Introduction

The Constitution of the Irish Free State[1] entered into force on December 6, 1922 after six turbulent years that saw rebellion against British rule, the success of the Sinn Féin party at the 1918 general election, the War of Independence, the partition of the island of Ireland and, ultimately, the Anglo-Irish Treaty of December 1921. The 1921 Treaty had provided for the establishment of the Irish Free State, with Dominion status within the emerging British Commonwealth. While the new state was to be internally sovereign within its borders, its external sovereignty was, at least theoretically, compromised by the uncertainties associated with Dominion status. Yet, within a space of fifteen years, that Constitution was itself replaced following years of political and constitutional turmoil and debate, a process which accelerated following the accession of de Valera to power in March 1932. A new state thus emerged whose external sovereignty was now put beyond question.

The Treaty had contained provisions which were decidedly unpalatable so far as nationalist opinion was concerned: the British side had insisted on a number of essentially symbolic constraints on Irish sovereignty which, with hindsight, can fairly be described as a faint endeavour on their part to camouflage the extent to which a new independent State was being created. At the time, however, the British side certainly considered these to be real constraints which squarely confined the Irish Free State within the existing parameters of the prevailing Imperial/Commonwealth constitutional theory. There seems to have been no realisation on the part of the British side that the Irish Free State would successfully challenge and push back these boundaries over the next fifteen years.[2] These provisions were also incorporated into the Constitution and were declared by section 2 of the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922 to be beyond the amending power of the Oireachtas:

[1] For the drafting of the Irish Free State Constitution, see J.M. Curran, *The Birth of the Irish Free State, 1921–1923* (Alabama, 1980), 200–18; D.H. Akenson and J.F. Fallin, 'The Irish Civil War and the Drafting of the Irish Free State Constitution', *Éire-Ireland* 5, (1970), (no. 1), 10–26; (no. 2) 42–93; (no. 4), 28–70; Brian Farrell, 'The Drafting of the Irish Free State Constitution' in *Irish Jurist*, 5 (1970), 115–40, 343–56 and *Irish Jurist*, 6 (1971), 111–35, 345–59.

[2] Indeed, 'only in the summer of 1936 did the implications of the constitutional developments of the past two decades really dawn upon the British Government' (Deirdre McMahon, *Republicans and Imperialists* (Yale, 1982)), 186.

> 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 (hereinafter referred to as 'the Scheduled Treaty') which are hereby given the force of law, and if the provisions 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.

Thus, the Treaty provided for the position of Governor-General who was to be the King's representative.[3] While the Governor-General retained the power to 'reserve' Bills passed by the Oireachtas (i.e., not to sign them into law), this reserve power was purely theoretical and was never exercised.[4] Although the Governor-General's position was entirely ceremonial, his position as the representative of the Crown meant that the very existence of the office remained a constant irritant. In much the same vein, Article 4 of the Treaty provided that members of the Oireachtas were required to swear an oath of allegiance to the Constitution and fidelity to the British Crown. Article 2 of the Treaty also envisaged that there would be a right of appeal to the Privy Council.[5]

The Constitution of the Irish Free State was, in many respects, a unique experiment:

> 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.[6]

[3] Article 3 of the Treaty.

[4] Although in 1922 the British Government 'clearly believed that Instructions to reserve could and, if necessary, should be sent to the Governor-General of the Irish Free State': see Brendan Sexton, *Ireland and the Crown, 1922–1936: The Governor Generalship of the Irish Free State* (Dublin, 1989), 85.

[5] It did this through a somewhat oblique mechanism in that Article 2 provided that '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'. Since a right of appeal to the Privy Council was unarguably part of the constitutional practice and usage in Canada, this also imported the necessity for a similar right of appeal in the Irish Free State as well, a point which the Privy Council itself was to confirm in *Performing Right Society v. Bray Urban District Council*, [1930] IR 509.

[6] A.J. Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland, 1782–1922* (Dublin, 1994), 187.

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 legislation, represented a radical break with the previous British constitutional tradition, where the doctrine of the supremacy of parliament was fundamental.[7] 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 was concerned.[8]

Thus, the Constitution of the Irish Free State introduced the conspicuous novelties of judicial review of legislation and the protection of traditional civil rights such as personal liberty, free speech, the inviolability of the dwelling and religious freedoms.[9] In theory, this ought to have meant that legislation enacted by the Oireachtas which unfairly encroached upon these rights would have been unconstitutional and invalid. 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 fundamental rights of the population.[10] 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.

In the event, the 1922 Constitution did not prove—in this respect, at least—to be a success. In the period between 1922 and 1937, there were only two occasions when judicial review was actually exercised[11] and a combination of circumstances conspired to ensure that the provision of this power never played the significant role that the drafters

[7] Judicial review conferred on the courts 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.

[8] *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).

[9] Article 16 of the Treaty contained guarantees for religious freedom.

[10] 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 Gerard Hogan, 'Hugh Kennedy, the Childers *Habeas Corpus* Application and the Return to the Four Courts' in Caroline Costello (ed.), *The Four Courts: 200 years* (Dublin, 1996), 177–219; Ronan Keane, '"The Will of the General": Martial Law in Ireland, 1535–1924' in *Irish Jurist*, 25–27 (1990–2), 151.

[11] *R.* (*O'Brien*) *v. Governor of the North Dublin Military Barracks*, [1924] 1 IR 32; *ITGWU v. TGWU*, [1936] IR 471.

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 Constitution of the Irish Free State a highly restricted ambit. As J.M. 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.[12]

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*.[13] In that case 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 negating (should the legislature so see fit) the fundamental rights guarantees.

Article 50 of the 1922 Constitution

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

[12] J.M. Kelly, *Fundamental Rights in the Irish Law and Constitution* (Dublin, 1967), 16–17.
[13] See Chapter III of this volume for a discussion of this case.

> 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.*

The italicised words were added at the last minute during the course of the Dáil 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 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 which would have required a majority of voters on the register or two-thirds of the voters who actually voted.[14] However, as just mentioned, a last-minute alteration to the text of Article 50 allowed for amendments by ordinary legislation during an initial eight-year period from the date the Constitution came into force, i.e., until 6 December 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 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

[14] 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 observed:

> 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 (*I.F.S. and its Senate*, 502).

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

> removed in principle from the ideas and ideals before the minds of the first authors of the instrument.[15]

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.[16]

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 Dáil, sitting as a Constituent Assembly. During the debate on Article 50,[17] Kevin O'Higgins (Minister for Home Affairs) 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 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 to effect changes in the Constitution—changes about which there might be unanimity in the Dáil and in the Senate—if it were necessary to go to a referendum and get the majority of the voters on the register to record their votes in favour of such amendment. That would be a cumbrous 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

[15] Foreword to Kohn, *Constitution of the I.F.S.*, xiii. Cf. his comments in dissent on this point in *The State* (*Ryan*) *v. Lennon*, [1935] IR 170, and the observations of Justice Murnaghan (who was also a member of the 1922 drafting committee) by way of rejoinder:

> 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 (244).

[16] As Justice Fitzgibbon later remarked in *The State* (*Ryan*) *v. Lennon*:

> 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 (see document no. 33).

In more recent times, a former Chief Justice, writing extra-judicially, has expressed the same view regarding the effect of Article 50:

> 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 (Thomas O'Higgins, 'The Constitution and the Courts' in Patrick Lynch and James Meenan (eds), *Essays in memory of Alexis FitzGerald* (Dublin, 1987), 125–6).

[17] Originally Article 49.

> 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 that case a Referendum would have to be held.[18]

This amendment was warmly welcomed by prominent opposition deputies, including Thomas Johnson[19] and George Gavan Duffy.[20] 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'.[21] The Minister agreed to this suggestion and, accordingly, the five-year period was subsequently extended at Report Stage to eight years.[22] 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 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.

No one foresaw at the time the amendment was accepted by the Dáil 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

[18] 1 *Dáil Debates*, Col. 1237 (5 October 1922).

[19] Thomas Johnson (1872–1963) was a TD from 1922–7 and leader of the Labour Party. During this period—prior to the entry of Fianna Fáil to the Dáil in August 1927—Johnson was leader of the opposition. See J.A. Gaughan, *Thomas Johnson, 1872–1963: First Leader of the Labour Party in Dáil Éireann* (Dublin, 1980); Arthur Mitchell, 'Thomas Johnson, 1872–1963, a Pioneer Labour Leader' in *Studies*, 58 (1969), 396–404.

[20] Gavan Duffy said:

> 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 (1 *Dáil Debates*, Col. 1238 (5 October 1922)).

But he was subsequently quickly alive to the implications of the defective drafting of Article 50: see 4 *Dáil Debates*, Cols 418–9 (10 July 1923).

[21] 1 *Dáil Debates*, Col. 1238 (5 October 1922).

[22] 1 *Dáil Debates*, Cols 1748–9 (19 October 1922).

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 it led to the complete undermining of the Constitution.

Article 2A

Faced with the growing threat of political conflict from both the IRA and other groups,[23] by early autumn of 1931 the then Cumann na nGaedheal 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 jury system had more or less broken down.[24] Accordingly, on 14 October 1931, the President of the Executive

[23] For the nature of these threats, see Eunan O'Halpin, *Defending Ireland: The Irish State and its Enemies* (Oxford, 1999), 77–80; O'Sullivan, *I.F.S. and its Senate*, 256–65. The threats were certainly perceived as very real ones by the Government and so, for example, the then Minister for Justice (James Fitzgerald-Kenney) 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 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. (UCDA, P4/1058)

See Hogan, 'Hugh Kennedy, the Childers Habeas Corpus Application and the Return to the Four Courts' in Costello (ed.), *The Four Courts*, 177, 214.

[24] O'Halpin 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' (*Defending Ireland,* 79). O'Sullivan catalogued 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' (*I.F.S. and its Senate*, 255–61). On the other hand, J.M. Regan concludes 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 Dáil 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: *The Irish Counter-Revolution 1921–1936* (Dublin, 1999), 289–90.

Council introduced the Constitution (Amendment No. 17) Bill 1931 into the Dáil. This Bill was subsequently signed into law 'in the teeth of bitter and indignant criticism from Mr de Valera and his supporters'.[25] 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 3 or any subsequent Article, this Article shall prevail.

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[26] (from which there was to be no appeal) which was empowered to impose 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*[27] (an application brought by General Eoin O'Duffy[28] to restrain his trial before the Special Powers Tribunal, decided a few months before *Ryan's* case), Justice Hanna 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 charter set aside even though no one can see the ultimate benefits or

[25] Kelly, *Fundamental Rights*, 272.
[26] W.T. Cosgrave informed the Dáil 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 *Dáil Debates*, Col. 45 (14 October 1931).
[27] [1935] IR 70.
[28] Eoin O'Duffy (1892–1944) TD: revolutionary leader, General and former Garda Commissioner; leader of the quasi-fascist Blueshirt movement. See Fearghal McGarry, *Eoin O'Duffy: A Self Made Hero* (Oxford University Press, 2005).

> 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 if improperly used it might possibly become, as was said of the Star Chamber, a potent and odious auxiliary of a tyrannous administration.[29]

Having then described the amendment as creating 'a kind of intermittent martial law under the harmless name of a constitutional amendment', Hanna 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 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

[29] [1935] IR 70 86.

> experience, think that criminal law, and the law of evidence as to criminal offences, is simple and clear, whereas, in fact it is 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, deport or flog convicted persons or order the forfeiture or destruction of their property.[30]

The incoming Fianna Fáil Government had suspended the operation of Article 2A on accession to power in March 1932. The political mood of the country was, however, increasingly bitter and, in some respects, unstable. 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[31] 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.[32] When O'Duffy planned a major march towards the gardens of Leinster House in August 1933, the Government decided to re-activate Article 2A and promptly banned the march.[33] While the Blueshirt threat finally fizzled out in the subsequent two to three years, the Fianna Fáil Government was also finally forced to take action against the IRA. By late 1933, members of the IRA were appearing before the

[30] [1935] IR 97–8.
[31] Maurice Manning, *The Blueshirts* (Dublin, 1970), 48–53.
[32] Maurice Manning, *The Blueshirts,* 73–6. Following the amalgamation of Cumann na nGaedheal 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: Maurice Manning, *The Blueshirts,* 94.
[33] Maurice Manning, *The Blueshirts,* 85–8; O'Halpin, *Defending Ireland*, 117.

Military Tribunal[34] and it suffered the ultimate indignity of being suppressed under Article 2A in June 1936.[35] The fact that Article 2A had been opposed by Fianna Fáil 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 Justice Fitzgibbon 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 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.[36]

The validity of Constitution (Amendment No. 16) Act, 1929 (extending the time for amendment to sixteen years) and Constitution (Amendment No. 17) Act, 1931 (introducing Article 2A and the military tribunals) were ultimately challenged in the great case of *The State* (*Ryan*) *v. Lennon*.[37] Far reaching though these challenges were, it is important to stress that this case did *not* raise the question as to whether the Oireachtas had the power to amend *the Treaty*.

In *Ryan* 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[38] and, subsequently, by a majority of the Supreme Court.[39]

In the Supreme Court, Justice Gerald Fitzgibbon first rejected the argument that the power to amend the Constitution should be confined

[34] According to statistics supplied by de Valera in the Dáil, 513 persons were convicted by the Military Tribunal during the period from 1 September 1933 to 5 February 1935, of which 357 were Blueshirts and 138 were members of the IRA: 54 *Dáil Debates*, Col. 1759 (13 February 1935).
[35] O'Halpin, *Defending Ireland*, 124–6.
[36] [1935] IR 170, 235.
[37] See Chapter III of this volume.
[38] Timothy Sullivan, President of the Court, Justices James Creed Meredith and John O'Byrne.
[39] Justices Gerald Fitzgibbon and James Augustine Murnaghan, with Chief Justice Hugh Kennedy dissenting.

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].[40]

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 construction of Article 50, the Court is bound to give effect to that construction'.[41]

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*[42] 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 Constituent 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 Dáil Éireann 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 other undefined restrictions should be imposed by implication.

[40] See document no. 33.
[41] See document no. 33.
[42] The mention of one thing is to the (implied) exclusion of the other. This is a standard principle of statutory and constitutional interpretation.

Fitzgibbon then emphasised the fact that it was Dáil Éireann 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 within 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 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.

Fitzgibbon 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[43] so that it followed that:

> Our Constituent Assembly could in like manner have excepted 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 those powers.

Justice James Augustine Murnaghan spoke in similar terms and concluded that:

[43] 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.

> 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 incapable 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.[44]

While this line of argument was 'simple in its logic and devastating in its implications'[45] and while the sympathy of most modern commentators is with the dissenting judgment of Chief Justice Kennedy, 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 wholescale dismantling of the 1922 Constitution by ordinary legislation. After that decision, the only remaining check on the amendment power was that the Oireachtas could not legislate in contravention of the Treaty, but even this restriction had been purportedly removed by the Constitution (Removal of Oath) Act, 1933.[46]

Had the decision in *Ryan* been otherwise, every amendment after December 1930 would have had to be by way of referendum. One can only conjecture how the electorate would have responded to referenda on such topics as Article 2A and the abolition of the oath,[47] the appeal to the Privy Council,[48] the Senate,[49] the Governor General and all references to the Crown in the Constitution.[50] In this respect, it must be recalled that

[44] See document no. 34.
[45] Rory O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms' in *Journal of Civil Liberties*, vol. 4, no. 48 (1999), 58.
[46] Section 2 of the 1933 Act had repealed section 2 of the Constitution of the Irish Free State Act, 1922 (which precluded the Oireachtas from legislating in a manner inconsistent with the Treaty) and section 3 had deleted the words 'within the terms of the Scheduled Treaty' from Article 50 of the Constitution.
[47] Constitution (Removal of Oath) Act,1933.
[48] Constitution (Amendment No. 22) Act, 1933.
[49] Constitution (Amendment No. 24) Act, 1936. For the background to the abolition of the Seanad, see O'Sullivan, *I.F.S. and its Senate*, 464–9. O'Sullivan argued (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'.
[50] Constitution (Amendment) (No. 27) Act, 1936. For the background to this legislation, see Brendan Sexton, *Ireland and the Crown 1922–1936: The Governor-Generalship of the Irish Free State* (Dublin, 1992), 163–70.

Article 50 of the 1922 Constitution required for a valid amendment of the Constitution either *a majority of the voters on the register or two-thirds of the votes recorded*.[51] These conditions were far more stringent than currently apply in the case of referenda on constitutional amendments under the Constitution, where Article 47.1 simply requires a majority of the voters who actually voted.

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—three years from the date the first President entered office[52]—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 the 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 to prevent a repetition of cases such as *Cooney* and *McBride:*

> 46.3. Every such Bill shall be expressed to be 'An Act to amend the Constitution'.
> 46.4 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 Constitution is to exclude contingent or temporary amendments. If the Constitution is amended, that

[51] In the case of a majority of the voters on the register, this makes the percentage required to carry the Bill contingent on the actual turn-out. Thus, for example, in a 70 per cent turnout, the majority for the Bill would need to approach 72 per cent in order to constitute a majority of the voters on the register.
[52] Article 51.1. The first President (Dr Douglas Hyde) entered office on 25 June 1938 and so the transitory period expired on 25 June 1941.

amendment is permanent unless and until it is subsequently repealed or varied in another referendum.

Finally, Article 51.1 contained the 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, except 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.[53]

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 amendment of the amendment provisions themselves by means of ordinary legislation. After 25 June 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, 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,[54] 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 (permitting membership of the European Economic Community)—was enacted.

[53] 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), 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 Dáil Éireann and before being presented to the President for his assent, shall have been submitted to a Referendum 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.

[54] 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; the Second Amendment of the Constitution Act, 1941 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. See Chapters XIII and XIV of this volume respectively.

The Statute of Westminster

Externally, the single most important change during this period was the enactment by the British Parliament of the Statute of Westminster, 1931. This legislation gave effect to the recommendations of the Imperial Conferences of 1926 and 1930 and paved the way for the individual Dominions to achieve full external sovereignty.[55] Section 2 (2) provided that:

> No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of the Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

Section 3 declared that each Dominion had the full power to legislate with extra-territorial effect and section 4 provided that, henceforth, no Act of the Parliament of the United Kingdom should extend to a Dominion, unless it was expressly declared in that Act that the Dominion had 'requested, and consented to, the enactment thereof'.

So far as the Irish Free State was concerned, the significance here was that the Statute of Westminster now permitted the Oireachtas to dismantle entirely the 1921 Treaty. So far as the British were concerned, the Irish Free State had been the creation of the Westminster Parliament. As the Judicial Committee of the Privy Council was later to hold in *Moore v. Attorney General of the Irish Free State*,[56] both the Treaty and the Constitution derived their validity from the statute law of the United Kingdom, the former from the Irish Free State (Agreement) Act, 1922 and the latter from the Constitution of Irish Free State (Saorstát Éireann) Act, 1922.[57] This legislation had given effect to the Treaty and had debarred the Oireachtas from amending the Treaty. It followed from this line of reasoning that the restrictions which had been imposed on the Oireachtas by the Treaty had been the creation of an Act of Westminster. If that were so, then in the wake of the passage of the Statute of

[55] Dominions were defined by section 1 of the statute as meaning Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland.
[56] See Chapter III. For a full account of this remarkable litigation, see Mohr, 'Law without Loyalty' 37 *Irish Jurist* (2005), 187. It is interesting to note the memoranda from Conor Maguire and John Hearne, who both anticipated this very result and line of reasoning: see document nos 30, 31.
[57] 12 and 13 Geo. 5, c.4 and 13 Geo. 5., c.1, respectively.

Westminster, the Oireachtas was thus free to amend the Treaty, since it had been a statute of the Westminster parliament which had imposed the restrictions in the first place.

This was the very point which the Privy Council had made in *Moore* in June 1935 in upholding the validity of the Constitution (Amendment No. 22) Act, 1933. This Act had not only removed the right of appeal from the Supreme Court to the Privy Council, but it also amounted to a breach of the Treaty. In *Ryan* the Supreme Court had clearly implied that amendments to the Treaty would be void, since it had been Dáil Éireann sitting as a *constituent assembly* which, in enacting the Constitution of 1922, had entrenched the Treaty and put it beyond the reach of the amending power of the Oireachtas. On this basis, therefore, many of the fundamental changes effected by de Valera following his entry into Government in March 1932—such as the removal of the oath, the appeal to the Privy Council and the ultimate abolition of the office of Governor General—would have been unlawful.[58] The Privy Council had, of course, disagreed with this conclusion, since they proceeded from the different premise, namely, that these legislative restrictions derived from United Kingdom statutes, which, courtesy of the Statute of Westminster, the Oireachtas was now free to amend.

This divergence of judicial views certainly placed de Valera in an unpalatable predicament:

> Mr de Valera was thus in a kind of legal limbo. He must of necessity have accepted the Supreme Court's view [in *Ryan*] on the Constitution's root of title; anything else would have been a denial of his previous career. On the other hand, the Judicial Committee [of the Privy Council's] conclusion [in *Moore*] was eminently acceptable – but unfortunately it was based on an inadmissible premise.[59]

These uncertainties must have provided a further impetus for the drafting of an entirely new Constitution. Indeed, Article 34.5 of the Constitution now requires every judge to make a declaration to 'uphold the Constitution and the laws', so that any judge who declined or neglected to swear this would be 'deemed to have vacated his office' and Article 58 (a transitory provision) applied this requirement to all the judges who were then in office on the date the new Constitution came into force. This requirement effectively precluded the judiciary from

[58] It seems curious that no litigant came forward to challenge these changes at that time and had the courts then been confronted with this issue they would undoubtedly have been placed in a difficult situation.
[59] J.P. Casey, *Constitutional Law in Ireland* (3rd edn, Dublin, 2000), 20–1.

questioning the manner in which the Constitution came into being and de Valera 'thus astutely disarmed in advance anyone who was prepared to argue before an Irish court that the new Constitution was invalid'.[60]

It is against this general background that the documentary material commences in 1928. A word of explanation regarding the nature of the material and its sequencing is now, perhaps, in order. While the material broadly speaks for itself, a commentary has been provided at the start of each chapter for the assistance of the reader. The material has been presented for the most part in chronological order, although this has not always proved possible. While the focus is generally on the archival material which has hitherto, to some extent at least, remained hidden from public view, extracts from public sources such as Oireachtas debates, Acts of the Oireachtas, court judgments and contemporary newspaper accounts are also included, since much of this material also makes for essential reading. The volume does not purport to deal with constitutional law doctrine, although some reference is made to subsequent case law.

Some editorial judgment has been necessary. In that regard, while some key drafts of the Constitution have been reproduced, the reader should bear in mind that as the drafting process reached its zenith in the hectic months of April, May and June 1937, the drafting team worked quickly and left an incomplete documentary record. Many changes must have been agreed orally and informally. While the significance of certain changes were obvious and well documented, in other cases the reasons for the change can now only be conjectured. Nevertheless, this volume seeks to assist the reader to understand and appreciate the thought processes and concerns of the drafting team and their political master, de Valera, to the extent to which they can now be reproduced. The volume ends with the enactment of the Second Amendment of the Constitution Act, 1941.

Chapter I thus deals with the undermining of the 1922 Constitution, beginning with the removal of the Initiative and the Referendum in 1928–9. The principal change here was, of course, the Constitution (Amendment No. 16) Act, 1929 which extended the time period during which the 1922 Constitution could be amended from eight years to sixteen years. Major constitutional changes were effected by the

[60] Kelly, *Fundamental Rights*, 7.

new Fianna Fáil Government following their successes in the 1932 and 1933 general elections. The Constitution (Removal of Oath) Act, 1933 not only removed the oath, but also purported to enable the Oireachtas to make constitutional amendments which varied or amended the 1921 Treaty.

Chapter II deals with the role of the Constitution Committee of 1934. This Committee was given the task of reviewing the existing Constitution on an article by article basis. Its report proved to be of considerable importance so far as the drafting of the Constitution is concerned, as three of the four members—Michael McDunphy, Philip O'Donoghue and (especially) John Hearne—were later to play a pivotal role in its drafting.

Chapter III deals with the decisions of the Supreme Court in *Ryan* in December 1934 and that of the Privy Council in *Moore* in June 1935 and other material directly related to these decisions. There is here a slight break in the chronological sequence to ensure that all relevant material is conveniently located in one place.

Chapter IV deals with the early drafts of the new Constitution, starting with the 'squared paper draft' (probably dating from May 1935) which contains de Valera's notes regarding the initial set of instructions to John Hearne for the drafting of the new Constitution. It is clear that Hearne's early drafts and his associated commentary were hugely influential in the subsequent structure and layout of the Constitution. For reasons which are not entirely clear, the drafting process fell into abeyance from the autumn of 1935 for another twelve months.

Chapter V deals with the abolition of the Seanad in 1936 and the subsequent appointment of the Second House of the Oireachtas Commission. The Seanad's opposition to Fianna Fáil's programme of constitutional reform had sealed its fate and it was finally abolished in May 1936. The Second House of the Oireachtas Commission was established in June 1936 with a broad range of membership and with Chief Justice Kennedy (who as Attorney General from 1922 to 1924 had been a noted opponent of de Valera) as Chairman. The Committee reported with impressive speed at the end of September 1936 and its recommendations proved hugely influential.

Chapter VI deals with the role of Father Edward Cahill SJ and the Jesuit Constitution Commission in Autumn 1936. The Jesuit submission was an impressive document, which also drew heavily from the then contemporary constitutions of other European Catholic countries such as Poland, Austria and Portugal, as well as directly from Papal encyclicals.

There are strong echoes of this draft in the Constitution, although by the end of the entire drafting process Father Cahill—whose own views were regarded as somewhat idiosyncratic by other members of his community—seems to have felt somewhat marginalized. The contribution of Fr John Charles McQuaid is dealt with here.

Chapter VII deals with the External Relations Act 1936 and the abolition of the office of Governor General. The abdication of Edward VIII in December 1936 provided de Valera with the opportunity to remove all references to the Crown in the Constitution. John Hearne's draft Foreign Relations Bill of September 1936 also proved to be hugely influential.

Chapter VIII deals with the drafting of the new Constitution in the period from September 1936 until March 1937. The drafting process appears to have begun again in the autumn of 1936 and the first full draft of the Constitution was discussed at a Government meeting which took place over three days in October 1936. Following the abdication crisis, early 1937 saw the preparation of further drafts and other work done, largely it seems by John Hearne, with assistance from the parliamentary draftsman, Arthur Matheson. The first submissions from Fr John Charles McQuaid also seem to date from this period.

Chapter IX deals with invited observations on and criticisms of the Draft Constitution. The material here, along with that contained in chapter X, deals with one of the most crucial phases of the entire drafting process, namely, the period from 16 March 1937 to 2 May 1937. The first published draft (save for the Preamble and the provisions dealing with religion) to be widely circulated was sent to Ministers, Government Departments, the Revenue Commissioners, the Ceann Comhairle and a number of members of the judiciary on 16 March 1937. The Government Departments responded promptly, often with specialist comments particular to their own area of expertise. Some other contributions were especially influential, not least those of Michael McDunphy and Justice George Gavan Duffy. Two contributions, however, stand out, namely those of Stephen Roche, Secretary of the Department of Justice and J.J. McElligott, Secretary of the Department of Finance. Both submitted trenchant critiques of the draft and both expressed considerable hostility to the very idea of judicial review. On this the drafting committee was generally unyielding, save that it was agreed to avoid the potential impact of what are sometimes known as socio-economic rights through the creation of a new Article 45, the provisions of which would not be justiciable (i.e., enforceable) in the courts. The copious nature of the memoranda and the different drafts

which were generated during this period bear testimony to the fact that this was one of the most intense phases of the drafting process.

Chapter X outlines the revision of the Constitution in April 1937. Following the initial responses to the 16 March draft, de Valera formally appointed Maurice Moynihan, Michael McDunphy, Philip O'Donoghue and John Hearne as members of the drafting committee. A printed draft of the revised document was available by 1 April. The scene was then set for a busy month in which the drafting committee was occupied with a host of submissions and further drafting points. In addition, the material dating from this period shows de Valera wrestling with the most sensitive issue of religion and the exchanges with the various Churches. In the end, de Valera elected not to yield to clerical demands. Readers should note that commentary on the documentary material in Chapter X is found in the introductory remarks to Chapter IX.

Chapter XI deals with the reaction in the media and the debate in the Dáil following the publication of the Constitution on 1 May 1937. Much of the debate focused on the role of the President and the position of women in the Constitution. There were significant amendments made during the course of the Dáil debates, with de Valera responding on certain aspects of women's rights. Another important change which was made at this juncture was to restore the High Court's power of judicial review, with a right of appeal to the Supreme Court. The original draft had envisaged that the Supreme Court would have a full, original jurisdiction in all constitutional matters.

Chapter XII details the preparations for the coming into force of the Constitution following the plebiscite of 1 July 1937, held in conjunction with the general election. Much of the material here deals with the legislation which was to be enacted as a necessary consequence of the coming into operation of the Constitution. There was also an anxiety that a copy of the Constitution should be quickly enrolled with the Office of the Supreme Court, as it was anticipated that the validity of the new Constitution would soon be challenged in the courts.

Chapter XIII deals with the First Amendment of the Constitution Act, 1939, which was enacted by means of ordinary legislation during the transitional period contemplated by Article 51. The First Amendment (enacted on 2 September 1939) effected an amendment to Article 28.3.3°, extending the definition of 'time of war', so as to cater for the circumstances of a European war in which Ireland was neutral. Preparations for this had been in train since the Munich crisis the previous autumn.

Chapter XIV deals with the Supreme Court and the Constitution and the Second Amendment of the Constitution Act, 1941. The decision of Justice Gavan Duffy in *The State* (*Burke*) *v. Lennon* on 1 December 1939 presented the Government with an early reminder of the potential impact which the Constitution might have. Here the High Court held that the internment provisions of the Offences against the State Act, 1939 were unconstitutional and ordered the release of the detainee who had sought *habeas corpus*. When the Supreme Court held that it had no jurisdiction to hear an appeal in *habeas corpus* matters, the Government felt that it had no alternative but to release the remaining prisoners. A serious crisis then ensued with the recall of the Oireachtas in the opening days of 1940, the first meeting of the Council of State and the reference of a new Offences against the State Bill to the Supreme Court by President Hyde. The Court duly upheld the Bill, albeit apparently by a majority.

As early as December 1938, the Department of Finance had been planning one omnibus amendment Bill which would take effect before the transitional period expired in June 1941, i.e., some three years after the entry into office of the first President. The events surrounding the *Burke* case formed the background to some of the amendments, but most of the changes were largely technical or even purely verbal in nature.