
DRAFTING THE IRISH FREE STATE CONSTITUTION

LAURA CAHILLANE



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The Arthur Cox Foundation

Arthur Cox, solicitor, classical scholar and former president of the Incorporated Law Society of Ireland, was associated with the setting up of many Irish companies, not least the ESB. He was a specialist in company law and was a member of the Company Law Reform Committee which sat from 1951 and reported to the government in 1958, ultimately giving rise to the Companies Act 1963. When he decided to retire from practice as a solicitor in 1961 a number of his clients, professional colleagues and other friends, in recognition of his outstanding contribution to Ireland and his profession, thought that a fund should be established as a tribute to him, which fund would be used to encourage the writing and publication of legal textbooks. There was a generous response to this appeal.

After his retirement Arthur Cox studied for the priesthood and was ordained in 1963. He went to Zambia to do missionary work. He died there in 1965 as a result of a car accident.

The Foundation was established to honour Arthur Cox and was for many years administered by Mr Justice John Kenny in conjunction with the Law Society. John Kenny was the encouraging force behind the publication of a number of Irish legal textbooks. Without his quiet drive and enthusiasm there would have been no Foundation. To both Arthur Cox and John Kenny we pay tribute.

The Foundation's funds have been used to assist the writing and publication of Irish legal textbooks and the development of electronic databases of Irish legal materials. The Foundation has recently inaugurated an annual prize for the best overall results in the business and corporate law modules of the Law Society's Professional Practice Courses.

The Law Society, as the continuing trustee of the Foundation, is pleased to have been able to assist in the publication of this book.

Simon J. Murphy
President
Law Society of Ireland

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Finally, I would like to thank my family for their patience, encouragement and support.

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Laura Cahillane

Foreword

The Constitution of the Irish Free State lasted just over 15 years from 6 December 1922 until its ultimate demise on 29 December 1937 when the Constitution of Ireland took effect. For all of its (relatively) short life the Constitution was dogged by at least three fundamental weaknesses. First, it was linked with the terms of the Anglo-Irish Treaty of 1921. Section 2 of the Irish Free State (Saorstát Éireann) Act 1922 provided that the Treaty would have the force of law and that the Oireachtas was absolutely debarred from enacting any legislation inconsistent therewith. All of this meant that, as the 1922 Constitution was bound up with a treaty which had paved the way for civil war, the Constitution was deprived of a degree of popular acceptance from the start. Second, the Constitution could be amended by ordinary legislation for an eight-year period (save where this would conflict with the terms of the Treaty) and this period was itself extended by the Constitution (Amendment No. 19) Act 1928 for a further eight years: there was no period during the currency of the 1922 Constitution when it could not have been amended by ordinary legislation. Third, this paved the way for the doctrine of ‘implicit amendment’ when the courts simply assumed that, where legislation was inconsistent with the Constitution, it had the effect *pro tanto* of amending the Constitution in this implicit and oblique fashion.

These defects fatally flawed the 1922 Constitution almost from birth. The (comparative) success and longevity of the 1937 Constitution is due in no small measure to the fact that the drafters learnt from these drafting oversights so that the legal supremacy of the Constitution is put beyond question (see, e.g., Article 15.4.1) and, once the three-year transitional period (which could not itself be extended by ordinary legislation) had expired, the Constitution can be amended only by means of referendum: see Article 46 and Article 51.

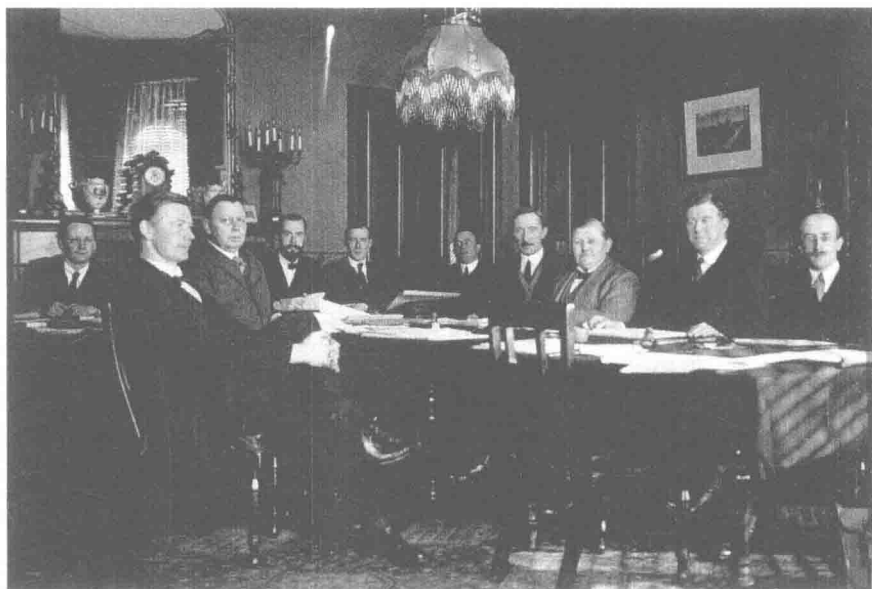
These drafting difficulties notwithstanding, the Constitution of 1922 contained much that was of value and even today remains of intrinsic interest. In some ways the finest tribute to it was paid by its implacable political opponents, since so much of that document is reflected in the present Constitution. For my part, one of the most interesting features of the 1922 Constitution was the extent to

Foreword

which the drafters consciously sought to borrow from the non-British legal tradition. Not only was the existence of a system of fundamental rights and judicial review of legislation conspicuously novel, but many of those fundamental rights provisions themselves were borrowed – in some cases, almost by means of a direct translation – from the (then avant-garde) interwar continental constitutions, most notably from the much admired Weimar Constitution of 1919. It provides another example of how the nation builders of the 1920s sought to emulate the best of other countries and to set for themselves and the country high standards of governance.

The present book offers the first comprehensive analysis of the drafting of the 1922 Constitution and its aftermath. It is elegantly written by one of the finest constitutional scholars of her generation, Dr Laura Cahillane. Dr Cahillane's work is sure to be the definitive account of a fascinating and hugely important period in Irish constitutional history. Every page of this book shows the meticulous scholarship and measured insights of a constitutional lawyer and historian of the highest possible standing. We all owe Dr Cahillane a huge debt of gratitude for providing us with such an engaging and impressive work which will make a further enormous contribution to our understanding of contemporary constitutional law and history.

Gerard Hogan
Court of Appeal Building
Four Courts
Dublin 7
14 August 2015



The 1922 Constitution Committee (image courtesy of the National Library of Ireland)

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Introduction

The modern Irish state was born in 1922 with the promulgation of the Irish Free State Constitution. It was at this moment that many aspects of our legal and political system were created. This momentous but relatively unexplored moment of Ireland's constitutional history has been overshadowed in popular memory by the 1916 Rising, the convocation of the first Dáil in 1919 and specifically by the present Irish Constitution of 1937. These topics have been written about extensively, and recent scholarship has shed light on the circumstances in which the 1937 Constitution came about. However, the circumstances leading to the creation of the 1922 Constitution remain somewhat obscure. This Constitution also gained a bad reputation as a working entity; it was the subject of controversy, misinformation, myth and half-truth. These in turn have each promoted a certain air of contempt or even derision towards what was no less than one of independent Ireland's basic democratic foundations.

This book addresses these issues; it examines the 1922 Constitution, with the benefit of hindsight, and provides a picture of both the document itself and the circumstances surrounding its creation and ultimate demise. It examines the manner in which the Constitution was drafted and, in doing so, elucidates the original intentions of those who drafted the document and examines the reasons why the results did not turn out as anticipated.

Many accounts of the Irish Free State Constitution are quite negative, and the dominant portrayal of the Constitution is that it was a failure; this book explores whether this portrayal perhaps fails to give sufficient credit to the vision of the drafters and the contribution that the Constitution has made to our current legal and political system.

Although many readers will already be familiar with this period in Irish history, for those who may be unaware of the events which led to the drafting of the

1922 Irish Free State Constitution, the following contextual information may be useful.¹

The creation of the Irish Free State Constitution was made possible only following the signing of the Anglo-Irish Treaty on 6 December 1921 by Irish and British representatives.² This Treaty was the outcome of a truce which brought an end to centuries of revolutionary struggle in Ireland. The agreement provided for the creation of a new Irish state, which would remain within the British Commonwealth but would have internal autonomy. Previous to this, Ireland had been part of the United Kingdom, a position violently resisted by many Irish. In 1916, a revolutionary group within the state had initiated a rising,³ which eventually led to a war of independence which lasted from 1919 until the truce in 1921.

However, the Treaty agreement was a controversial one and was not universally accepted in Ireland. Many of those who had fought in the War of Independence believed that a free Irish republic could have been achieved and so they were unwilling to accept anything less than that position. In particular, they refused to take an oath to the British King, something which had been specified in the Treaty. The Treaty agreement eventually led to a split amongst Irish nationalists; Eamon de Valera, then President of Dáil Éireann,⁴ and his supporters disapproved of the agreement and refused to recognise the authority of the new Irish state which had been created.⁵ However, the Treaty was approved by a majority of the Dáil, and those who were prepared to accept its terms then undertook the task of creating the Irish Free State and writing its first constitution. This task was undertaken by Michael Collins, who became Chairman of the Provisional Government, and Arthur Griffith, who became President of the Dáil.

¹ This is intended as general background information only for those who may be unfamiliar with the context.

² For an account of the circumstances surrounding the signing of the Treaty and the discussions which led to that point, see Frank Pakenham, *Peace by Ordeal: An Account from First-Hand Sources of the Negotiation and Signature of the Anglo-Irish Treaty 1921* (3rd edn, London, 1962).

³ The 1916 Easter Rising. This was a small and unsuccessful rising organised by the Irish Republican Brotherhood. It was an event which had little support and inspired little sympathy or respect, until the brutal actions of the British gave it a retrospective grandeur: leaders were shot following trials by field general court martial, in clandestine circumstances, and buried in a mass grave at Arbour Hill. For more, see Adrian Hardiman, 'Shot in Cold Blood: Military Law and Irish Perceptions in the Suppression of the 1916 Rebellion' in Doherty, Gabriel, and Keogh, Dermot (eds), *1916: The Long Revolution* (Cork, 2007), 225.

⁴ The Irish Parliament which had been created in 1919.

⁵ De Valera had not been involved in negotiating the terms of the agreement.

The Constitution Committee and the beginning of the drafting process

I do not think I ever worked on a Committee where there was more good fellowship, and where it was possible to have strong differences of opinion without any personal feeling whatsoever. I doubt if a better Committee from the point of view of character and good-will ever attempted to draft a Constitution in any country.¹

The Constitution Committee

On a cold, sleety day in January 1922, when the newspapers carried stories of the success of the Collins–Craig Agreement, Michael Collins himself was addressing a modest gathering in the Mansion House. Seven men sat in front of him and the anticipation in the room was palpable. These men had been given the immense task of constructing a new constitution for the embryonic Irish state. Outside, Ireland teetered on the brink of civil war and this constitution would represent a chance to finally bring peace to a battered nation. It would need to be not only a document which would appease the Provisional Government and the British authorities but also one which would satisfy the Southern Unionists and would entice the moderate anti-treaty leaders back in from the cold. In essence, these men were being asked to prevent both a civil war and a return to hostilities between the fragile Irish state and Britain. The significance of their task would not have been lost on these men.

Following the signing of the Anglo-Irish Treaty on 6 December 1921, it had been decided to establish a Constitution Committee to draw up a suitable constitution which would be based on the Treaty. Collins had appointed himself chairman of this Constitution Committee but, owing to his many other commitments, he attended only one further meeting and so, guided by his instructions,

¹ Letter from James Douglas to L. Hollingsworth Wood, 9 March 1922, in Brian Farrell, 'The Drafting of the Irish Free State Constitution II' (1970) 5 *Irish Jurist* 343, 347.

the committee worked otherwise independently. Because of the magnitude of their task, it was of the utmost importance that the Committee, chosen by Collins and Arthur Griffith, should comprise accomplished, intelligent, politically neutral members.² The Committee was an interesting mix of nine very different characters.

Darrell Figgis was appointed acting chairman and, in the absence of Collins, effectively directed the proceedings of the Committee. He was a renowned literary figure in Ireland and had been an active member of the Irish Volunteers. Akenson and Fallin have described his appointment as a 'most curious choice'³ as he was very unpopular. While Figgis was friendly with Griffith, a rift had occurred between himself and Collins but, despite this, he was, as Farrell notes, 'a major influence on the shaping of the Constitution, both in his daily attendance at the Committee and in the subsequent debate in the Constituent Assembly'.⁴ Figgis was a hard worker in terms of his studies of constitutions and he was particularly impressed with the German Weimar Constitution. Having written a book on the ancient Gaelic state,⁵ he was anxious, as were the others, that aspects of this ancient heritage be reflected in the new Constitution.

Hugh Kennedy was a distinguished lawyer and would later become the first Chief Justice of the Irish Free State. Kennedy was a constitutional nationalist and he saw Dominion status as a way to establish new Irish institutions of the state, which he believed were necessary in order to ensure the legitimacy of the state. He was devoted to the work of the Constitution Committee and accompanied almost every delegation for negotiations with the British government. He played a major role both in the preliminary drafting and the legal phrasing of the document. He was the only member of the drafting Committee who was present at the discussions of the Irish government and subsequently he assumed the leading role in the constitutional negotiations and redrafting in London.

James Douglas was a Quaker and close friend of Collins. He was a pacifist and was involved with the Irish Conference Committee in 1917 which sought full Dominion status for Ireland on the Canadian model. He may have been chosen

² The exact basis on which members of the Committee were chosen is unclear. It appears Thomas Johnson of the Labour Party was asked but did not accept a position on the Committee. See letter from Figgis to Collins, 9 March 1922, National Archives of Ireland (NAI), S8952. Various other people were proposed; Griffith suggested Michael Francis Doyle, an American lawyer who was unable to attend (Hugh Kennedy Papers, University College Dublin Archives, P4/317). Figgis suggested Ernest Henry Alton of Trinity College Dublin but subsequently withdrew that recommendation but also proposed Lord Justice James O'Connor. See NAI, S8952. It seems members of the clergy were also approached but none was inclined to join the Committee. See NAI, Cabinet minutes PG1, 17 and 28 January 1922.

³ D.H. Akenson & F.P. Fallin, 'The Irish Civil War and the Drafting of the Irish Constitution' (1970) V (1) *Éire-Ireland* 10, 13.

⁴ Brian Farrell, 'The Drafting of the Irish Free State Constitution I' (1970) 5 *Irish Jurist* 115, 117.

⁵ Darrell Figgis, *The Gaelic State in the Past and Future* (Dublin, 1917).

because of his work with the Irish White Cross;⁶ Collins felt that Douglas's membership of the Committee was imperative as, besides the fact that he was experienced, conscientious and nonpartisan, he had also earned the trust of all varieties of Irish nationalists. Douglas reported regularly to Collins on the progress of the Committee.

Clement J. France, a lawyer from Seattle, Washington State, was an outspoken champion of workers' rights. He came to Ireland in 1922 as a representative of the American Committee for Relief in Ireland. It was at this time that he met Douglas. The latter was impressed by France's contribution to the success of the White Cross organisation and he proposed that France might be a useful addition to the Committee considering both his transatlantic experience and his legal capability. Later, however, Douglas was to doubt whether this was a sound decision. He received a letter from John Ryan, a New York correspondent who warned Douglas about France, saying France was claiming he had a special place in Irish governmental circles and that he was not to be taken as representative of Irish-American opinion.⁷ Douglas duly passed on the letter to Collins, while noting that France had been a great help to the work of the Committee. However, more letters were received within a few weeks which convinced Douglas that 'the face value of the correspondence makes France look a pure adventurer'.⁸ Despite this, it appears France did make a valuable contribution to the work of the Committee. He was particularly concerned with the idea of complete economic freedom for Ireland and the protection of the natural endowments of the state.

Timothy James McNeill, brother of the nationalist revolutionary Eoin MacNeill,⁹ had served as a high-ranking civil servant in the Raj Civil Service in Calcutta before returning to Ireland. He had been active in a number of nationalist movements and became chairman of Dublin County Council. After serving on the Constitution Committee, McNeill was appointed as Irish High Commissioner in London and later as Governor-General. McNeill, like Douglas and France, was also involved in the White Cross.

James Murnaghan was a lawyer and an academic. He was appointed to the Supreme Court in 1925. He does not appear to have been involved in any way with Sinn Féin or any other nationalist organisation. Unfortunately, there is little

⁶ A civilian relief organisation, set up to raise funds in the United States in order to supply relief to people whose property had been devastated by the Crown forces in reprisals for IRA activity.

⁷ See Farrell, 'Drafting II', 351. Ryan commented that they were unaware of France's views so they could not say if these were an accurate representation of Irish-American opinion. However, he also commented that France's brother had lately come from Russia with obviously communist opinions which shocked the great majority of thinking Americans.

⁸ *Ibid.*, 352.

⁹ Famous Irish scholar, nationalist, revolutionary and politician. He co-founded the Gaelic League and also established the Irish Volunteers. He was also professor of early Irish history at University College Dublin.