for the common good; that that will not be done in an arbitrary way, but that it will be done in accordance with law."<sup>22</sup>

Again, perhaps, with the benefit of hindsight Mr. de Valera might be thought to have had the better of the argument. Save with very limited exceptions - such as, e.g., freedom from torture - no fundamental rights can be described as absolute and must, on occasion, yield to the superior considerations of the public interest. The opposition clearly envisaged that the qualifying clauses would always defeat

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<sup>22</sup> 67 *Dail Debates* at Cols. 61-63.



the right protected, but experience has shown that this was too pessimistic an assessment.

Summing up, therefore, as far as the Dail Debates are concerned, it must be conceded that in many respects the evidence is equivocal and Mr. de Valera's comments are suitably ambiguous and open to a variety of interpretations. Nevertheless, when this evidence is looked at as a whole it would seem that it is not as compelling in support of Professor Kelly's thesis as he suggested and that there is, in fact, some significant evidence from the Dail Debates which points in the exact opposite direction.

#### *The travaux preparatoires of the Constitution*

Professor Kelly did not, of course, have available to him any of the drafters' working papers. In a sense, even the very terms of reference of the 1934 Constitution Review Committee provide almost irrefutable evidence of Mr. de Valera's determination to protect fundamental rights via a system of judicial review. But the drafters' working papers also provide a clear insight into their thinking. Almost all the available evidence suggests that the drafters were conscious of the fact that they were drafting a document in which the role of the courts and judicial review would loom large. A detailed note prepared by Hearne on April 4, 1937 formed the basis of de Valera's radio address and press statement on the occasion of the publication of the Constitution some four weeks later on May 1, 1937. While

the following passage did not find its way into the final version of address - it was evidently considered to be too technical - it nonetheless provides clear evidence of Hearne's thinking:

"In a list before me of 52 countries, I find that the courts of 14 of these countries have powers comparable to those of the Supreme Court of the United States to pass on the constitutionality of laws, that the courts of 17 [such countries] have limited powers in this regard and that the courts of 21 have no power to pass on the question at all. Where the Constitution of a country is written down and the legislative powers of the Parliament are declared to be subject to the Constitution, there must be authority to determine the question as to the constitutionality of laws. The view on which the draft proposal in the draft Constitution is based is that constitutional issues should be determined expeditiously and finally on the authority of the highest judicial tribunal in the land."<sup>23</sup>

The only reference which de Valera made in this context in his subsequent radio address was in respect of the Article 26 powers of the President to refer Bills to the Supreme Court:

"These powers are undoubtedly great powers and will call for the exercise of a wise discretion. The due

exercise of these powers will, however, provide a safeguard for the Constitution itself and a protection for the people against legislation contrary to the public interest.”<sup>24</sup>

Neither Hearne’s draft note nor de Valera’s comments suggest any lack of awareness regarding the significance or importance of judicial review of legislation. This conclusion is also borne out by an examination of the Departmental responses to the draft Constitution. It would be impossible to cover every aspect of this drafting process under this heading, but it is proposed, first, to survey the general departmental reaction to the structure of the new Constitution and, secondly, to examine the drafting of certain critical individual provisions.

### *The general departmental reaction*

As we have already seen, the first official draft of the Constitution was circulated in draft form to various Government Departments in the second half of March 1937. J.J. McElligott<sup>25</sup>, the Secretary of the Department of Finance, prepared a lengthy memorandum prepared which

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<sup>23</sup> S. 9868.

<sup>24</sup> *The Irish Times*, May 1, 1937.

<sup>25</sup> For a profile of McElligott, see generally Fanning, *The Irish Department of Finance 1922-1958* (Institute of Public Administration, 1978), especially at 490-492.



was circulated on March 23, 1937.<sup>26</sup> Among his key objections was the extent to which the draft Constitution provided for judicial review of legislation:

"apart from questions of complexity and expense involved in the Constitution, it seems that there will be a degree of uncertainty introduced into our legislative system by the extent to which recognition is given to the doctrine of repugnance."

Not surprisingly, McElligott was particularly troubled by the draft text of Article 43. At this stage Article 43 not only dealt property rights, but also included a number of additional sections, many of which were subsequently included in Article 45. McElligott objected that such "declaratory phrases" while "individually unobjectionable as a statement of social policy" might "if launched into the void in the draft Constitution, recoil like a boomerang on the Government of some future day in circumstances not anticipated by the originators." The memorandum also argued that the draft Article 43 was:

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<sup>26</sup> S. 10159. This thirty-nine page memorandum began by stating that it look the line "that it was not called upon to praise but rather to point out possible defects and difficulties, so that what follows is conceived in that spirit." This was rather an understatement, for what followed was in many respects a devastating attack on the fundamental purposes and objects of the Constitution itself. But McElligott was noted for his "readiness to present his political masters with what he knew was unpalatable advice couched in caustic and coruscating prose": Fanning, *op.cit.*, 491.

"...not of a kind usually enshrined in the Constitution. They will not be helpful to Ministers in the future but will provide a breeding ground for discontent, and so create instability and insecurity. They are consequently objectionable and even dangerous. Their provisions are too vague to be of positive assistance to any Government and are yet sufficiently definite to afford grounds for disaffection to sections of the Community, who might claim that the Government were not living up to the Constitution.

The provisions are the more objectionable by reason of the earlier Articles relating to repugnance under which laws may be disallowed after reference to the Supreme Court or too a referendum. Some of the provisions are too advanced, some too conservative and many cut across actions taken daily by the Government, e.g., restrictions on private property and initiative.

Further the provisions are most unnecessary. Distinct advances along the lines of social and economic policy outlined have already been made without the aid of these declaratory provisions, some of which are themselves, it should be noted, repugnant to present Government policy, e.g., we do not settle 'as many families as practicable' on the land.<sup>27</sup> 'Five acres and a cow' would suffice if that were the policy. We create economic holdings of twenty-five acres...

Also, the provisions are contradictory. The State has established monopolies in important articles such as sugar, electricity, cement, tyres, oil etc.<sup>28</sup> The reference to the 'economic domination of the few in what pertains to the control of credit'<sup>29</sup> is not understood. In so far as one can attach any intelligible meaning to it, it is untrue, but it could easily be worked up by agitators as a weapon of attack on the Banks, the Agricultural Credit Corporation, the Industrial Credit Co. or against any large joint-stock concern."

These concerns were also reflected in the observations of the Department of the President's on the first draft which were also circulated at around the same time. In essence, these particular observations appear to have constituted an Article by Article commentary with de Valera's own personal response to suggestions and comments which had been made by others on the first published draft. It seems clear from the comments on Article 43 that de Valera had already realised by this stage that it would be necessary to distinguish between fundamental rights (which would be justiciable in the courts) and certain types of socio-economic rights (which would not be so justiciable):

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<sup>27</sup> As now provided for in Article 45.2.v.

<sup>28</sup> I.e., the provisions of the present Article 45.3 notwithstanding.



“The President’s opinion is that a number of these sections are merely statements of moral principles and should not be created as positive rights.

I have accordingly suggested the following formula which should be inserted at the beginning of this portion of the Constitution:

‘The State shall be guided in its general policy by the principles embodied in this Article, but the said Article shall not of itself operate to confer rights.’”<sup>30</sup>

Gavan Duffy J. made very similar comments in respect of the fundamental rights provisions in a note to de Valera on April 2, 1937:

“The articles intended to carry with them legal redress for the citizen can be segregated from those which enunciate and classified under some such separate title as ‘Legal rights secured to the citizens.’ These principles might be entitled ‘Guiding Principles of Social Policy’ or ‘Principles of Social Policy’, the term

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<sup>29</sup> A modified version of this phrase appears in the present Article 45.2.iv.

<sup>30</sup> S. 9715. The identity of the writer of the memorandum is unclear, but at a guess it is probably either Dr. Moynihan or Mr. McDunphy.

'personal rights' being omitted to prevent confusion, as a 'right' implies legal redress."<sup>31</sup>

We see here the genesis of the preamble to the present Article 45<sup>32</sup> and the origins of the clear division that was

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31 UCD 1082/6. Underlining in the original. Mr. de Valera also received a personal letter from a Mr. John Finnerty dated May 21, 1937 (contained in file S. 9852). Mr. Finnerty appears to have been a senior legal adviser to the Department of Transportation in Washington DC, who, along with a list of other prominent Irish-Americans, had been sent a personal copy of the draft Constitution by Mr. de Valera's personal secretary:

"Let me say that I particularly admire Articles 40, 42, 43 and 44 and perhaps especially the social provisions of Article 45. I assume that the provisions of the 1<sup>st</sup> paragraph of Article 45 excluding the courts from taking any cognizance of the operation of these principles is not without relevance to the experience we are now having with our own Supreme Court."

Somewhat surprisingly, this appears to be the only reference in the Constitution's drafting papers to the debate which was then engulfing the political debate in the United States regarding the role of the Supreme Court. Although it might not have been fully apparent at the time Finnerty was writing, the "switch in time" - whereby the US Supreme Court abandoned its use of substantive due process to invalidate social legislation of which it disapproved - began in late March 1937 with the judgment of Hughes C.J. in *West Coast Hotel Co. v. Parrish* 300 US 379 (1937). While de Valera was probably not familiar with the details of the clash between the US Supreme Court and President Roosevelt and Congress, it would be surprising if the contemporary US experience did not suggest the need for caution in respect of any suggestion that socio-economic rights of the kind contained in Article 45 should be given justiciable status.

32 The Department of Finance was pleased with this change and as McElligott noted in his comments on the third revise on April 24, 1937 (S. 10160):

"The Preamble which now introduces this Article deprives it of the character of a declaration of rights enforceable in the courts and to that extent it meets the objections urged by the Department of Finance."

ultimately drawn between the Fundamental Rights provisions on the one hand (Articles 40 to 44) and what became the Directive Principles of Social Policy (Article 45) on the other:

“The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of these principles in 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 the Constitution.”

The language of the Preamble to Article 45 closely follows a draft suggested by Gavan Duffy J. on April 2, 1937:

“The Oireachtas is the guardian of the Constitution. In fulfilling that trust the Oireachtas shall faithfully observe the guiding principles of social policy set down in Articles....The application of these 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.”<sup>33</sup>

Of course, the very fact that de Valera agreed to such an elaborate distinction being made at this point of the drafting process underscores the argument which is made here, namely, that he fully intended that the other fundamental rights provisions contained in Articles 40 to 44



would be justiciable and would form the basis for an attack on the constitutionality of enactments of the Oireachtas. Certainly, it is manifest from these comments that this distinction must have been to the forefront of the minds of the drafting committee at this time.

This point had also excited the attention of two important commentators who themselves had been members of the 1922 Constitution Committee, James Douglas<sup>34</sup> and Professor Alfred O’Rahilly.<sup>35</sup> The former had noted that:

“One important feature of the draft Constitution is the recital of a large number of ‘fundamental rights’ in Articles 40 to 44. Article 45 enumerates a number of principles of social policy which shall not be cognizable by any Court and which have therefore no constitutional validity.

Articles 40 to 44 are proposed to be binding on the Oireachtas and it would appear that the validity of any

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<sup>33</sup> UCD P. 1082/6.

<sup>34</sup> Douglas had been a member of the Senate from 1922-1936; 1938-1943; 1944-1954 and served - with Professor O’Rahilly - on the 1922 Constitution Committee. See generally, Gaughan ed., *Memoirs of Senator James G. Douglas, Concerned Citizen* (Dublin, 1998).

<sup>35</sup> Professor O’Rahilly was then Professor of Mathematical Physics at University College, Cork and he had later become President of the College. He had previously been a member of the 1922 Constitution Committee. O’Rahilly has been described as “the outstanding controversialist in the Ireland of his day, presenting trenchantly argued - if often idiosyncratic - views on virtually

law may be challenged on the ground that it does conform to these articles. Whether or not it is wise to set out fundamental principles of government in the Constitution is a matter on which a difference of opinion existed in the original Constitution Committee. One of the drafts contained a statement of general fundamental rights not unlike those which appeared in President de Valera's draft. If the new draft Constitution is passed in its present form we may look forward to some very important arguments in the Supreme Court when constitutional cases are under consideration.

For instance, it is difficult to see how a Court can decide whether any particular Act has respected 'as far as practicable' the personal rights of the Constitution (Article 40.3.1) or whether the State has 'endeavoured' to ensure that mothers should not be obliged by economic necessity to engage in labour to the neglect of their duties in the home. The reason for the constitutional distinction between Article 45 on the one hand and Articles 40 to 44 on the other is not clear to me."<sup>36</sup>

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every topic of public debate": see Redmond, *Modern Irish Lives: Dictionary of 20<sup>th</sup> Century Biography* (Dublin, 1998) at 256.

<sup>36</sup> *The Irish Independent*, May 8, 1937.

The distinction between justiciable and non-justiciable rights was also strongly emphasised by Professor O'Rahilly. Speaking of Article 45, Professor O'Rahilly admitted that:

"Mr. de Valera is undoubtedly dealing with a difficulty; but I think that he has dealt with it in the wrong place and in the wrong way.

For outside [Article 45] the Draft Constitution lays down other social principles for the guidance of the Oireachtas and these declarations he has left to be cognisable by the Supreme Court. For instance, according to Mr. de Valera, the Court might be asked to decide whether such and such an Article has 'as far as practicable' respected the personal rights or whether in an enactment the State has really endeavoured to prevent the economic exploitation of mothers.

Why should the Court be bound to take cognisance of Articles 40 and 41 and be precluded from 'cognizing' Article 45. I see no reason for this discrepant attitude towards different Articles. Mr. de Valera, who gives the Supreme Court power to determine the constitutionality of a law, is surely not logical in withdrawing some of the inclusive social principles from the judge's cognisance. Personally, I reiterate, I am against giving this power to the Court. My only reason



is that we do not know what parameters of jurisprudence they will employ.

Without being a lawyer, I know enough of British jurisprudence and law principles - in which most of our legal men are saturated - to know that on many important points they differ from the presuppositions of Catholic sociology. Hence I see no use in recognising new social principles (i.e., new in relation to British legalism) in the Constitution and then allowing them to be pared down with the knife of an alien jurisprudence. But even I holding this view, which, apparently, is not shared, object to withdrawing part of the Constitution from the cognisance of the Courts.”<sup>37</sup>

These particular comments were also expressly drawn to the attention of the drafting committee.<sup>38</sup>

But the concerns that were expressed in these Departmental observations did not relate solely to the property rights and social policy provisions. De Valera’s own Department observed with respect to the fundamental rights provisions that:

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<sup>37</sup> *The Irish Independent*, May 15, 1937.

<sup>38</sup> The drafting committee prepared a bulky file (S. 9851) summarising a list of objections and comments made both in the press and elsewhere. The comments of both Douglas and O’Rahilly were summarised and included in this file.

“It is clear that as they stand many of them could be invoked so as to create very difficult situations.”

The Secretary of the Department of Justice, Stephen Roche, also prepared a lengthy memorandum which, not surprisingly given his clear antipathy to judicial review of legislation, expressed serious concerns about the potential for judicial activism which the new Constitution would afford. Roche was thus, for example, unhappy with the major/minor offences distinction contained in Article 38.2:

“If the Oireachtas thinks it proper to give Justices summary jurisdiction in the case of attempted suicide, it should not be in the power of anybody to occupy the time of the Supreme Court for days with the argument that attempted suicide is not a minor offence.”

Similar concerns were expressed by the Department of Education about aspects of Article 42<sup>39</sup>; by the Department

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<sup>39</sup> The Minister for Education (Thomas Derrig T.D.) wrote to de Valera on April 12, 1937 (S. 10159) expressing certain departmental concerns about Article 42, among them the question of whether Article 42.5 would provide sufficient constitutional authority for enactments such as the provisions of the Children’s Act 1929 (which allowed children to be sent to an Industrial School on the grounds of their parents’ poverty.) These fears were subsequently realised by decisions such as *In re Doyle*, Supreme Court, December 21, 1955. Here the Court held that s.10 of the Children’s Act 1941 (which allowed a Court to send a child to an industrial school where the parents were unable to support it) was invalid having regard to Article 42.1 and was not saved by reference to Article 42.5.



of Lands about the constitutionality of the Land Commission<sup>40</sup>; by the Department of Local Government

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Of course, in line with the recommendations of the 1934 Committee, the obligation on the State previously contained in Article 10 of the 1922 Constitution had been changed in the new Article 42.4 from to "provide" free primary education to "provide for" free primary education. The Department of Finance in their observations on the second revise on April 10, 1937 (S. 10159) noted with satisfaction that the obligation contained in Article 42.4 had been somewhat diluted. McElligott nevertheless expressed concern that it was "still open to the interpretation it places on the State an obligation to provide free books etc. for children in primary schools." (The Department of Lands expressed a similar concern lest Article 42.4 might impose additional financial obligations regarding the construction and maintenance of school buildings.) But while these precise concerns have not (at least to date) been shown to be well-founded, nevertheless the gist of Finance's fears - namely, that Article 42.4 would be interpreted in unexpected ways so as to place a heavy financial burden on the State - have been surely borne out by a series of remarkable decisions dealing with disadvantaged children. In *FN v. Minister for Education* [1995] 1 IR 409 Geoghegan J. held that the State's obligations under Article 42.5 meant that it was required "as soon as reasonably practicable" to make "suitable arrangements of containment with treatment" for the applicant, a young boy with severe behavioural problems. This was followed in quick succession by cases such as *DB v. Minister for Justice* [1999] 1 IR 29 and *TD v. Minister for Education* [2000] 2 ILRM 321 (where the State was required by injunction to construct and operate secure units and "high support" units for unruly teenagers) and *Sinnott v. Ireland*, High Court, October 4, 2000 (where the State was held to have breached its constitutional obligation by not providing appropriate education for autistic children). It is a fair surmise that McElligott - whose major objective was to minimise the "heavier bill presented by the new Constitution to the taxpayer" - would not have been pleased with these developments.

<sup>40</sup> Similar concerns were expressed by the Department of Finance in their comments of April 24, 1937 on the third revise (S 10160):

"No change has been made to meet the criticism that the use of compulsory powers of acquisition of property might be questioned under the section. Possibly the section is to be interpreted as merely prohibiting the abolition of the rights of property in general, but as it stands, it seems to be capable of being applied to any particular act of expropriation of the kind for instance being carried out every other day in the Land Commission. Those acts can



regarding aspects of Article 34<sup>41</sup>; by the Registrar of Marriages about aspects of Article 44<sup>42</sup> and by the Revenue Commissioners about aspects of Articles 34 and 37.<sup>43</sup> While

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hardly be called 'delimitations' of the exercise of the right of private property and are therefore not covered by [Article 43.2.2]."

It may be noted, however, that in *Fisher v. Irish Land Commission* [1948] IR 3 the plaintiff conceded that property could be expropriated for public purposes, in this instance, the distribution of lands to necessitous farmers. The constitutionality of section 39 of the Land Act 1939 was upheld, with Maguire C.J. observing tersely that it was not contested that the Legislature "has the power to expropriate owners so as to make land available for public purposes."

<sup>41</sup> In a memorandum dated March 22, 1937 (S. 9715B) the Department expressed concerns about Article 43: "It is imperative that the extensive powers of local bodies to acquire private property for public purposes should not be weakened."

<sup>42</sup> In a memorandum dated May 13, 1937 (S. 9903) the Registrar drew attention to the fact that the Marriage Acts (which prescribed different rules for marriages depending on the religious denomination of the celebrants) appeared to be inconsistent with the non-discrimination provisions contained in Article 44.2.3. While similar arguments have been advanced by other commentators (see, e.g., Kelly, *The Irish Constitution* (Dublin, 1994) at 1111), this point does not yet appear to have been litigated. However, in the light of cases dealing with Article 44.2.3 religious discrimination (such as, e.g., *M. v. An Bord Uchtala* [1975] IR 81) it is hard to see how, given a suitable case, such a challenge would not succeed.

<sup>43</sup> In a memorandum dated April 7, 1937 (S. 9715B) the Revenue Commissioners expressed concern lest Article 34.3.1 (which vests the High Court with a full original jurisdiction to determine all matters and questions, whether law or fact) might be interpreted as conferring a right of appeal on questions of fact from decisions of the Special Commissioners (now Appeal Commissioners) for Income Tax. They were also concerned that the limitation contained in Article 37 confining the vesting of limited judicial functions to non-judicial personages to civil matters only might affect aspects of tax collection and revenue penalties. They accordingly suggested that it might be desirable if the reference to "matters other than criminal matters" were to be deleted. This memorandum presciently anticipated arguments which were subsequently to be advanced in cases such as *Melling v. O Mathghamhna* [1962] IR 1 and *McLoughlin v. Tuite* [1989] IR 82.

the drafting committee sought to respond to these concerns by, for example, seeking advice from the Attorney General's Office on some of the issues raised<sup>44</sup>, the fundamental objection on the part of many Departments - concern that they would not be able to live up to the new Constitution's new guarantees and the consequential possibilities for judicial review - were simply brushed aside. Thus, in a letter dated April 13, 1937 enclosing the Department of Justice's response to the second revise Roche vainly pleaded with McDunphy to think again about the entire project, saying that:

"I dislike the whole idea of tying up the Dail and Government with all sorts of restrictions and putting the Supreme Court like a watchdog over them for fear that they may run wild and do all sorts of indefensible things."<sup>45</sup>

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<sup>44</sup> In a memorandum prepared by Philip O'Donoghue on May 26, 1937 (S. 9924) the Attorney's office sought to re-assure the Revenue Commissioners with regard to Articles 34 and 37. O'Donoghue argued that it was necessary for Article 37 to permit the delegation of certain limited judicial functions to non-judicial personages:

"It is absolutely necessary in order to give effect to much of our present day legislation that the Commissioners in the Circuit Court, Minister for Industry and Commerce, County Registrars, Referees (to mention but a few) shall be entitled to carry out certain functions of a judicial or quasi-judicial kind while persons affected by such decisions are not debarred from proceedings in the courts [to challenge such decisions on vires grounds]. Article 37 merely attempts to establish that the rulings of such quasi-judicial bodies shall not be upset on merely technical grounds, namely, that they were not judges. This is mischievous."

<sup>45</sup> S. 10159.



Not surprisingly, therefore, the Departmental submissions of the same date commenced with the following frank statement:

“Generally the Department felt that the draft Constitution went into too much detail whereas the Department’s feeling is that the shorter and more general the Constitution is the less likely it is that the maintenance of law and order will be impeded by limitations on the power of the Dail and by conflicts between the judiciary and the executive. The Departmental view on these particular matters and on the general policy remains unchanged but presumably a decision has been taken in favour of the opposite point of view and there is nothing to be gained by re-opening the matter.”

It will be seen from these comments that Roche evidently considered that the drafting committee was so determined to enshrine the system of judicial review of legislation coupled with fundamental rights guarantees that further resistance was futile.

It will be seen, therefore, from the general departmental reaction that the key Departments - Finance, Justice and, not least, that of the President of the Executive Council - realised at an early stage the potential importance of the fundamental rights provisions in general and of judicial



review of legislation in particular. The Department of Justice had, through Roche, argued strongly against the entire project. If, therefore, Mr. de Valera had not intended to give such a prominent role to the courts in relation to these matters, it cannot be said that he had not received adequate advance warning about the direction which the draft Constitution might have been taking.

This point is also borne out by a more detailed examination of a number of key constitutional provisions.

#### *Article 15.2.1*

Before examining a series of instances dealing with the structure of judicial review, it may be convenient to commence with one of the key separation of powers provisions, Article 15.2.1. This provides that:

“The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”

This object of this provision is generally regarded as being to declare in emphatic terms the legislative independence of the Oireachtas and to guard against any suggestion that the Westminster Parliament might enjoy any residual

legislative authority.<sup>46</sup> Of course, in modern times, this provision has assumed enormous importance since it is the very mechanism whereby the courts ensure that the Oireachtas has not abdicated its law-making powers to the executive and in this regard, it probably suffices to refer to the two leading cases in this area, *City View Press Ltd. v. An Comhairle Oiliuna*<sup>47</sup> and *Laurentiu v. Minister for Justice, Equality and Law Reform*.<sup>48</sup> But here again doubts have been expressed as to whether the drafters ever intended that Article 15.2.1 should be used in this way. As Keane J. said in *Laurentiu*:

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<sup>46</sup> Article 12 of the Irish Free State Constitution had provided that:

“...The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Éireann) is vested in the Oireachtas.”

But, of course, that Oireachtas was subject to the legislative shackles which had been imposed by section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922 (which gave the Treaty the superior force of law) and it might be argued that the Oireachtas only acquired full legislative independence with the passing of the Statute of Westminster 1931. Professor Gwynn Morgan has noted in *Separation of Powers in Ireland* (Dublin, 1997) that the “peace, order and good government” formula was:

“typically used in constitutions for ‘dominions’ at a time when this expression was current (see, e.g., South African Act 1909, s. 59) or colonies. However, in spite of this unwelcome association, the expression seems not to have indicated any substantial curtailment of legislative power, see Roberts-Wray, *Commonwealth and Colonial Law* (1966), pp. 369-370.”

<sup>47</sup> [1980] IR 381.

<sup>48</sup> [2000] 1 ILRM 1.

“Historically, this article can be seen as an uncompromising reassertion of the freedom from legislative control by the Imperial Parliament at Westminster of the new State. But it is also an essential component in the tripartite separation of powers which is also the most important feature of our constitutional architecture which is enshrined in general terms in Article 6.”<sup>49</sup>

Professor Gwynn Morgan has very helpfully outlined the background to the drafting of Article 15.2.1 and has presented impressive evidence that the drafters were principally concerned with potential interference by the Westminster Parliament:

“However, there is good historic evidence that the principal - and probably the only - body which the Founding Fathers had in mind, in 1922 and again in 1937, was the former colonial power, in particular the Imperial Parliament at Westminster...Nor, seen with the eye of the time, was there anything strange in this pre-occupation. The Imperial Conferences of 1926 and 1930 and the Statute of Westminster were still in the future and the Imperial Parliament retained the power (substantially restricted, by convention only) to legislate for the dominions. And writing in the 1930s, Dr. Kohn and Professor Mansergh each accept, in the most matter-of-fact way, that the provision is directed

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<sup>49</sup> *Ibid.*, 43.



against the supposed power of the British Parliament to super-legislate over the Dominion Parliaments. Likewise in the future, was the fear of delegated legislation, popularised by Chief Justice Hewart in 1929.”<sup>50</sup>

Professor Gwynn Morgan continued by observing with regard to Article 15.2.1:

“This shows two changes in comparison in comparison with its precursor in the 1922 Constitution. First, the formula ‘for the peace, order and good government’ was dropped...Secondly, another part was added on to the provision, namely: ‘no other legislative authority.’ Although this matter was not discussed by the [Dail] of 1937, it seems likely that this additional part was designed to bar the door even more strongly (albeit at the cost of repetition) against the Imperial Parliament: for the phrase ‘other legislative authority’ is surely more apt to refer to the Westminster Parliament than the Irish Minister for (say) Agriculture.”<sup>51</sup>

There can be no doubt whatever but these considerations were uppermost in the minds of the drafters, but the contemporary documentation demonstrates that these were not only the considerations. The issue of the potential relevance of Article 15.2.1 to statutory instruments was

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<sup>50</sup> Gwynn Morgan, *Separation of Powers* at 262-263.

<sup>51</sup> *Op.cit.*, 262.

first raised by Gavan Duffy J. in his notes on the final draft Constitution on April 11, 1937:

“If the Oireachtas has the sole and exclusive power to make laws, what of statutory rules and orders and by-laws which, if they are not ‘laws’ are waste paper! Article 50 presumably means to continue them as ‘laws’ in force. It seems to follow that Art. 15 must say that nothing therein contained shall prevent the delegation of legislative powers by the Oireachtas for the purpose of carrying its laws into effect.”

These comments were transmitted to the drafting committee and the memorandum in response of Philip O’Donoghue deserves to be reproduced in full:

“1. It has been suggested that Article 15.2 is deficient in omitting to refer to Statutory Rules and Orders. This Article is drawn in the same terms as the corresponding Article 12 of the existing Constitution. No difficulty or inconvenience has been caused under the present Constitution by reason of the absence of any saving provision for Statutory Rules and Orders. I am definitely of opinion that the present Article 15 is completely satisfactory in this regard and that no reference should be made to any Statutory Rules or Orders.

2. If any saving clause is added to this Article it must be taken away from the sole and exclusive right vested in the Oireachtas. In other words, to lend support to the view that Ministers can also legislate in respect of certain matters. I submit that this would be mischievous and I would call attention to the fact that, largely through the vigilance of the Parliamentary Draftsman, the criticism of legislating by Order is much less in volume than in Great Britain where the Lord Chief Justice frequently calls attention to the pernicious tendency of delegated legislation.

3. Statutory Rules and Orders, as the title suggests, are intimately related with legislative enactments. They are considered part of the law and have the force of law but alone do not constitute legislation. They must always be referred back to the enabling statute under which they are made. Very little consideration will indicate the abuses which would grow up if the legislature contented itself with enacting loose and indefinite principles adding that the Minister could give effect to such principles by rules and regulations.

4. The principles of legislation must be definitely enacted in the statute. Statutory Rules and Orders may prescribe such matters as the form, time and manner of carrying into effect the objects of the statute, but any such rule which would seek to depart from the scope of the statute, impose new obligations or confer



new rights would be clearly ultra vires the statute and could properly be set aside by the courts. This position is clearly understood by lawyers and, in my opinion, it is a position that should be strenuously defended.

5. It will be said that the only object of mentioning Statutory Rules and Orders in the new Article will be to give them a claim to be considered legislation. As I have said, alone they do not constitute legislation and cannot be considered apart from the statutes under which they are derived. It is definitely in the public interest that the legislation should make itself explicit and clear in its enactment and that to encouragement should be given to slovenly or imperfect statutory provisions while relying on Statutory Rules and Orders to complete what the legislature itself should have done.”

This excellent memorandum drew the following response from the Attorney General (Patrick Lynch K.C.) on April 16, 1937:

“I have carefully considered this question and thoroughly agree with the opinions expressed in this minute. The suggestion that to have an addition to Article 15.2 in the terms indicated must have been made under a misapprehension. Statutory Rules and Orders, as the term itself shows, must be something

necessary to enable the carrying out of the statute and for that purpose must be in conformity with it strictly and literally. A statement in a statute and particularly in an Article of the Constitution that legislation should be subject to, or varied or read subject to, Statutory Rules and Orders, to be made by some other person or body than the legislation is a contradiction of terms. It would certainly be not permitted to be included in any place of considered legislation by anyone who has had to study the subject. I am not aware that the Article in the existing Constitution proved to be in any way at variance with the opinion I have expressed.”

McDunphy noted on the margin that “Mr. Matheson is satisfied that there is no point in [Gavan Duffy’s argument.]”<sup>52</sup>

#### *Article 15.4.1*

We have already noted how the 1922 Constitution had no counterpart to Article 15.4 of the Constitution. Of course, this provision clearly imposes an obligation on the Oireachtas to take strict cognizance of the limitations on its legislative power imposed by the Constitution. Not surprisingly, the courts have fastened on to this provision in order to justify the general presumption of constitutionality of an Act of the Oireachtas:

"The presumption of constitutionality which operates in favour of an Act of the Oireachtas is based on the presumption [and is] an expression of the 'respect which one great organ of State owes to another' that the Oireachtas has obeyed the injunction of Article 15.4.1."<sup>53</sup>

Article 15.4.1 has also been expressly cited by way of justification for the exercise of the powers of judicial review.<sup>54</sup> But it is quite clear that de Valera's own Department had fully reflected on the possible implications of this provision at drafting stage:

"A Bill containing provisions for the amendment of the Constitution is, until it becomes law, repugnant to the Constitution and the question might be considered whether this section requires any amendment in the light of this consideration."

Although no action was taken on foot of this suggestion, it was not until some sixty years later that the issue was ultimately disposed of with the Supreme Court's ruling in

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<sup>52</sup> s. 9823A.

<sup>53</sup> Kelly, *The Irish Constitution* (Dublin, 1994) at 124. The internal quotation is, of course, taken from the judgment of O'Byrne J. in *Buckley v. Attorney General* [1950] IR 67, 80.

<sup>54</sup> See, e.g., *National Union of Railwaymen v. Sullivan* [1947] IR 77, 100 per Murnaghan J.; *Buckley v. Attorney General* [1950] IR 67, 83 per O'Byrne J.



*Riordan v. An Taoiseach (No.1)*<sup>55</sup> to the effect that a Bill to amend the Constitution was not a “law” for the purpose of Article 15.4.1. While the issue, is perhaps, a minor one, it provides further evidence of the extent to which these provisions were carefully examined and the foresightedness of the drafting team.

### *Article 26 and the plan for a Constitutional Court*

The other radical innovation as far as the power of judicial review is concerned was contained in Article 26. This provides that the President, following consultation with the Council of State, may refer Bills prior to signature to the Supreme Court for an adjudication as to their

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<sup>55</sup> In *Riordan v. An Taoiseach (No.1)* [1999] 4 IR 325 the plaintiff claimed that the 15<sup>th</sup> Amendment of the Constitution Act 1995 was unconstitutional, but Barrington J. held (at 339-340) that an Act to amend the Constitution, duly passed, was not a “law” for the purposes of Article 15.4 and, by extension, it also would seem that it is not a “law” for the purpose of Article 34.3.2:

“There can be no question of a constitutional amendment properly placed before the people and approved by them being itself unconstitutional. That is why the President has no power to refer to the Supreme Court a Bill containing a proposal to amend the Constitution for an opinion on its constitutionality. A proposed amendment to the Constitution will usually be designed to change something in the Constitution and will, therefore, until enacted, be inconsistent with the existing text of the Constitution, but, once approved by the People under Article 46 and promulgated by the President as law, it will form part of the Constitution and cannot be attacked as unconstitutional....Such ‘law’ is in a totally different position from the ‘law’ referred to in Article 15.4 of the Constitution which refers only to a law ‘enacted by the Constitution.’”

constitutionality.<sup>56</sup> It is worth spending some time examining the drafting of Article 26, since this provision was at the heart of the drafters' plans for judicial review of legislation. As we have already seen, the 1934 Constitution Review Committee could not agree on whether the functions of the ordinary courts in constitutional matters should be transferred to a special Constitutional Court. The very first draft heads of a new Constitution submitted by John Hearne on May 18th, 1935 had envisaged that the power of judicial review of legislation would continue to be vested in the High Court. However, on 10th December 1935, Hearne had prepared a memorandum on the functions of Constitutional Courts in other countries and this memorandum was seen immediately by de Valera.<sup>57</sup> While the memorandum was purely factual, Hearne's introductory minute is nonetheless of interest:

"I send you herewith the accompanying notes on the Constitutions of Czechoslovakia, Austria, Spain, Poland, the United States and France showing the machinery established to determine the validity of laws and to resolve, e.g., conflicts between the administrative authorities and the Courts. It will be observed that in

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<sup>56</sup> However, Money Bills, Bills the time for which have been abridged by the Senate and Bills to amend the Constitution are excluded from the scope of Article 26. For the Article 26 procedure generally, see Kelly, *op.cit.*, 212-219; Casey, *op.cit.*, 332-339.

<sup>57</sup> The Assistant Secretary minuted to de Valera: "Herewith memorandum on Constitutional Courts in other countries which you asked for this morning."

only three of those Constitutions is there provision for a Constitutional Court so called.

I enclose a copy of an extract (bearing on the subject) from the Report of the Constitution Committee which reported on the 3rd July 1934."<sup>58</sup>

Some nine months later on August 20, 1936 Hearne submitted what he described as a "Plan of Fundamental Constitutional Law and Preliminary Drafts." These draft heads sketched out the provisions relating to the courts as follows:

"Article 31. Establishment of the Constitutional Court.

Article 32. Jurisdiction.

Article 33. Continuance of existing Courts of First Instance and Court of Final Appeal."

Unfortunately, at this stage, Hearne's completed draft text only took him as far as Article 30 and, at all events, no drafts relating to the jurisdiction of the Constitutional Court (if, indeed, there were any) appear to have survived. The latest hint of this thinking may be found in the draft of January 2, 1937, where the draft Article 38.4 provided in relevant part that:

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<sup>58</sup> The three countries in question were Czechoslovakia, Austria and Spain.



"The Supreme Court shall have *full original* jurisdiction *in and power* to determine questions [of] *as to* the validity of any law having regard to the provisions of this Constitution."<sup>59</sup>

The draft Article 39 (the equivalent of the present Article 36) provided that, subject to the foregoing provisions of the Constitution relating to the courts, the following matters might be regulated by law, including:

"(c) the procedure of the Courts of Eire, including the Constitutional Court."

A line was crossed through these words by Hearne and this appears to be the last reference to a Constitutional Court in any of the drafts. At this stage, however, it was considered that the Supreme Court would perform the work of a Constitutional Court in that it was to be given exclusive jurisdiction to determine the constitutionality of laws.

Side by side with this, Hearne's first drafts of Article 26 bore a striking similarity in both style and structure to that provision as it was ultimately enacted. There were, however, some very important differences. Hearne's first draft envisaged that the President would refer the Bill to

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<sup>59</sup> UCD P. 1049. The italicized words were written in hand by Hearne.

the Supreme Court upon the petition of two-fifths of the members of the Dail or a majority of the Seanad. While the petitioners were required to state the ground or grounds of alleged unconstitutionality on which the petition was based, the President was given no independent discretion in the matter, since the draft Article 26.4 provided that:

"4. Upon receipt of a petition addressed to him under this Article the President shall forthwith refer the question raised by the petition to the Supreme Court for an advisory opinion thereon."

The draft Article 26.5 also envisaged that the Supreme Court would give what was described as an "advisory opinion" not later "than seven days after the date of such reference." This draft also provided for the "one judgment" rule on Article 26 references. By the date of the fourth (pre-publication) draft of the Constitution - prepared by Hearne on February 13, 1937 - Article 26<sup>60</sup> was even closer to its ultimate form in that the discretion as to the reference was now vested in the President following consultation with the Council of State.

The new Article prompted a number of different observations from those to whom the draft was shown. The Parliamentary Draftsman, Arthur Matheson, had been

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<sup>60</sup> UCD P. 1068. Numbered as Article 21 in this draft.

asked to review the existing drafts "with a view to seeing whether any provision could be shortened by leaving the subject-matter to be dealt with by ordinary law"<sup>61</sup> and Article 26 was among those provisions which Matheson had sought to shorten. Matheson's draft sought to enable provision to be made by legislation subsequently enacted by the Oireachtas for the reference of Bills to the Supreme Court and, in the end, this particular draft was not adopted. Several suggestions of Matheson regarding the Article 26 procedure did, however, prove to be influential.

In a letter of 4th March 1937 to de Valera, Matheson queried whether:

"the expression 'advisory opinion' should be retained or should be deleted in favour of the word 'decision' or the expression 'advisory decision.'"

This wording is now reflected in the provisions of Article 26 itself which refers to the "decision" of the Supreme Court, i.e., not simply non-biding advice from the Court to the President.

By early March 1937 the draft of Article 26 envisaged that at that stage the Supreme Court would form an opinion as to the constitutionality of the Bill. Matheson noted that:

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<sup>61</sup> Matheson to de Valera, March 4, 1937, UCD P 1082/9E.



"In sub-article 5, is the Court entitled to hear argument, and, if so, argument by whom? If the Court is entitled to hear argument, then the bill is correctly stated to be referred to "the Court"; but if the Court is to arrive at a decision in private, then the bill should be stated to be referred to 'such of the judges of the Supreme Court as are able to act', and subsequent references should be to 'the judges' and not to 'the Court.'"<sup>62</sup>

Article 26.2.1 now requires the Court to arrive at its decision having heard arguments "by or on behalf of the Attorney General and by counsel assigned by the Court" and this change appears to have been prompted by Matheson's comments. The related issue as to the number of judges who might sit on Article 26 was queried by Finance in their comments on the Second Revise in late April, but this was firmly rebuffed by McDunphy who noted in handwriting on the submission:

"This has been carefully considered and decided on. The Court must be a court of five judges."<sup>63</sup>

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<sup>62</sup> McDunphy noted at the end of March 1937 (S. 9715) that, having spoken to de Valara, it was agreed that Article 26 should be amended so that the "Attorney General should be entitled to be heard by the Court."

<sup>63</sup> S 10159. In a letter which Hearne wrote to Dr. Rynne (his successor as Legal Adviser in the Department of Foreign Affairs and who was a member of the 1940 Constitution Review Committee) on May 4, 1940 (S. 12506) he explained that the object of the five judge requirement was to ensure that there "was little likelihood...that a Supreme Court which had decided on a

Comments were also received from Maguire P., Gavan Duffy J. and (perhaps most interestingly of all<sup>64</sup>) FitzGibbon J. on the subject of Article 26. Maguire P. made two interesting points, the first of which appeared to raise doubts about the desirability of this provision:

"This Article may have the effect of placing the Court in conflict with the Dail. The parties before the Court will in practice be (on the one side) the President and Council of State and on the other the Dail.

If the Article is to stand, consideration might be given to providing for a presumption of constitutionality so as to put the onus on the Counsel who alleges unconstitutionality. Is there not a danger in asking the Court to decide a matter around which fierce controversy will have raged at a moment

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reference to them under Article 26 that a Bill is valid holding that the same Bill when enacted into law is invalid." The background to the subsequent enactment of Article 34.3.3 (which provides for an immunity from challenge in respect of Bills upheld under the Article 26 procedure) by the Second Amendment of the Constitution Act 1941 is discussed in Chapter 7.

<sup>64</sup> FitzGibbon J. would have been regarded as a staunch Unionist whose judgments in such cases as in *Re Westby, minors* [1934] IR 311 and *The State (Ryan) v. Lennon* [1935] IR 170 appeared to display considerable disenchantment with the Free State and its institutions: see generally, Hogan, "Chief Justice Kennedy and Sir James O'Connor's Application" (1988) 23 *Irish Jurist* 144, 155-157. It is, therefore, a little surprising to find that FitzGibbon J. wrote so promptly to Mr. de Valera with suggestions regarding the draft Constitution.



when the controversy will probably be at fever heat?"<sup>65</sup>

These comments have found echoes in subsequent controversies. Thus, in the first two Article 26 references in 1940<sup>66</sup> and 1943<sup>67</sup> - which took place with Sullivan C.J. presiding in the Supreme Court - counsel on behalf of the Attorney General supporting the Bill went first and with counsel appointed to oppose the Bill replying. This practice - appropriate to the order followed if a law had been found to be unconstitutional in the High Court - suggested that the very fact that the Bill had been referred by the President under Article 26 was sufficient to create an aura of unconstitutionality. Interestingly, the practice was

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<sup>65</sup> Similar concerns were expressed by Deputy John A. Costello SC in an article written in *The Irish Independent*, May 5, 1937:

"The system which it is proposed to set up conferring consultative jurisdiction on the Supreme Court at the instance solely of the President is a novel one and which, it is imagined, may not commend itself to the judicial mentality which notoriously dislikes being consulted on hypothetical questions apart from concrete cases or past realities.

The President may refer a Bill to the Supreme Court at the public expense in the teeth of the wishes of the Prime Minister or of the Dail. Apart from the consideration of hypothetical cases being considered by the courts, it is not easy to see the justification for these proposals. It is not easy to see the necessity for allowing the President so to involve the public in expense at his own particular will and fancy."

<sup>66</sup> *Re Article 26 and the Offences against the State (Amendment) Bill, 1940* [1940] IR 470.

<sup>67</sup> *Re Article 26 and the School Attendance Bill, 1942* [1943] IR 334.



discontinued during the course of the third Article 26 reference in 1961, *Re Article 26 and the Electoral (Amendment) Bill*<sup>68</sup> when the Supreme Court directed that the ordinary practice should prevail and counsel opposing the Bill should proceed first.<sup>69</sup> It may be just coincidental that Maguire C.J. (as he had by this stage become) was presiding in the Supreme Court for this reference, but the change in practice was certainly consistent with the expression of his views some twenty-four years earlier. Moreover, despite frequent attempts to persuade the Supreme Court to the contrary, it has consistently adopted the view that a Bill passed by the Houses of the Oireachtas enjoys the presumption of constitutionality.<sup>70</sup>

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<sup>68</sup> [1961] IR 169.

<sup>69</sup> Maguire C.J. noted (at 179):

“Although in the two earlier cases of a reference of a Bill to the Court under the Article counsel for the Attorney General opened the argument, it was agreed by counsel that owing to the nature of the provisions contained in this Bill it would be more convenient if counsel assigned by the Court should open the argument and state the grounds on which it would be submitted that the Bill was repugnant to the Constitution. This Court was approved by the Court.”

<sup>70</sup> See, e.g., *Re Article 26 and the Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129; *Re Matrimonial Homes Bill 1993* [1994] 1 IR 305 and *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*, Supreme Court, August 28, 2000. In the latter case the Court expressly rejected the invitation to overrule its earlier decisions, with Keane C.J. observing that the argument that a Bill did not enjoy the presumption of constitutionality gave “entirely insufficient weight to the fact that the President, although doubtless an integral part of the Oireachtas, plays no part whatever in the purely legislative function of the Oireachtas.”

The other comment made by Maguire P. was an immensely practical one:

"7 days is much too short a time in which to obtain a considered decision on such an important question. It should *at least* be one month."<sup>71</sup>

This suggestion was acted upon and in the draft Constitution as published the time period was extended to thirty days. But even this was considered by some to be too short and a few days after the publication of the draft Constitution, FitzGibbon J. wrote to Mr. de Valera with cogent arguments regarding the difficulties which even the thirty day time limit might involve:

"It will be necessary for the Chief Justice to get together a Court of five judges and hear the question. The question must be referred within four days of the passage of the Bill. The reference might be at a moment when the judges are on Circuit under the Courts of Justice Act. There might be a delay in assembling five judges to hear the case. In any event, the Attorney General must make up his case and still more, the Court at its first sitting might find it necessary to assign counsel to argue against the

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<sup>71</sup> Gavan Duffy J. was to make a similar point as late as April 11, 1937 in his "Notes on the Final Draft Constitution" (UCD P 1082/7A):



Attorney General as provided by the Article itself. And counsel must have some reasonable time to make up an argument in a case which, in the nature of things, is of the first importance and there is no telling how long the argument might take.

I fully realise the vital importance of an early deliberation and I am profoundly conscious of the dissatisfaction which has been occasioned, on at least two occasions, by long delays on the part of the Supreme Court<sup>72</sup> in delivering judgment in important cases and I have no objection to offer to a proposal that judgment should be given within a stated period of the argument having concluded. The judges who heard a case might well be directed to make up their minds within even a shorter period than one month. But I feel very strongly that injustice might be caused and a proper consideration of an important constitutional question might be prejudiced if a hard and fast law were to be passed that all the preliminaries and all the argument must be prepared

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"The argument may be lengthy and 14 days from the close of the argument would be more satisfactory than a fixed time after the date of reference."

<sup>72</sup> This is presumably a reference to the on-going Erasmus Smith Schools case, the delays in respect of which had caused the Court not a little embarrassment, The appeal in this matter had been heard by the Supreme Court in 1933, but no judgment had been given by the date of Chief Justice Kennedy's sudden death in December 1936. Although the Supreme Court offered to re-hear the appeal, the parties had had enough of the delays and a settlement was announced to the Supreme Court on June 23, 1937: see *The Irish Times*, June 24, 1937.



and a decision pronounced, irrespective of the magnitude and complexity of the questions involved within 30 days of the reference of the matter by the President who must himself act within four days of the decision of the Oireachtas. That decision might conceivably be made shortly before Christmas or Easter or where the courts have closed in the summer and many judges are away on vacation and the 30 days would be running irrevocably all the time.

Provide, if you will, that the question shall be referred to the Supreme Court of five judges who shall proceed to hear it *at the earliest opportunity* and shall pronounce their decision within a month or a week, if you will, of the conclusion of the *hearing*, but modify the provision that the decision must be given, even though the case be unheard, within a month from the date of the reference.”<sup>73</sup>

These suggestions were accepted and Article 26.2.1 now requires the Supreme Court to pronounce judgment as soon as may be, but, in any case, within sixty days from the date of the reference.<sup>74</sup> Even this time limit may be too

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<sup>73</sup> S. 9856, letter of May 3, 1937, emphasis in original. Mr. de Valera replied on the same day, thanking FitzGibbon J. warmly for his comments and assuring him that his observations would receive “careful attention.”

<sup>74</sup> In fact, Article 26.2.1 as originally published provided for a thirty day limit. This was changed to sixty days at Committee Stage following a Government amendment to this effect. As Mr. de Valera said (67 *Dail Debates* at Col. 1490, June 2, 1937):

onerous and the Constitution Review Group recommended that the period be extended to ninety days.<sup>75</sup>

Gavan Duffy J.'s first comments on Article 26 appear to date from the second half March 1937. His observation was:

"It would hardly be fair for the President to ask the Court, nor practicable for the Court to answer such a question as 'Can you find anything unconstitutional in this Bill?'

The practical way of making the Court consultative is to enable the Government to inquire whether or not a Bill is for specified reasons, or in specified requests, unconstitutional, or to limit the inquiry to a specified clause or clauses.

If this view is accepted, some re-drafting of Article [26] is necessary. I have not attempted this in the absence of more definite information as to the intention of the Article. But the objection above noted to its present form will be felt, and no doubt

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"The purpose of that amendment is give a longer time to the courts to hear a case and to arrive at a decision. It is hoped, of course, that the court will do it as soon as possible, but it has been represented to me that to fix the time that we have in the Draft as 30 days might make it difficult for the court to examine fully the questions involved, and consequently we are extending the period from 30 to 60 days."

<sup>75</sup> Pn. 2632 at page 85.

voiced, very strongly by lawyers. The alternative way suggested would seem to give the Government all that it really needs and to give a very useful power to consult the Court."

These suggestions were echoed by the President's own comments which were made in respect of the 1<sup>st</sup> published draft of March 16, 1937:

"The President is of opinion that where possible a definite question should be referred to the Court in each case, that is to say, that the Court should not be asked whether a Bill is unconstitutional but whether a specific provision to be specified by the President is or is not constitutional. I understand this is the view of the President of the High Court."<sup>76</sup>

Although McDunphy minuted that it might be best to "leave this to practice", the drafters ultimately took note of these suggestions, since the final version of Article 26.1.1 permits the President to refer specified parts of the Bill:

"The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified

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<sup>76</sup> S. 9715. March 23, 1937.



provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof."

In fact, of the fourteen references to date, in only three cases has the President exercised the option of referring only a specified provision to date. This first occurred in 1943 with the reference of the School Attendance Bill<sup>77</sup> where President Hyde referred only one section of the Bill for consideration by the Court. President McAleese also availed of this power twice in 2000 when she referred Part V of the Planning and Development Bill 1999 and sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999 to the Supreme Court.

In other cases there have been clear signs of judicial unease where the entirety of very large Bills have been referred to the Court, most recently with the Employment Equality Bill, 1996, where the entirety of the Bill had been referred by the President. In its decision in that reference, *Re Article 26 and the Employment Equality Bill, 1996*<sup>78</sup>, the Court was confronted with a very substantial Bill which raised a miscellany of constitutional issues. The Court drew attention to these difficulties towards the start of a very long judgment:

"The form of reference in this case has raised certain practical problems for the Court....When one considers

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<sup>77</sup> [1943] IR 334.

that the Bill consists of 74 sections and either amends or refers to 33 other statutes one can see that the task confronting the Court is a formidable one. The task is not made lighter by the fact that the Court is constitutionally obliged to give its decision on the Bill within 60 days of the date on which the Bill was referred to the Court by the President. Within this time the Court must assign counsel, give them time to prepare their written submissions, hold an oral hearing at which the issues are debated in open court, make its decision and deliver its judgment. It would have been possible for the President to specify some specific provision or provisions of the Bill on which she needed the Court's decision but she was not obliged to do that."<sup>79</sup>

To some extent, these comments may be seen as almost an implied criticism of the President for having referred the entirety of such a large Bill. But why have Presidents to date generally refrained from availing of the option to refer only a specified provision of the Bill? Two reasons may be advanced. The first is probably that it has often been felt to be impossible to isolate what may often be inter-locking statutory provisions. The second concern probably stems from the wording of Article 34.3.3:

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<sup>78</sup> [1997] 2 IR 321.

"No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of the Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26."<sup>80</sup>

Although it seems relatively clear from this provision that the finality attributed thereby to a finding of validity by the Supreme Court in an Article 26 reference only applies to the sections actually referred by the President, the matter is not completely free from doubt. Indeed, it was precisely because of these concerns and the fear that constitutional immunity might attach to those parts of the Bill not so referred, that President Robinson decided to refer the entirety of the Employment Equality Bill 1996 following an inconclusive discussion of this very issue at a meeting of the Council of State.<sup>81</sup>

The second point raised by Gavan Duffy J. related to the one-judgment rule which the drafters had proposed for Article 26, but this point seems more conveniently dealt

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<sup>79</sup> *Ibid.*, 331.

<sup>80</sup> As inserted by the Second Amendment of the Constitution Act 1941.

<sup>81</sup> Information from a confidential source.



with in Chapter 7 dealing with the Second Amendment of the Constitution Act 1941.

An issue which was closely related to the Article 26 jurisdiction was whether the Supreme Court should have an exclusive original jurisdiction in constitutional matters, as had been proposed by the early 1937. This prompted a very interesting submission from Nicholas Barron<sup>82</sup> which is worth reproducing in some detail:

"Because the Supreme Court is granted exclusive and original jurisdiction of such a matter, the lower Court must, upon the raising of such a question, proceed according to either of the following methods:

A. Refuse to determine the issue of a pending cause until the constitutionality of the law is determined by the Supreme Court.

This would result in such a matter being referred first to the Supreme Court to determine the constitutional question only (because it has original jurisdiction only to determine that question and no other.) If the law is held to be constitutional it will be necessary to again refer the matter back to the

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<sup>82</sup> Barron was a junior counsel practising at the Bar who was sympathetic to Fianna Fail and whose family were friendly with de Valera.

Court of First Instance for a hearing on the other issues - a most expensive procedure.

B. Try all other issues and deliver judgment thereon; then it would be necessary to proceed to the Supreme Court by way of a Writ of Certiorari, or some similar procedure, to determine the constitutional question.

This seems to be an unnecessary division of jurisdiction, especially when an issue of patent unconstitutionality is considered. It is also a most expensive way of dealing with the problem. Both of the methods allowable under the section as it now stands would act as hardships to many, especially when a law violated their constitutional rights in smaller matters.”

Barron then went on to offer two alternative suggestions. The first was that where a constitutional question was raised, the Supreme Court would have jurisdiction to the exclusion of all other courts. His first alternative draft provided that:

“The Supreme Court shall have full original jurisdiction in and power, exclusive of all other courts, to determine any and all matters, civil or criminal, and any and all issues of law and fact arising therein, when a question or questions are raised in such

matters as to the validity of any law having regard to the provisions of the Constitution."

He added that:

"A provision of this nature would place completely in the hands of the Supreme Court the determination of all of the issues in such a case. It would concentrate the matter in one court only."

The other alternative suggested by Barron involved a devolution of power to determine the constitutional issue to the lower courts, save that such determination would only bind the parties to the case and would not have *erga omnes* effect:

"The courts of first instance shall have jurisdiction to determine the validity of any law having regard to the provisions of the Constitution, when such validity of such law has not previously been determined by the Supreme Court, provided, however, that such a determination by a Court of First Instance shall not be generally binding, but binding only in so far as the particular matter under consideration is concerned. An appeal from such Court of First Instance direct to the Supreme Court shall be allowed on such question of the validity of a law."

Barron's commentary on this proposal is especially revealing:



"Under these provisions litigants would be facilitated in protecting their constitutional rights in petty as well as in major matters. The extent of the jurisdiction of the lower courts in such constitutional questions is limited and a decision of unconstitutionality by one of these courts would not invalidate the law insofar as the general public and State officials and representatives are concerned. The law would be to them a constitutional law until declared otherwise by the Supreme Court.

A citizen should be entitled to full constitutional protection at all times and before all the courts. A very important part of the protective force of the fundamental law is that no statute can be passed in derogation of its provisions. A citizen should be entitled to plead the protection of the Constitution before any court in the land and in any matter no matter how unimportant."<sup>83</sup>

These were very sensible suggestions. While all of Hearne's initial drafts and thinking on this topic - a Constitutional Court, "abstract" judicial review via the Article 26 procedure and an original constitutional jurisdiction for the Supreme Court - appears to have been heavily influenced by the constitutional structure in civilian countries, the

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<sup>83</sup> UCD 1082/1.

vesting of an original jurisdiction in the Supreme Court would probably not have been practicable.

For a start, that Court's overall function is best discharged as an appellate court, where it reviews the legal conclusions of the High Court and lower courts on the basis of primary facts found by the court of trial. Given that at least some right of appeal is generally regarded as fundamental to the proper functioning of a legal system, it would scarcely have been ideal if the Supreme Court had operated as a court of first and last instance in constitutional matters, particularly in lengthy cases where the hearing of evidence would have been protracted.<sup>84</sup> Barron's views were not immediately accepted and the Constitution as originally published on May 1, 1937 vested the Supreme Court with an exclusive and original jurisdiction in constitutional matters.

This aspect of the draft was subjected to sustained criticism from the legal community. For example, in a thoughtful article<sup>85</sup> written in *The Irish Independent* by "A Lawyer" it was argued that:

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<sup>84</sup> Thus, in *Ryan v. Attorney General* [1965] IR 294 65 days were occupied with the hearing of complex scientific evidence directed towards the issue of whether or not the fluoridation of the public water supply system violated her constitutional right to bodily integrity.

<sup>85</sup> Unfortunately, "A Lawyer" undermined an otherwise well written article with the following somewhat intemperate opening comments:

"The deepest impression left on the mind after reading it is that it obviously the handiwork of amateurs who had not

“Most lawyers will probably agree that the Article depriving the High Court of jurisdiction to hear a case involving the constitutional validity of any law and transfer that jurisdiction to the Supreme Court was a grave blunder.

The real value of a Court of Appeal (as the Supreme Court is) lies in the fact that it has presented to it a case by counsel who have already prepared, argued and been questioned on every aspect of it by a competent court and that the Court of Appeal has before it the judgment of that Court and the reasons for that judgment. With such material before it the task of the Court of Appeal is enormously lightened. Now it is proposed to deprive the Supreme Court of this material and to throw upon it the duty of hearing the case for the first and last time and that in respect of the most onerous task of a court - namely the determination of whether the legislature has exceeded its power”<sup>86</sup>

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properly learned what a Constitution should contain. They appear to have been more concerned with making gestures to various sections of the community and with making protestations of loyalty to certain ideals. [In contrast, a Constitution] should contain in the minimum of words the fundamental principles and rights which the Courts could and should enforce and apply.”

<sup>86</sup> *The Irish Independent*, May 3, 1937. The comments of O’Flaherty J. in *Best v. Wellcome Foundation Ltd.* [1993] 3 IR 421 illustrate this point rather well, albeit in a different context. Here the Supreme Court was asked to review on appeal an inference from a primary fact by the trial judge in a complex medical



Writing in the same newspaper a few days later, Deputy John A. Costello K.C. also made a similar point:

“But surely it cannot have been intended by the framers of the Constitution to deprive a citizen of his right to habeas corpus when he is illegally detained in virtue of a law which is, or is alleged to be, unconstitutional.

That, however, is the effect of the draft as it stands. 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

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negligence case and O’Flaherty J.’s comments (at 485) illustrate the value of the sifting process conducted by the High Court in any complex civil action:

“In a sense we approached this case with certain advantages over the trial judge. We have had the advantage of seeing the case laid out before us in its entirety, with the findings of the trial judge in place. A number of issues debated at the trial have disappeared from the scene before us....It is true that the scientific evidence was traversed extensively once more but while the trial judge had to grapple with it as it emerged in a raw condition it was well matured when it came before us. The trial judge had to wrestle with a welter of documents in the course of the case and while they did not diminish before us they appeared well contained and ordered. At the end of the day we were left in a position where the spotlight was allowed to shine brightly on the single, great issue in the case: the credibility of the [plaintiffs].”

his application until the Supreme Court have determined the question of how by whatever means may be determined to enable the Supreme Court to decide on the constitutionality or unconstitutionality of the law. In the meantime the person remains illegally and unconstitutionally deprived of his liberty.”<sup>87</sup>

These were telling criticisms of an innovative and avant garde proposal. At all events, in response to opposition suggestions, the Government agreed to an amendment at the Committee Stage of the Dail Debates on the Constitution whereby the power was transferred to the High Court with a right of appeal to the Supreme Court.<sup>88</sup>

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<sup>87</sup> *The Irish Independent*, May 6, 1937. The distinguished British constitutional scholar, Professor A. Berridale Keith had observed in *The Manchester Guardian*, May 4, 1937:

“An innovation of dubious merit is the restriction to the Supreme Court of all questions of the validity of any law, but the Court will be strengthened to enable it effectively to play this part.”

<sup>88</sup> The following exchange took place between Mr. de Valera and Professor O’Sullivan at the Committee Stage (68 *Dail Debates*, cols. 1492-5, June 12, 1937):

The President (Mr. de Valera):.....There is something to be said for that inasmuch as you have the same court dealing with constitutional matters all the time....

Professor O’Sullivan:.....Unless a judge of the High Court can take into account the constitutionality of a law, a citizen of this State who was arrested under a law the constitutionality of which he contested, could not apply to a judge of the High Court for a habeas corpus.....

The President: That was not the point on which we were deciding....We were dealing with the general question as



The key point in all of this is that whatever the merits and demerits of the structure of judicial review which the drafters were considering (such as a Constitutional Court, the Article 26 procedure and the plan for an exclusive constitutional jurisdiction for the Supreme Court), this entire protracted debate would surely have been an empty exercise had not the drafters been serious about the potential impact of judicial review of legislation. After all, if some influential members of the drafting committee such as Hearne had been pressing for the establishment of a special Constitutional Court, this would have seemed like a futile exercise unless they had also anticipated that such a specially constituted court would have had a significant amount of litigious business to transact.

#### *Article 40.3.1 and Article 40.3.2*

The personal rights provisions contained in Article 40.3 are probably the most important single clauses in the entire Constitution. As we have already noted, much of modern constitutional law traces its origins to the decision of

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whether it is better that the High Court should have the initial jurisdiction as regards the constitutionality of laws, with an appeal to the Supreme Court, or whether you should have the Supreme Court being the first court to deal with it and have no further appeal. Much could be said on both sides and it was not easy to make up one's mind as to which was the better. The point brought out by the Deputy is undoubtedly an extra reason why it is well to have the High Court having the original jurisdiction in that case."



Kenny J. in *Ryan v. Attorney General* to the effect that Article 40.3.1 protected fundamental rights not expressly enumerated elsewhere in the Constitution. In recent times, the correctness of this decision and the very legitimacy of the jurisprudence which it has subsequently engendered has been a matter for fervent debate.<sup>89</sup>

What, therefore, do the drafting papers tell us about this debate? There appears to have been no counterpart to Article 40.3 in Hearne's original 1936 draft or in the drafts from the Autumn of 1936. However, by mid-February 1937, the fourth pre-publication draft was ready. At this stage, the key provisions of the draft Article 38 (now Article 40) read as follows:

"1. The State guarantees to respect and defend the personal rights of each citizen [including] those that are inalienable, indefeasible and antecedent to positive law, as well as those that have been by law granted and defined. Accordingly, the State shall take all necessary measures to prevent abuses, enforce respect for social order and punish offenders against its laws."

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<sup>89</sup> For this debate, see, e.g., Quinn, "Reflections on the Legitimacy of Judicial Activism in the Field of Constitutional Law" (1989) *Dli* 29; Hogan, "Constitutional Interpretation" in Litton ed., *The Constitution of Ireland 1937-1987* (Dublin, 1988) at 173-191; Hogan, "Unenumerated Personal Rights: Ryan's case re-evaluated" (1990-92) 25-27 *Irish Jurist* 95; Humphreys, "Constitutional Interpretation" (1993) 15 *Dublin University Law Journal* 59; Humphreys, "Interpreting Natural Rights" (1993-1995) 28-30 *Irish Jurist* 221; Kavanagh, "The Quest for Legitimacy in Constitutional Interpretation" (1997) 32 *Irish Jurist* 185.

A line was then drawn through the first sentence and a note from Hearne read as follows:

“The State guarantees to respect, defend and vindicate the personal rights of each citizen.”<sup>90</sup>

This was a re-draft of enormous importance and perhaps even Hearne probably did not then appreciate its potential significance. It is particularly unfortunate that there appears to have no memorandum prepared by him (or any other member of the drafting committee) which sought to explain the objectives of this provision.<sup>91</sup> This omission notwithstanding, this re-drafting nevertheless would seem to provide some evidence that the personal rights referred to in Article 40.3.1 had not been not intended - by Hearne, at least - to be confined to those rights actually enumerated elsewhere in the Constitution. It is clear from the language of earlier draft (with its reference to the protection of rights which were expressed to be “inalienable, indefeasible and antecedent to positive law”, as well as those rights “that have been by law granted and defined”) that it was here intended to protect all

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<sup>90</sup> A line was also drawn through the word “abuses” and an accompanying note from Hearne in the margin: “any violation of these rights

<sup>91</sup> The present writer had previously commented (before having seen Hearne’s drafts) that Article 40.3.1 “appears to be something of a legal ‘Lohengrin’, in that nobody seems to know where this provision came from of what its precise purpose is”: see Hogan.

rights deemed to be sufficiently fundamental by the courts, irrespective of whether such rights were elsewhere expressly enumerated in the Constitution.

In addition, the draft Article 40.3.2 (then numbered Article 38.4) provided that:

“The State guarantees

to protect, as best it may, from unjust attack, and, in the case of injustice done, to vindicate, the person, life and good name of its citizens and their right of ownership.”

The only further contemporary insight into the thinking of the drafters may be gleaned from the reaction of the various Departments to these provisions. Not surprisingly, this reaction was generally adverse. While the precise future significance of these provisions may not have been identified by many of the departmental commentators, their unease about the potential implications was palpable. From the Department of Justice, Roche characteristically expressed unhappiness about the breadth of the guarantees contained in Article 40.3.2:

“The guarantees in section 2 of this Article are very widely worded and may have unexpected results. For

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“Unenumerated Personal Rights: *Ryan’s* case re-evaluated” (1990-92) 25-27 *Irish Jurist* 95, 113.



example, under [Article 40.3.2]<sup>92</sup> if a man is slandered is the State really bound to vindicate his good name? Is that guarantee carried out by the existing device of providing a Court in which he can, at his own risk, sue his slanderer?"

Finance had similar objections. McElligott queried whether Article 40.3.2 could be interpreted:

to oblige the State to take the initiative in libel actions, proceedings for the recovery of debts and actions for personal injury? This might be a straining of the sense, but greater clarity would be desirable."

McElligott was even more concerned about Article 40.3.1:

"It is still thought that they are dangerous and there still remains obscurity as to what practical obligations they impose on the State."

McDunphy was unimpressed. He wrote "policy" beside McElligott's comments on Article 40.3.1 and, in response to the latter's concerns regarding the extent of the obligations imposed on the State by Article 40.3.2, he minuted: "The Law Officers are satisfied."

At this remove it is difficult to draw firm inferences from these exchanges. Were the Law Officers satisfied because

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<sup>92</sup> Numbered Article 38.2.2 in the first published draft.

they considered McElligott's concerns to be unfounded? Alternatively, did they and the drafting committee acknowledge the potential implications of these clauses, but that a decision was taken to adhere to these drafts, irrespective of the concerns of both the Departments of Finance and Justice? Was this what McDunphy had in mind when he wrote "policy" beside McElligott's comments? Perhaps we shall never be able to supply a definitive answer to these questions. What we can say, however, is that such limited evidence as there is from these fragmentary drafts suggests that Hearne (at least) intended that the Constitution would protect unenumerated as well as specifically enumerated rights. If, this is correct, then it offers us a tantalising glimpse in the mind of the key drafter of the Constitution. This suggests that the drafters intended to protect fundamental rights via the principal vehicle of Article 40.3 and it would seem to follow that the actual result in *Ryan v. Attorney General* was no accidental by-product of the actual phrasing of Article 40.3. Besides, if the drafting committee had intended to exclude such an interpretation of Article 40.3 whereby the courts were to assume a major role in determining the scope of fundamental rights, one would have expected that they would have paid greater heed to the warnings expressed by both McElligott and Roche.

### *Conclusions*

The evidence, taken in its totality, suggests, therefore, that Professor Kelly was wrong to assert that the drafters never intended a vigorous system of judicial review of legislation. Of course, particular decisions - such as the invalidation of the internment provisions of the Offences against the State Act 1939 by Gavan Duffy J. in *The State (Burke) v. Lennon*<sup>93</sup> - certainly came as a surprise. Mr. de Valera and his drafting team would probably also have been somewhat surprised by the prominent and central role played by the modern day Supreme Court in the public and political affairs of the nation. That, however, is not the same thing as saying that the drafters never intended the power of judicial review to be taken seriously. If it had been otherwise, certain of them - Hearne included - would not have been prominent advocates of a special Constitutional Court. Nor would they have agonised over the details of the very innovative Article 26 procedure and they surely would not have sought to make the sharp distinction which they ultimately did make between the justiciable rights contained in the Fundamental Rights provisions of Articles 40 to 44 on the one hand and the Directive Principles of Social Policy contained in Article 45 (which rights were expressly declared to be non-justiciable) on the other. Against this background, why then do most commentators insist that the drafters never intended the power of judicial review to be taken seriously? Several reasons may be advanced.

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<sup>93</sup> [1940] IR 136. This case is discussed extensively in the next chapter.



First, , Mr. de Valera was characteristically ambiguous when he was confronted on this subject by the opposition in the course of the Dail Debates on the Constitution. The concept of judicial review was not then well understood and the potential impact of many of the fundamental rights provisions was not appreciated either by the opposition or by contemporary observers. Although de Valera - who had no legal training - displayed an intuitive grasp of these complex issues which was always impressive, he may, perhaps, be faulted for having failed to spell out to the Dail and the public at large the potential for constitutional development. Nevertheless, as O'Dowd correctly observed:

“Overall, a fair assessment of the debates [on the Constitution] would seem to be that de Valera often showed a better grasp of the fundamental issues of constitution-making than his critics at the time or since have been disposed to give him credit for. If the quality of the debate on the Draft Constitution leaves something to be desired it is largely due to the lack of serious engagement with those issues, by either de Valera’s own colleagues or by the official Opposition.”<sup>94</sup>

Of course, it is just possible that Mr. de Valera did not himself fully appreciate the significance of the judicial

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<sup>94</sup> O'Dowd, "Equality in Irish Constitutional and Administrative Law" (1999) *European Review of Public Law* 769, 799.

review powers and fundamental rights provisions of the Constitution or the extent to which these provisions had for organic development. Some evidence of this is provided by a report of the then American minister in Dublin, Alvin Owsley, to the State Department. Shortly after the publication of the draft Constitution in early May 1937 Owsley had asked de Valera whether he had been inspired by “our immortal American document” in drafting the new Constitution. De Valera replied in the negative, much to Owsley’s intense disappointment. The former took the view that the American Constitution was:

“too all-inclusive and was meant as a super-imposed set of laws and rules of conduct for a confederation or association of States and such a status would not apply to the needs of the Irish.”<sup>95</sup>

It seems likely that de Valera was here concerned with essentially political comparisons as between federal constitutions as distinct from those designed for a unitary state. Viewed from a legal perspective, of course, de Valera’s comments were plainly wrong, since the judicial review and fundamental rights provisions of the Constitution were clearly very heavily influenced by the American model.<sup>96</sup> Nevertheless, it is puzzling that de Valera

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<sup>95</sup> NA/SDR, RG 59/841D.011.36, Owsley to Secretary of State, May 5, 1937. See McMahon, *Republicans and Imperialists: Anglo-Irish Relations in the 1930s* (Yale, 1984) at 214.

<sup>96</sup> Thus, Article 34.4.3 (dealing with the appellate jurisdiction of the Supreme Court) is modelled on the corresponding provisions of



did not make these points in private to a senior US diplomat who clearly would have been deeply gratified to have had such comparisons drawn to his attention. It would be wrong to make too much of this episode, but it may provide some limited evidence that de Valera did not, after all, fully grasp the importance and potential significance of the judicial review and fundamental rights provisions of the Constitution which his drafting committee had provided for him.

Secondly, many commentators failed to understand the reason why the fundamental rights provisions had to be drafted in an open-ended format and why these rights had to be qualified in the way that they were.<sup>97</sup> (As it happens, these qualifications - such as "save in accordance with law" or "subject to public order and morality" etc. - are, if anything less extensive than those contained in, for example, the European Convention of Human Rights, but, for some reason, one does not often hear the same criticism of that document which is so often pointedly

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Article III of the US Constitution and Articles 38.1 (trial in due course of law); Article 40.1 (equality before the law) and Article 40.3 (unenumerated personal rights) were all plainly inspired by the 14<sup>th</sup> Amendment. In addition, of course, the entire system of judicial review of legislation was also inspired by the US constitutional experience. There are also many other provisions of lesser importance which are directly drawn from the US Constitution, including, for example, the impeachment provisions so far as they concern the President and Article 39 dealing the treason.

<sup>97</sup> Cf. the comments of Lyons, *Ireland since the Famine* (London, 1972) at 545: "It is true that these particular rights were made 'subject to public order and morality' [but] this qualification was regarded by Mr. de Valera's critics as characteristically devious."



made of the Constitution). This naturally led them to the conclusion that the rights in question were essentially valueless or worse and, hence, that the drafters never intended these provisions to be taken seriously.

Thirdly, the sophistication of the constitutional model was not widely appreciated or understood. Up until relatively recently Mr. de Valera was considered to be the principal drafter of the Constitution, albeit perhaps assisted by some clerical friends<sup>98</sup> and the role of such skilled jurists as Hearne was either unknown or underplayed.<sup>99</sup> In those circumstances, it was only natural that political and

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<sup>98</sup> This view is still expressed by some commentators: see, e.g., the somewhat tendentious comments of Fitzpatrick, *The Two Irelands 1912-1939* (Oxford, 1998)(at 230):

“De Valera’s moral apotheosis coincided with the application in 1937 of his new constitution, much of which had been drafted by Jesuits and other clerical advisers.”

Likewise, in his classic and pioneering work, Whyte, *Church and State in Modern Ireland 1923-1979* (2<sup>nd</sup>.ed., 1980) had described (at 51) the Constitution “as clearly very much Mr. de Valera’s own creation” Writing over a decade later, Mansergh, *op. cit.*, still echoed that view (at 299):

“ [de Valera] had drafted the Constitution without conference or committee for discussion or debate, but - and it is remarkable - without enquiry of individuals on occasion, as with John Hearne and also the Archbishop of Dublin on the position of the Church. But any such exchange was on a bilateral basis; save to that limited extent all remained in President de Valera’s hands.”

<sup>99</sup> Cf. the comments of O’Sullivan, *The Irish Free State and its Senate* (London, 1940) at 496:

“The new Constitution was not the result of the labours of jurists and other experts. So far as known, its author is Mr.

historical commentators - who, for the most part, had no training in or understanding of constitutional law - should fail to grasp the subtlety of the model which had been provided by the drafting team.

Fourthly, much of the political commentary on the Constitution focussed on its controversial features, such as Articles 2 and 3, the ban on divorce in Article 41 and the special position of the Catholic Church. In addition, much of this commentary was written in the 1970s and 1980s when, as a result of the civil conflict in Northern Ireland, many commentators were keen to eradicate those features of Irish society which were seen as confessional or offensive to the minority religious and political traditions. Viewed from that perspective, it was easy to criticise those features of the Constitution as originally enacted and the easy assumption that the 1937 document compared unfavourably with its 1922 predecessor was frequently made. Thus, writing in 1972 in his seminal book, *States of Ireland*, O'Brien said of Articles 2 and 3 and the special position of the Catholic Church in Article 44 that it would be hard to think of "a combination of propositions more likely to sustain and stiffen the siege-mentality of Protestant Ulster."<sup>100</sup> Speaking of the conditions prevailing in 1937, O'Brien added that:

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de Valera himself, aided, no doubt, by Civil Servants and others whose duty it is to advise him and his Government."

<sup>100</sup> *States of Ireland* (London, 1972) at 120.

“The main opposition party, Fine Gael, was not at this time complaining - as some of its spokesmen were to do later - about Mr. de Valera’s abandonment of the relative liberalism of the first Constitution.”<sup>101</sup>

The same easy assumption permeates Whyte’s analysis of the two Constitutions:

“There was, however, one other important difference between the Constitutions, apart from the elimination of the Crown. This was in the treatment of fundamental rights. The 1922 constitution had been a typical liberal-democratic document which would have suited a country of any religious complexion. The only article on religion was one which briefly guaranteed religious freedom and equality. The other personal rights guaranteed were what might be described as a stock list - freedom from arbitrary arrest, inviolability of the home, freedom of speech and of association and the right to free elementary education.”<sup>102</sup>

The clear impression created by these two highly influential commentators was that the 1922 Constitution was a far superior document. Such criticism could only fairly be described as unbalanced. There is no mention of the fact that the 1922 Constitution had ended “in almost total

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<sup>101</sup> *Op.cit.*, 122.

<sup>102</sup> Whyte, *op.cit.*, 51.



failure”<sup>103</sup> or that it had proved wholly ineffective as a means of protecting individual rights. In addition, neither of them made any effort to analyse those provisions of the 1937 Constitution which had, for example, strengthened fundamental rights or the system of judicial review.

The assessment of the Constitution by Professor Lee in his seminal work, *Ireland 1912-1985, Politics and Society*<sup>104</sup> is more balanced and fair-minded. But even he seemed sceptical of the value of certain fundamental rights guarantees:

“When the [ban on divorce is] considered in conjunction with section 17 of the Criminal Law (Amendment) Act 1935, which prohibited the sale and importation of contraceptives, it was difficult to avoid the impression that the State considered it a duty to impose specifically Catholic doctrine on all citizens, irrespective of their personal convictions. Critics might be excused for dismissing as hypocrisy in these circumstances the apparently comprehensive guarantee in Article 44.2.3 that ‘the State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.’”<sup>105</sup>

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<sup>103</sup> Humphreys, Review of Kelly, *The Irish Constitution* (1994) 16 *Dublin University Law Journal* 222, 223.

<sup>104</sup> Cambridge, 1989, especially at 201-211.

<sup>105</sup> *Op.cit.*, 203.

Yet, quite apart from the fact that the legislation in question did not *as such* seek to discriminate against non-Catholics, the fact remains - which Professor Lee does not mention in this context<sup>106</sup> - that in *McGee v. Attorney General*<sup>107</sup> the Supreme Court held that section 17 of the 1935 Act was unconstitutional on the ground that it violated the personal rights of privacy and family autonomy protected by Articles 40 and 41 of the Constitution.

Fifthly, much of the critical commentary of the Constitution appears, in part, at least to have been influenced by the fact that the Constitution was seen as "de Valera's Constitution." Many of the same commentators were bitterly hostile to de Valera on whom "was projected our disenchantment with post-revolutionary society" and who for them had come to epitomise "emigration, poverty and depression."<sup>108</sup> In addition, such commentators tended to write from a broadly left-liberal and anti-clerical perspective who could not bring themselves to accept that de Valera's political and legal *weltanschauung* was anything other than insular and authoritarian in perspective.<sup>109</sup> They accordingly

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<sup>106</sup> Professor Lee does, of course, refer to the *McGee* case at a much later stage in the book.

<sup>107</sup> [1974] IR 287.

<sup>108</sup> Comments of Dr. John Regan, at Dr. Douglas Hyde Conference, *The Irish Times*, July 24, 2000.

<sup>109</sup> Cf. the comments of Ryan, "Information, Justice and Politics" in *Murphy & Twomey ed., Ireland's Evolving Constitution, 1937-1997: Collected Essays* (at 237-8):

"For many in Ireland, an economic and cultural conservatism was identified as overlaying, and, indeed, flowing from, the

tended to associate the Constitution with highly contentious and reactionary measures, such as the original provisions of Article 44.1.2 (recognition of the “special position” of the Catholic Church), Articles 2 and 3, and the ban on divorce and were simply unwilling or unable to look beyond these provisions and analyze the Constitution on its strict legal merits.

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sectarian character of the Constitution. Of course, the association of the Constitution with Eamon de Valera and with the 1930s is readily interpreted as further confirmation, if such be needed, of anachronism and sectarianism. As a result, a large section of liberal Ireland now appears to subscribe to the view that we need a ‘new’ or ‘modern’ of ‘simplified’ Constitution. By this method, the embarrassment of sectarianism and the overtones of the 1930s’ corporatism which some identify could be expunged.”



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