

* WRITTEN IN VAUGHAN'S HOTEL DUBLIN,
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IN THE MANSION HOUSE DUBLIN,
1918. 32 COUNTY ELECTION
FROM G.H.G VAUGHAN'S HOTEL.
PROFESSOR BRIAN FARRELL
R.T.E.
2. From First Dáil
through Irish Free State

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* IN 1938 Ireland was still getting used to its brand-new constitution. De Valera's Bunreacht was not the first effort to provide a fundamental law for the Irish state. It replaced the Constitution of the Irish Free State, and that, in turn, replaced the often-forgotten Constitution of Dáil Éireann drafted in 1919. It is difficult to understand the present Constitution, and impossible to assess the balance of continuity and innovation in its provisions, without some examination of these earlier constitutions. On the one hand, they illustrate the strength of an enduring constitutional tradition within which de Valera framed his Bunreacht; on the other, they provide a comparison against which to measure his contribution to Irish constitution-making.

Ireland in the early twentieth century was already well set along the road of constitutional development.¹ Within the United Kingdom, of which it was still part, a recognisable—if uniquely traditionalist—modern democratic state was emerging; the old claims of divine right of kings and the pretensions of the Lords were well and truly becoming subordinated to the will of elected representatives of the people. Elections and parties were elbowing aside older sources of

parliamentary sovereignty.² Ireland, through its representatives at Westminster, played an important part in that process; it also benefited from a democratisation that gave the vote to a wider public and that pointed up the anomaly of an Irish population subject to an alien and imposed administration.

Home Rule, vigorously championed by the Irish Parliamentary Party at Westminster, represented one solution to that dilemma. It also, of course, provoked a militant reaction, especially among Northern Unionists, which was an augury of troubles ahead for Irish constitutional development.³ But the Irish Parliamentary Party was not alone in planning a new constitutional future for Ireland.

Arthur Griffith's original Sinn Féin proposed, as a variant, the restoration of the 'constitution of 1782', the re-creation of Irish legislative independence historically enshrined in Grattan's Parliament.⁴ In brief, his proposal was to apply the Hungarian solution, which had been used to resolve a similar tension between Austria and Hungary: a dual monarchy symbolically representing the common interests of the people of these two islands, but an independent Irish parliament in which popularly elected representatives would control the government. Many saw Griffith's ground-plan as an illusion, set against the promise of immediate Home Rule.

The militant minority involved in Irish-Ireland were impatient with any solution short of complete independence; symbolically their case was asserted in the Easter Rising of 1916, which instituted a Provisional Government to 'administer the civil and military affairs of the Republic in trust for the people,' pending 'the establishment of a permanent National Government, representative of the whole people of Ireland, and elected by the suffrages of all her men and women.'⁵ It may be objected that this language of the Proclamation is the rhetoric of military coups the world over: a direct intervention claiming to create or restore a proper order, reform existing maladministration, and the promise to restore 'normal democracy', including elections. But the 1916 leaders were not the military élite of a professional, established army: they proposed a specifically advanced franchise, embracing

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five short, simple articles it sketched the provisional scheme of government for the embryonic Irish state. It was to remain the basic law of that emerging state until the adoption of the Irish Free State Constitution. It was, to adapt Bagehot's famous phrase, a buckle which fastened, a hyphen that joined, the institutions of the new Irish state to the structures, processes and values of the British system. In particular it enshrined the British cabinet model in the central, strategic location it has continued to hold in the Irish political system down to our own day.

Briefly, the Constitution declared that 'all legislative powers shall be vested in Dáil Éireann'; that all executive powers were vested in a Ministry composed of Dáil Deputies approved of, and dismissible by, the Dáil; that the Ministry was financially responsible to the Dáil; and that this provisional Constitution could be altered by vote of the Dáil. Fundamentally, then, it was—in the words of Hugh Kennedy, the first Free State Attorney General and Chief Justice—founded on the great principle 'that all legislative, executive, administrative and judicial power had its source in and was derived from the sovereign people.'

Kennedy suggested that this emphasis on the sovereign people was 'a return, in a sense, to the idea behind the old Irish state.' But this is to ignore the representative emphasis in article 1; the new Ireland was not committing itself to some restored system of primitive direct democracy. On the contrary, it was copying and codifying (admittedly in a simplified way) the three fundamental principles of British constitutional convention: parliamentary sovereignty, untrammelled by any reference to any higher law; a cabinet sustained by its parliamentary support; and a constitution as flexible as ordinary statute law.

The Dáil Constitution, the first Irish twentieth-century constitution, the seed-bed in which de Valera was to root Bunreacht na hÉireann, is a significant document in Irish political development. It reflects the timidity of the 'Irish revolution', confirms the innate conservatism of its leaders, is an enduring monument to the anglicisation of Irish political institutions. There is here none of the crusading fervour,

GRIFFITH BECAME PRESIDENT OF THE IRISH REPUBLICAN BROTHERHOOD AND HEAD OF STAFF

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radical optimism, creative experimentation of the American founding fathers. Efforts to moderate the entrenched cabinet model and provide for greater legislative involvement by ordinary deputies through a committee system similar to the US Congress were twice raised. The Acting President, Arthur Griffith, described the scheme as 'a complete revolution of the Constitution of Dáil Éireann. It meant taking away the responsibility of the Ministers and placing it in the hands of Committees.'¹⁰ The same sentiments were echoed by Eoin MacNeill: it was 'a very revolutionary proposal' and he 'did not believe that the country would approve of it.'

The Dáil took the hint. Similarly the actual legislation proclaimed in the decrees of the First and Second Dálaí, between 1919 and 1922, was modest and moderate.¹¹ The emphasis throughout was on continuity and, at most, incremental change.

A similar caution and restraint is evident in the next Irish exercise in constitution-making. This arose in January 1922, after the Dáil—by a narrow vote—accepted the Treaty. De Valera resigned; Griffith was elected head of the Dáil Government, and Collins head of the Provisional Government established under the terms of the Treaty. In fact, although the formal existence of two governments was contentious and confusing, their personnel was virtually identical and they met as a single body. One of their very first decisions was to establish a committee to draft a constitution for the new Irish state.¹² A distinguished, experienced, professional group was chosen. It included three future Supreme Court judges: Hugh Kennedy, James Murnaghan, and John O'Byrne; James McNeill, a future representative in London and future Governor-General, and the Cork-based academic polymath, Alfred O'Rahilly, as well as the Dublin Quaker businessman James Douglas and an American lawyer, C. J. France. Officially Michael Collins was chairman of the committee but in reality that task was left to Darrell Figgis, a well-known literary figure, protégé of Griffith, and a troublesome colleague.

* Collins gave the group, which met in the Shelbourne Hotel in Dublin, its terms of reference: 'They were not to be bound up by

* COLLINS ACTED AS AGENT FOR KING GEORGE V OF ENGLAND.

A CONSTITUTIONAL CLAIM IN THE COURSE OF NORTHERN IRELAND FOR HIS 25% OF THE SHIP BUILDING OF THE WORLD. 80% OF THE LINEN TRADE AND THE HEAVY INDUSTRY THE CROWN FORCES ARTICLES 2 AND 3, ADOPTED THE POLICY OF MAKING IRELAND REMUNERATIVE FOR THE CROWN OF ENGLAND.

Valera, in his capacity as President of the Executive Council and Minister for External Affairs, should merely *mention* so significant a step to his cabinet colleagues, and that he rightly assumed their acquiescence in his wishes—well illustrates his predominance over his ministers.

It is historically accurate to speak of the 1937 Constitution as de Valera's constitution, not merely because he was the head of the government that enacted it but because the records recently released by the Department of the Taoiseach and by the Franciscan Institute in Killiney, where de Valera's own papers are housed, put his personal predominance beyond any shadow of doubt.

Acting on his own initiative, often in advance of informing or consulting cabinet colleagues in respect of matters he adjudged especially sensitive, Éamon de Valera personally controlled every detail of the process of drafting a new constitution. His two most important assistants in that process were civil servants: the first, John Hearne, has already been mentioned; the second was Maurice Moynihan, the secretary to the Executive Council, who ran the committee responsible for drafting the constitution.

The dimensions of the process of constitutional change were significantly widened as a result of the abdication crisis of November 1936 that engulfed Edward VIII. Although John Hearne's draft heads of May 1935 show that de Valera then intended that the constitution 'contain provision for the retention of the King as a constitutional officer of Saorstát Éireann in the domain of international relations,'⁷ he now seized the opportunity to complete one of the most delicate manoeuvres in his restructuring of Anglo-Irish constitutional relations: taking the King out of the constitution.

De Valera did this by two acts rushed through the cabinet and the Dáil between 9 and 12 December 1936. The first, the Constitution (Amendment No. 27) Act, struck out of the constitution all mention of the King and of the Governor-General. The second, the External Relations Act, provided by ordinary law for the continued exercise by the King of certain functions in external matters as and when advised by the Irish government—in practice this meant that all foreign diplomats in

Dublin continued to be accredited to the King until the External Relations Act was repealed in 1948. But the External Relations Act, as de Valera frequently insisted, was 'a simple statute repealable by the legislature and not a fundamental law,'⁸ and the way was now clear for the introduction of a new constitution.

Again, de Valera moved swiftly. He circulated the draft constitution to his cabinet colleagues and to certain of the more sympathetic members of the judiciary on 16 March 1937. He also established a small, four-member committee to examine and revise the draft in the light of observations that might be received from ministers or from their departments. Few ministers bothered. Even so energetic and independent-minded a cabinet colleague as Seán Lemass contented himself with some minor and anodyne comments relating to social policy.⁹

Indeed, it well illustrated the extraordinary reluctance of Fianna Fáil ministers to question de Valera's authority that the only trenchant criticism of his draft constitution came, not from a cabinet colleague but from a civil servant: J. J. McElligott, the Secretary of the Department of Finance.

Although McElligott had been appointed to Finance by the Cosgrave government, first as Assistant Secretary in 1923 and then as Secretary in 1927, his republican credentials were impeccable. He had joined the rebels in the GPO on his return to Dublin from Fairyhouse races on Easter Monday 1916, and was jailed and dismissed from the civil service in consequence. He then worked in London as a financial journalist until his reinstatement in 1923.

McElligott's response to the request for departmental observations on the draft constitution began by taking the line that his department 'was not called upon to praise but rather to point out possible defects and difficulties.' He then launched a savage attack on the political core of the constitution, articles 1-4.

These Articles, dealing with the Nation as distinct from the State, (a distinction which many political scientists would not admit), seem rather to vitiate the Constitution, by stating at the outset what will be described, and with