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THE CONSTITUTION OF THE IRISH FREE STATE

FIRST PUBLISHED IN 1932

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FOREWORD

BY

THE CHIEF JUSTICE OF THE IRISH FREE STATE

I HAVE been privileged to watch this work grow out of a small but fruitful essay. The writer was some years ago a candidate for his Doctor's degree in the University of Heidelberg and was required to offer a thesis on a legal subject-matter in support of his candidature. He was drawn to choose as his subject the Constitution of the Irish Free State, not indeed because of any either sentimental or polemical interest in Ireland or its affairs (the source of much worthless writing about this country) but because the obvious interest (at that time still fresh) in the newest of the after-war European Constitutions having attracted his attention to it as a student of constitutional law and theory, he found that it offered themes the examination and treatment of which seemed to offer scope for original work. He was already familiar with the English Constitution and with the framework of the British Commonwealth of Nations, and he understood the origin and common source of the constitutions of the Dominions which had been built on British colonial foundations. The Irish constitutional instrument was something different. He saw that it derived from another line of thought. He recognised principles and theories with which he was familiar as a student of constitutions on the Continent of Europe breaking through and flowering in a soil for long hardened to a surface of British appearance, and he found that he must look down into Irish history for the seeds and to the more recent revolution for the fertilising power. He also came to appreciate and to understand the insistence upon national sovereignty of a people who refused to be classified as a colony or to be subordinated to the position of a province but accepted equal place in an association of political entities, some of national, others of colonial origin, but all now internally sovereign.

This called to mind the analogy suggested in German Constitutional history and law, and particularly of the combination of sovereign German States in a single political association by the Empire in 1871. Here was a juristic problem for the student of comparative systems in the association with the British group of Ireland, claiming intrinsic nationhood and sovereign statehood (unlike the colony-Dominions), and the association of the German States in the German Empire. These were the themes which began to take shape in the University thesis, and the fascination of which has led on the writer to the studies which are realised in the present volume.

He obtained his degree with distinction. Shortly afterwards the work of an University appointment brought him to London, but the enquiries which he had begun when writing his thesis had given a direction to his studies in his special subject (Constitutional law and theory) and he determined to devote his leisure to preparing himself for the writing of an exhaustive work on the Constitution of the Irish Free State. Already equipped by wide reading in the literature of his subject in German, French and English, he applied himself to the study of our history and of the movements and events which ultimately led to the Treaty of 1921, the formulation of the Constitution by the Dáil sitting as a Constituent Assembly in 1922, and the continuation of the new order of things during its first decade. London affords great facilities for such studies, but Dr. Kohn was not content to take the risk of having his views cramped by the possible limitations of merely reading in London. He seized every opportunity of coming to Ireland and staying here for considerable periods, during which he made the acquaintance of men charged with administrative responsibility and studied at first hand the working of the new institutions. His studies were facilitated by a Rockefeller Research Studentship dedicated to the same object. I am not alone in my admiration of the way in which he has penetrated the surface of things and grasped the realities (so often spiritual) in this Country, a closed book to less indus-

trious and less sincere enquirers and writers. Now, after a course of patient study and enquiry spread over a period of some five years, this book, the first scholarly treatise on our polity, is offered to all who, whether in Ireland or out of it, have a serious interest in the subject.

I have read the work in manuscript several times as it was from time to time revised and sometimes rewritten. I cannot here refrain from a word of admiration for the linguistic attainments of the writer, born and educated in Germany, who has been able to write this treatise direct in the English language with a diction so rich and equal to all the needs of the subject.

I welcome this book for several reasons, which should recommend it also to others.

The drafting of a constitution for the Saorstát was entrusted to a Committee nominated by the two leaders—Arthur Griffith and Michael Collins. The Committee was small but included men of diverse training, administrative, commercial, legal, academic, political. Their work was given coherent direction by unity of purpose to make secure the full measure of sovereign statehood and political liberty won by the sufferings and sacrifice of their countrymen and crystallised in the Treaty of 1921, and by unity of principle in the simple instruction given them by Griffith and Collins, namely, to draft a democratic constitution. The Committee was happily free from any obligation to accept existing British or Dominion models, and could, on the one hand, respond to the guidance of Irish history and existing Irish conditions and, on the other hand, borrow of the experience of the constituted democracies of the world, looking for instance to the Constitution of the United States produced in circumstances of some analogy, to that of the German Republic, a political *tour de force* framed to work in contemporary conditions, as well as to those rules of law, affirmations and negations, enunciated from time to time over centuries, which make up collectively the unwritten constitution of Britain. The Committee, working under severe

limitations of time, presented a draft constitution which was submitted to a close scrutiny and revision by the Provisional Government and Dáil Ministry. Then the views of the British Government were taken upon the matter with which alone Britain was concerned, viz. the accordance of the instrument with the Treaty between the two countries, while portions of the instrument purporting to carry out the promises made to the Irish minority were submitted to representatives of those interests. A final draft was thus at last completed for submission to the Dáil sitting as a Constituent Assembly. The document was, after long debates in the course of which it was altered and amended in certain respects, enacted by the Dáil and became the Constitution of the Saorstát as it now appears, the first legislative act and fundamental instrument of the new State.

This book presents for the first time, so far as I know, the forces and tendencies, historical, political, moral and intellectual, which, consciously or unconsciously on the part of the many participators in the work, came together in the making of the instrument here analysed and presented in a scientific objective and searching examination.

During upwards of a century, the political vision of the mass of the ordinary people of this Country became more and more exclusively directed to Westminster and fixed upon the varying fortunes of their little band of representatives in the British Parliament, notwithstanding the educative efforts of Thomas Davis, William Rooney, Arthur Griffith and Padraig Pearse and others, a line of teachers working alongside the active revolutionary movement. Political and legal constitutional studies in this Country were in practice limited to the British Constitution and the working of the British Parliament. Professor Dicey's book became an evangel accepted reverently and without criticism or question in our schools (such as they were) of political philosophy and constitutional law. One has only to observe the tendencies which have asserted themselves in amendments of the Constitution, in parliamentary rules

and forms, and in the attitude towards reform in the administration of the law, once the first ebullience of revolutionary success was spent in the first new institutions, to realise the truth of what I say. I see in the use of Dr. Kohn's book, written from the wide-view standpoint of current European thought, a hope for the emancipation of our schools of law and political studies from the thraldom which has made them negligible wraiths; a starting-point from which, stimulated to work in the tradition of a revitalised national culture but in a new freedom and breadth of outlook, they may become schools of learning and philosophy of which the nation need not be ashamed, and which may even perhaps discover a message for the distracted world.

Dr. Kohn did not close his study with the enactment of the Constitution. He has included in his work the acts afterwards passed for implementing the instrument and filling those gaps in detail which were left deliberately to be completed by subsequent legislation. 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. At the last moment, however, it was agreed that a provision be added to Article 50, allowing amendment by way of ordinary legislation during a limited period so that drafting or verbal amendments, not altogether unlikely to appear necessary in a much debated text, might be made without the more elaborate process proper for the purpose of more important amendments. This clause was, however, afterwards used for effecting alterations of a radical and far-reaching character, some of them far removed in principle from the ideas and ideals before the minds of the first authors of the instrument. These amendments have been examined and considered in this book in their proper places.

I fear lest this foreword may exceed in length a reasonable

introduction to the book, but having studied the work of the author in progress, I am anxious that it should be known and that it should at once find a place in the studies of our universities and schools of law. It is not, and of its nature could not be, in any way connected with any phase of Irish party politics and has no polemical purpose. While it is a book for lawyers who will find in it the relevant statutes as well as the principal judicial decisions noted and discussed, it is not a mere lawyers' text-book. It is an essay in political philosophy applied to a concrete case of living interest by an independent observer, trained in the modern European schools, who has fitted himself by special study for his task.

I venture to summarise Dr. Kohn's treatment of the subject thus. In the first place, the matter is illuminated by being placed against an historical background both as a whole and in particular sections, as for instance in the case of the most interesting presentation of the derivation of the clauses entitled in the Draft "Fundamental Rights." In the second place, each provision is so discussed in relation to the existing and previous law and practice as to exhibit its full legal import and the effect of subsequent legislation and decisions upon it is shown. Thirdly, the place of each provision in the Constitution as an organised whole is considered with critical examination of its adequacy to its purpose. Irish readers are given a key to the place of their Constitution in the field of current political theory. Non-Irish readers are supplied with historical materials as to movements and political ideas in Ireland to enable them to realise the significance of the instrument in which the revolution has for the time being found expression and political form. Finally, students generally will find in the work a valuable technical study in the mechanics of government, legislative, executive and judicial.

I am not to be supposed to agree with everything which is stated or suggested in these pages (though I believe that all matters of fact are accurately set forth and I know that great trouble has been taken to verify them), nor am I to be taken

as suggesting that there is any finality in the treatment of the subject here. I do say that it is a most valuable critical study, scholarly and detached, but of exceptional insight—that nothing of the kind has so far been attempted, and, therefore, that the work can justly claim the attention of serious public men, of lawyers and of students whether of politics or of law.

AODH UA CINNÉIDIGH

PREFACE

THE present work is the outcome of a thesis submitted in 1927 to the University of Heidelberg. To the continental jurist familiar with the history of English political institutions the fascination of the subject was twofold. In its internal structure the Constitution of the Irish Free State presented an unprecedented impact between the theoretical dogmatism of continental systems and the evolutionary empiricism of the British Constitution. Even in so far as the design of the latter was followed the formal enunciation of its unwritten traditions was distinctly "continental." More significant even was the application of the same tendency to the external framework of the new State. The conversion of the undefined conventions of "Dominion Status" into concrete rules of constitutional law effected by the Treaty Settlement produced an entirely novel framework of public law. Its significance was not limited to Ireland. As happens so often in political evolution, abstract postulates became the ferment of structural transformation. It was the new conceptions of co-equality and national sovereignty embodied in the Constitution of the Irish Free State which inspired the re-definition of inter-Imperial Relations by the Imperial Conferences of 1926 and 1931. It expressed that a limitation of external sovereignty was not incompatible with the maintenance of a comprehensive and self-derived national statehood, a truth of more than Irish or even Imperial import.

Such were the problems which inspired the present effort. Its prosecution was delayed and frequently interrupted by personal and professional circumstances. It was only the award of a Rockefeller Fellowship which enabled me to concentrate on its completion, and it is my first and pleasing duty to express to the Trustees of the Rockefeller Foundation my grateful appreciation both of the material assistance rendered to this work and of the sustained interest evinced in its progress.

I have been fortunate in having been favoured by the advice

ınd assistance of wise counsellors and kind friends. To two ›f them in particular—Chief Justice Kennedy and Professor Harold Laski—I would beg to express my heartfelt gratitude ›n the completion of the task. Chief Justice Kennedy has fol-owed this work with the most active sympathy from its early ›eginnings, as revealed in the kind Foreword with which he ıas been good enough to honour this volume. He has guided ny investigations, has given me generously of his wise counsel t every stage, and has warned me against the pitfalls which nust of necessity beset the enquiries of an outsider. He has n no way influenced my conclusions and I should like on ny part to emphasise his disclaimer of responsibility for the ›pinions expressed therein; it is not his fault if no better ıse has been made of the help he has so amply bestowed on his work. Professor Laski has given to my efforts a measure f help and encouragement which only those who have been imilarly befriended will be able fully to appreciate. I have ıever been a student of his in the academic sense—though here are few contemporary thinkers in the field of political cience from whose writings I have derived greater benefit; et he helped and supported me at every stage of this work in ıe true spirit of the great *civitas academica*. I am deeply ıdebted to him.

It is my further pleasant duty to thank the heads of the De-artments of the Irish Free State, the Secretariat of Dáil Eireann and the Office of the High Commissioner in London for ıuch valuable information and for many kindnesses. I finally esire to express my gratitude for many services in the suc-essive stages of the work to my friends Mr. R. O'Sullivan of ıe Middle Temple, Mr. M. H. Eliassoff, M.A., and Mr. W. ·. Ettinghausen, B.A., and to my helpful secretary, Miss R. andall.

A debt remains which words can no longer repay. No ıalytical estimate can convey the creative share in this work f her to whom it was to have been dedicated, to whose memory must now be inscribed. Several of the earlier parts, written

during the single year of our fellowship—notably the chapter on the Fundamental Declarations—bear the direct impress of her mind. Hers was that rarest of combinations: a warm-hearted and sensitive approach to reality inspired by a mind of intense austerity and objectivity. No greater merit could this work have in my eyes than if it were felt to reflect in some measure that characteristic quality of the spirit of her life.

L. K.

UXORIS IN MEMORIAM

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PART I

THE HISTORICAL BACKGROUND

INTRODUCTION

THE Constitution of the Irish Free State bears the paradoxical impress of a dual inspiration. Moulded in the frame of the Dominion Constitutions and subject to their formal limitations, it yet derives its origin from the enactment—"in the exercise of undoubted right"—of an Irish Assembly which acknowledges "that all lawful authority comes from God to the people" and implicitly denies any other. Its structural design is that of a limited monarchy, but its tenor is essentially republican. A King, invested with the attributes of a "constitutional monarch," forms the apex of the governmental pyramid, but it is a King without divine right and without a prerogative. As a *Deus ex machina* he appears in the centre of a constitutional framework which derives all authority in Ireland from the sovereign will of the Irish people. The internal structure of the Constitution exhibits the characteristic features of the British system, but a multiplicity of novel devices indicates the influence of foreign models, while a consistent effort to modify the fundamental conventions of the former reveals an anti-authoritarian tendency alien to its basic inspiration. In the face of such complexity, an examination of the historical background assumes more than introductory significance. It is of the essence of the interpretative analysis.

CHAPTER I

THE ANGLO-IRISH DILEMMA

IT is by contrast with the elaborate schemes devised to effect a solution of the Irish question within the framework of the United Kingdom that the fundamental character of the constitutional advance embodied in the Treaty Settlement is most evident. The last effort towards such a solution before the War, the Home Rule Act of 1914,[1] enshrined a scheme of devolution, bestowing on a united Ireland a limited measure of semi-provincial legislative and administrative autonomy. The Irish Parliament which it proposed to set up was not conceived as a sovereign assembly, such as Grattan's Parliament had purported to be, nor did it enjoy those practically unlimited powers of self-government which the British Dominions had acquired in the course of a long process of development. Not merely was its legislative scope vitally restricted by the concession of a power of absolute veto to the British Government, but the British Parliament reserved to itself the express right of legislating for Ireland even in those limited spheres which were to fall within the competence of the Irish Legislature. A larger measure of local autonomy was indeed hardly practicable if the framework of the United Kingdom was to be preserved. The limitations imposed on the legislative competence of the Irish Parliament affected not merely those external functions, such as the making of war and peace, the conclusion of treaties, the succession to the Crown and the law governing alienage and naturalisation, which might logically have been reserved to the central legislative assembly of the Empire, but even such essentially domestic services as the collection of taxes, postal services, the Irish police, land purchase and national insurance. Several of these were, it is true, merely reserved for a limited period, and

[1] Government of Ireland Act, 1914 (4 and 5 Geo. V, c. 90).

might be taken over by the Irish Parliament and its Executive after a number of years. The essential right of fiscal legislation, however, was definitely and irrevocably retained by the Parliament of the United Kingdom, in which Ireland was to have a representation of forty members, an elaborate scheme of provisions regulating the financial relations between the Irish Province and the United Kingdom as a whole and the allocation of a proportionate share of the common revenue to the Irish Administration through the medium of a Joint Exchequer Board. An Irish Ministry responsible to the Irish Legislature was to be set up to "aid and advise" the Lord Lieutenant in the administration of these functions, while in regard to those reserved to the British Parliament, he was to be "advised" by the Executive of the latter, the British Cabinet.

The hybrid nature of this artificial constitutional structure is patent. In the light of subsequent events, it seems difficult to conceive how, even if Ulster[1] had been prepared to accept the scheme, it could have produced a workable solution of the Irish question. It is clear that a Parliament and an Executive limited in the essential sphere of public finance and subject to the legislative and administrative interference of another Legislature and its Executive could not have enjoyed any effective measure of authority. The actual working of the Constitution of Northern Ireland under the Act of 1920[2] indicates how even with so large a measure of public support as the Northern Government possesses within its sphere of authority, no reality of government, in the sense of a comprehensive concentration of the political interest and will of the governed, can be achieved when the control of finance is in effect withdrawn from the competence of the Legislature. It seems inconceivable how such a half-way measure, setting up what in all essentials was bound to be an impotent Legislature and Executive, could have satisfied those compre-

[1] The term "Ulster" is used throughout this Chapter in the narrow, political sense. The province of Ulster consists of nine counties, of which six constitute at present the unit of "Northern Ireland," while the remaining three form part of the Irish Free State.

[2] Government of Ireland Act, 1920 (10 and 11 Geo. V, c. 67).

hensive national aspirations which constituted its very *raison d'être*. Despite the assurances of the Nationalist Party at Westminster, the Act could in no respect be said to realise the political aspirations of Irish nationalism, as Mr. Balfour, a leading Unionist opponent, pointed out in a penetrating analysis.[1] Neither in its technical structure nor in its psychological foundations could be found any element of permanency.

A wide step marks the transition from the Home Rule Act of 1914 to the next comprehensive effort under British auspices, the Irish Convention of 1917–1918.[2] Two decisive developments during the intervening period characterise the new situation which faced the Convention: the rise of Sinn Fein, consequent upon the Easter Week Insurrection of 1916, and the overthrow of Home Rule in its accepted form by a Cabinet virtually committed to the exclusion of Ulster. In opposite directions both developments illustrated the realities of the new situation. The recommendations of the Convention could command little authority when its entire proceedings were boycotted by Sinn Fein—then already probably the strongest, certainly the most virile, party in Ireland—while the other representative party, the Ulster Unionists, vehemently dissociated themselves from the entire body of its recommendations. In the face of such radicalism the essential issue could no longer be evaded. If the principle of nationality was to be recognised as the basis of the new political organisation of Ireland—as seemed inevitable if acceptance by the bulk of Irish opinion was to be secured—there could be no justification for the relegation of the Irish Parliament to the position of a subordinate Legislature nor for the restriction of its fiscal powers. If, on the other hand, the Nationalist demands for full fiscal autonomy and the withdrawal of Irish representation from Westminster were to be adopted, how was the unity of the United Kingdom to be preserved and Unionist Ulster to be kept within the framework of the new Irish State? From

[1] A. J. Balfour: *Nationality and Home Rule* (London, 1912).
[2] Report of the Irish Convention, Dublin, 1918 (Cd. 9019).

this dilemma there was no escape, and the complex scheme finally accepted on the basis of Nationalist concessions by a narrow and clearly unrepresentative majority obviously represented no more than a compromise adopted in the expectation that immediate legislative sanction would be given to its proposals. Despite the considerable advances made in the direction of Dominion Home Rule, the scheme evolved by the majority of the Convention was in vital essentials—such as the maintenance of the concurrent legislative prerogative of the Parliament of Westminster, the temporary exclusion of the control of the Irish police and postal service and the restrictions placed on fiscal autonomy—open to the same strictures as the Home Rule Act. Not in that complex compromise, but in the statements of the two minority groups, the Ulster Unionists and the Nationalist Minority, were the real elements of the new situation to be found.

The essence of the statement of the Nationalist Minority Group[1] lies in the emphasis placed on the principle of nationality as the essential foundation of any scheme of Irish self-government. There was room, they declared, for compromise on details and even on secondary questions of principle; there was abundant room for compromise in the form of safeguards for minorities without limiting the powers of Ireland as a whole. It was essential, however, in their view that the principle that Irish affairs, including all branches of taxation, should be under the control of the Irish Parliament, be accepted as the basis of the Settlement. Ireland, it was urged in a supplementary statement which reflected pre-eminently their view, was a nation, an economic entity.[2] Self-government did not exist where those nominally entrusted with the affairs of government did not possess control of fiscal and economic policy. No finality, they maintained, could therefore be achieved by an arrangement which did not entrust full taxing powers to the Irish Parliament. While, however, the Nationalist Majority was prepared, for the sake of achieving some measure of unanimity

[1] Pages 36–43 of the Report. [2] *Ibid.* p. 67.

with the Southern Unionists, to postpone the settlement of the control of Customs and Excise until after the War, the Minority regarded the attainment of complete fiscal autonomy as of such basic importance that they preferred to dissociate themselves entirely from acceptance of the agreed Report. On other points they were no less emphatic, and though insistence on these was waived for the sake of promoting a measure of unanimity with Southern Unionists, their nature and the form of their statement could not fail to be symptomatic. For the first time a strong plea was made against Irish representation at Westminster, which was shown to be both invidious from the British and ineffectual from the Irish point of view. It was an argument long used by Unionist opponents of successive Home Rule Acts, but it assumed an entirely novel meaning when embodied in a statement which based the whole case for Irish self-government on the principle of nationality. In the same light must be read the opposition expressed in the statement to any settlement prohibiting Ireland from raising military forces for its local defence and the equally emphatic denunciation of the imposition of conscription without the consent of the Irish Parliament. No less characteristic was the plea against even a temporary reservation of the control of the Irish Police. It will be seen that the postulates, both positive and negative, embodied in this statement cover the entire field of what has become known as Dominion Home Rule. Yet it is not without significance that even this group, which was clearly in closest touch with the new developments in the country, and was the only one of those participating in the Convention to stress its unrepresentative character, should have been prepared at that time to accept a compromise on these demands, with the sole exception of fiscal autonomy. It was clearly not constitutional ingenuity, but an entirely new dynamic impetus that was required if a comprehensive reconstruction of the framework of Irish government was to be effected.

It was with the basic conception underlying the demands of the advanced Nationalists that the spokesmen of Unionist Ulster

joined issue.[1] Their strictures read almost like an analysis of the new constitutional status of Ireland as established three years later by the Treaty. They insisted that the Nationalist demands amounted in fact to a claim that Ireland be separated entirely from Great Britain, and, except for the sovereignty of the King, occupy the position of an independent nation. The Irish Parliament to be established in accordance with the recommendations of the Majority would be a sovereign independent assembly, co-equal in power and authority with the Imperial Parliament. The claim to fiscal autonomy set up by the Nationalists was an indication of that comprehensive aspiration, since, under a Colonial form of government, such autonomy was bound to separate all Irish interests from Great Britain, and inevitably lead to the same goal as Sinn Fein desired to reach under a republic. Hence their uncompromising opposition. If fiscal autonomy implied political separation and the establishment of a sovereign Irish State, it became all the more imperative to insist on the maintenance of the fiscal unity of the United Kingdom, carrying with it, as it did, the sovereignty of the Imperial Parliament and Irish representation therein. It equally followed from their analysis of the Nationalist position that the plea that compulsory service could be imposed only with the assent of an Irish Parliament must, both in itself and for its obvious implications, be radically opposed. Nor, viewed from this angle, could the proposal that the Royal Irish Constabulary be placed immediately after the War under the control of the Irish Parliament be regarded as anything but "excessively dangerous." Their attitude to the proposals of the Convention could on these premises be only one of radical negation. Their sole contribution was the submission of a proposal for the permanent exclusion of Ulster from any scheme of Irish self-government and for the unqualified maintenance of its association with the United Kingdom.[2]

[1] Pages 30–34 and 68 of the Report.

[2] Page 116 of the Report.

A further characteristic development which emerged from the deliberations of the Convention was the establishment of an unprecedented contact between Southern Unionists and Irish Nationalists. Southern Unionists, in contrast with the uncompromising attitude of self-isolation adopted by the Unionists of Ulster, were so deeply alive to the growth of a new spirit in Ireland and to the inevitable trend of coming events as to support the Nationalist demand for an Irish Parliament endowed with complete powers over internal legislation and administration and, in matters of finance, over direct taxation and excise.[1] They insisted on the permanent exclusion from the competence of the Irish Parliament of the right to fix the rates of Customs duties, obviously fearing that these powers might be used to the detriment of British trade, although prepared to concede that the Customs revenue be paid into the Irish Exchequer. The retention of Irish representation in the British Parliament, however, they regarded as a condition *sine qua non*. It was a position untenable in itself, yet characteristically indicative of a new realistic orientation that was soon to reshape the traditional alignment of political parties in Ireland.

In a threefold direction the proceedings of the Convention thus indicated the lines on which the *dénouement* of the Irish drama was to proceed during the following years. Between the view that Ireland's political reconstruction could be effected only on the basis of the principle of nationality, and Ulster's fundamental insistence on the maintenance of the framework of the United Kingdom no compromise was clearly possible. The one led as inevitably in the direction of the establishment of a virtually independent Irish State, as the other involved exclusion from the coming Irish polity. In the face of so uncompromising a dilemma, the choice for Southern Unionists could not be doubtful. It led them inevitably into the Irish Free State.

As was natural, the first move in the final stage came from

[1] Pages 5 and 48 of the Report.

the quarter which, in the circumstances then prevailing, was able to realise its aspirations with the least resistance. In the light of subsequent events, in the light, in particular, of the statements of the Ulster Unionists in the British Parliament, the Government of Ireland Act of 1920[1] must be regarded not as a Home Rule Act, but as a measure designed to ensure the permanent exclusion of Ulster from any future scheme of Irish self-government. Its essential contribution to the final settlement was partition. The expediency of a temporary or limited exclusion of Ulster had, it is true, been recognised before, and a variety of devices, such as provisional exclusion, county option, the grant of a veto to dissentient counties, or even the establishment of a subordinate provincial legislature, had been suggested in the successive stages of the discussion. Never before, however, had the permanent partition of Ireland been proposed as an official British policy. The new Act implied the official adoption of the two-nation theory. It set up not merely two separate Legislatures and Executives; it even divided the Judiciary by establishing two self-contained systems of judicature. Beside these essential features of the Act such tentative proposals for a potential unification as the provision for the establishment of a Council of Ireland shrank into insignificance. They could assume reality only if Ulster desired a closer union; and its spokesman in the House of Commons was emphatic in declining "to lend the slightest hope of that union arising within the lifetime of any man in this House."

Viewed as such, the "Act of Partition" could clearly not be expected to offer a real contribution to the problem of Home Rule for Ireland as a whole. It seems inconceivable that the British Government, with its knowledge of the intensity of Irish national feeling, could have assumed that an Act which not only perpetuated the concurrent legislative authority of the British Parliament, but even went beyond the Home Rule Act of 1914 in withholding from the Irish Parliament and its

[1] 10 and 11 Geo. V, c. 67.

Executive the imposition and collection of Income Tax, Customs and Excise, would be accepted by Nationalist Ireland. Its actual working in Northern Ireland demonstrates that no effective measure of self-government could possibly have been evolved under these provisions. With the three most important sources of revenue reserved to the Imperial Parliament, yielding in all seven times the amount collected from the remaining "transfer taxes," with the framing of the annual budget dependent on the findings of a Joint Exchequer Board charged with the fixing of the relative proportion of Northern Ireland's Imperial contribution and the cost of reserved services, the centre of gravity remains definitely fixed at Westminster. Unionist Ulster aspired to no more. It made no claim to self-government and would have been well satisfied with a measure merely providing for its permanent exclusion from any future Irish State. But it was recognised by its leaders that Home Rule in one form or another was inevitable, and that the only effective method to prevent all future attempts to draw it into an Irish Parliament was the establishment of a local Executive and Legislature ensuring, by the very fact of their existence, the permanency of its separation. From the rest of Ireland the acceptance of the Act could not be, and obviously was not, expected. The very inclusion of a section providing for the setting up of a form of Crown Colony Government, in case of the non-establishment of either Irish Parliament, would indicate that no such acceptance was anticipated. It seems probable that the British Government was already then considering the eventual grant of a wider measure of self-government to nationalist Ireland, with the threat, in the event of its non-acceptance, of Crown Colony Government as an ultimate measure of coercion. The position of Ulster having been rendered secure, a bold effort might be made towards satisfying the wider aspirations of Irish nationalism. But the initiative in the matter of Irish political reconstruction had by this time passed from the hands of the British Government. Nationalist Ireland was no longer in a frame of mind to accept

any form of local autonomy as a gift from the British Parliament. The aspirations which had been the moving force of the Gaelic Revival and the Insurrection of 1916 had long ceased to be a mere sectarian current. They had grown into a national stream which, when the offer of liberty came, overflowed and in the result transformed the constitutional framework which was to have shaped it.

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CHAPTER II

THE IRISH REVOLUTIONARY MOVEMENT

THE history of the Irish national revival reflects the characteristic complexity of a revolutionary movement in an age of progressive social and economic disintegration. Its substratum is the aspiration, instinctive in character and vague in concrete aim, of a conquered people for the restoration of its national independence. Its primary embodiment is a physical force movement maintained in almost unbroken continuity from the Conquest over a period of seven centuries through a long chain of political insurrections, economic revolts and secret organisations. In the face of an overwhelming opponent it is seemingly doomed to eternal failure, hence the almost eschatological fervour of its impetus and, by reaction, the fierce passion of its revolt. A movement so hopeless in outlook is not concerned with niceties of political philosophy. It has but one aim: freedom from external domination. The political frame which the liberated national commonwealth might assume cannot in such circumstances be of more than secondary concern. It was not till the last decade of the eighteenth century that the movement assumed a definitely republican complexion. It is characteristic that even to Tone himself the establishment of a republic was not in the earlier stage of his revolutionary career, when he was already a confirmed separatist, the immediate object of his speculations. His aim was to secure the independence of Ireland "under any form of government," and he was prepared to leave "to others, better qualified for the enquiry, the investigation and merits of the different forms of government."[1] It was, as Tone's writings clearly indicate, under the influence of the French Revolution that the political programme of the last phase of the Irish revolutionary move-

[1] Quoted from P. H. Pearse: "The Separatist Idea," in *Collected Works* (Dublin, 1917), p. 273

ment was shaped, culminating in the postulate of an independent Irish Republic, as it was in fact a French Expeditionary Force which first proclaimed a Republic on Irish soil. Yet it would seem in the light of subsequent developments as if the formative effect of the French Revolution on the Irish national revival lay not so much in an active adoption of the republican doctrine as such as in the direction of its vague aspirations towards concrete political aims. The ideal of an independent national republic became the outward symbol of the struggle for national freedom, but both to Young Irelanders and to Fenians that freedom, and not its embodiment in a specific constitutional framework, was the primary object of their revolutionary aspirations.[1]

The influence of French teaching was more concretely effective in the moulding of the social programme of the Irish revolutionary movement. The aim of the "United Irishmen" was, in Tone's classical phrase, "the establishment of the Rights of Man in Ireland." The basis of his political philosophy was the conception of the sovereignty of the people, the doctrine confessedly assimilated from French revolutionary teaching that "all government is acknowledged to originate from the people and to be so far only obligatory as it protects their rights and promotes their welfare."[2] In substance this was hardly new teaching in Ireland. From its early origins the revolutionary movement had ever been imbued with an intense democratic radicalism. But the fusion of national and democratic aims in a concrete programme of powerful emotional appeal became a potent factor in the subsequent evolution of the movement. Tone's formulae provided the slogans of its successive phases until its final emergence in the new Irish State. They inspired the programme of Emmet who, in pro-

[1] Cf. John Mitchel's dictum that he cared nothing for "Republicanism in the abstract" ["Jail Journal," entry of January 16, 1849] and the statement of a Fenian writer that the propaganda of that movement during its most influential period had been "entirely separatist with practically no reference to Republicanism." [Quoted from R. M. Henry: *The Evolution of Sinn Fein*, p. 88.] [2] Cf. P. H. Pearse, *op. cit.* p. 271.

claiming the Republic, prohibited the transfer of land, bonds and public securities and claimed the lands of the Church as the property of the nation. They shaped the national revival programme of the "Young Irelanders." In the revolutionary doctrines of James Fintan Lalor they received a comprehensive reinterpretation. "The principle I state," he wrote, "and mean to stand upon, is this: that the entire ownership of Ireland, moral and material, up to the sun and down to the centre, is vested of right in the people of Ireland; that they, and none but they, are the landowners and lawmakers of this island; that all laws are null and void not made by them, and all titles to land invalid not conferred or confirmed by them."[1] The people's control over the material resources of the nation represented to him the very essence of political liberty. Legislative autonomy could have no reality unless based on the national ownership of the soil. "Let laws and institutions say what they will, this fact will be stronger than all laws and prevail against them, the fact that those who own your lands will make your laws and command your liberties and your lives."[2] His trend of thought was unfeignedly socialistic. "To any plain understanding the right of private property is very simple. It is the right of man to possess, enjoy and transfer the substance and use of whatever he has himself created. . . . But no man can plead any such title to a right of property in the substance of the soil."[3] These declarations embody the social philosophy of the subsequent phases of the revolutionary movement. They inspired the radical programme of the Fenians, who took up the torch of the revolution in the sixties, and they became enshrined in the secret creed of the Irish Republican Brotherhood, which was the repository of the revolutionary tradition during the half century from the beginnings of the Irish Parliamentary Party to the rise of the new republicanism. In the Republican Proclamation of 1916, in the "Democratic Programme" of 1919 and in the deliberations of the Constituent Assembly of 1922 will be heard the echo of their reverberations.

[1] Pearse, *op. cit.* p. 354.
[2] Pearse, *op. cit.* p. 356.
[3] Pearse, *op. cit.* p. 359.

It was this social strain which in its last phase brought about the active fusion of the separatist movement with revolutionary labour. There can be little doubt that throughout its history the labouring classes had in Pearse's words been "the repositories of the Irish tradition, as well the spiritual tradition of nationality as the kindred tradition of stubborn physical resistance to England."[1] Each conspiracy and insurrection had drawn the majority of its adherents from the lower orders in town and country. Emmet's rebellion was essentially a working-class rising, the Fenian movement was no less an expression of militant class feeling than of revolutionary nationalism, and the most successful Irish revolutionary effort in the nineteenth century, the Land League, was in pre-eminent degree a rural proletarian revolt. Yet it is characteristic that in its organised forms labour had never embraced the revolutionary doctrine either in its socialist or in its nationalist aspects. It was not until the last decade of the nineteenth century that the Irish Socialist Republican Party was formed through the efforts of James Connolly and a few collaborators similarly inspired. Its programme was in essence that of the great Socialist parties on the Continent, but to the collectivist postulates of the latter was added a characteristic nationalist and individualistic note. The aim of the party was described as the establishment of an Irish Socialist Republic, based upon the public ownership by the people of Ireland of the land and of the instruments of production, distribution and exchange. The following sentence of the programme, however, postulated that agriculture "be administered as a public function under boards of management elected by the agricultural population and responsible to them and to the nation at large, all other forms of labour necessary to the well-being of the community to be conducted on the same principles."[2] Here lay a significant innovation of more than Irish import. Tracing the political

[1] Pearse, *op. cit.* p. 345.

[2] D. Ryan: *James Connolly: his Life, Work and Writings* (London and Dublin, 1924), p. 19.

institutions of the modern State, which in common with other Socialists he regarded as the coercive forms of capitalist society, to the territorial division of power in the hands of the ruling classes of past ages, Connolly was led to a negation of the democratic character of territorially elected Parliaments, and to the postulate that "the administration of affairs be in the hands of representatives of the various industries of the nation."[1] In such a system of democratic control he saw the salvation of a socialised society from the dangers of bureaucratic control. "Industrial Unionism," as he termed it, meant the liberation "of the individual and the community for the development and exercise of now dormant or hindered intellectual and spiritual faculties."[2] Connolly's doctrine has found a powerful application in Bolshevist Russia; but while the organisation of workmen's councils became in Russia pre-eminently an instrument for the effective concentration of political and economic control in the central organism of the State, it was in Connolly's political philosophy essentially a means for the emancipation of the individual and the spiritual enrichment of society. Industrial Unionism, to quote W. P. Ryan, was to him "a means to the saving of the soul."

It was this individualistic tendency which led Connolly to a positive support of Irish nationalism. Nationalist and socialist ideals were to him intimately united. He regarded every people as "the possessor of a definite contribution to the common stock of civilisation," and the capitalist class of each nation as the "logical and natural enemy of the national culture which constitutes that definite contribution." "The stronger I am," he wrote, "in my affection for national tradition, literature, language and sympathies, the more firmly rooted am I in my opposition to that capitalist class which in its soulless lust for power and gold would bronze the nations as in a mortar."[3] Irish nationalism he felt in a particular measure to be the cause of the Irish proletariat, for in the ancient social order of Gaelic

[1] W. P. Ryan: *The Irish Labour Movement*, p. 164.
[2] *Ibid.* p. 167.
[3] *Ibid.* p. 240.

society he saw an inspiring ideal for the evolution of that co-operative commonwealth in which all his hopes for a regenerated mankind were enshrined.

It was but natural that the comprehensive nationalism embodied in Connolly's doctrines should exercise a profound influence on advanced thinkers in the republican camp. It imbued their romantic nationalism with a powerful realistic content. Thus the last decade before the War, which witnessed the dynamic revival of republican thought and action, saw also a growing *rapprochement* between revolutionary nationalism and militant socialism. In Pearse's last writings, which restated Lalor's doctrine in the comprehensive application of Connolly's individualist socialism, the theoretical fusion of the two aspirations was consummated. The establishment of a truly democratic social order became as essential a postulate of the revolutionary programme as the establishment of a Republic or separation itself.

Such fusion was the less difficult as both movements were equally isolated and esoteric. Neither the protagonists of political independence nor those of economic liberty commanded the adherence of any measurable section of those to be liberated. While the Fenians and the Republican Brotherhood secretly maintained the utopian aspiration of a liberation by armed insurrection, and revolutionary labour slowly groped its way towards a militant policy, the very basis of the national movement, the Irish national consciousness, was being slowly devitalised by the political, economic and cultural forces of the day. The end of the century which had opened with the enactment of the Union saw the decay of all the distinctive features of Irish nationhood. Under the influence of the educational system established in the wake of the Union the Irish language, until the end of the eighteenth century the common possession of the bulk of the nation, had dwindled to the position of an exotic curiosity. The economic life of the people had become almost completely merged in that of Great Britain. The centre of political, intellectual and social activity had

shifted to the English metropolis. With the essential substance of national life thus in gradual process of evanescence, the political arena became the domain of parliamentary tacticians, who might still mechanically repeat the old revolutionary slogans, but who were so essentially reconciled to the fact of the Union as to accept as "a final settlement between the two nations" the semi-provincial devolution scheme described in an earlier part of this section. The provincialisation of Ireland seemed complete indeed. It was not until the last decade of the century that a reaction set in by one of those strange manifestations of a stark realism in which seems to lie the salvation of nations and individuals alike at the extreme danger point of imminent extinction.

The revival began very characteristically in the cultural sphere. Its primary embodiment was the Gaelic League, aiming at the revival and the propagation of the Irish language, Irish music and Irish crafts. Though its programme was emphatically non-political, it indicated a new outlook which could not long fail to be translated into political terms. That translation was effected by the political philosophy of the Sinn Fein movement. Realising the futility of all efforts to liberate Ireland by armed revolt, Sinn Fein radically discarded the romantic adventurism of the physical force movement. Its aim was the attainment of the substance rather than of the external symbols of national independence; hence it was little concerned with the establishment of a Republic, which, it held, could only be achieved by a military defeat of England, but took its stand on the Constitution of 1782, demanding not a sovereign republic, but a national constitution under an Irish Crown. Its spiritual aim was the inculcation of a new sense of national self-reliance; its concrete programme the promotion of a constructive nationalism in all spheres of political, economic and cultural activity. Dissociating itself from the purely political movements of the day, it was emphatic in its insistence that political freedom, to be a reality, must be the outcome of a moral regeneration from within. Its concrete programme of

action aimed at the gradual assumption by the Irish people of the essential functions of government without any active infringement of the existing law. It advocated a policy of non-co-operation, the primary postulate of which was the withdrawal of Irish members from the British Parliament and the constitution of a Council of Three Hundred, forming a *de facto* Irish Parliament whose resolutions were to have binding force on the representative organs of local government. The British courts of law were to be superseded by Irish arbitration courts. A national system of primary and secondary education was to be set up to counteract the process of cultural assimilation. The enlistment of Irishmen in the British Army was to be opposed with the utmost force. The most comprehensive application of its policy lay in the economic sphere. The new school taught a doctrine of economic autarchy, aiming at the development in Ireland of all industries essential to the requirements of the country, safeguarded where necessary by protective tariffs. The establishment of an Irish Mercantile Marine, a National Bank, an Irish Stock Exchange, the national control of transport and fisheries, the setting up of an Irish Consular Service abroad and, in particular, the organisation of a general survey of the natural resources of the country with a view to their productive development—such were the principal items of its comprehensive programme of economic self-dependence.

It might well be that, despite its innate realism, the programme would not be easy of realisation. It presupposed for its execution a spiritual mobilisation of the entire nation which it would be difficult to organise in normal times, while the closely knit economics of a modern society would hardly permit of the evolution by mere voluntary effort of an isolated system of economic autarchy. With all this, however, the new policy represented a constructive advance of far-reaching import. It imbued the separatist movement with a new spiritual impulse and a powerful realism; it rationalised its aims and prepared it for the ultimate assumption of national leadership. It divested it of its utopian and esoteric character; it gave it a compre-

hensive appeal and a permanent application. It represented political freedom as an object to be attained not by the heroic endeavours of inspired individuals but by the concentrated, self-reliant and constructive efforts of a united nation. In fine, it transformed the Irish Revolution from a chain of spasmodic physical revolts organised by an advanced minority—and as such necessarily doomed to constant failure—into an evolutionary movement of national scope, attacking the essential problems of dependence with a policy rooted in basic principles, permanent in application and comprehensive in appeal. Two of its postulates in particular were in time to exercise a profound influence on the course of the revolutionary movement: its insistence on the gradual upbuilding of Irish freedom from within through the assumption by an Irish Parliament of the legislative, administrative and judicial functions of an organised State, and its acceptance of the dual monarchy in the place of the sovereign republic as the external frame of the new Irish State.

The public reaction to the new movement offered scant indication of its future popularity. If the republican and the socialist movements had to be described as esoteric, Sinn Fein, in its first phase, could hardly be said to command more than the support of an intellectual coterie. The critical evolutionism of its programme could not appeal to the revolutionary separatists, the bourgeois economics of its principal protagonists estranged revolutionary labour, while the avowedly revolutionary character of its ultimate political aims rendered it suspect in the eyes of the supporters of the existing order. Yet, despite the rejection of its concrete formulae, its underlying political philosophy subtly affected and eventually transformed the political programmes of the other separatist currents. Despite its rejection of the resort to physical force, it gave a new impetus to the republican movement by its advocacy of a political reconstruction from within through the agency of a self-constituted national Parliament. Through the medium of its republican adherents again the ground was prepared for

a *rapprochement* to the nationalist section of labour. Yet it is a characteristic of the Irish revolutionary movement that the distinctiveness of its several currents was maintained until the course of external events brought about their dynamic amalgamation.

The transformation of the movement was the result of a new factor: the revival of the resort to physical force, initiated in Ireland by the revolt of Ulster and intensified by the outbreak of the War. Its first manifestation, though half hidden, was the organisation of the Irish Volunteers, its overt and decisive demonstration the Easter Week Rising of 1916. Both events—as was subsequently revealed—were the deliberate work of the Republican Brotherhood. Sinn Fein as such was concerned in neither. Labour had already previously fashioned its own instrument of force. The great Dublin strike of 1913 had led to the establishment of the Irish Citizen Army, pledged under its Constitution both to the cause of labour and to that of Irish unity and liberty.[1] Many of its members later drifted into the ranks of the Irish Volunteers, and although apparently not participating in the plans for the Easter Rising, the Citizen Army, when it came, definitely associated itself with and fought in the insurrection. In the heroic self-sacrifice of that struggle the union between republicanism and socialist labour, which the propaganda and the writings of Pearse and Connolly had prepared, became a passionate reality. In the Proclamation of the Irish Republic of Easter Monday, 1916, it found formal embodiment. In words re-echoing the earlier teachings of Lalor, as reaffirmed by Pearse in his last writings, the Proclamation declared "the right of the people of Ireland to the ownership of Ireland and to the unfettered control of Irish destinies to be sovereign and indefeasible." The terms might be general, the character of the new order which they postulated could not be in doubt. A sovereign republic was to be its external framework, economic democracy its social content.

[1] P. O. Cathasaigh: *The Story of the Irish Citizen Army* (Dublin, 1919), p. 71.

In a dramatic manner the Rising and the method of its suppression transformed the alignment of the political forces in Ireland. The mystical flame of the blood sacrifice of the new martyrs seemed to have transfixed the entire body of the nation. A fierce reaction set in. The Parliamentary Party, which for nearly half a century had been the official spokesman of the vast majority, lost in the brief span of two years every vestige of authority. A *rapprochement* took place between the several separatist parties, which a year later led to the fusion of Sinn Fein and the republican movement. Physical force having again proved of no avail, the evolutionary revolutionism of Sinn Fein seemed to have received a new justification, while its constant and emphatic insistence on the principle of nationality as the essential basis of the claim to independence invested it with an unrivalled strength and a unique appeal at a moment when the plea for the self-determination of nations was the most popular political formula in Europe. One basic concession, however, seemed essential if Sinn Fein was to assume national leadership: in the political atmosphere created by the Easter Rising there was no room for dual monarchy schemes. The Sinn Fein Convention which met in November 1917 drew the inevitable conclusion. It adopted the republican formula. It declared that "Sinn Fein aims at securing the international recognition of Ireland as an independent Irish Republic." But it is characteristic that even then the Republic was not accepted in any doctrinaire spirit. "Having achieved the status of an independent Irish Republic," the new Constitution of the movement continued, "the Irish people may by referendum freely choose their own form of government."[1] The essential doctrine of the party remained unaffected, but a new and—as events were to show—ephemeral formula was grafted on to it. Of more immediate importance

[1] "It will be noticed that the status of an independent Republic is claimed not because republicanism is the ideal polity, but because such a status will leave Ireland free to choose either that or any other form of government" (R. M. Henry: *Evolution of Sinn Fein*, p. 242).

was the demand, reiterated from previous Sinn Fein declarations, for the convocation of a Constituent Assembly, "comprising persons chosen by the Irish constituencies, as the supreme national authority to speak and act in the name of the Irish people and to devise and formulate measures for the welfare of the whole people of Ireland." On the basis of this Constitution the fusion between Sinn Fein and the republican movement became a reality.

The effect of the Easter Week Rising on the association of labour with the national movement was curiously in contrast with this development. The labour movement had lost its revolutionary leader, and the evolutionary policy on which, in the reaction that followed, it also fell back, led it not so much in the direction of new national efforts as to a resumption of intensive trade-union organisation. It did not abandon its advocacy of the national claim for political independence. It participated vigorously in the campaign organised by Sinn Fein in the winter of 1917–18 against the exportation of foodstuffs from Ireland. It took an active share in the anti-conscription propaganda of 1918, and called a successful general strike in its support. At the International Socialist Conference which took place during the War at Berne, it demanded the recognition of Ireland's independence as a sovereign State. With all this, however, it remains true that labour had abdicated the leading part in the national struggle which it had acquired in the ecstatic union of forces of 1916. The unique phenomenon of a national revolution led prominently by revolutionists of the economic order paled away. The separatist movement was henceforth to proceed along the historic lines of purely national revolutions, with organised labour as an external auxiliary, frequently influencing, but no longer shaping, the course of its essential policy.

The last two years of the War saw the unimpeded progress of Sinn Fein throughout Ireland. At the General Election which was held immediately after the conclusion of the Armistice in December 1918, it nominated candidates in all Irish

constituencies pledged not to attend at Westminster, but to form an Irish national parliament. Labour, though at first inclined to nominate candidates of its own pledged in principle to similar abstention, finally decided by an overwhelming majority not to participate in the elections as an independent group in order to enable the claim for political self-determination to be endorsed by an unequivocal national vote. The result of the election was a sweeping victory for Sinn Fein and the complete extinction of the old Parliamentary Party. The way was now clear for the convention of a national Irish Parliament in accordance with the old postulate of the Sinn Fein programme. The elected members met in Dublin on January 21, 1919, and constituted themselves as "Dáil Eireann," the "Parliament of Ireland." It is from this meeting that Irish constitutional theory dates the establishment of the new Irish State.[1] The meeting adopted a "Declaration of Independence," reaffirming the Proclamation of the Irish Republic of 1916. It was followed by the adoption of a "Message to the Free Nations of the World," in which the historic claim of the Irish nation to political freedom was forcefully restated. The democratic implications of the Republican Proclamation of 1916 were similarly reaffirmed in a "Democratic Programme" drawn up in collaboration with the Irish Labour Party. The "Democratic Programme" reiterated in Lalor's and Pearse's characteristic phrasing the doctrine that "the nation's sovereignty extends not only to all its citizens, but to all its natural possessions, the national wealth and wealth-producing processes," the rights of private property to be subordinated to the public welfare. From this basic doctrine was deduced a comprehensive declaration of fundamental rights: the individual citizen was to be assured of free opportunities to serve the public welfare and in return to receive a proportionate share of

[1] Cf. s. 1 of the Indemnity Act (No. 40 of 1924). For a continental parallel cf. the decision of the Supreme Administrative Court of Czechoslovakia of May 29, 1925, reported in the *Annual Digest of Public International Law Cases*, 1925–1926, Case No. 8.

the produce of the nation's labours; adequate provision was to be made for the education of the young and the safeguarding of the physical and moral health of the people. The socialist inspiration of the Programme was evident in its demand for the development of the natural resources for the public benefit, and the establishment of industries on the most beneficial and progressive co-operative lines, further, in the demand for international co-operation in the sphere of social and industrial legislation "with a view to a general and lasting improvement in the conditions under which the working classes live and labour." It seems doubtful whether the far-reaching aspirations embodied in the Programme meant more than pious wishes to the majority of those who adopted it. Its significance is not minimised by the unreality of its support. It reaffirmed the democratic tradition of the revolutionary movement, and handed down to the new Irish State a spiritual legacy which, as the analysis of the Constitution will show, was not without some influence on the framing of its functional organisation.

Of more immediate effect than these social declarations was the political constitution which was adopted at the first session of Dáil Eireann. The official title of the new State was "Saorstát Eireann," the Irish equivalent of "Irish Republic." Its internal constitution embodied a curious revival of the old revolutionary conception of parliament as the incorporation of all governmental authority. Dáil Eireann was not only the legislative organ, it was "the Government of the Irish Republic."[1] In practice, executive authority was vested in a Cabinet of five members, consisting of a President elected by Parliament and four Ministers (Finance, Home Affairs, Foreign Affairs and Defence) nominated by the President subject to confirmation by the Dáil. At a subsequent meeting of the Dáil, held secretly in April of the same year, the membership of the Cabinet was increased to eight by the nomination of Ministers for Local

[1] The oath taken by the members of the revolutionary Dáil was to "support and defend the Irish Republic and the Government of the Irish Republic, which is Dáil Eireann."

Government, Labour, Industry and Agriculture, while a novel form of ministerial office, which was to remain a permanent feature of Irish constitutional practice, was introduced by the appointment of a "Director of Trade," who was not to be a member of the Cabinet.

When in the spring of 1921 the British Government, pursuant to the Government of Ireland Act, 1920, ordered elections to be held for "the Parliament of Southern Ireland," Dáil Eireann, while declaring that Act to be "illegal," resolved that the Parliamentary elections to be held be regarded as elections to Dáil Eireann and that the first Dáil dissolve upon the new body being summoned by the President. It was thus that the "Second Dáil" was constituted.[1]

The aim of the Revolutionary Government was the realisation of the old Sinn Fein programme of internal reconstruction. In the economic sphere it inaugurated schemes of agricultural and industrial development and a comprehensive survey of the natural resources of the country. A Land Mortgage Bank was established to provide credit facilities to farmers. A strong impetus was given to the development of Irish fisheries. A National Land Commission was entrusted with the promotion of close settlement. In the sphere of local government a successful attempt was made to capture the county councils and to influence through them the policy of the local authorities. It was in the judicial sphere, however, that the new system attained its most notable success. In order to obviate the resort to the law courts, which were held to be an instrument of British domination, national courts of arbitration were set up, which were subsequently transformed into a comprehensive judicial system, embracing courts of primary jurisdiction in all parts of the country and courts of appellate jurisdiction for entire districts. More effectively than any of the quasi-governmental activities of the revolutionary State, these judicial agencies succeeded in establishing the

[1] For a definition of the terms of "First, Second and Third Dáil Eireann," cf. the Interpretation Act (No. 46 of 1923).

legitimacy of the new order in the minds of the people and of observers abroad. They gained a rapid popularity for efficiency and fairness, which was successfully maintained when they were called upon by Unionist landlords to settle disputes over land purchase, which was in danger of suspension owing to the disturbed state of the country. Their judicious and effective settlement of these cases was the first step in the reconciliation of this class to the approach of the new regime. Similarly the Revolutionary Government was able to organise an efficient police force to counteract the growing lawlessness in the countryside and prevent the outbreak of a land war against Unionist farmers.

In the sphere of foreign policy the revolutionary State developed a feverish activity. An intensive propaganda was organised in the principal European and American centres; political and trade representatives were appointed in the leading capitals. The main effort in this field, however,—the attempt to secure the presentation of the Irish case at the Peace Conference—failed, but the unsuccessful issue of this temporary deviation from the original Sinn Fein policy of inner concentration only tended to lend additional energy to the constructive efforts of the movement at home.

The execution of these policies inevitably brought the Revolutionary Government into conflict with the British authorities. In order to provide funds for its manifold activities, it found itself compelled to float a national loan in Ireland and America. It was promptly proscribed by the British Government, and those found to be engaged in the sale of bonds were arrested. The proscription marked the beginning of a policy of intense repression, which before long resulted in open warfare between the contending forces. Its outbreak could hardly be avoided. The consistent application of the republican policy of non-co-operation and passive resistance involved a state of national mobilisation which could clearly not be maintained for any length of time without resulting in physical conflicts. Incident followed incident, and it was not

long before the country found itself drifting into an undisguised state of active warfare. The "Irish Volunteers," revived and reorganised as the defence force of Dáil Eireann, were declared an illegal body. Their continued activities resulted in the proscription of the entire machinery of the revolutionary State. Sinn Fein, having accepted the aims of the republican movement, found itself reduced to its methods. But though it had adopted the aims and methods, it could not lay claim to the pristine single-mindedness of the earlier republicanism. A movement that had sprung from a basic distrust of the efficacy of physical force and from a keen perception of the complexity of the task of the reconquest of national freedom amidst modern conditions could not superimpose upon itself the political philosophy of a more primitive aspiration without incurring the loss of its very identity. Its dilemma was indeed acute. In the face of the rigid suppression of the entire movement by the British authorities, in an atmosphere of daily shootings, executions and reprisals, doubts as to the efficacy of physical force as a method for the solution of an intricate national problem would obviously be out of court. A *union sacrée* came to embrace alike militant republicans and passive resisters, bourgeois nationalists and revolutionary socialists, Gaelic romanticists and physical force men. But no such ephemeral solidarity has ever eradicated the internal diversities of a complex national movement. A rigid war formula might seem to have united the entire body of revolutionary Ireland; its very rigidity left it singularly unprepared for the advent of peace.

CHAPTER III

THE IMPACT

THE inevitable clash between realities and formulae came when the inauguration of peace *pourparlers* by the British Government forced Sinn Fein to reduce its revolutionary postulates to concrete political terms. The dilemma that faced it was in essence the same which in every phase had confronted revolutionary and reform movements alike. How was a political framework to be devised which would, on the one hand, give comprehensive expression to the national aspiration for political independence and, on the other hand, ensure that friendly and positive relationship with the powerful neighbour which both political and economic considerations rendered imperative? As long as the separatist movement had been merely esoteric and little concerned with the complexities of a problem which it could never hope to shape in real life, it could well postulate complete separation and the establishment of an independent republic as ultimate fighting aims. Sinn Fein, however, had definitely taken its stand as a movement for the realisation of Irish freedom, not in any remote future, but in the immediate present. Provided that the essential national aspiration could be realised, it had been prepared to advocate a constitutional solution which might fall short of full republican sovereignty. It was true that at the very moment when it was expanding into a national movement with the early promise of political leadership, it had paradoxically adopted the utopian formulae of aspirations widely divergent from it both in political complexion and emotional inspiration. Yet its earlier realism could not be entirely effaced. The new republicanism that went under the name of Sinn Fein was clearly not the utopian movement of old. The Republic was postulated not as the ideal of a distant future, but as the most emphatic expression of the claim for full national freedom in the present. That some form of political

association with Great Britain was inevitable if Irish freedom was not to remain a romantic dream, but become a political reality—of this all strata of the movement were clearly aware. The restatement of the war aims of a revolutionary movement might have its psychological difficulties, but, despite the rigid maintenance of the republican front, the repeated declarations of the leaders that they were not "republican doctrinaires" indicated a growing realisation of the ultimate inevitability of some form of association in the sphere of external relations, necessarily involving a certain derogation from full sovereignty in the international sense of the term.[1] The immediate problem was a tactical one, and with the advent of negotiations it became one of vital urgency. Could the consummation of Irish aspirations be achieved by a dogmatic maintenance of the abstract status of a self-constituted sovereignty, or was the effective solution to be found in the old Sinn Fein policy of the attainment of the substantial reality rather than the formal framework of national freedom, leaving it to the creative forces thereby released to dematerialise such forms and symbols as might for the time being have to be accepted? Beneath the tactical alternative lay in truth the central issue of the approaching settlement.

The first impact between the British and the Irish conceptions was as sharp as it was fundamental.[2] The British Government offered to Ireland the comprehensive autonomy of a British Dominion, the conditions of settlement to be embodied in a treaty subject to ratification by the British and Irish Parliaments.[3] Its scope was limited by certain reservations designed

[1] Cf. the declaration of Mr. de Valera on his election as President, that he did not take oaths "as regards forms of government," but that he regarded it as his task "to maintain the independence of Ireland and to do the best for the Irish people" (*Treaty Debate*, p. 25).

[2] Cf. *Official Correspondence relating to Peace Negotiations, as laid before Dáil Eireann in December 1921;* reprinted in *Leabhar na hEireann* (*The Irish Year Book*), Dublin, 1922, p. 233 *et seq.*

[3] In view of the subsequent denial of the "treaty" character of the Settlement, it is worthy of note that it was the British Government which first proposed its embodiment in the form of a treaty.

to ensure British military and naval security and to exclude the imposition of protective duties or other trade restrictions as between the two countries. The British Navy was to retain the right of control of the Irish Sea and the use of Irish ports, and similarly the Royal Air Force was to be afforded all necessary facilities for the development of air communications and defence. Ireland was, further, to assume a share of the Public Debt of the United Kingdom and of its liability for war pensions. The offer contained no concrete proposals in regard to the future relationship between the Irish State to be set up under the terms of the Settlement and Northern Ireland. The British Government merely insisted that the existing powers and privileges of the Northern Parliament could not be abrogated except with the consent of the latter, and that it was in general only by consent that the political unity of the country could be achieved; they undertook to give effect, so far as it depended on them, to any terms on which all Ireland united.

The offer went beyond any ever made by a British Government to the Irish people. It involved the concession not merely of full domestic self-government, but also of that ever-growing freedom of action in the sphere of international relations which the British Dominions had acquired since the Treaty of Versailles. It implied, moreover, a recognition of Ireland's status as a nation: Ireland, in the words of the British Prime Minister in a subsequent letter, would, in fact, within its shores, "be free in every aspect of national activity, national expression and national development. The States of the American Union, sovereign though they be, enjoy no such range of rights." The offer was far-reaching, but the form of its statement and the reservations attached to it implied a maintenance of Ireland's position as a British dependency which ran counter to the fundamental postulates of the revolutionary movement. The reply came with all the force of basic principle. If the offer of the British Government connoted a recognition of Ireland's national status, that recognition, it was

urged, was "strangely set aside" by the British claim to impose limitations on the realisation of Irish freedom. The stipulations and conditions attached to the British offer implied a claim to an interference in Irish affairs which could not be admitted. Such limitations amounted not merely to a derogation from Irish national status, they even detracted from the offer of Dominion autonomy, for no such restriction had ever been imposed on any of the self-governing Dominions. Dominion status in itself for Ireland was declared to be "illusory," seeing that the essential guarantee of the freedom of the Dominions was to be found not in legal enactments or treaties, but in their geographical distance from Great Britain. So far, therefore, from being fettered in the exercise of its national freedom by additional limitations, Ireland, it was urged, should have been offered "most explicit guarantees" of equality with the Dominions, including "the Dominions' acknowledged right to secede." Here, it was clear, lay the crux of the problem. True friendship with England, the Irish Cabinet maintained, could be obtained only by "absolute separation." The "political interests of Ireland demanded her detachment from Imperialistic entanglements." A treaty of free association with the British Commonwealth group they would have been prepared to recommend for acceptance, but it was made clear that the essential condition even for that concession would have been that it might have secured for Ireland the allegiance of the dissenting minority, "to meet whose sentiment alone this step could be contemplated."

The central issue had been stated, and the further correspondence between the British Prime Minister and the President of Dáil Eireann resolved itself into a typical conflict between the representatives of the legitimist and the revolutionary principles. The Irish President, in the characteristic manner of all revolutionary leaders, based his case on natural right. If the British Government, as it had declared, accepted the principle of government by the consent of the governed as the basis of the political reconstruction of Ireland, no allegiance could

clearly be claimed from the Irish people except that which they had voluntarily recognised. But there had been no such voluntary acceptance of British sovereignty. The Irish people, so the reply ran, acknowledging no voluntary union with Great Britain and claiming as a fundamental natural right to choose freely for themselves the path of their national destiny, had by an overwhelming majority declared for independence and set up a Republic. Nor was there, as had been suggested on the British side, any contract of union that forbade separation, the Act of Union being invalidated by the "notorious" circumstances of its origin.

In reply to these arguments the British Government took its stand on the legitimist principle that Ireland was not entitled to denounce its historical allegiance to the British Crown. The historical association of the two countries based on their geographical propinquity, Irish membership of the British Parliament, Irish services in the British Forces, Irish attachment to the British Throne were cited in support of the refusal to acknowledge any right of secession and to negotiate with Ireland as a separate and foreign Power. The principle of government by consent of the governed was accepted, but it was denied that such acceptance compelled the British Government to a recognition of an Irish right to secession, or that in repudiating it the Government were straining geographical or historical considerations to justify a claim to ascendancy over the Irish race. "There is no political principle, however clear, that can be applied without regard to limitations imposed by physical and historical facts. Those limitations are as necessary as the very principle itself of the structure of every free nation; to deny them would involve the dissolution of all democratic States." If applied in accordance with Irish claims, the principle of government by consent of the governed "would undermine the fabric of every democratic State and drive the civilised world back into tribalism." Permanent reconciliation of Great Britain and Ireland, it was claimed, could be attained only by a recognition of their physical and historical interdependence,

which rendered complete political and economic separation impracticable for both.

Judged by the test of abstract principle, the statement of the Irish case would appear as the stronger, because the more consistent. The British refusal to accept the Irish claim to an unlimited right of political self-determination might well be maintained on legitimist grounds, on which every revolution is, of course, illegal. But once the principle of government by consent of the governed had been accepted, the dogmatic claim to an undenouncable Irish allegiance—however strong the practical arguments for association—was difficult to uphold. The argument on which it had been based—that an unrestricted application of the principle would involve a return to tribalism—suggested a denial of Ireland's distinctive nationhood which the British offer had implicitly recognised. The fabric of a democratic State might well be undermined if its ethnically homogeneous units claimed a right to political independence and secession, but the argument could clearly not apply where the group demanding independence possessed a distinctive ethnical character and based its claim on the same principle of nationality from which the head State derived its claim to political sovereignty. Limitations to the principle of national sovereignty there might well be, but they are the limitations incumbent on all nations alike in deference to a higher internationalism, not those imposed on a single nation by virtue of historical conquest.

If, however, the case for independence was unassailable on grounds of principle, it was clearly a question of political tactics how far its formal implications should be pressed in the preliminaries to negotiations of peace. To state the Irish claim to national freedom with the austere force of basic principle was one thing, to claim its acceptance as a preliminary to agreement a very different thing. The attempt to secure from the fact of the negotiations an implied recognition of the Irish Republic by the British Government was inevitably doomed to failure. In the end both sides had to agree to disagree: the British

Government explicitly and emphatically declined to accept conference with the Irish delegates on a formal statement of their claim to independence, which, it was pointed out, would entitle the Irish negotiators, if they so preferred, to conclude a treaty of association with some other foreign Power in preference to the British Commonwealth. The Irish President, thereby forced to abandon his bid for recognition, could not, on the other hand, but restate the Irish position, if only in the terms of a "self-recognition."[1] The problem was, indeed, insoluble in its static form. When an internal revolution transforms the political organisation of a State, its new constitutional status is settled by the success of the victorious party. Where, however, the two orders—the revolutionary and the legitimist—continue to co-exist, no formal reconciliation on the question of theoretical status is clearly possible. Consistency of principle is a powerful asset in a debate on abstract premises, and it gave to the Irish negotiators a dialectical advantage over their legitimist opponents. But no dialectical methods could solve the essential problem. If a positive agreement commanding the willing assent of both sides was to be attained, an entirely new framework of association would have to be devised. It was in this direction that the personal negotiations had to proceed.

The deliberations of the Conference were slow and groping. Secondary issues were considered first with a view to establishing how far a measure of agreement could be reached. Of the two vital problems it became clear that, as a result of Ulster's intransigence, the question of partition would not admit for the present of anything more than a formal solution. The central problem of the constitutional form in which the new Irish State was to be associated with the British Commonwealth remained. There might be room on the Irish side for

[1] The effort to secure recognition of the Irish Republic prior to the negotiations was not, however, wholly abandoned. In the Debates on the Treaty the Irish President stated that letters of credentials from the Irish Republic had been given to the Irish negotiators "in order to get the British Government to recognise the Irish Republic" (*Treaty Debate*, p. 11).

inevitable compromise on the question of external sovereignty, there could be no derogation from the fundamental revolutionary postulate of a self-derived and self-contained Irish statehood. Dominion Home Rule, owing to its formal limitations, could offer no solution; it implied a status of dependency which Irish nationalism could not accept. For a sovereign Irish Republic, on the other hand, there was no room in the British Imperial system. A new constitutional structure had to be designed if, in the agreed terms of reference, "the association of Ireland with the community of nations known as the British Empire was to be reconciled with Irish national aspirations." Its evolution was the achievement of the Treaty.

CHAPTER IV

THE TREATY

THE provisions of the Treaty may be conveniently grouped under four heads. The first group (Arts. 1–4) defined the new relationship of Ireland to the British Commonwealth and to the British Crown and Parliament. The second (Arts. 5–9) dealt with the problems of defence and finance arising from Ireland's secession from the constitutional unit of the United Kingdom. The third (Arts. 11–16) provided for the settlement of the constitutional relations between the new Irish State and the dyarchical unit of Northern Ireland. The last (Arts. 10, 17, and 18) comprised the transitory provisions consequential upon the settlement.

Ireland as a whole was invested *in law* with the constitutional status enjoyed *in practice* by the five self-governing Dominions of the British Empire, with a Parliament having full powers to legislate for the "peace, order and good government" of the country and an Executive responsible to the latter. The official designation given to the country in its new political status was "The Irish Free State," this being a literal re-translation of "Saorstát Eireann," the official title adopted by the Revolutionary State established in 1919. The constitutional status of the Irish Free State in relation to the Imperial Parliament and Government and otherwise was, subject to a number of specific qualifications and amplifications, to be that of the Dominion of Canada, and the relationship of the British Crown and its representative and of the British Parliament to the Free State was to be governed by the "law, practice and constitutional usage" of that Dominion. Similarly, the manner of the appointment of the representative of the Crown was to be governed by Canadian precedent, a provision explained in a letter addressed by the British Prime Minister to the head of the Irish Delegation as connoting that the appointment would be made by consul-

tation between the British and the Irish Governments. A new form of parliamentary oath to be taken by members of the Irish Parliament was prescribed, pledging "true faith and allegiance to the Constitution of the Irish Free State as by law established" and faithfulness to the monarchical head of the British Commonwealth in virtue of Ireland's common citizenship with Great Britain and her adherence to the British Commonwealth.

It will thus be seen that the solution of the constitutional problem had been found in the transformation of the new reality of Dominion autonomy into a framework of positive law. In substance this implied full internal self-government, unrestricted fiscal autonomy, the right to maintain an Irish Police Force and an Irish Army subject only to the control of the Irish Parliament. In the sphere of external relations it involved the concession of the new international status of the British Dominions, the right to enter into agreements with foreign States, freedom from obligations arising from treaties not specifically approved by the Irish Parliament, full discretion in the matter of Irish participation in British wars, and, lastly, membership of the League of Nations. In form it connoted the conclusive recognition of Irish internal sovereignty.

The selection of the framework of Dominion status was, despite the advantages of its constitutional elasticity, clearly not the most obvious solution of a problem the most characteristic feature of which lay in a strong and self-assertive national consciousness. Ireland was clearly no Dominion, and the mechanical transplantation of a form of government developed under very specific psychological, geographical and economic conditions and deriving its characteristic strength from its very indefiniteness, to a revolutionary people in close proximity to Great Britain, conscious of a distinctive nationhood and bent on a rigid definition of its constitutional position, could not but involve far-reaching consequences both for the mutual relations of the two countries and for the Constitution of the Commonwealth as a whole. It is conceivable that from the Irish point of view

the dual monarchy, advocated by Sinn Fein at an earlier stage, might have appeared as the more organic solution, for it would have signified Ireland's constitutional co-equality with Great Britain and given distinctive expression to her historical position. The dogmatic republicanism, however, which Irish national aspirations had adopted in their latest phase, militated against such a solution. It led the Irish negotiators to favour a constitutional framework which, despite its nominal monarchism, had come to be generally regarded as that of a "Ministerial Republic," whilst to the British Cabinet a mode of association which would not interfere with the existing symmetry of the British Empire would clearly appear as the most acceptable solution. The dilemma might have been solved on diametrically opposite lines by the incorporation of the Irish Republic as such in the framework of the British Empire, much as, for instance, the three city republics of Hamburg, Bremen and Lübeck had found a place in the monarchical constitution of Imperial Germany. Such a solution, however, was incompatible with the formal rigidity of the British monarchical system. Thus there remained but the framework of Dominion autonomy, but if the fundamental position of the Irish national movement was to be maintained, it had to be so reshaped as to provide scope for a national and self-derived statehood. The monarchical frame of Dominion status was taken over, but it was subjected—by the formal enunciation of its actual content—to so restrictive an interpretation as to nullify it both in form and in substance.

The transformation of "Dominion status" was exemplified in three innovations: the conversion of Dominion "usage" into positive law, the introduction of a new form of parliamentary oath and the incorporation of the Settlement in the legal frame of a treaty. The conversion of convention into law was effected by the first two Articles of the Treaty. Art. 1 provided that Ireland should have the same constitutional status in the British Commonwealth of Nations as the British Dominions. The domestic implications of that status were specifically set

out as the possession of "a Parliament having powers to make laws for the peace, order and good government of Ireland," and of "an Executive responsible to that Parliament." The second Article subjected the external relationship of the Free State to the British Crown and to the British Government and Parliament to "the law, practice and constitutional usage" of Canada. The addition, hardly necessary in itself, was designed to implement the general definition of the first Article by the express assertion that the living practice and not the obsolete form of "Dominion status" was to be the law of the Irish Constitution; the prototype of Canada being chosen as the Dominion in which the advance from dependency to statehood was regarded as having reached almost complete fruition. The joint effect of the two Articles was threefold. The formal declaration of Art. 1 that the Irish Executive was to be responsible to the Irish Parliament excluded *ab initio* and as of right any form of executive authority not derived from the will of the Irish people. The subjection of the relationship of the Crown to the Irish Parliament to Canadian law, practice and constitutional usage similarly ensured the unrestricted legislative autonomy of the Irish Parliament.[1] In restricting the exercise of the royal power in the legislative sphere within the scope of the "constitutional practice" in a Dominion where, by virtue of very long non-usage, it was held to be definitely extinct, it rendered that power itself null and void. Finally, the application of the same precedent to the relationship of the Imperial

[1] Its constitutional significance was noted by Professor McIlwain in a cogent comparison between the autonomy of the Free State and that of the period of Grattan's Parliament: " 'Dominion status,' as it is now called," he writes, "differs from the position of Ireland between 1782 and 1801 simply in this, that 'dominion status' implies self-government in fact without legislative independence in law, while Ireland then had the legislative independence without any self-government. Since 1922 Southern Ireland has more than any other Dominion in having both self-government and legislative independence guaranteed by law, and this gives a promise for the new Irish Free State which Grattan's Ireland never could have had." Ch. H. McIlwain: *The American Revolution* (New York, 1923), pp. 56 and 57.

Parliament to the Free State formally excluded any interference by the British Parliament with the legislative autonomy of the Free State.

The second qualification of "Dominion status" was contained in the new form of the Oath to be taken by Members of the Irish Parliament. The Oath consists of two parts: in the first "true faith and allegiance" is pledged to the Constitution of the Irish Free State as by law established, while in the second a declaration of "faithfulness" is made to the British Monarch in virtue of Ireland's common citizenship with Great Britain and her adherence to and membership of the British Commonwealth of Nations. The new formula represented a significant deviation from the form of oath taken by Members of the British and the Dominion Parliaments. The Oath taken by the latter is an unqualified Oath of Allegiance to the King. The Oath prescribed by the Treaty is of entirely different import. Allegiance is pledged exclusively to the Constitution of the Irish Free State, in which the King, in so far as he forms part of that constitutional structure, derives his authority not from any inherent prerogative, but from the sovereign will of the Irish people, as whose functionary he appears both in his executive and in his legislative capacities. It is from the allegiance of the Irish citizen to his own State that the declaration of faithfulness to the King as the head of the British Commonwealth of Nations is derived. The difference of terms used in the two parts of the Oath has been the subject of much comment by Irish defenders of the Treaty: "faith," it has been urged, might also be expressed to an equal, and a declaration of faithfulness was not identical with one of fealty.[1] Whatever the force of these terminological distinctions, the constitutional meaning of that characteristic modification of the accepted form of the British Oath of Allegiance cannot be in doubt. "The adoption of a new form of Oath," wrote Professor A. B. Keith, "emphasises that the fidelity and allegiance of the Members of the Parliament of the Free State are primarily to the Constitu-

[1] *Treaty Debate*, p. 194 (Mr. Blythe).

tion of the State and only secondarily to the Crown."[1] More forcefully still was this stated by Mr. Arthur Griffith, the head of the Irish Peace Delegation, in his defence of the Treaty Settlement in Dáil Eireann. The Irish member, he declared, in swearing the oath, "pledges his allegiance to his country and to be faithful to this Treaty, and faithfulness after to the head of the British Commonwealth of Nations. If his country were unjustly used by any of the nations of that Commonwealth or its head, then his allegiance is to his own country, and his allegiance bids him to resist."[2] This interpretation of the Oath is not invalidated by the subsequent reference to the "common citizenship of Ireland with Great Britain" as one of the grounds of the declaration of faithfulness to the King. Irish adherence to the Commonwealth involved, as a corollary to the acceptance of the British Monarch, the assumption of the common citizenship of the Association. A significant innovation, however, as pointed out by Mr. Michael Collins in the Treaty Debates, was contained in the expression of the bond of association not, as hitherto, in terms of subjection, but in those of citizenship.[3] It is characteristic, again, of the new status of Ireland that such common citizenship did not exclude the institution of a specific Irish citizenship.[4]

The practice of Members of Parliament taking an Oath of Allegiance to the Sovereign is a peculiar tradition of the British Constitution going back to the political and religious struggles of the post-Reformation era.[5] The practice was unknown in mediæval Parliaments. It was introduced by the Act of Supremacy, which required Members of Parliament to make a

[1] *Journal of Comparative Legislation*, Vol. IV, p. 105.

[2] *Treaty Debate*, p. 22. In similar terms the implications of the Oath were expressed by Mr. K. O'Higgins, *ibid.* p. 46.

[3] *Ibid.*, p. 34. Mr. Michael Collins: "Common citizenship is the substitution for the subjection of Ireland."

[4] Cf. Part IV, Chapter I (*c*), *post*.

[5] Cf. Erskine May: *The Law, Privileges, Proceedings and Usage of Parliament* (13th ed.), pp. 158 *et seq*, and J. Redlich: *The Procedure of the House of Commons*, 1908, Vol. II, p. 62 *et seq*.

Declaration on oath testifying to their belief that the English Sovereign was the only supreme governor of the realm both in ecclesiastical and in temporal matters. Under James I two further Oaths were imposed by statute, the Oaths of Allegiance and of Abjuration, incorporating a repudiation of the claim of the Pope to depose the King. After the Restoration a Declaration against the doctrine of trans-substantiation was added. These complex formulae remained in force until the enactment of Catholic emancipation in 1829, when a special form of oath was provided for Roman Catholic members. It was further modified in 1866, so as to allow of the admission of Jews to Parliament, and in 1888, in order to enable persons who entertained religious objections to an oath to substitute a solemn affirmation. These facts indicate that the original object of its introduction was not so much to impose upon Members of Parliament a special obligation of loyalty to the Crown as to exclude from the Legislature those whose profession of a divergent spiritual allegiance rendered them suspect of disloyalty to the secular order of the Protestant Succession. The advent of Catholic emancipation and the abolition of religious tests deprived it of its essential *raison d'être*. It survived as a formal affirmation of the monarchical character of the Constitution devoid of any specific legal import—for it adds nothing to the civic obligations imposed upon all members of the political community—but all the stronger in its symbolic significance. It is instructive that the practice has scarcely any parallel in monarchical Constitutions on the Continent. No oath of allegiance to the monarch was ever imposed on members of the German Reichstag or of the several German Diets. No reference to it is to be found in any of the Scandinavian Constitutions nor in that of the Belgian Kingdom. In Holland members of both Houses take an oath of "fidelity to the Constitution." Similarly, in Bulgaria and Yugoslavia oaths are taken by members of the Diets to defend and to protect the Constitution. Under the Italian Constitution Members of Parliament are required to take an oath pledging both fidelity

to the King and loyal observance of the Constitution and of the laws of the State.

The formula embodied in the Anglo-Irish Treaty represents a combination of the Continental oath to the Constitution with the English oath to the Monarch, but the latter is not a pledge of allegiance and, as previously shown, of merely secondary derivation. Its complex structure reflects the dualistic character of the constitutional status of the Free State. It is as a self-contained and self-derived national statehood that it was incorporated in the framework of the British Commonwealth; hence the fidelity of the Members of its Parliament is "primarily to the Constitution of the State and only secondarily to the Crown." The simultaneous exclusion of every vestige of constitutional power of the latter divested the pledge of any element derogatory to the internal sovereignty of the Free State. Paradoxical as it might seem, it was the expression of the Free State's adherence to the British Commonwealth in the feudal rite of an oath of fidelity to a sovereign liege which symbolised the full measure of its freedom in the new bond of association.

The third characteristic expression of the distinctive status of Ireland lay in the form of the Settlement. The negotiation and conclusion—in the form of an international agreement—of a Treaty between representatives of the British Cabinet and of the Irish Revolutionary Government, subject to ratification by the British and the Irish Parliaments, implied a formal admission of Ireland's constitutional co-equality with Great Britain. What the British Government had steadfastly refused as an anterior condition to the opening of negotiations, it seemed to have conceded implicitly in the conclusion of the Settlement. It was true that such implicit recognition had been accorded only as a preliminary to the abdication of the Irish claim to full external sovereignty, as implied in the acceptance of membership of the Commonwealth; but even in this transient form the recognition was clearly of profound significance. The constitutional position, as read not merely by Irish interpreters,

was that an Irish Parliament, asserting anew the historical claim to national independence, had denounced the Act of Union—itself described, at the time of its adoption, as a "Treaty of Union"—and in the exercise of national sovereignty had entered into a new bond of association with the British Commonwealth of Nations, accepting the limitations necessarily imposed thereby on the external exercise of such sovereignty. The position was cogently stated by Professor Keith in some notes on the Treaty: "Constitutionally," he wrote, "the most interesting aspect of the Irish Settlement is the fact that the Irish Free State owes its existence as a Dominion to a formal treaty between duly authorised representatives of His Majesty's Government and plenipotentiaries representing Sinn Fein. There is, of course, no precedent for such a position in the earlier history of the Empire . . . The closest parallel to one side of the transaction is the treaty of peace with the revolting American colonies in 1783, for by it the Imperial Crown conceded the national status and sovereignty of these States which it had hitherto denied, and similarly the Treaty of December 6, 1921, constitutes a recognition of Irish sovereignty. Fortunately, however, there is a vital distinction that the State thus recognised (*sic*) has agreed to accept Dominion status in lieu of claiming independence."[1] The fact of such recognition was accepted on all sides in the British Parliament. Mr. Asquith referred to it as a "great international pact," adding that he used the term advisedly.[2] Mr. Lloyd George, the British Prime Minister and principal British negotiator, was no less emphatic: "My right honourable Friends and I," he said, "have signed a document—a Treaty between the people of this country and the people of Ireland."[3] When, three months later, the Bill of Ratification came before the House of Commons, Colonel Gretton, moving on behalf of the Unionist critics of the Settlement that the word "Treaty" be omitted from the Schedule, drew passionate attention to its constitutional

[1] *Journal of Comparative Legislation*, Vol. 4, p. 104.
[2] Hansard, Vol. 149, col. 144. [3] *Ibid.*, Vol. 150, col. 52.

implications: "Under the Constitution," he said, "a Treaty can only be made between high contracting Powers and independent States, and it is not possible constitutionally for Ministers of the Crown or the Crown itself to make a Treaty with subjects of the Crown. If Ministers maintain that the word 'Treaty' is properly inserted at this point, they then, by their action and by the phraseology of the Bill, admit that the State which we are setting up in Ireland is a Sovereign Independent State, competent to make treaties, and they further admit that at the time the Agreement was come to the Irish representatives had established independence and sovereignty to be in a position to negotiate a Treaty."[1] Similarly, Sir F. Banbury asked: "With whom can we make a Treaty? Only with an independent State. Nobody has ever heard of a Treaty being made, shall I say, with Scotland since it became part of the United Kingdom. We cannot make a Treaty with New Zealand."[2] Colonel Wedgwood (Labour) readily accepted the implications of the Agreement. "It is as well," he said, "that we should have the facts stated in this Act of Parliament. A Treaty has been made between this country and the Irish Republic. It is useless for His Majesty's Government to try to evade the issue by saying that the words are merely formal. . . The people of this country should realise that they are not in this Bill making a gift to the people of Ireland, but fulfilling their part of a bargain between two free peoples."[3] Even where it was held that the use of the term did not necessarily connote the recognition of the Irish Revolutionary State, it was admitted that the Treaty acknowledged the independent status of the Irish nation, that such recognition had indeed been conceded already in the course of the hostilities and by the opening of negotiations. The essential position was aptly summarised by Mr. Hailwood: "I believe," he said, "the Government are doing right in keeping the word 'Treaty' because it does imply that we are treating with a nation. The Irish people are not so much

[1] Hansard, Vol. 151, col. 600.
[2] *Ibid.* Vol. 151, col. 604.
[3] *Ibid.* Vol. 151, col. 607.

concerned at being considered as belonging to the Irish Republic, but they are very much concerned with being part and parcel of a nation."[1] In the end Mr. Churchill, the Minister in charge of the Bill of Ratification, strongly pressed by his Unionist critics for a constitutional definition, declared that the description of the agreement as a treaty connoted "the closing of an episode." "As far as the future is concerned," he said, "the position of Ireland with regard to treaties will be exactly the same as the position of Canada, Australia and other Dominions."[2] Although the emphasis of the reply lay on its second part, it implicitly suggested that *in statu nascendi* the new Irish State had been recognised as a sovereign entity.[3]

It was a striking evidence of such recognition that it was formally maintained even in those provisions of the Treaty which in substance restricted the full exercise of Irish sovereignty: the regulations governing the new problems of military and naval defence arising from the dissolution of the Union. Few of the provisions of the Treaty were more vehemently attacked in Dáil Eireann than the maintenance of British naval control over Irish coastal defence, and the concession to the British Government of harbour and air defence facilities which might in time of war be extended to anything required for British defensive purposes (Arts. 6 and 7). The facilities might be specifically enumerated and provision be

[1] Hansard, Vol. 151, col. 614. [2] *Ibid.* col. 620.

[3] It is worthy of note that while the Agreement is referred to in Irish legislation throughout as "The Treaty," English official usage still maintains the designation of "Articles of Agreement for a Treaty." Yet it is clear that the latter description indicates but a transient stage which ended when the Agreement was formally ratified by the two Parliaments and the Articles of Agreement became the "Treaty" which they had been designed to prepare. Any other interpretation would imply that the transaction is still incomplete. The Treaty was registered by the Free State Government with the League of Nations, a step which called forth a protest of the British Foreign Office on the ground that the Covenant of the League was not "intended to govern the relations *inter se* of various parts of the British Commonwealth" (League of Nations, Treaty Series, Vol. XXVII, p. 449). It was not contended, however, that the Agreement was not a "Treaty."

made for the assumption by Ireland, after the lapse of five years, of a share in its coastal defence; the principle underlying all these arrangements and the special Conventions to be concluded for the regulation of air communication, submarine cables, wireless stations and lighthouses[1] was that the existing rights of Great Britain were to be fully maintained, and alterations to be effected only with the consent of the British Government. These provisions undoubtedly implied a severe restriction of Irish sovereignty in its external import, in particular in the contingency of war; yet it is characteristic that the terms in which they were formulated were in form those of concessions from one sovereign nation to another. No agreement on such matters between Great Britain and any one of the self-governing Dominions—assuming even that an agreement would be required for the purpose—would be couched in such international phraseology. Even the provision of Art. 8 restricting the Military Forces of the Free State to a size not exceeding the proportion of the population of Ireland to that of Great Britain was lifted into the international sphere by being motivated by the principle of the international limitation of armaments. Much in the same strain of high international language the freedom of sea-borne traffic between the two countries was formally enunciated (Art. 9).

Of more immediate concern to the new State was its assumption, under Art. 5 of the Treaty, of a proportionate share of the Public Debt and the war pensions liabilities of the United Kingdom, subject to an Irish counter-claim to be fixed, in default of agreement, by the arbitration "of one or more independent persons being citizens of the British Empire." The assumption of such an undetermined liability, however equitable in itself—it was accepted in almost identical terms in the two alternative proposals submitted to the Dáil by the opponents of the Treaty[2]—involved a financial encumbrance of the Free State which might have become a source of

[1] Cf. Sections 2 and 3 of the Annex to the Treaty.

[2] *Irish Year Book* (1922), pp. 253 and 255 *et seq.*

prolonged friction with Great Britain. It was hence an important implementation of the Settlement that in the Agreement on the Boundary question concluded in London on December 3, 1925, between the Governments of the Free State, Great Britain and Northern Ireland,[1] the Free State was completely released from these obligations. It merely assumed the liabilities undertaken by the British Government in respect of malicious damage done in its area of jurisdiction since January 21, 1919—the date of the constitution of Dáil Eireann—and agreed to compensate the British Government for sums paid or promised under this head.

The formal acceptance of the Sinn Fein postulate of the political unity of Ireland, as embodied in the first Article of the Treaty, was strikingly exemplified in the provisions regulating the complex relationship of the Free State to the semi-autonomous unit of Northern Ireland. That an immediate absorption of the latter by the Free State was not practicable was obvious to all sides. So strong, however, was the insistence of the Irish negotiators on the principle of a united Ireland that it elicited from the British Government at least a formal acknowledgment of this basic claim. Under Art. 1 the Irish Free State was to embrace the whole of Ireland. In form, at least, this nullified the fundamental principle of the Government of Ireland Act of 1920. The British Government, pressed in the House of Commons by the Ulster Unionists for a statement as to the implications of the Treaty in regard to the constitutional position of Northern Ireland, had to admit that it had recognised the Sinn Fein delegates as the spokesmen of all Ireland.[2] The inclusion of the six counties of the North within

[1] Cf. Schedule of the Treaty (Confirmation of Amending Agreement) Act (No. 40 of 1925).

[2] Cf. the statement of Mr. Churchill, Hansard, Vol. 151, cols. 642 and 650. The principle that the Free State comprised the whole of Ireland was consistently applied throughout the Treaty. Among the special facilities for naval defence purposes which the Government of the Irish Free State undertook under Art. 7 to afford to the British Imperial Forces, the Annex enumerated also the harbour defences of

the Free State having thus been established in principle, the maintenance of the existing constitutional status of Northern Ireland, as established by the Act of 1920, had to be ensured by specific measures of exclusion. In the first instance, the exercise of the legislative and executive powers of the Irish Free State in relation to Northern Ireland was excluded until the expiration of one month from the ratification of the Treaty by the British Parliament. By subsequent arrangement between the British and the Irish Governments it was agreed that this month should run not from the date of the British Act of Ratification, but from the date of the passing of the Act promulgating the Constitution of the Free State.[1] In accordance with this agreement a proviso was inserted in the Irish Free State (Agreement) Act of March 31, 1922, to the effect that that Act, which gave the force of law to the Treaty, should not be deemed to be the Act as from the passing of which the "Ulster Month" was to run, while Section 5 of the Irish Free State Constitution Act of December 5, 1922, declared the latter to be the Act of Ratification for this purpose. The critical month thus began to run only from December 6, 1922.

Belfast Lough, which in fact never came under the control of the Free State Government. Art. 12, in making provision for the contingency of Northern Ireland "opting out" from the Free State, laid it down that the powers of the Free State should in that contingency "no longer extend to Northern Ireland," which extension had, of course, never begun. In the same Article the task of the Boundary Commission was described as the determination of "the boundaries between Northern Ireland *and the rest of Ireland*"—not the Irish Free State as would have been substantially correct. In Art. 11 the fiction was even carried to the length of a pretended assumption that both Houses of Parliament in Northern Ireland might pass a resolution in favour of members of the Free State Parliament being elected for Northern Irish constituencies during the critical month. Cf. also the dictum of Mr. Justice Murnaghan in *Fogarty* v. *O'Donoghue*, [1926] I.R. 531: "The Government of the Irish Free State is a Government for all Ireland, although the Treaty included provisions by which the six counties, or such portions as are defined by a Boundary Commission, might elect to continue under the provisions of the Government of Ireland Act" (at p. 548).

[1] Statement by Mr. Churchill, Hansard, Vol. 150, col. 1274.

Within this month Northern Ireland was given the alternative of either effecting its exclusion from the Free State by a special address presented to the King by both Houses of its Parliament, subject to a subsequent revision of its frontiers by a Boundary Commission, or of entering the Free State, in which case it would be invested with wide powers of local self-government.

The provisions governing the latter contingency were far-reaching and elaborate. If Northern Ireland was prepared to accept its incorporation in the Free State and abstained from presenting the address, it was to retain the local autonomy which had been conferred upon it by the Act of 1920, while the Parliament and Government of the Irish Free State were to exercise in respect of Northern Ireland the same powers as in the rest of Ireland in relation to those matters which, under the Act of 1920, fell outside the scope of its local autonomy, including the special functions vested under that Act in the Council of Ireland. The scope of these powers, however, was to be restricted within narrow limits. The autonomy of Northern Ireland was to be secured and amplified by the introduction of a number of additional safeguards to be agreed upon between the Governments of the Free State and of Northern Ireland. Although merely the subjects on which such an agreement might be concluded were indicated in the Treaty, and nothing was stated as to the character of the settlement to be made or the number of points on which agreement was essential, these conventions were in advance given the force of law. The legal position produced by these provisions was not free of ambiguity; it is evident that if the self-exclusion of Northern Ireland had not been so definite a certainty, more specific regulations would have had to be inserted. The subjects on which additional safeguards might have been provided for Northern Ireland included patronage, the collection of revenue, import and export duties affecting the trade or industry of the northern area, safeguards for minorities, the settlement of the financial relations between the Free State and Northern

Ireland, the establishment and powers of a local militia in Northern Ireland, and the relation of the Defence Forces of the Free State and of Northern Ireland respectively. Several of these matters were clearly intended to extend the legislative powers of the Northern Parliament; others, such as the provision for the introduction of safeguards for minorities in Northern Ireland, represented a concession to public feeling in the South. As the Treaty stands, it would seem as if the conclusion of an agreement on one single of these points—e.g. on the protection of minorities in Northern Ireland—would have been sufficient to give effect to the Settlement, which, on the other hand, would have been entirely inoperative if no agreement on any one of the points indicated had been reached. The total result of this mode of settlement would have been that Northern Ireland would have become an integral part of the Free State, with a far-reaching measure of local autonomy, yet not far-reaching enough—in view of the absence of the vital fiscal power—to prevent its gradual immersion in the more comprehensive autonomy of the Free State.

The second alternative which the Treaty offered to Northern Ireland was to exclude—or, as the fictitious phrasing of the Treaty put it, to end—the application of the powers of the Free State Government and Parliament to Northern Ireland by the adoption of a joint address of both Houses of the Northern Parliament to that effect. In the contingency of such an address being presented, the provisions of the Government of Ireland Act of 1920 regarding Northern Ireland, including those relating to the Council of Ireland, would remain in full force, but a Boundary Commission consisting of three members to be appointed respectively by the Governments of the Irish Free State, Northern Ireland and Great Britain—the nominee of the last-named to act as Chairman—would be set up to determine the frontiers between Northern Ireland and the Free State in accordance with the wishes of the inhabitants and with due regard to economic and geographic conditions. The local autonomy bestowed on Northern Ireland by the Act of 1920

and its association with the United Kingdom would thus b fully maintained. The extent of its territorial area, however might be the subject of revision, the scope and nature of which were left entirely to the discretion of the Boundary Commission, whose award was to become law automatically on its announcement by the Chairman. Although it might thus seem that, apart from the question of the boundaries, the constitutional position of Northern Ireland as established by the Act of 1920 had been essentially maintained, the provisions of the Treaty governing the contingency of its non-entry into the Free State entailed a considerable modification of the earlier Settlement. The scheme of the latter had been based essentially on the division of Ireland into two political and administrative units of equal status. The relationship of the two parts, however, assumed an entirely new character when one of the two parties became a virtually independent State, while the other remained a semi-autonomous province of the political unit of Great Britain. The transformation primarily affected the status and functions of the Council of Ireland which the Treaty was emphatic in maintaining in either contingency. Although the Free State agreed to a postponement of the application of the powers vested in the Council of Ireland for a period of five years, the ultimate effect of the Settlement would have been that, whilst the Free State would eventually have been in a position to exercise an active influence on important public services in Northern Ireland, it would in its own sphere have been immune from any external control. In the event, the solution envisaged by the Treaty proved impracticable. The relevant address to the King was passed by both Houses of the Northern Parliament on December 7, 1922, but the appointment of the Boundary Commission did not take place until November 1924. The setting up of the Commission itself caused considerable difficulty owing to the refusal of the Northern Government to appoint its Commissioner. The defect was remedied by the conclusion of a Supplemental Agreement between the British and the Free State Governments—the contracting parties of

the Treaty—whereby the power of the Government of Northern Ireland to appoint a Commissioner was transferred to the British Government.[1] Despite lengthy and elaborate investigations, the Commission was not able to arrive at an agreed solution, and the breakdown of its efforts, culminating in the resignation of the nominee of the Free State on the eve of the publication of the award, led to the acceptance of an agreed solution by the three Governments concerned, which considerably modified the provisions of the Treaty. The Agreement signed on December 3, 1925, by the heads of the three Governments[2] revoked the powers conferred on the Commission under the Treaty, and confirmed the existing boundaries as defined in the Government of Ireland Act, 1920. At the request of the British and the Free State Governments, the Commissioners agreed to postpone the publication of their award, and thereby to prevent its coming into operation. On the other hand, the Free State Government was released from all liability for the Public Debt service of the United Kingdom and the payment of war pensions, as undertaken by Art. 5 of the Treaty. It accepted, however, the liability assumed by the British Government in respect of malicious damage done in the area of jurisdiction of the Free State since January 21, 1919, and undertook to refund to the latter monies paid or promised under that head. The Government of the Free State further agreed to promote legislation with a view to increasing by ten per cent. the measure of compensation under the Damage to Property (Compensation) Act, 1923, in respect of malicious damage to property done in the area of the Free State from July 11, 1921, the date of the proclamation of the Truce, to May 12, 1923, the end of the Irish Civil War.[3] The Agreement finally abolished the only remaining nucleus of a future political

[1] Scheduled to the Treaty (Confirmation of Supplemental Agreement) Act, No. 51 of 1924.

[2] Scheduled to the Treaty (Confirmation of Amending Agreement) Act, No. 40 of 1925.

[3] Effect was given to this undertaking by the passing of the Damage to Property (Compensation) (Amendment) Act, No. 19 of 1926.

unity of the country, the proposed Council of Ireland. The powers conferred upon the Council by the Government of Ireland Act, 1920, in relation to Northern Ireland were transferred to the Government of the latter, the two Irish Governments agreeing to meet informally whenever necessary for the purpose of considering matters of common interest connected with the functions which the Council was to have exercised. The opposition to the Council was based not merely on apprehensions of an inequitable treatment of Northern Ireland in the administration of the common services. It was felt to have no place in the new constitutional position created by the Treaty. The Council was designed by the Act of 1920 not as an All-Ireland Executive of limited scope, but pre-eminently as a kind of Irish "Inter-Parliamentary Union." Its purpose was not so much the administration of the specific functions allocated to it by the Act as the psychological preparation of both Irish sections for a unity in wider fields of public life. For this purpose an Inter-Parliamentary Committee representing not the two Executives, but the rank and file of both Parliaments would indeed have been the more appropriate agency. From the point of view of administrative efficiency, a system of informal consultations between the executive heads of the two Governments was no doubt preferable to an administration "by an *ad hoc* committee, the majority of the members of which have no executive authority";[1] from the point of view of Irish unity the abolition of the Council, inevitable as it may have been, marked the final abandonment of the single device contained in the Act of 1920 which might have paved the way for a progressive unification of the country.

In connection with the regulations governing the relationship between the Free State and Northern Ireland, a provision was inserted which involved a certain restriction of the legislative autonomy of the Free State, though it was accepted in equal measure by Great Britain in respect of Northern Ireland.

[1] Letter of the Prime Minister of Northern Ireland, quoted in a statement by Mr. Churchill (Hansard, [illegible]

Under Art. 16 neither of the two Irish Parliaments may pass any legislation providing for the endowment of any religion, the restriction of free religious exercise, the imposition of any disability on account of religious belief or status, or prejudicing the right of any child to attend a school supported by public funds without attending the religious instruction given there, or differentiating in the matter of State aids to education between schools of different denominations or, finally, diverting property belonging to any denomination or educational institution except for public utility purposes and on payment of compensation. The Article is, in general terms, identical with the similar provisions embodied in the several Home Rule Acts and in the Government of Ireland Act of 1920. It differs from them, however, in several material points. On the one hand, the prohibition of Art. 16 extends merely to the "endowment" of any religion, not to its "establishment," as provided in the earlier enactments. Nor does it cover, as in the latter, legislation making any religious belief or ceremony a condition of the validity of any marriage. Similarly, the provision of the earlier Acts which prohibited the Irish Parliament from altering the constitution of any religious body, except with the approval of its governing body, was omitted. On the other hand, important additions were introduced by the prohibition of any discrimination in respect of State grants-in-aid to schools under the management of different religious denominations and the extension of the restriction on the diversion of religious property to that of educational institutions. The omission from Art. 16 of the Treaty of the prohibition of legislation making a religious belief or ceremony a condition of the legal validity of any marriage gave rise to impassioned attacks in the House of Commons, but no explanation of the grounds for the departure from the terms of the clauses of the earlier Acts was offered on behalf of the British Government.

The concluding Articles of the Treaty contain transitory provisions governing the ratification of the Settlement and the transfer of the machinery of government. The ratification was

to be effected in both countries by two separate acts. It was first to be submitted by the British Government for the approval of the British Parliament and by the Irish signatories to "a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland." If approved, it was subsequently to be "ratified by the necessary legislation." The provision for the submission of the instrument to a meeting of all the members elected under the Act of 1920 was designed to enable the Treaty to be endorsed also by the Unionist section which was not represented in Dáil Eireann, while it implicitly excluded from the act of ratification members of the Dáil elected for constituencies in the six counties of Northern Ireland. On the other hand, no provision was made in the Treaty for its approval by the other political group not represented in Dáil Eireann—Irish Labour.

In order to enable an immediate transfer of the administration to be effected, a Provisional Government was to be constituted by a meeting of the members of the Southern Ireland Parliament, whom the British Government undertook to provide with the necessary powers and machinery. The only conditions attached to the provision were that every member of such Provisional Government should have signified in writing his acceptance of the Treaty and that its term of office should not extend beyond twelve months from the conclusion of the Treaty. Among the transitory provisions must also be classified that of Art. 10, by which the Government of the Free State agreed to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to judges, officials, members of Police Forces and other public servants retiring or discharged in consequence of the change of Government, with the exception of members of the Auxiliary Police Force and persons recruited in Great Britain for the Royal Irish Constabulary during the preceding two years, for whose compensation or pensions the British Government assumed liability. The Article and the consequential provisions of Arts. 76 and 78 of the Constitution have been the subject

of considerable controversy and extensive litigation since the establishment of the Free State.[1]

The Treaty received the approval of the British Parliament at a special session convened in December 1922 by an overwhelming majority composed of the bulk of the three political parties, the minority consisting of the Ulster representatives and a number of their Unionist sympathisers. Its legislative ratification was effected by the adoption, after some heated opposition from the same quarter, of the Irish Free State (Agreement) Act of March 31, 1922. The procedure in Ireland was more complicated. The Treaty was first submitted to Dáil Eireann, and was approved after two weeks of stormy debates on January 7, 1922, by a narrow majority of seven votes, sixty-four members of the Dáil voting in favour and fifty-seven against approval. It was subsequently submitted, in accordance with the terms of the Treaty, to a meeting of the members elected to the House of Commons of Southern Ireland held on January 14, 1922, at which the members of the Dáil who had voted in favour of acceptance and the four representatives of Dublin University attended, and was unanimously approved.[2] Its legislative ratification for Ireland was effected by s. 2 of the Constitution of the Irish Free State (Saorstát Eireann) Act 1922.[3]

The split of Sinn Fein on the issue of the Treaty led to the resignation of Mr. de Valera and of his Cabinet. In his place Mr. Arthur Griffith, the Chairman of the Irish Peace

[1] Cf. *Wigg and Cochrane* v. *Attorney General of the Irish Free State*, [1925] I.R. 149; [1927] I.R. 285; [1927] A.C. 674; *In re compensation to Civil Servants under Art. 10 of the Articles of Agreement for a Treaty between Great Britain and Ireland*, [1928] I.R. 44; *Cahill* v. *Attorney-General*, [1925] I.R. 70; *Londsdale and Others* v. *Attorney-General*, [1928] I.R. 35; *Fitzgibbon and Others* v. *Attorney-General*, [1930] I.R. 49; *Cassidy and Others* v. *Attorney-General*, [1930] I.R. 65.

[2] The meeting represented in no sense a formal constitution of the full "Parliament of Southern Ireland." The latter was dissolved by a Proclamation of the Lord-Lieutenant, dated May 27, 1922, pursuant to the Irish Free State (Agreement) Act, 1922.

[3] Cf. Part III, Ch. II, *post*.

Delegation, was appointed President of Dáil Eireann. In pursuance of the terms of the Treaty a Provisional Government of eight members, under the Chairmanship of Mr. Michael Collins, was constituted by the meeting of the members of the Southern Ireland Parliament on January 14th. Such, however, was the dogmatic attachment to the Republic that even after its virtual repudiation by the acceptance of the Treaty, its constitutional forms and administrative institutions were kept in existence for a period of several months. Dáil Eireann continued to sit at the instance of its new President—himself the principal signatory to the Treaty—and the Dáil Ministry—though in personnel largely identical with the Provisional Government—was formally maintained. It was only the Civil War that broke out in the summer of 1922 which led to the final disestablishment of the Republic. On September 9th, President Cosgrave, the new head of the Provisional Government, announced in the Third Dáil, which sat as the Provisional Parliament and Constituent Assembly, that dual government ended from that day.[1]

Viewed in its formal aspect, the Treaty represented the most revolutionary settlement ever effected within the framework of the British Empire. It embodied the formal acceptance of the fundamental aspiration of the Irish Revolution for a self-derived and unfettered national statehood, comprising the whole of Ireland. The practical effect of that acceptance was, of course, minimised by the self-exclusion of Northern Ireland, but the express recognition by the British Government of the integral unity of Ireland was clearly an advance of more than transient import. In respect of the major portion of Ireland the Treaty dissolved the Act of Union and established a constitutional structure based not on the preceding legitimist order, but on the revolutionary will of the Irish people. In the garb of "Dominion status" a nationally self-conscious European State was introduced into the symmetry of the Empire, a Dominion neither in form nor in substance, bound indeed to transform

[1] *Dáil Debates*, Vol. 1, col. 56.

the entire framework of Dominion association by its revolutionary origin and nationalist inspiration. The Settlement represented the supreme vindication of the original policy of Sinn Fein. The Irish negotiators could accept the disintegrated structure of "Dominion status," as interpreted in the Treaty, because that interpretation divested it of the stigma of subordination and enabled the embodiment within its frame of that national sovereignty to which they aspired. A merely apparent contradiction remained between the nominal and the real form of that status. Yet it was this which became the fatal obstacle to Irish acceptance of the Agreement. The first impact between British formalism and Irish dogmatism was fraught with consequences of supreme tragedy. The opponents of the Treaty in Dáil Eireann clung dogmatically to the dead letter of the legal framework of Dominion association, oblivious to the formal significance of the conversion of its *de facto* practice into a *de jure* status. They recognised the inevitability of Ireland's association with the British Commonwealth in the sphere of international relations, but believed that the framework of an independent Irish Republic might be maintained by clothing that attachment in the form of an "external association." Even if the British Government had been prepared to accept such an arrangement, which ran counter to the entire symmetry of the Imperial system and which could obviously not have been worked without constant friction, it is clear that "external association" would not have enhanced the Irish position either in form or in substance, if in fact it would not have derogated from it. It would not have added a single power to those which the Treaty conferred upon the Irish State, for the "association," which in the case of so unequal a partnership could in practice only have meant Irish subordination, was to cover the very same functions in respect of which the Treaty limited Irish sovereignty.[1] On the other hand, such a mode of passive association would clearly not have given to Ireland that

[1] Cf. the two alternative drafts submitted to the Dáil, reprinted in the *Irish Year Book*, 1922, p. 253 *et seq.*

dual influence in the realm of international relations which, as an active member of the Commonwealth, it is able to exercise both in the counsels of the latter and in the independent sphere of the League of Nations. Nor would it under such an arrangement have enjoyed that guarantee of its newly acquired freedom by the British Dominions which alone, as Mr. Griffith pointed out in the Treaty Debate, rendered the military and naval clauses of the Treaty—which were also included in the "external association" proposals—acceptable from the Irish point of view. Nor, on the other hand, would the proposed mode of "external association" have implied a higher degree of formal status or enabled the maintenance of republican sovereignty. No State clearly can claim sovereign independence which in the sphere of international relations is attached to another group, however "external" the bond of such association. Here lay the inherent unreality of the proposed alternative. "Sovereignty" has a twofold connotation. It is not the unrestricted freedom of international action which constitutes the essential attribute of statehood, but the derivation of its authority *jure proprio* and the supremacy of its organs over all other embodiments of authority within its territorial limits. The States of the American Union, the *Länder* of the German Empire, the Cantons of Switzerland renounced none of their statehood when they accepted an infinitely greater restriction of their external sovereignty than the Irish Free State, which possesses the *ius legationum* and the *ius foederum ac tractatum*, and which cannot be committed to active war without the consent of its Parliament. Internal sovereignty the Treaty guaranteed in full measure, international sovereignty "external association" also could not confer.

The Treaty was approved by the Irish Parliament and by the Irish electorate. The substantial freedom which it secured to Ireland could not be obscured by its archaic terminology, but the formal paradox of that terminology remained the flaw of the Settlement. On its removal the efforts of the Free State Government were concentrated from its very inception. The

obsolete formalism of Dominion status, though dematerialised by the definitions of the Treaty, could not be eliminated, but the Settlement might be so implemented as to nullify its constitutional reality. The first constructive implementation was effected by the Constitution, which in its first Article enunciated the constitutional co-equality of Ireland not merely with the Dominions, but also with Great Britain, and in its second derived all authority of government in Ireland from the Irish people. It was realised, however, that a conclusive solution of the problem could not be reached by Irish effort alone. Since the framework of Dominion association had been accepted, the formal implementation of the constitutional status of the Free State could only be effected by a redefinition of Dominion autonomy in the sense of the elimination in general of the symbols of inferiority still attaching to it. To promote such a reinterpretation became the object of Irish efforts at successive Imperial Conferences. They attained fruition in the formal restatement of Inter-Imperial Relations by the Imperial Conference of November 1926.

PART II

THE GENESIS OF THE CONSTITUTION

CHAPTER I

THE FRAMING OF THE CONSTITUTION

THE genesis of the Irish Constitution reflects the interplay of the two forces that had moulded the external framework of the new State. The conflict between English formalism and Irish dogmatism was transferred to the technical sphere of constitutional detail, but it lost none of its intensity. The complex task of translating the finely balanced definitions of the Treaty into a concrete scheme of government was bound to produce at each step a renewed clash of the conflicting tendencies which had been subtly composed by the novel design of the Settlement. It is not surprising that the very question whether a written Constitution should be enacted at all should have been the subject of much doubt and divergency. Authoritative voices urged that the Treaty itself should be regarded as the Organic Law of the new State, and that within its framework an unwritten constitution should be allowed to develop on the evolutionary lines of the British system. Apprehensions were expressed lest the adoption of a rigid structure might involve the perpetuation in the internal organisation of the new State of those obnoxious features of the British Imperial system which had proved so detrimental to Irish acceptance of the Treaty. It is characteristic of the political realism of the framers of the Settlement that the Provisional Government felt no such hesitation. Apart from the fact that the Treaty envisaged a formal act establishing the constitutional framework of the new State, it was realized that the enactment of a written Constitution by an Irish Parliament would not only give emphatic expression to the new constitutional status of Ireland but that so far from stereotyping the obsolescent features of "Dominion Status," it might indeed offer an opportunity for carrying further its re-interpretation and implementation in accordance with Irish national aspirations. The framing of a

Draft Constitution was accordingly undertaken immediately after the Treaty had received the approval of the Irish Parliament. A Constitution Committee was set up, consisting of Michael Collins, the head of the Provisional Government, as Chairman; Darrell Figgis, Vice-Chairman and Secretary; James Douglas; Hugh Kennedy, K.C., Law Adviser to the Provisional Government; James Murnaghan, James McNeill, Alfred O'Rahilly, C. J. France, Kevin O'Sheil and John O'Byrne. The Committee were given a month to prepare a Draft; they achieved in fact the production of three schemes. A diligent search of foreign Constitutions was instituted, particular attention being devoted to the Constitutions of the new States of Central and Eastern Europe.[1] Theoretical inclination and republican outlook alike led the framers of the Irish Constitution to seek inspiration from Continental models, however experimental, rather than from the empirical framework of the British Constitution.

On the basis of the schemes submitted by the Committee, a final draft was prepared by the Provisional Government, which was subsequently taken to London for consultation with the British Government. The Irish Government, as was expressly admitted by the British Colonial Secretary in the House of Commons,[2] was under no obligation to consult the British Cabinet. Inasmuch, however, as the Constitution represented an implementation of the Treaty and would, therefore, require to be confirmed by the British Parliament, it was obviously expedient prior to the publication of the Draft to secure an assurance from the British Government that it was regarded by Great Britain as conforming to the terms of the Treaty. In the event, the British Government found several of the interpretations of the Treaty embodied in the Draft

[1] A record of these comparative studies was subsequently published in a volume embodying the texts of eighteen Constitutions with historical introductions prepared for the guidance of the Constituent Assembly: *Select Constitutions of the World, prepared for presentation to Dáil Eireann by order of the Irish Provisional Government*, Stationery Office, Dublin, 1922.

[2] Hansard, Vol. 155, col. 522 (June 15, 1922).

Constitution unacceptable. The original Draft has not been published, and comments on the points of disagreement can therefore be hardly more than conjectural. From such light, however, as was thrown on the issue in the debates of the Constituent Assembly, it would seem that although the Draft Constitution was in essence in conformity with the constitutional position as created by the Treaty, it did not reproduce the subtle balance of the constitutional structure of the Treaty by which the formal symbols of the British and the Dominion Constitutions were first introduced and subsequently reinterpreted in the sense of their practical elimination. Events in the Free State since the acceptance of the Treaty, culminating in an agreement between the Provisional Government and its republican opponents for the joint support of an agreed panel of candidates at the elections to the Constituent Assembly, had undoubtedly stiffened British insistence on the maintenance of the strict formalism of the Dominion Constitutions despite its conclusive abrogation by the interpretative clauses of the Treaty. The ingenious duel of wits that had preceded the Treaty had thus to be resumed in its constitutional interpretation. The British view demanded rigid adherence to the letter of the Dominion framework, the Irish its qualification by the living law of a new order. An additional factor complicated the task before the draftsmen. In the negotiations preceding the Treaty the Chairman of the Irish Delegation had given a pledge that the Unionist minority would be guaranteed special safeguards in the Constitution, ensuring to it a fair measure of representation in the Legislature. Machinery had to be devised for giving effect to these assurances without detriment to the democratic character of the Constitution as a whole. The influence of this factor is reflected in the provisions governing the composition of the Senate and the system of election. It was not on account of its technical merits, but as a conservative device for stabilising the transition to the new order, that Proportional Representation was introduced into the framework of the Irish Free State.

CHAPTER II

THE DRAFT CONSTITUTION OF JUNE 1922

THE final Draft on which agreement had been reached between the Law Officers of the British and the Irish Governments was published on June 15, 1922, the eve of the elections to the new Parliament which, under the terms of the Treaty, was to sit as a Constituent Assembly. The Draft[1] embodied the most revolutionary constitutional project in the political history of the two islands since the instruments of government of the Cromwellian period. It represented not a new Bill "for the better government of Ireland," but a most comprehensive and, in spirit, essentially republican constitution on most advanced Continental lines. It had the characteristic dogmatic ring of all constitutions which embody not the legislative crystallisation of an organic development, but the theoretical postulates of a revolutionary upheaval. It mocked the time-honoured empiricism of the British Constitution by the enunciation of basic principles and the formulation of dogmatic definitions. It postulated fundamental rights. It defined in detail the scope and the functions of the several constitutional powers. It reduced to precise terms the conventional rules of the British Constitution. Its archaic symbols had to be introduced, but their meaninglessness for Ireland was writ large on every page. The monarchical forms paled into insignificance in the light of the formal enunciation and the consistent application of the principle of the sovereignty of the people as the fundamental and the exclusive source of all political authority. The new spirit of post-War Europe, utopian and disillusioned at once, breathed through its pages. It was instinct with a supreme faith in the inherent ethos of democratic principle, but that faith was permeated by a critical realization of the inadequacy

[1] It was published as Cmd. 1668 (1922) and reprinted in the *Irish Year Book* (1922), pp. 260–267.

of the traditional forms of parliamentary government to ensure a more than formal democracy, a scepticism intensified by a deeply rooted distrust of governmental authority—the peculiar Irish heritage of centuries of opposition. The habit of resistance dies slowly; to the successful revolutionary, possessed at last of the long-coveted gift of self-government, restriction of authority is of greater moment than effective government. Such scepticism was not confined to the organs of executive authority. It was directed in equal measure against the British conception of parliamentary omnipotence. Distrust of representative assemblies is a general characteristic of revolutionary creeds in a more sophisticated age. It drew additional inspiration from Irish experience of the majoritarian defects of the British parliamentary system. That system is rooted in a rich political tradition. It is ripe in the wisdom of restraint; it is imbued with an instinctive aversion from political chaos. In the battle of political parties the appeal to the electorate looms large as the ultimate political resort, but however fierce the conflict, a tacit agreement unites the combatants that never must that weapon be used to upset those subtle structural balances and continuities on which the existing order is founded. A system so balanced must work through methods of concentration. Tacit conventions will be respected in a struggle between equals. They will receive scant regard from a weak third who may hope to win through to influence if not to power by their very neglect. The inevitable tendency of such a system must be to be intolerant of political minorities, especially if these represent not a new viewpoint on general issues, but an extraneous claim of ephemeral character. Such had been Irish experience of the British parliamentary system during the century of the Union. None of its features, as the literature of the period reveals, had left a deeper mark on the minds of the generation that had witnessed the struggle for Home Rule. It inspired an elaborate system of checks and constitutional balances designed to preclude the growth of either executive or legislative autocracy. A network of restrictions reduced the

power of the Executive and weighted the balance of constitutional authority in favour of the Legislature. The power of the Cabinet to dissolve the latter was limited; the exercise of the formal functions of convocation and prorogation was subjected to its assent. The introduction of a new type of extra-parliamentary Ministers not subject to the political bond of Cabinet responsibility was designed to invest Parliament with a direct measure of control over the more technical departments of State. On the other hand, the growth of parliamentary self-sufficiency was to be precluded by the introduction of the corrective powers of the Referendum and the Initiative. The very enactment of a written Constitution amendable only by Referendum and protected against legislative encroachment by the introduction of the judicial review of the constitutionality of laws, involved a severe restriction of parliamentary sovereignty. Finally, a new sphere of extra-parliamentary control was opened by a project of vocational organisation which, in the first creative *élan*, was carried to the length of a comprehensive transformation of the central agency of the representative system, the parliamentary Cabinet.

CHAPTER III

THE DEBATE IN THE CONSTITUENT ASSEMBLY

THE publication of the Draft Constitution was obscured by the political events which monopolised public attention immediately after the elections to the Constituent Assembly. The Civil War, which broke out at the end of June, necessitated its repeated prorogation; it did not meet until September 9th. The republican members abstained. On the other hand, two political groups which had been absent from the preceding Dáils made their appearance in the new assembly. A representative delegation of Irish Labour assumed the part of the official Opposition, while the spokesmen of Dublin University brought to the Assembly the intellectual element of the Anglo-Irish tradition. On all fundamental questions of policy, in particular on the interpretation of the Treaty, the Provisional Government could count upon a solid majority.

The Constitution Bill was introduced in the Constituent Assembly by the President. Its conduct through the debates was entrusted by the Government to the Minister for Home Affairs, Mr. Kevin O'Higgins. In so far as the interpretation of the Treaty and the special safeguards for minorities were concerned, the Bill was introduced as a Government measure. For the rest voting was free, members of the Government itself pleading on one occasion opposite causes.

The Constitution Bill was introduced on September 18, 1922, and the second reading was taken on the 20th and 21st of the month. The Constituent Assembly then went into Committee. In the course of the debates the Draft was considerably revised, the most important alterations relating to the representation of the Universities in the Dáil, the mode of constitutional amendment and the composition and scope of the Executive. The revised Bill was the subject of a considerable number of further amendments during the fourth and fifth readings. It

received the final approval of the Constituent Assembly on October 25, 1922. The debates in the Constituent Assembly centred in the main on two issues. On the one hand, efforts were made by the Opposition to effect a constitutional interpretation of the Treaty in the sense, not merely of the "dematerialisation," but of the complete elimination of the monarchical elements. These the Provisional Government was pledged to resist. The Labour Party, furthermore, was bent on giving more emphatic expression in the Constitution to those socialistic tendencies which, as shown in preceding pages, had been a potent factor in the Irish revolutionary movement, and which had found formal acceptance in the "Democratic Programme" of the Revolutionary Dáil of 1919, which was regarded as the first Parliament of the new State. These endeavours were not so successful as the similar efforts of Continental Socialist parties in the framing of the Constitutions of 1919. The great formative urge that had swept Europe after the breakdown of the Continental monarchies had faded away by the time that Ireland attained national freedom. Even that most advanced functional proposal of the Draft Constitution, the scheme of a partly non-parliamentary Executive, was in the course of the debates so transformed as in its ultimate form to embody no more than an optional modification of the British system. No part of the Constitution was more intensely and more objectively debated. It remained in the end a torso, bound to be swept away by the technical exigencies of parliamentary government.

CHAPTER IV

THE BRITISH CONFIRMATION ACT

THE British Parliament gave its formal endorsement to the Constitution, as enacted by the Constituent Assembly, by the passing of the Irish Free State Constitution Act, 1922,[1] in which the entire body of the Irish Act was incorporated as a schedule. Simultaneously, the Irish Free State (Consequential Provisions) Act, 1922,[2] was passed, a measure designed to effect the necessary modifications in the scheme of the Government of Ireland Act of 1920, arising from the establishment of the Free State. The British Act consists of a Preamble and five sections. The former, after reciting the fact that the Irish Constituent Assembly had passed a Constituent Act whereby the Constitution scheduled to it "is declared to be the Constitution of the Irish Free State," quoted Art. 2 of the Constituent Act, which embodies a repugnancy clause, and referred to the expediency of enacting a transitory fiscal provision corresponding to that of Art. 74 of the Irish Constitution. The first section of the Act declared that the Constitution as adopted by the Irish Constituent Assembly was, subject to the provisions embodied in it, as previously recited—the reference was clearly to the repugnancy clause—to be the Constitution of the Free State and, as provided in Art. 83 of the Constitution, to be brought into operation by a Proclamation of the King, a further proviso reserving to the latter the power to appoint a Governor-General by Proclamation. The second section of the Act provided that the establishment of the Free State was not to affect existing liabilities for taxes and duties, and that goods transported during the current financial year from or to the Irish Free State to or from "any other part of the United Kingdom"[3] or the Isle of Man were not to be treated as

[1] 13 Geo. V, c. 1, Session 2. [2] 13 Geo. V, c. 2, Session 2.

[3] The phrasing of the provision, as of the third clause of the Preamble,

imported or exported goods. It further enabled this arrangement to be continued by an Order in Council for another year, if agreed between the two Governments and approved by a Resolution of the House of Commons. The Act further enabled the Irish Parliament to make earlier British statutes relating to the Dominions applicable to the Free State by corresponding legislation (s. 3), and reserved to the British Parliament the power to legislate in respect of the Free State "in any case where, in accordance with constitutional practice, Parliament would make laws affecting other self-governing Dominions" (s. 4). The last section of the Act, finally, embodied the British ratification of Art. 11 of the Treaty as from which the "Ulster Month" was to run.

An analysis of the provisions of the Act reveals its purely complementary character. The Preamble refers to the passing of the Constitution by the Irish Assembly not as a preliminary to, but as a declaration of, its enactment. The first section expresses the British assent without any qualification and in rigid adherence to the terms of the Irish Act. The second embodies a consequential provision affecting exclusively the United Kingdom. The third confers upon the Free State the optional benefit of earlier inter-Commonwealth enactments. The apparent reservation embodied in the fourth section, finally, is of purely technical import. It was designed to preserve the formal right of the British Parliament to legislate for the Free State in regard to those questions of inter-imperial concern in respect of which the British Parliament still retained an exclusive nominal competence, which, as authoritatively affirmed four years later by the Imperial Conference of 1926, could only be exercised with the assent of the Parliaments of the Dominions.[1]

would seem to indicate an inadequate appreciation of the legal effect of the Treaty in dissolving the Union in respect of the twenty-six counties. It was formally recognised by the subsequent alteration of the official designation of the United Kingdom.

[1] Cf. Part V, Chapter I, *post*.

The debates in both Houses of the British Parliament centred exclusively on the question whether the Constitution was in conformity with the provisions of the Treaty, the only question which, in the opinion of the British Government, the British Parliament was competent to consider, the only one which, in the view of the Irish Government, justified its submission to the latter. The debates in both Houses were brief, the necessity under the provisions of the Treaty of establishing a new framework of Irish Government within one year from the conclusion of the latter and the delay in the assembly of the Irish Parliament caused by the Civil War having allowed but the span of a few days for the consideration of the measure by the British Parliament. The Prime Minister, in moving the adoption of the Bill, stated that the Law Officers both of the actual and of the preceding Administrations had examined the Constitution and declared that it was in accordance with the Treaty. This authoritative declaration and the saving clause of Art. 2 of the Constituent Act, which in general terms declared void any provision of the Constitution contravening the Treaty, were regarded as sufficient guarantees to secure a rather uncritical passage of the Bill. Sponsorship by a purely Conservative Government contributed effectively to silence most of the partisan opposition that had faced the Coalition Government when moving the ratification of the Treaty. The novel structural features of the Constitution received scant notice in an overwhelmingly conservative assembly. Only the leader of the Labour Opposition found words of sympathetic appreciation for the democratic innovations embodied in it. Few of the speeches re-echoed the passions of past conflicts. *Sine ira et studio* the Irish issue faded away from the deliberations of a Chamber which for more than a century it had shaken more deeply than any other political controversy.

CHAPTER V

THE ROYAL PROCLAMATION

(ART. 83)

THE last Article of the Constitution provided that its passing and adoption by the Constituent Assembly and the British Parliament should be announced by a Royal Proclamation not later than December 6, 1922, the date on which, under Art. 17 of the Treaty, the term of office of the Provisional Government was to expire, and that the Constitution should come into operation on the issue of such Proclamation. The British Act, after having passed through both Houses, received the Royal Assent on December 6th, and was immediately followed by the issue of the Proclamation. The unusual procedure adopted—it has no precedent in the enactment of the Dominion Constitutions, which, though framed by local conventions, were enacted by British statutes—indicates the complexity of the legal position. It has been suggested that the Royal Proclamation forms part of the ratification of the Constitution by the Irish Parliament, and that the King, in issuing it, was acting in his capacity of executive head of the Free State.[1] So interpreted, the Proclamation might be regarded as an anticipation of the novel procedure sanctioned by the Imperial Conference of 1926 for the ratification of international agreements concluded by Member States of the British Commonwealth. The phraseology of the Proclamation, however, hardly seems to lend itself to such construction. Its tenor, as indicated by the renewed recital of the repugnancy clause and its reference to the British Legislature as "Parliament," is essentially British. Although the issue of the Proclamation is expressly based on Art. 83 of the Irish Constitution—which provides that the Proclamation shall announce the passing and

[1] E. J. Phelan: "The Sovereignty of the Irish Free State" (in *The Review of Nations*, Geneva, March 1927, p. 35 *et seq.*).

adoption of the Constitution by the two Parliaments and that it shall thereupon come into operation—and although the British Act merely recites the Irish Article, the Preamble of the Proclamation refers to the latter Article only in so far as the announcement of the ratification by the two Parliaments is concerned, but quotes the British Act in respect of its function of bringing the Constitution into operation, a procedure tending to lend countenance to the interpretation that it was by an Act of the British Parliament that the Constitution was given the force of law. The same view is evident in the phrasing of the declaratory section of the Proclamation, which, instead of announcing, as prescribed in Art. 83, "the passing and adoption of the Constitution by the Constituent Assembly and the British Parliament," proclaimed that the Constitution "as the same was passed and adopted by the said Constituent Assembly has been passed and adopted by Parliament," the announcement thus relating essentially to the latter enactment and only indirectly to the former, but not, as prescribed, in equal measure to both. Yet, despite the legal phrasing of the Proclamation, the very fact that the Constitution was brought into operation not by an Act of the British Parliament, as were the Dominion Constitutions, but by a Proclamation prescribed in the body of the Irish Statute, would seem to indicate that it is from the latter that the legal authority of the Constitution is basically derived. In the Constituent Assembly the form of an announcement by Royal Proclamation was defended by the Minister in charge of the Bill as representing a "definite announcement of renunciation and withdrawal" on behalf of the Crown.[1]

[1] *Dáil Debates*, Vol. 1, cols. 1458 and 1464.

CHAPTER VI

THE LEGAL ORIGIN OF THE CONSTITUTION

THE divergency of interpretation revealed in the phrasing of the Proclamation illustrates the complexity of the legal origin of the Constitution. Saunders,[1] and following him others, have commented upon the constitutional problem involved in the fact that the Constitution appears to derive its formal authority neither from the Constituent Act of a sovereign Irish Legislature nor, like those of the Dominions, from a Statute of the British Parliament. It was not an emanation of British sovereignty, as it had been enacted by the Irish Constituent Assembly. It represented, on the other hand, not the act of an Irish *pouvoir constituant*, since it required the assent of the British Parliament before being brought into operation and was, moreover, subject to the Treaty and valid only in so far as not repugnant to the provisions of the latter. On the other hand, it appeared to be of superior rank to the Treaty, since it was only by the Constituent Aet (s. 2) that the latter was invested with the force of law. It is undeniable that the phrasing of the several enactments, as indicated in the analysis of the Royal Proclamation, is fraught with a certain measure of ambiguity, perhaps deliberate, necessitated by the exigencies of the political situation then prevailing in the two countries. On the whole the legal evidence, however, would seem to favour an interpretation in conformity with the Irish contention that the Constitution derived its authority essentially from the enactment of the Irish Constituent Assembly. Its constituent power was formally asserted in the Preamble to the Constituent Act and implicitly acknowledged by the British Parliament when it re-embodied the latter in its Act of Confirmation. If the opposite view had been held, it would

[1] A. F. Saunders: "The Irish Constitution" (in *American Political Science Review*, 1924, Vol. 18, No. 2).

hardly have been so re-embodied. In so far, however, as the Constitution interpreted and implemented the Treaty—the latter purpose was expressly indicated in its title—it required the assent of the British Parliament. Both the Irish and the British Governments insisted in their respective Parliaments that it was the only question which the British Parliament was competent to consider. In the Constituent Assembly it was urged by the Opposition that the application in Art. 83 of the terms "passing and adoption" both to the Constituent Assembly and the British Parliament might be read as implying a recognition of the right of the latter to effect changes in the Constitution, and an amendment was proposed restricting the reference of the phrase to the Constituent Assembly alone and describing the share of the British Parliament as a mere act of "registration." Mr. Kevin O'Higgins, on behalf of the Government, resisted the proposal on the ground that its adoption would be "equivalent to a claim that, utterly regardless of anything that this Constitution may or may not contain, the function of the British Parliament was simply to register that." [1] He suggested that the word "passing" referred to the Constituent Assembly and "adoption" to the British Parliament.[2] The British Prime Minister in the House of Commons referred to it as a measure of "ratification." It was in essence a declaratory Act embodying the formal assent of the British Parliament to the Constitution as an interpretation of the Treaty.[3] Nor would the provision of s. 2 of the Constituent Act,

[1] *Dáil Debates*, Vol. 1, col. 1460.

[2] In this distinctive sense the two terms are used by Professor Keith in his analysis of the Constitution. Cf. *Journal of Comparative Legislation*, Vol. 5, p. 120.

[3] Cf. the dictum of Chief Justice Kennedy in *R.* (*Alexander*) v. *Circuit Judge of Cork*, [1925] 2 I.R. 165: "By the Treaty it was agreed that Ireland should have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa. Dáil Eireann thereupon proceeded to enact a Constitution giving effect to the terms of the Treaty. The Constitution so enacted by the Dáil was recognised by the British

which subjected the construction of the Constitution to the terms of the Treaty, appear to imply a denial of the sovereign character of the Irish Constituent Assembly. A parallel for such subjection of a constitution to the terms of an international agreement may be found in Art. 178 of the German Constitution, by which the Treaty of Versailles was accorded priority over the provisions of the Constitution without prejudice to the integral sovereignty of the Reich. On the other hand, the fundamental status of the Treaty is not affected by the insertion of its formal ratification in the body of the Constituent Act. The embodiment of the legislative ratification of the Treaty and of the Constitution in the same Statute was a measure of expediency; the former might with equal force have been effected by a separate Act of the Irish Legislature.

Parliament, and by the Statute called the Irish Free State Constitution Act, 1922 (Session 2), it was made binding upon all who were subject to the authority of that Parliament" (at p. 183).

PART III

THE CONSTITUENT ACT

CHAPTER I

TITLE AND STRUCTURE

THE Irish Statute embodying the Constitution is entitled "An Act to Enact a Constitution for Saorstát Eireann and for implementing the Treaty between Great Britain and Ireland signed at London on the sixth day of December 1921." [1] In the title of the Draft Constitution the two objects of the enactment had not been so divided. It read: "An Act to Enact a Constitution for Saorstát Eireann for implementing the Treaty," etc., which in the Constituent Assembly gave rise to the stricture that only one of the purposes of the enactment of the Constitution had been specified to the exclusion of all others.[2] The amended version does not entirely meet this criticism, but it indicates the two fundamental implications of the enactment. It signifies that the act of the Irish Constituent Assembly was conceived, not as a preliminary to but as the effective enactment of the Free State Constitution. It further expressed that an essential purpose of its enactment was the implementation of the Treaty. The specific reference to the latter object was not without constitutional significance. It was the character of the Constitution as an implementation of the Treaty which constituted from the Irish angle the essential reason for its submission to the British Parliament.

The Constituent Act consists of a Preamble and three declaratory sections. The Constitution itself and the Anglo-Irish Treaty, of which the Constituent Act is the legislative ratification, are appended in the form of schedules. The arrangement of the several sections of the Constitution follows the established order of Continental models. It opens with a chapter of fundamental declarations, which is followed by the traditional sections on the composition and the functions of the Legislature, the Executive and the Judiciary. A concluding

[1] Act No. 1 of 1922.

[2] *Dáil Debates*, Vol. 1, col. 1501.

chapter of transitory provisions regulates the legal, administrative, judicial and fiscal succession of the new régime, the composition of the first Parliament and the mode of promulgation. In the Draft Constitution the several sections were grouped under sub-headings. During the later readings of the Bill these titles, with the exception of that of the last section, were deleted in order to preclude their investment with any legal significance.

CHAPTER II

THE PREAMBLE

THE Preamble of the Constituent Act enunciates in the austere tenor of Continental models the spiritual source and the higher purpose of the enactment. "Acknowledging that all lawful authority comes from God to the people," Dáil Eireann, the indigenous Irish Parliament, "sitting as a Constituent Assembly in this Provisional Parliament," proclaims the establishment of the Irish Free State and "in the exercise of undoubted right" decrees the enactment of the Constitution. The sovereignty as well as the continuity of the native Parliament could not have been expressed more emphatically. The constitutional source of the Organic Law of the new Irish State is Dáil Eireann. Its function as a Constituent Assembly is as ephemeral as is its convention under the Treaty as a Provisional Parliament. Its national character is similarly expressed in the purpose of the Act. It is "in the confidence that the national life and unity of Ireland shall thus be restored" that it proclaims the establishment of the Free State and the enactment of its Constitution.

CHAPTER III

THE LEGAL IMPORT OF THE CONSTITUENT ACT

THE import of the provisions of the Constituent Act is threefold. It embodies the legislative ratification of the Treaty. It formally proclaims the establishment of the Irish Free State. It enacts its Constitution. In investing the Treaty with the force of law the Act gave effect to Art. 17 of that instrument. As such legislative ratification had been expressly prescribed, it is thus from s. 2 of the Constituent Act that the binding force of the Treaty for the Free State is derived. The title and the Preamble of the supplementary Agreement of December 3, 1925,[1] expressly refer to the Constituent Act as having "duly ratified and given the force of law" to the Treaty.

It is one of the formal paradoxes of the Treaty Settlement that it received the force of law in Ireland in the body of an Act which subjected its own interpretation to the terms of the Treaty. Such complicated draftsmanship, which has tended to obscure the legal genesis of the Constitution, was in no way inherent in the legal structure of the Settlement. The legislative ratification of the Treaty might with equal force have been effected by a separate enactment. If such ratification made the Agreement part of Irish municipal law, the "Repugnancy Clause" of s. 2 in which it was embodied, invested it with an even higher legal status. It gave its provisions overriding effect both over the Constitution and over all subsequent Irish legislation. Any provision of the Constitution or of any subsequent constitutional amendment or other Act passed by the Irish Parliament which was repugnant to any of the provisions of the Treaty was *quoad hoc* to be void and inoperative, and the Parliament and the Executive Council of the Irish Free State were respectively to pass such further legislation and take such

[1] Scheduled to the Treaty (Confirmation of Amending Agreement) Act, 1925 (No. 40).

administrative action as might be necessary to implement the Treaty. The object of the provision was clearly to maintain the fundamental status of the instrument by which the Free State had been established. No provision, however, was made for its legal enforcement. The decision as to the existence of any repugnancy would, under Art. 65, lie with the Irish Central Courts but, beyond declaring any such legislation to be void and inoperative, the Courts clearly have no power to coerce either Parliament or Executive to repeal or render ineffective the impugned provisions.

The legal import of the provision is not free of doubt. It has been repeatedly suggested by Professor Keith that its effect, in conjunction with Art. 2 of the Treaty, might be to render void provisions of the Constitution which did not conform to Canadian precedent.[1] Such evident deviations were contained in at least five articles. The Canadian Parliament had not the power of the Irish to amend its Constitution. Convocation and prorogation were not subject to its assent. The Canadian Constitution specifically preserved the royal prerogative of disallowance, which is entirely omitted from the Irish Constitution. The Governor-General in Canada was invested with a certain measure of discretionary power in regard to the dissolution of Parliament; the Governor-General of the Irish Free State is expressly deprived of any such discretion under Art. 53 of the Constitution. Finally, under the Canadian Constitution an appeal from the Courts of the Dominion lay to the Judicial Committee of the Privy Council, both as of right and by special leave; under the Irish Constitution, only the latter is preserved. Is it to be inferred that these express provisions of the Irish Constitution are null and void or that the legal advisers of two British Cabinets overlooked these patent departures from Canadian precedent when they gave it as their considered opinion that the Constitution was in

[1] *Journal of Comparative Legislation*, Vol. 5 (1923), p. 121; *The Constitution, Administration and Laws of the Empire* (1924), p, 202; *The Sovereignty of the British Dominions* (1929), p. 213.

conformity with the Treaty? It is noteworthy that these provisions occur in those very "Agreed Articles" which represented the official interpretation of the Treaty by the Law Officers of the two Governments. The most potent argument against that restrictive interpretation is, however, to be found in the injunctive provision of the "Repugnancy Clause" itself, for in imposing upon the Irish Parliament an obligation to rectify by further legislation any repugnancy found to exist between the Constitution and the Treaty, it implicitly attributed to the Irish Parliament a power of constitutional amendment which is clearly denied to that of Canada. It would, therefore, appear that the "Repugnancy Clause" of the Constituent Act cannot be held to imply a requirement of literal adherence to the constitutional model of Canada, but that the explicit deviations from Canadian precedent contained in the above quoted provisions must be regarded as having been endorsed by the British Legislature when it gave its formal assent to the Irish Constitution.

PART IV

THE FUNDAMENTAL DECLARATIONS

INTRODUCTION

THE inclusion in the body of the Irish Constitution, prior to its functional provisions, of a chapter of fundamental declarations in the traditional tenor of Continental Constitutions, represents a characteristic deviation of the Irish from the Dominion Constitutions. The essential feature of the Treaty Settlement—the "Statehood" of the new Irish polity—could not have been brought out more emphatically. The Dominions were clearly not States. Their Constituent Acts, though in substance prepared by local conventions, were British Statutes, designed to entrust the British citizens living in the overseas provinces of the Empire with such powers of regional self-government as they required for the management of their local affairs. They were in origin no more than measures of technical devolution necessitated by the exigencies of geography. They aspired in no sense to be regarded as comprehensive codes of constitutional law comparable to the Organic Laws of Continental States. The constitutional character of the Dominions as dependencies of the British Crown was in law as little affected by the enactment of these Constituent Acts as the national status or the civic liberties of their citizens as British subjects. The juridical status of the Irish Free State was *ex origine* of entirely different character. It embodied an indigenous national statehood. Its Constitution was the Organic Law of a new State. It would hence appear appropriate that, following Continental precedent, not merely the functional organisation of its frame of government, but also the political and personal rights of its citizens should be comprehensively defined, even though the latter might in substance be assured without such constitutional restatement by the maintenance of the continuity of the legal order of the preceding régime (Art. 73).

The significance of the insertion of a declaration of fundamental rights is not exhausted, however, by a comparison with the Constitutions of the Dominions. It was equally opposed to

the basic inspiration of the modern framework of the British Constitution. It is true that the conception of fundamental rights has not always been as alien to the British system as modern interpreters, steeped in the doctrine of parliamentary and judicial supremacy, have been apt to assume. Less dogmatic research has shown that, from Magna Carta down to the charters of the American Colonies, the conception of a formal enactment of political fundamentals was as accepted in England as throughout mediaeval Europe. When the absolutism of the first Stuart kings was seen to undermine the organic structure of the mediaeval English State, the Petition of Right represented a conscious effort—in the familiar garb of a restoration of ancient custom—to fix by formal enactment a new balance of constitutional power. During the Civil War several attempts were made in the successive phases of the fluctuating struggle to enshrine the political philosophy of the hour in a constitutional framework of permanent duration. It was only the essentially conservative outcome of that conflict, the joint victory of Parliament and Common Law, which effaced that formative conception from the records of English constitutional history. If the doctrine of the legislative omnipotence of Parliament was incompatible with the notion of a pre-existent and unchangeable fundamental law, the technique of the Common Law militated against the form of an organic enactment. Thus it is that, although British statutes like Magna Carta, the Petition of Right and the Bill of Rights have provided most of the terminology, and the spiritual impulses of the English Revolution much of the metaphysical inspiration, of the modern "Declarations of Rights," it is essentially under American and French influence that the formal enunciation of individual and civic rights embodied in most modern Constitutions has received its theoretical formulation. Of the two factors that went to the framing of these declarations—the philosophy of the Law of Nature and the political experience of the absolutist State—the England of the seventeenth century lacked neither. Nor was the historic situation without call for such funda-

mental restatement. The radical transformation of the constitutional character of the English monarchy effected by the "Glorious Revolution" might well have inspired a more comprehensive enunciation than the merely subsidiary safeguards of the Bill of Rights. But the dynamic link was missing. The theory of the Law of Nature, stated in England by Locke with a force that made it the most powerful revolutionary ferment in Continental political thought for more than a century, could not affect the evolution of a constitutional system that was being shaped by the empirical habits of the guardians of the Common Law. By an ingenious fictionism the legal continuity of the preceding order was formally safeguarded, much as in the sphere of action the continuity of Parliament prevented any violent revolutionary transformation. That English mentality is not so inherently opposed to an abstract formulation of fundamental rights as often dogmatically maintained, is revealed by the constitutional projects of the Commonwealth period when the formative influence of the conservative agencies of Parliament and Judiciary was temporarily in abeyance. The "Agreement of the People" drafted by the Levellers, the most revolutionary project of the period, embodied also the nucleus of a declaration of fundamental and irrevocable political and personal rights. That the realisation in the British political sphere of the radically anti-authoritarian postulates of Cromwell's Levellers should have been effected by the Constitution of an autonomous Catholic Ireland is one of the minor ironies of that belated settlement.

The inclusion of a Declaration of Fundamental Rights in the Irish Constitution was indeed of more than formal import. It marked a radical break with the pivotal conception of the modern British Constitution, the doctrine of the Sovereignty of Parliament. It invested the basic principles of public law enunciated in the Declaration with the legal sanction of a higher order. It was by design that these declarations were inserted prior to the functional sections of the Constitution. Such priority was to emphasise that these fundamentals were,

at least in principle, not to be subject to interference by the Legislature, the simultaneous introduction of the power of judicial review (Art. 65) providing the constitutional sanction for the enforcement of such non-interference. This was in conformity with a basic doctrine of the Law of Nature. Men, asserted the School, were prepared to sacrifice to the State part of their liberty in order to obtain thereby a greater measure of security for the enjoyment of the rest. But the doctrine assumed a new significance when that State represented no longer a merely externally imposed authority, but the corporate embodiment of the common will. Fundamental rights in a modern constitution imply the limitation of Parliament and the protection of minorities. In the modern structure of the British Constitution the legislative power of Parliament is —at least in theory—unlimited and illimitable. Hence, the fundamental rights both of the individual citizen and of the body politic, whether derived from statutes or from the Common Law, can be modified and even abrogated by a majority vote in any Parliament, as was done on an extensive scale in the Irish Coercion Acts of the nineteenth century. That pragmatic conception of parliamentary omnipotence, too, is far less an immemorial heritage of English law than an *ex post facto* construction of Victorian theorists. Mediaeval "Acts of Parliament," when no longer mere judgments, represented but declaratory affirmations of an unwritten Common Law which was regarded as "founded upon the unalterable principles of reason and revelation." [1] Even when under the activist impulse of the New Era the conception emerged that human agency could make law, the overruling force of the basic principles of the Common Law was not thereby invalidated. Statutes might be repealed, they might be treated by judges as entirely null and void if found to be "erroneous and unjust and opposed to all reason." But even Coke, though conscious of the growing ascendancy of Parliament, held that in substance Parliament could not alter the rules of Natural

[1] Cf. Ch. H. McIlwain: *The High Court of Parliament* (1910), p. 299.

Law. These rules might not be easy to define, the "essence" difficult to distinguish from the "ornaments," and the principle hence not of general application; but the precedents quoted by Coke[1] seem to indicate that the power of judicial review was claimed and apparently also exercised in reference to statutes which were regarded as manifestly inequitable, or perhaps merely ephemeral. The problem, however, assumed a new aspect when in the parliamentary struggle with the first Stuart kings legislation became pre-eminently a political weapon. The tyranny of a self-perpetuating and non-representative Legislature had to be experienced before men recognised the need for the introduction of formal constitutional checks on parliamentary legislation no less than on the Royal Prerogative. In the declarations of the first "Agreement of thePeople" the old conception of an overruling fundamental law received a new democratic interpretation. It defined the scope of Parliament and expressly withdrew from its legislative interference the fundamentals of the democratic State: freedom of religion, freedom from military service, freedom of expression and equality before the law. It significantly added to those reservations a clause that laws, "as they ought to be equal, so they must be good and not evidently destructive to the safety and well-being of the people."[2] So far-reaching a conception, presented in so uncompromising a form, could not, however, survive the age of revolution. The idea of limiting the power of Parliament would make little appeal to a generation which in its own time had witnessed the triumph of Parliament over an arbitrary prerogative, a triumph, moreover, won pre-eminently on the issue of individual liberty. In its close association with the Judiciary Parliament seemed to be invested with something of the transcendental authority of the Law itself. The political no less than the moral force of its supremacy as it emerged from the post-revolutionary Settlement appeared so overwhelming as to preclude any scepticism of the merits of majority

[1] Dr. Bonham's case, 8. Rep. 118.

[2] B. Gardiner: *History of the Great Civil War* (1898), Vol. III, p. 392.

rule. Nor, indeed, would the postulate of the protection of minorities, which underlay the schemes of the Levellers, find much favour with the framers of that avowedly majoritarian and intolerant Settlement. In that historical background the conception of a constitutional withdrawal of the sphere of political and individual liberty from the competence of Parliament was bound to fade away. It found a refuge in the writings of the theorists of the Law of Nature and was translated into positive law in the Constitution of the United States and in the Declaration of the Rights of Man.

It is in the light of such precedents that the constitutional significance of the insertion of a declaration of fundamental rights in the Irish Constitution becomes apparent. Though Continental constitutions may have provided the model, its deeper inspiration is to be found in the revolutionary origin of the Constitution. It is characteristic of all constitutional settlements which arise from a political upheaval that they endeavour to ensure the perpetual maintenance of the newly-won liberties by their incorporation in the organic law of the new order. It is the paradox of all revolution that it paralyses the creative impulse from which it sprang. Its origin a principle, its end a formula—such is its fatal cycle. Its dynamic urge succumbs to the static spell of legitimism. The radical break of historical continuity, the sudden loss of the security of tradition compel the framers of the new order to protect by formal enactment what as yet possesses no unwritten guarantee in the civic consciousness of the community. The first attempt in English constitutional history to proclaim fundamental rights in the form of an organic law—the above-cited "Agreement of the People"—arose from the single revolutionary break of its historical continuity. The motive in that case was of the same anti-authoritarian order as that which underlay the similar departure in the modern Irish Constitution. It may not be easy to discover a common denominator of the transcendental convictions of the Independentist Levellers and of the Catholic framers of the Irish Constitution, but distrust of the secular

power is as deeply ingrained in the Church of Authority as in the individualist dispensation of the Puritan Creed. The force of such scepticism would be of particular strength in a country where for centuries past the authority of the secular arm had been as low as that of the spiritual power had been high. It was not limited to the executive organs of that secular power. Irish experience of British parliamentary rule during the century of the Union had revealed that that system offered scant protection to political minorities. Coercion Acts abrogating the most elementary guarantees of individual and civic liberty had been adopted by majority votes in a Parliament in which those affected by them were represented by a necessarily permanent minority. If the fundamental framework of the State, if the personal liberty of its citizens were to be adequately safeguarded, it seemed essential that the danger of their modification by ephemeral parliamentary majorities should be effectively precluded. Inclusion in the Constitution offered that guarantee, for it ensured that—in accordance with the general provisions governing the amendment of the Constitution—no modification of these rules could be enacted unless it had been approved by a vote of the electorate. The old postulate of the "Agreement of the People" that the fundamental rights are "reserved by the represented to themselves" was realised by the adoption of the modern device of the Referendum. As a result of such reservation the Irish citizen was to enjoy, at least in principle, a more secure, because less easily amendable, measure of protection than would have been the case if the English principle of parliamentary sovereignty had been adopted. It is characteristic that the significance of the inclusion should have been missed by the English Attorney-General when he explained in the House of Commons that the insertion of these declarations was of no practical import as they added nothing to the existing law.[1]

[1] Hansard, Vol. 159, col. 156 (November 8, 1922). Dicey, as a passage in the "Introduction" indicates (p. 197), was not unaware of the legal implications of the Continental "constitutional guarantees," but they could find little appreciation in a work so insistent on the

The Irish Declaration of Fundamental Rights is framed on the elaborate model of the more recent Continental constitutions. In these the Declaration includes provisions of a threefold character. It generally embodies, first, a general statement of the political fundamentals of the State, ranging not infrequently from the sublime enunciation of the philosophy of the social contract to a minute description of the technicalities of the national flag. It enshrines, secondly, the classic guarantees of individual liberty of the American and French declarations. It finally embodies a series of general injunctions directing the Legislature to enact those social, economic and cultural reforms which the framers of the Constitution conceive as the ideals of the new order, but to which they do not feel able to give legal effect in the framework of the organic law itself. While the first two categories embody rules of law, the declarations of the last-named type represent no more than general directions from the Constituent to the Legislative Power, the translation of which into positive law cannot, of course, be claimed by any legal method.[1] The Declaration of Fundamental Rights embodied in the Irish Constitution comprises provisions of all three types. The general tendency of the Irish draftsmen was, however, positive enough to prevent the inclusion of such purely abstract maxims as encumber some

incomparable perfection of the British system. From the fact that the right of individual freedom is in Continental constitutions deduced from the fundamental principles of the constitution—i.e. from a document which in principle is not intended to be altered,—he was led to derive the amazing conclusion that "the idea readily occurs that the right is capable of being suspended or taken away"; while it is in fact precisely under the British Constitution that individual freedom can be most easily curtailed or suspended by legislation, as indicated by the Irish Coercion Acts.

[1] It has, however, been suggested that the courts, in deciding cases relating to the subject matter of such declarations, are by virtue of the fundamental character of the Constitution bound to take cognisance of the general tendency of these declarations, even while no legislative effect has as yet been given to them. Cf. R. Thoma: *Die juristische Bedeutung der grundrechtlichen Sätze der Deutschen Reichsverfassung* (Berlin, 1929), p. 14.

recent Continental constitutions. Even the guarantees of civil liberty are drawn up in rather elliptical form. In no sense can the provisions of Arts. 2 to 11 of the Constitution be regarded as an exhaustive exposition of the fundamental rights of the Irish citizen.

CHAPTER I

THE POLITICAL FUNDAMENTALS OF THE CONSTITUTION

(*a*) THE DUAL SOURCE OF ITS DEMOCRATIC INSPIRATION (ARTS. 1 AND 2)

AN intense democratic radicalism permeates the framework of the Irish Constitution. It is inspired, on the one hand, by the powerful social strain with which, as shown in the introductory section, the Irish national movement has from its early origins been imbued. It is rooted, on the other hand, in the association, deeply ingrained in Irish mentality from time immemorial, of the conception of government with the notion of external domination. In the consciousness of the people the anti-democratic had ever been identical with the anti-national, however little indeed such identification might frequently have corresponded to actual facts. The tendency received an additional impetus from the fact that under the Treaty Settlement the organs of authority remained, at least nominally, stained with the insignia of that external domination. Anything that might tend to detract from the powers of the Executive or to demonstrate its constitutional subjection to the will of the people would, therefore, appear as an additional expression and safeguard of the new liberty.

In the introductory declarations of the Irish Constitution both these motives are subtly discernible. The Preamble of the Constituent Act enunciates with the metaphysical ethos of all revolutionary constitutions the divinely inspired sovereignty of the people as the transcendental basis of the Constitution. Dáil Eireann, "acknowledging that all lawful authority comes from God to the people and in the confidence that the national life and unity of Ireland shall thus be restored," proclaims the establishment of the Free State and enacts the Constitution. If, in the words of Lord Bryce, the "vital impulse of democracy

lies in the conception of a happier life for all coupled with the mystic faith in the people through whom speaks the voice of the Almighty Power that makes for righteousness," the fundamental principle of a democratic constitution could not have been stated more concisely. What the Preamble proclaimed as the abstract source of the Constitution, Art. 2 re-affirmed as the concrete basis of the governmental organisation of the new State. All powers of government are declared to be derived from the Irish people and to be exercisable only through the agencies established under the authority of the Constitution. If these declarations enshrine the democratic element, the first Article indicates the national motive. It proclaims the constitutional co-equality of the Irish Free State with the other Member States of the British Commonwealth of Nations. The declaration implied a characteristic advance beyond the static definition of the Treaty. As a statement of the external relationship of the Free State to the British Commonwealth, it was clearly out of place in a document which purported to establish the internal organisation of the new State. Its insertion was admittedly designed for the purpose of eliciting from the British Parliament a declaration that the Free State was recognised as a co-equal member of the Commonwealth.[1] It formed the logical preliminary to the subsequent proclamation of popular sovereignty. It was because Ireland was free that her people was sovereign.

(*b*) THE SOVEREIGNTY OF THE PEOPLE (ART. 2)

The constitutional significance of the insertion in the opening section of the Irish Constitution of a formal declaration that "all powers of government and all authority legislative, executive and judicial in Ireland are derived from the people of Ireland" need hardly be laboured. A pronouncement of such theoretical character and revolutionary antecedents could

[1] Statement of the Minister for Local Government, *Dáil Debates*, Vol. 1, col. 508.

clearly have found no place in the Constituent Acts of the British Dominions, under which all legal authority in the latter is derived from the sovereign fount of the Parliament of Westminster. It re-embodied the fundamental postulate of the Constitution of the Republican Dáil of January 1919, but the assertion no longer constituted an *ex parte* claim. The Article represented one of the "Agreed Clauses," and its confirmation by the British Act was regarded as a "valuable recognition of the sovereignty of the Irish people." [1] Its significance is indeed not exhausted by a comparison with Dominion precedent. There can be little doubt that under the modern British Constitution the people is in fact sovereign, however restricted the effective scope for the exercise of such sovereignty may be. In law, however, sovereignty, now as ever, rests with the "King in Parliament." That mystical entity may by successive stages have become more and more identical with the adult citizenry, but the archaic formalism of the British Constitution is sublimely incognisant of so chaotic an entity as "the people." A formal recognition of popular sovereignty would be as repugnant to its empirical legalism as to its structural dualism. In both respects the Irish Constitution deliberately deviated from it. Its opposition to the time-honoured fictionism of the British Constitution was as deliberate as its insistence on the integral monism of a democratic constitution. The republican "leitmotif" given out in the Preamble runs through its entire structure. The monarchical head of the Association into which the Free State had entered had, under the terms of the Treaty, to be introduced into the framework of the Constitution, but it was as a functionary of the Irish people that he appeared therein, almost as the permanent President of an Irish Republic. There is a King; there is no Royal Prerogative.

When the constitutional innovation implied in the insertion of a declaration of popular sovereignty has been noted, it may be well to inquire into the functional significance of that

[1] *Dáil Debates*, Vol. 1, col. 655.

abstract postulate in the concrete scheme of the Constitution. In the century which has elapsed since the first stormy enunciation of that revolutionary doctrine, the body of democracy has suffered no greater mutilation at the hands of the men of force than has its spirit from the cynical subtlety of its reactionary analysts. The fundamental declaration of the sovereignty of the people, proclaimed with noble rhetoric in many a constitution, has not weakened the arbitrary power of the unrepresentative few: the party caucus, the press magnate, the autocratic cabinet, the more powerful autocracy of high finance. From such failure dialectical generalisation has been quick to demonstrate the inherent absurdity of the democratic principle and to infer the inevitability of the rule of an aristocratic minority or of the efficient dictator. It is, of course, true that the principle of popular sovereignty represents in itself but the general, if not the nominal basis of democratic government, that at its lowest it connotes no more than the "*pouvoir du dernier mot.*" Its effective realisation in the organised life of a political community is dependent on a variety of concrete factors, of which the civic virility, the educational standards and the economic freedom of its members are the most fundamental. Its proclamation in the organic law of a State is in itself as little a guarantee of its constitutional reality as the similar enunciation of the fundamental rights of the individual can be regarded as a permanent safeguard of personal liberty. This, to be sure, is no reason why it should not be so proclaimed. The machinery of a constitution is something more than a mere technical device for the registration of the fluctuating impulses of a hypothetical popular "free will." It is indeed that assumption of the latent existence of a spontaneous and definite "popular opinion" which is at the root of all abstract criticism of the unreality of democratic government. Such static purism ignores the dynamic complexity of the political organism. It is essentially through the agency of the constitutional framework of a State that the political will of its citizens is not merely rationally trained, but constructively

shaped. The process of such articulation is utterly misconceived if it is represented as a deflective adaptation of the political "life-force" to the mechanism of a rigid machinery of transmission. The momentum of the process is inherently creative. The organised forms of political life are no more than the static records of its continuous evolution. Through their agency proceeds the growing intensification of its dynamic substance. They not merely express, but elicit and mould its progressive emanations. It is, indeed, by the measure of the preponderance of its creative over its mechanical function that the merit of a system of government must be assessed. Judged by such tests it may be claimed that the Irish Constitution cannot be charged, like some others, with having reduced the principle of popular sovereignty to a mere metaphysical metaphor. It is true that the articulation of the popular will was restricted to the channels provided in the Constitution, but these embodied a framework of government of singular variety and sensitiveness. A constitution based on a wide suffrage, Proportional Representation and a rational distribution of constituencies, embodying an elaborate system of checks and balances designed to preclude the growth of autocratic tendencies in any of its organs, such a framework, whatever might be thought of the practicability of some of these devices, could claim to have not merely proclaimed the sovereignty of the people in the abstract, but to have invested it with concrete reality.

(*c*) IRISH CITIZENSHIP (ART. 3)

The implications of the principle of popular sovereignty are both constitutive and functional. The primary inference drawn from it in the Constitution was the institution of a distinctive Irish citizenship. If sovereign authority in Ireland was vested in the Irish people, it was clearly from that original source, and not from any secondary association with a wider political grouping, that citizenship of the Irish State must be derived.

Under Art. 3, a specific Irish citizenship was bestowed on every person domiciled in the Free State at the time of the coming into force of the Constitution who was born in Ireland, or either of whose parents was of Irish birth, or who had been ordinarily resident in the Free State for not less than seven years before the enactment of the Constitution. Any person possessing one or the other of these qualifications, but owning allegiance to another State, was allowed to opt against acceptance of Irish citizenship. A law of nationality was to determine the conditions governing the future acquisition and termination of Free State citizenship.

Until the passing of such a nationality law, which, though ten years have elapsed since the establishment of the Free State, has not yet been enacted, Irish Free State citizenship is thus of twofold origin and character. In the case of persons of Irish birth or descent it would appear that domicile in the Irish Free State at the time of the enactment of the Constitution was sufficient to establish Irish citizenship. This implied that every person of Irish birth was entitled to the privileges and subject to the obligations of Irish citizenship unless he had abandoned his Irish domicile, a departure for which, in accordance with the general rule, not merely physical residence abroad, but actual intention of effecting a change of domicile is required.[1] Unless, therefore, clear evidence can be adduced that such a change had taken place at the time of the enactment of the Constitution—and the burden of proof would clearly lie on those asserting it—a person of Irish birth would not lose his Irish citizenship even if he permanently resided abroad. In the case of a person either of whose parents was born in Ireland, but who himself was not of Irish birth, on the other hand, residence in the area of jurisdiction of the Free State at some time prior to the enactment of the Con-

[1] It was, on the other hand, held by the Supreme Court in *The Earl of Iveagh* v. *The Revenue Commissioners*, [1930] I.R. 386, that "the retention and occasional occupation of a residence in a domicil of origin is not incompatible with or conclusive against the acquisition of a domicil of choice." Cf. also *Bradford* v. *Swanton and Crowley*, [1931] I.R. 446.

stitution with the concomitant intention to maintain such residence indefinitely, would appear to have been the essential condition for the acquisition of Irish citizenship. As long as no new home is acquired, an Irishman who has been so resident retains his Irish domicile and thereby his Irish citizenship, even if residence in the Free State may since have ceased.

The conditions under which persons not of Irish birth or descent, but merely possessed of a seven years' residential qualification in the area of the Free State prior to the enactment of the Constitution, could acquire Free State citizenship, were considerably different. In their case "ordinary residence" was required in addition to domicile. The distinction was fundamental and, as evident from the Debates in the Constituent Assembly, fully intended. In the terms of the old definition it is "habitual physical presence" which constitutes "residence." Habitual residence for seven years before the enactment of the Constitution and the intention to maintain such residence indefinitely were thus the essential conditions for the acquisition of Irish citizenship by persons of this category. No formal act of denizenship was necessary, but freedom was reserved to such residents who were citizens of another State to decline the adoption of Irish citizenship. Beyond this, however, the legal implications of the provision were distinctly vague. No time-limit was fixed within which such persons would have to make the prescribed option if they elected not to accept Irish citizenship. Nor was any renunciation of their former citizenship demanded as a condition precedent to the acquisition of that of the Free State. As the law stands, it would appear that such persons, not having renounced their former citizenship by any formal act, may claim the privileges both of the latter and of the new Irish citizenship thus bestowed upon them.

It is clear that the framers of the Constitution envisaged the early promulgation of a law of nationality to regulate the terms of the acquisition and termination of Irish citizenship. The actual position is full of uncertainty and clearly untenable

for any length of time. For, under the law as it stands, the number of Irish citizens is rigidly fixed and hence subject to constant decrease. Children born in the Free State of Irish parents, since they were not "domiciled in the area of the jurisdiction of the Irish Free State at the time of the coming into operation of the Constitution," are not Irish citizens and will not, unless the Constitution is implemented, be entitled to the parliamentary franchise when they attain majority. Nor would the marriage of an Irishman to a woman not of Irish nationality confer on the latter the status of Irish citizenship.

The practical significance of the institution of a distinctive Irish citizenship lies in the fact that it is the categories of persons enumerated in Art. 3, and these alone, who are entitled to the privileges and subject to the obligations of Irish citizenship. These privileges comprise the civic and national rights generally inherent in modern citizenship: the franchise, both parliamentary and municipal, eligibility to the legislative, administrative and judicial bodies, a claim to political protection abroad and the right of immunity from deportation. Civic allegiance, on the other hand, imposes an inherent obligation to abstain from treasonable acts [1] and such positive duties as service on juries or, potentially, military service, though these obligations—apart from the last named—are now generally imposed also on resident aliens. A difficulty of interpretation might appear to arise from the fact that the Constitution guarantees certain fundamental rights specifically to Irish citizens. Art. 5, in precluding the grant of honours; Art. 7, in safeguarding the inviolability of the dwelling; Art. 8, in guaranteeing freedom of conscience and religious profession and practice; and Art. 10, in granting the right to free elementary education, refer expressly to "the citizen." In the debates on the Constituent Act in the British Parliament, the term was the subject of much critical comment by the Unionist opponents of the Treaty Settlement. It would, however, seem that in the employ-

[1] The law of treason has been the subject of a comprehensive enactment: the Treasonable Offences Act (No. 18), 1925.

ment of the term the inexact phraseology of Continental constitutions has been followed.[1] It is inconceivable that the framers of the Constitution should have intended to restrict religious freedom to Irish "citizens," and it would seem to follow that this applies equally to the guarantee of the inviolability of the dwelling. It is only the express term "Citizen of the Irish Free State," as used in the definition of citizenship (Art. 3), in regard to the conferment of honours (Art. 5), the right to free elementary education (Art. 10) and the franchise (Art. 14) which would appear to connote membership of the political community.

The conception of an Irish national citizenship is as novel and as distinctive as the Treaty itself. It is true that the growing diversity of conditions and interests in the complex structure of the British Commonwealth had led previously to the institution of separate forms of "Dominion Nationality" in respect of specific political functions and privileges. Thus Canada had found it necessary to create a Canadian "nationality" in connection with the laws governing re-immigration into the Dominion and in respect of the appointment of Canadian members of the Permanent Court of International Justice. Yet, though this departure indicated a growing distinctiveness of interest and outlook, its scope was purely technical. There was no intention—even if there had been the requisite legal authority—to constitute a self-derived and exclusive Canadian "nationality" in the full sense of the term. Again, in several of the Dominions disabilities and restrictions had been imposed upon natives of other parts of the Empire, but these had been directed exclusively against persons of coloured race and were not designed to affect the status of British citizenship as such; none of these measures had placed any disability on natives of the United Kingdom. English law,

[1] Interpreters of the German Constitution are almost unanimous in rejecting the view that the use of the term "citizen" in the fundamental declarations excludes aliens from their application. Cf. G. Anschutz: *Die Verfassung des Deutschen Reichs* (1926), p. 300.

in its turn, had in the matter of naturalisation maintained the purely local character of the citizenship acquired by Dominion naturalisation unless effected under the reciprocal provisions of the "British Nationality and Status of Aliens Act" of 1914. The burden of such maintenance, however, was to emphasise the inferiority rather than the distinctiveness of Dominion naturalisation. In contrast to all this, the essential characteristic of the novel citizenship created by the Irish Constitution was that it restricted political membership of the Irish State primarily to persons of Irish birth or descent and that, in so far as it bestowed it on non-Irish residents, it introduced no distinction between British subjects and citizens of foreign States; British subjects living and even domiciled in Ireland but not possessing the specific residential qualifications prescribed by the Constitution were thus deprived of all privileges of active citizenship in the Free State. It is only in the light of an interpretation which admits the national character of the statehood established by the Treaty that the legality of these provisions—which were included among the "Agreed Clauses" accepted by the two Governments and as such defended by the British Government in the House of Commons—can be maintained.[1]

The relation between Irish citizenship, as established by these provisions, and British citizenship, as defined by suc-

[1] So revolutionary, indeed, was the innovation that the British Government was urged in the House of Commons to take reciprocal measures and subject Irishmen resident in England to corresponding disabilities. The suggestion was rejected by the Attorney-General, who emphasised that all British citizens, whatever their origin, were equally entitled to the franchise, irrespective of the conditions on which their respective country of origin might grant the franchise to Englishmen (Hansard, 1922, Vol. 159, col. 771). The position thus created is certainly unequal; but the emergence of such inequalities can hardly be obviated if the central position of Great Britain in the symmetry of the Empire is to be maintained, which involves the unrestricted grant of British citizenship to all natives of the Empire. To have introduced discriminating legislation against Irishmen resident in Great Britain could only have tended to accentuate Irish isolation.

cessive British Nationality Acts, remains, in the absence of an Irish Nationality Law, of a somewhat ambiguous nature. Although the formula of the Oath to be taken by members of the Irish Parliament refers to "the common citizenship of Ireland with Great Britain," it is clear that only those Irish citizens can claim to be British subjects who conform to the provisions of the British Nationality Acts. These include persons who are either British or Irish by birth or by descent from a British or Irish parent or grandparent, or who have acquired British naturalisation under English law. On the other hand, aliens who had been ordinarily resident in Ireland for seven years prior to the enactment of the Constitution cannot, as the law stands, lay claim to British citizenship, although they may enjoy all the privileges of Irish citizenship and in this respect be more privileged than British subjects living in the Free State but not possessed of the requisite residential qualification. Persons of this category would appear to be in the same position as persons who have acquired Dominion naturalisation prior to the British Nationality Act of 1914 or who have become naturalised since 1914 in any Dominion which has not accepted the reciprocal conditions of British naturalisation laid down in Part II of that Act. They will receive the protection of British diplomatic and consular officers abroad by way of courtesy, but in Great Britain itself they are treated as quasi-aliens and may in time of war, if of enemy origin, be subjected to the disabilities imposed on alien enemies, even as regards internment.[1] Nor can Irish citizens of this class obtain British naturalisation except by application to the British Home Secretary. Under the provisions of the British Nationality and Status of Aliens Act of 1914,[2] and Section 3 of the Irish Free State Constitution Act, 1922, (Session 2)[3], it is within the competence of the Irish Legislature to acquire the power to bestow British citizenship through an

[1] *Rex* v. *Francis*, ex parte *Marckwald*, [1918] 1 K.B. 647; *Marckwald* v. *Attorney-General*, [1920] 1 Ch. 348.

[2] 4 and 5 Geo. V, c. 17.

[3] 13 Geo. V, c. 1.

act of the Irish Executive by adopting Part II of the British Act of 1914, i.e., by enacting the conditions embodied in that Act for naturalisation in Great Britain. No legislation to that effect, however, has so far been passed.

(*d*) THE OFFICIAL LANGUAGES (ART. 4)

The national character of the new Irish polity, which found expression in the institution of a specific Irish citizenship, was similarly exemplified by the proclamation of Gaelic as "the National language of the Irish Free State." The revival of the Irish language had, as shown in the introductory chapter, been the first stage in the evolution of the new nationalism. Its enunciation as the official language of the Free State marked the consummation of the process of national emancipation. The phrasing of the declaration reflects the same combination of nationalist principle and political realism which was generally characteristic of the Treaty Settlement. Gaelic was declared as the national language, but the exigencies of the actual linguistic position were met by the equal recognition of English "an official language." In effect this amounted to the adoption of two official languages, but a comparison with similar bilingual developments in the Dominions shows the novel inspiration of the Irish departure. In Canada and South Africa English was from the beginning the official language of the authorities. The use in official intercourse of French and Dutch—both spoken by considerable sections of the population—was admitted, but such admission implied no derogation from the preponderant status of the English language. To the framers of the Irish Constitution, on the other hand, the old native language, though actually spoken only by a fraction of the population, was the national language as such. It was only the actual predominance of English which compelled its recognition as a second official language. An added proviso authorised Parliament to make special provisions for districts in which only one language was in general use. The object of

this permissive clause, which allowed of the exclusive use of one language in districts where the other was not in use, was to provide for the contingency of the entry of Northern Ireland into the Free State and to preclude apprehensions of a bilingual fanaticism, which might impede that much desired consummation.

The official practice of the Free State reflects the dualism of the constitutional provisions. Speeches in Parliament are for the most part delivered in English, but the formal proceedings are conducted exclusively in Irish. Legislation has hitherto been passed only in English—an Irish translation being subsequently prepared in the Clerk's Office—and the provision of Art. 42 of the Constitution, which enabled promulgation to be effected in either language, has hence remained a dead letter.[1] Similarly, in the administrative practice of the Departments of State, English is the preponderant medium of official intercourse, except in the Gaedhealtacht district, where Gaelic is almost exclusively used. The requirement, progressively imposed, of a knowledge of Gaelic for admission to all grades of the Civil Service and official insistence on its acquisition by all members of the Service have, however, had the effect of gradually extending the use of Irish as an official language. In the sphere of judicial administration elaborate provisions have been introduced to enable the use of both languages in the Courts without prejudice to the fundamental principle of natural justice that each party is entitled to be adequately informed of the statements of the other. The rules of the High Court and Supreme Court (Order XXIX) provide for the appointment of official interpreters attached to the offices of the two Courts, to be available for the translation of statements in Court and of legal communications between the parties. Summonses and notices to be served personally in the Gaedhealtacht must, if in the English language, be accompanied by an Irish translation; and, conversely, summonses and notices to be served in any

[1] Cf. Part V, Chapter VI, *post*.

other part of the Saorstát must, if in Irish, be accompanied by an English version. Similarly, affidavits filed by one party in the Central Office have, at the request of the other, to be translated if the latter files a declaration that it does not understand the language in which the affidavit is drawn up. In the Circuit Court only the general rule prevails that "either the National Language or the English Language may be used in proceedings in the Court" (Rule 4 of Order 1). In fact, cases in Galway and other places in the Gaedhealtacht are heard entirely in the Irish language.

(*e*) TITLES OF HONOUR (ART. 5)

The principle of popular sovereignty is exemplified in its equalitarian aspect in the restriction imposed by Art. 5 on the award of honours to citizens of the Free State, though the phrasing of the Article would seem to indicate that its inspiration was national rather than democratic. The exercise of the prerogative of honour had, especially since the War, become the subject of progressive restriction in the British Dominions, Parliaments and Executives alike having in increasing measure expressed their disapproval of the award, on the advice of the British Cabinet, of titles of honour to Dominion citizens. In Ireland republican sentiment and historical memories of past abuses of the power combined to inspire its effective elimination. In accordance with the general design of the Settlement the right of the Crown to award honours—being regarded as implicit in "Dominion status"—was nominally upheld, but its exercise in relation to citizens of the Free State and in respect of services rendered in or in relation to the latter was made dependent on the approval of the Irish Executive Council. The provision imposed no limitation on the award of honours to Irish citizens in respect of services rendered to the British Commonwealth outside the Free State. In the Constituent Assembly the absolute prohibition of the grant of honours to Irish citizens was urged, with particular reference to the Canadian

and South African precedents. It was resisted by the Provisional Government on the ground that the insertion of such a prohibition in the Constitution would be considered as an infringement of a formal implication of Dominion status and that the object of the movers could be achieved by the adoption by each successive Parliament of a general instruction to the Executive not to recommend any titles of honour.[1]

[1] *Dáil Debates*, Vol. 1, col. 679 *et seq.* Perhaps a flaw may be found in the use of the term "approval" as well as "advice" in the restrictive clause of the Article, as the former may be read to imply that the Crown could act in the Free State on its own initiative and merely subject to the approval of the Irish Cabinet, but not, as generally maintained, exclusively "on the advice" of the Irish Executive in the technical sense of that term. The phrase reflects the essentially extraneous character of the power.

CHAPTER II

PERSONAL FREEDOM

(ARTS. 6–9)

(*a*) INDIVIDUAL LIBERTY IN IRELAND

THE group of Articles which in the Irish Constitution enshrine the constitutional guarantees of personal freedom represents, like its classic prototypes, a somewhat unsystematic aggregation of general rules of private and public law. As an exposition of the fundamentals of individual liberty it is necessarily incomplete: it hardly covers more than its most elementary forms. Nor can a legislative definition of personal liberty which ignores the group function of the individual be regarded as adequate to the requirements of a modern society.[1] The rationale of the compilation is indeed to be found not in any legal principle, but in historical experience. The administration of justice was one of the earliest functions assumed by the State, but from those early beginnings it has been vitiated by the requirements of the self-preservation of the latter. The State will inevitably tend to claim that inasmuch as justice depends for its enforcement on the maintenance of its supreme authority, the exercise of the judicial function must not imperil its social structure. It is but a small step to the further inference that the existence of that structure is indissolubly bound up with the maintenance of the prevailing political system. In an early stage of political evolution this claim will assume the taboo garb of an overruling Royal Prerogative. When the break-up of the absolutist order has dissolved that frame, it

[1] "L'État moderne ne peut se contenter de la reconnaissance de l'indépendance juridique de l'individu, il doit en même temps créer un minimum de conditions juridiques qui permettront d'assurer l'indépendance sociale de l'individu." B. Mirkine-Guetzévich: *Les Nouvelles Tendances du Droit Constitutionel* (Paris, 1931), p. 89.

will find no less formidable support in legislative enactment of "exceptional laws" and in judicial concern for the maintenance of "law and order." The State will gradually come to agree not to regard every one of its justiciable interests as equally vital. It will in growing measure allow actions of property to be brought against it. It will in time even submit to a legislative demarcation of the sphere of its self-preservation and to a regularisation of the modes of its enforcement. But whatever its constitutional structure, whether sovereignty rests with a monarchical despot or with a free electorate, it will not cease to regard that self-preservation as the supreme social good. It will submit to the "rule of law," but its significance will be no more than formal. No State, however liberal, has ever abandoned its residual power of suspending the rule of law in time of emergency, whether by virtue of a general constitutional authorisation, as in Continental countries, or by special acts of suspension followed by laws of indemnity, as in England. In that background the legal sphere of that immemorial conflict assumes a fundamental significance. The constitutional guarantees of freedom from arrest, security of dwelling, liberty of conscience and free literary expression may appear in form as so many rules of private law. In political reality they connote nothing less than the place of the State itself in the legal system of which it is the supreme guardian. They represent the concrete instances where actual historical experience has shown the need for special safeguards. Hence their inclusion in the organic law of the State—an inclusion which, as has been suggested, may have been the prime object of the very enactment of written constitutions.[1] They represent a category of rights antecedent to the State: it is pre-eminently in those periods of crisis and transformation when the protection of the

[1] Cf. Richard Schmidt: *Zur Vorgeschichte der Geschriebenen Verfassungen* (1916). The history of the early charters of the Anglo-Norman Monarchy presents a close analogy to the Continental examples quoted by Professor Schmidt.

law is inevitably invoked for the preservation of the existing order that they assume pre-eminent significance. If the functional rights of citizenship represent the medium of the normal statics of political life, it is these libertarian guarantees which are the vehicle of its revolutionary dynamics. In that view the supreme significance of this category of rights in Irish history need hardly be stressed. The history of personal liberty in Ireland is in microcosm the history of Ireland.

The public law of mediaeval Ireland since the Norman Invasion was in essence that of a semi-conquered province of the Roman Empire. The invader brought his own law, but he applied it merely to his nationals. The native population was left in the precarious possession of its traditional law, not, indeed, as a privilege, but by way of contemptuous toleration. In any conflict with a member of the invader's class or with the public law of the new régime, the native was virtually an outlaw. Thus, although Magna Carta was solemnly proclaimed in Ireland, it offered no benefits to the native Irish. For centuries an Irishman was not allowed in his own country to bring an action against an Englishman. In the great constitutional conflict of the seventeenth century between the English Parliament and the Crown, the Irish Parliament seems for a time to have evinced a tendency to support the latter. In the result, however, none of the great libertarian enactments of the English Civil Wars was extended to Ireland: they were regarded as incompatible with its status as a dependency. It was not until after the great constitutional reform of 1782 that Ireland obtained the remedial benefits of an Act of Habeas Corpus. It is pathetically significant that that enactment, which had been unsuccessfully attempted for nearly a century, should have represented the first boon of the newly-won legislative autonomy; and although it was not long before Habeas Corpus was again suspended in Ireland, the case of Wolfe Tone shows that while the weapon was available, Irish judges knew well how to make effective use of it. The Act of Union, so far from extending to Ireland the liberties of British

citizenship, in fact opened up a chapter of restrictions of a novel order. Every new wave of the Irish national movement—sometimes even minor disturbances of the public peace—led to the adoption by the United Parliament of preventive and punitive Acts of Coercion under which, sometimes for years without intermittence, not only Habeas Corpus was suspended, but even the most elementary civic rights such as trial by jury, the right of public meeting and the freedom of the press, might be annulled at the free discretion of the Executive. There were many shades of form and intensity, but from the first "Suppression of Rebellion Acts," which followed immediately upon the Act of Union, to the "Restoration of Order in Ireland Act" of 1920, parliamentary majority rule proved as effective an instrument for the restriction of individual liberty as either Royal Prerogative or Government by Privy Council had ever been. When Dicey wished to illustrate the limited effect of the English Habeas Corpus Suspension Acts, he quoted by way of contrast not the arbitrary ukase of some despotic monarch or the autocratic decrees of a "Tribunal of Public Safety," but the Irish Coercion Acts of the British Parliament—implicitly invalidating thereby his main thesis of the effective realisation of the rule of law under the English Constitution.[1]

(*b*) HABEAS CORPUS (ART. 6)

It is in the light of that historical experience that the specia significance of the incorporation of legal safeguards for th protection of individual liberty in the organic law of the nev Irish State will be apparent. Such fundamental insistence o the sacrosanctity of personal freedom was to emphasise th reality of the new liberty and to mark the end of a rule o which its infringement had been a most insidious feature. Bu the influence of the preceding system was not limited to thi

[1] A. V. Dicey: *Introduction to the Study of the Law of the Constitutio* (8th ed.), p. 227.

negative inspiration. The phrasing of the habeas corpus provision of the Irish Constitution reveals, in spite of its abstract tenor, the influence of the specific conceptions of English law. The form of a procedure against the gaoler ordering him to produce the body of the detained, the requirement of a written return of the cause of the detention, the obligation imposed on "the High Court and any and every judge thereof" to order the production of the prisoner and in case of an insufficient return to compel his immediate release—all these details are intelligible only in the light of the evolution of habeas corpus in English legal history. On the other hand, no English enactment would have prefaced these essentially procedural provisions by so abstract and general a declaration as that "the liberty of the person is inviolable."

Such abstractness was, indeed, not free from the dangers of ambiguity. In guaranteeing the several spheres of individual liberty, the Constitution enacted that they might not be infringed except in accordance with "law." The question arises as to the scope of the term as used in these provisions. The rules of Arts. 6 and 7 may be regarded as a purely formal enunciation of the general principle of the "rule of law," yet their embodiment in a rigid constitution clearly invested them with more than merely formal import. Under the British Constitution, Parliament may by ordinary legislation, such as a Habeas Corpus Suspension Act or a Defence of the Realm Act, abrogate the most elementary safeguards of individual liberty and create arbitrary forms of "lawful detention." Is the general reference to "law" in Arts. 6 and 7 of the Irish Constitution to be interpreted as investing the Irish Parliament with a similar competence? It would seem difficult to maintain that such an interpretation would conform with the spirit, even if it could be said to accord with the letter of the Irish Constitution. The only object that could clearly have been intended by the inclusion in the Constitution of fundamental safeguards of individual liberty was to invest these rules with a special sanctity and to prevent their abrogation or restriction except

by the special procedure prescribed for the amendment of the Constitution in general. Hence a construction which would interpret the requirement of legal authority for any infringement of such liberty as implying the grant of a general authorisation to Parliament to restrict the scope of the constitutional protection of individual liberty by ordinary legislation would in effect amount to a stultification of the essential object of the inclusion of these safeguards in the Constitution. The argument against such an interpretation rests not merely on the formal point that its adoption would reduce these fundamental articles of the Constitution to empty verbiage. However formal, indeed, their appearance, these regulations embody a fundamental prohibition of all arbitrary interference with individual liberty by the executive organs of the State. Hence, any legislation which sanctions such arbitrary interference represents in effect *pro tanto* an amendment of the Constitution, and would, therefore, require to be enacted by the special procedure governing constitutional amendment.

It is of interest to note that there has been a distinct development in the attitude of the Irish Parliament and the Irish Courts to this problem of interpretation. The parliamentary debates in the Constituent Assembly indicate that the constitutional significance of the inclusion of these fundamental provisions was not appreciated in its full import even by those who enacted the Constitution. When the first Public Safety Act was passed in 1923, the view that it involved an amendment of the Constitution *quoad hoc* was urged, but the legalistic interpretation held sway. The question first came before the Courts—which were then still the Courts of the preceding régime—in April, 1924, in the case of *The King* (*O'Connell*) v. *The Military Governor of Hare Park Camp*.[1] Lord Chief Justice Moloney, in disposing of the argument advanced on behalf of the defendant that the Public Safety Act, 1924, contravened the Constitution, quoted from the judgment of the House of Lords in *The King* v. *Halliday* on the subject of the Defence of the Realm Act,

[1] [1924] 2 I.R. 104.

1914, in which it had been held that that Act did not infringe upon the Habeas Corpus Acts, as it had become part of the law of the land. Similarly, the Lord Chief Justice held, the Public Safety Act, 1924, did not contravene the Constitution, as it came under the term "law" as used in Art. 6. The essential difference between the English constitutional system, under which any Act of Parliament implicitly invalidates earlier statutes in so far as it contravenes them, and the Irish Constitution, which restricts the legislative scope of Parliament, was thus entirely ignored. A certain approach to the problem, however, is to be found in the judgment pronounced in the same case by Mr. Justice Pim. He declined to accept the interpretation that the words "in accordance with law" used in Art. 6 meant "in accordance with the normal and constant law," because that interpretation would prevent the Irish Parliament from ever strengthening the criminal law dealing with the liberty of the person.[1] He conceded, however, that it might be argued successfully that a permanent law giving the Executive power to deprive a citizen of his liberty without trial was contrary to the spirit of Art. 6 and hence a violation of the Constitution, but that this could not apply to a temporary law made in abnormal times for a temporary purpose. There would, however, appear to be nothing in the Constitution to justify such a distinction between permanent and temporary laws.

The incompatibility of legislation restricting or abolishing the fundamental safeguards of individual liberty with the spirit of the Constitution was officially recognised in the Public Safety Act, 1927. A special section was inserted in the introductory part of that Statute to the effect that "every provision of this Act which is in contravention of any provision of the Constitution shall to the extent of such contravention operate

[1] It seems difficult to find in the Constitution any ground for that assumption. It is not the creation of new criminal offences by ordinary legislation which is in conflict with the Constitution, but the abrogation of the formal judicial safeguards of individual liberty, such as the sanction of imprisonment of suspected persons without trial or of preventive detention.

and have effect as an amendment for so long only as this Act continues in force, of such provision of the Constitution." (s. 3). It was explained in the course of the parliamentary debates on the Bill that it had not been introduced and designated as a constitutional amendment in accordance with the procedure generally adopted for Amendment Acts because the amendment which the Bill was designed to effect was of exceptional and purely temporary character.[1] *Pro tanto*, however, it admittedly represented an amendment of the Constitution, whatever might indeed be said against the mode of such a vague and unspecified amendment. The formal procedure of a constitutional amendment was finally adopted in the enactment of the comprehensive public safety measure passed in October, 1931. It was expressly designated as a Constitution Amendment Act and incorporated as an additional Article in the body of the Constitution, the construction of all subsequent Articles of the latter being subjected to its provisions.[2]

The procedure in habeas corpus under the Constitution involves no change from the previous system. The general provision of Art. 6 in no way invalidates the specific rules of the Habeas Corpus Act of 1782.[3] It may perhaps appear

[1] *Dáil Debates*, Vol. 20, col. 1152.

[2] Constitution (Amendment No. 17) Act (No. 37 of 1931).

[3] In habeas corpus proceedings both the Habeas Corpus Act (Ir.), 1782, and Art. 6 of the Constitution are generally quoted. It was held by the High Court in *The King* (*Edward O'Reilly*) v. *Attorney-General of the Irish Free State*, [1928] I.R. 83 that the provisions of the Habeas Corpus Act were not impliedly repealed by the terms of the Courts of Justice Act, 1926. In the case of *O'Boyle and Rodgers* v. *The Attorney-General and The Commissioner of the Civic Guard*, [1929] I.R. 558 it was held by the same Court that the provisions of Art. 6 do not exclude jurisdiction to grant an injunction in an appropriate case, if, for instance, it were sought to arrest a person illegally and remove him out of the jurisdiction before he could apply for a writ of habeas corpus. On the other hand, it was affirmed by the High Court in a subsequent case (*The State* (*Kennedy*) v. *Little*, [1931] I.R. 39) that the Fugitive Offenders Act, 1881, continued to be in full force and effect in the Irish Free State by virtue of the provisions of Art. 73 of the Constitution, and that it was not inconsistent with the provisions of the Constitution.

doubtful, however, how far the English practice in regard to appeals from decisions granting or refusing the writ is applicable under the Irish Constitution and the new system of judicature established under its provisions. Prior to the Judicature Acts of 1873 and 1877, the established practice in habeas corpus cases was that if the decision of the Courts was favourable to the detained there was no appeal; if unfavourable, however, the application might be renewed until each jurisdiction had been exhausted, and "every court in turn and each court or judge was bound to consider the question independently, and not to be influenced by the previous decisions refusing to discharge."[1] The Judicature Acts provided for an appeal from any order of the High Court to the Courts of Appeal both in England and Ireland, and from the latter to the House of Lords, but it was held by the House of Lords in *Cox* v. *Hakes* that in regard to habeas corpus these general provisions could not be interpreted as having implicitly reversed the practice of centuries and that it could not be assumed that "the right of personal freedom was no longer to be determined summarily and finally, but to be subject to the delay and uncertainty of ordinary litigation." The House avoided a definite expression of view as to whether this implied also a denial of the prisoner's right to lodge an appeal against a decision refusing the writ, but the *obiter dicta* of Lord Halsbury and Lord Herschell left little doubt that they would not support a discontinuance of the established practice. The question arose in the Irish Courts in the case of *Johnstone* v. *O'Sullivan* which came before the Court of Appeal after the establishment of the Provisional Government, but before the enactment of the Constitution.[2] It was submitted on behalf of the Irish Provisional Government on the strength of the decision of *Cox* v. *Hakes* that the principle of that case applied also to an order refusing a writ of habeas corpus, and that accordingly no appeal lay from such order. The argument was not accepted by the Court of Appeal, it being held that an order refusing a writ of habeas corpus was a "judgment or order"

[1] *Cox* v. *Hakes*, [1890] 15 A.C. 506 [2] [1923] 2 I.R. 13.

within the material section of the Judicature Act of 1877 and that the decision of *Cox* v. *Hakes* could not be held to apply to an appeal against an order refusing the writ. The same view was upheld in England with even greater force by the House of Lords in the great constitutional case of *The Secretary of State for Home Affairs* v. *O'Brien*,[1] where the fundamental difference between the legal position of the applicant for the writ and that of the Executive in relation to the right of appeal was emphatically asserted and the finality of the verdict granting the writ—even prior to the actual discharge of the detained—affirmed. The Courts of Justice Act, 1924, by which the new judicial system of the Free State was set up, affords no specific guidance as to the procedure in habeas corpus, but inasmuch as the new Irish High Court and Supreme Court are vested, under the terms of the Constitution, with the same powers as those possessed by the corresponding Courts of the preceding system of judicature, it may be inferred that the English practice, as confirmed in the Irish Courts in the cases of *In re Keller*[2] and *Johnstone* v. *O'Sullivan*, will govern the procedure in habeas corpus under the Irish Constitution.

(*c*) MARTIAL LAW (ARTS. 6 AND 70)

In the Draft Constitution of June 1922 the declaration of habeas corpus was not qualified by any restriction. As the result, however, of the outbreak of the Civil War, which occurred between the publication of the Draft Constitution and the meeting of the Constituent Assembly, the need for constitutional provisions to enable the suspension of habeas corpus in time of war or rebellion was strongly urged in the deliberations of the Assembly. It was first proposed to qualify the declaration of the inviolability of personal liberty by the insertion of a clause limiting its application to "times of peace."[3] To obviate too extensive an interpretation of a phrase so

[1] [1923] A.C. 603.
[2] (1887), 22 L.R Ir 158.
[3] *Dáil Debates*, Vol. 1, col. 686.

general—which might have been held to enable the suspension of habeas corpus during mere local commotions or industrial disturbances—the negative formula "except in time of war or rebellion" was adopted.[1] This version was again altered during the fourth reading of the Constitution Bill in favour of a special proviso attached to the main body of Art. 6, the proviso being thus clearly marked out as an exception to the normal law.[2] It is in the light of that proviso and of its effect on the preceding law as established in judicial precedents, that the scope of the exceptional powers of the Military Authorities in times of war and insurrection must be interpreted.

It had been regarded as an established rule of the English Constitution ever since the Petition of Right and until very recent times that martial law in the sense of a suspension of the normal law and the temporary government of the country, or parts of it, by military tribunals was unknown to English law. English theorists of constitutional law had drawn eloquent contrasts between this fundamental characteristic of the English Constitution and the "Declarations of a State of Siege" authorised by the French and most Continental constitutions, under which the whole civil power passes to the Military Authorities except in so far as the latter empower the Civil Services to continue the exercise of their normal functions. Whatever may be thought of the respective merits of the two systems—of which the one sanctions the introduction of a military régime by a declaration of the Executive and in accordance with fixed legal rules, while the other derives such exceptional powers from an undefined prerogative automatically released by the state of war, the interpretation of which is left to the discretion of the judiciary—it is noteworthy that the general principle was never established in Ireland with the same force as was claimed for it in England. It has even been asserted that the Petition of Right never applied to

[1] *Dáil Debates*, Vol. 1, col. 693.

[2] *Ibid.* col. 1693. The same form of drafting was used in Art. 66, in relation to the right of appeal to the Privy Council.

Ireland.[1] The insistent refusal of the English Cabinet before the reform of 1782 to permit the introduction of a Habeas Corpus Act in the Irish Parliament has been noted above. The Irish Habeas Corpus Suspension Acts and Coercion Acts of 1797, 1803 and 1833 in their preambles specifically referred to the undoubted prerogative of the Crown to resort to the exercise of martial law. But it was left to the Irish Courts in the last phase of the British régime to give to the prerogative an interpretation so extensive as to nullify effectively the Petition of Right and to invalidate completely the dogmatic theorems of English constitutional lawyers from Coke to Dicey. It had been strenuously asserted by the latter school that the term "martial law" connoted in English law no more than the right of the Crown to meet force by force in war as in rebellion, but that "the authorities appear to show that it is illegal for the Crown to resort to martial law as a special mode of *punishing* rebellion."[2] It was regarded as the right not merely of the Crown but of every citizen to preserve the public peace in case of armed opposition to the law by the use of any necessary amount of force. It was, however, the established view that any action taken during such a state of disturbance in defence of public order might, after the restoration of peace, be capable of review in the Civil Courts, and that whatever force might be applied by the Military Authorities in crushing an insurrection in actual combat or pursuit, a rebel once captured could only be tried by the ordinary criminal courts.[3]

[1] W. F. Finlason: *A Treatise on Martial Law* (London, 1866), Preface, p. 1.

[2] Opinion of the Law Officers (Edward James and Fitzjames Stephen), quoted by Forsyth: *Constitutional Law* (1869), p. 556.

[3] Maitland: *Constitutional History*, p. 491. Even in reference to the above-mentioned Irish Habeas Corpus Suspension Acts the authoritative view of the two Law Officers quoted above was to the effect that "it is impossible to suppose that such a declaration (i.e. of martial law) should operate as a repeal of the Petition of Right as regards Ireland. It must probably be construed to mean only that the Crown has an undoubted prerogative to attack an army of rebels by regular forces conducting themselves as armies in the field generally do" (*loc. cit.*).

It was only in the case of prisoners taken in open resistance and with whom, on account of the suspension of the ordinary tribunals, it was impossible to deal according to the regular course of justice, that the use of martial law might be permitted. Anything beyond this would require special authorisation by an Act of Parliament.

Such was the traditional English conception of the scope of martial law. The right of the Crown to declare martial law in the realm in time of insurrection was regarded as amounting to no more than the "undoubted prerogative to attack an army of rebels by regular forces." But the Crown, it was held, had no right when prisoners had been taken in such conflict to try them except in the ordinary criminal courts, unless the latter had ceased to function. It was indeed this question of fact—whether or not the ordinary tribunals were functioning—which was regarded as the general test as to the existence or non-existence of a state of war or insurrection. This is a conception peculiar to English common law, characteristic of the supremacy of the Common Law Courts. It was originally only in the disappearance of the Civil Courts that there could be found any justification for the establishment of Military Courts. Such, however, was the central authority of the Common Law Courts, that a rule so clearly rooted in obvious necessity became gradually invested with the abstract force of a great constitutional principle. The Common Law Courts having in the course of the constitutional struggles become the arbiters in the internal political dissensions of the Commonwealth, the fact of their functioning or suspension appeared as a proper test of the normality or pathology of the State. The test was regarded as an established rule of English Common Law, until its inherent inadequacy was revealed in the decision of the Privy Council in the South African case of *Ex Parte Marais* (1902), where it was held that "the fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war is not raging."[1] It is clear that this decision, which

[1] *Ex Parte Marais*, [1902] A.C. 109.

although in the highest legal opinion not binding on the English Courts,[1] was consistently followed by the Irish Courts during the last phase of the British régime, nullifies in effect the long-established rule. It might be true that the functioning of a few isolated civil courts during an insurrection could not be accepted as proof that war was not raging, but far more dangerous was the contrary inference to be drawn from the vague rulings of this decision, that the non-functioning of some courts might be taken as conclusive evidence of the suspension of the civil law throughout the country and as a justification for the general establishment of Military Courts of summary jurisdiction over civilians. More far-reaching, however, was the further pronouncement of that judgment, that "where actual war is raging acts done by the Military Authorities are not justiciable by the ordinary tribunals." Even if this ambiguous statement was not intended to convey that even after the conclusion of hostilities the Military Authorities could not be held to account in the Civil Courts for their acts during the disturbance, it was clear that it placed almost unlimited powers in the hands of the military during the actual state of war or insurrection, especially as the latter could, on the basis of a long-standing tradition, expect to be protected after the conclusion of peace by Acts of Indemnity. The decision represented a radical break with a great tradition of English Common Law. Neither of the two authorities on which the judgment relied offered any ground for so far-reaching a surrender to military rule. It produced, in effect, a position analogous to that created by the Continental "Declarations of a State of Siege" without providing, however, for the legal safeguards attaching to the latter. The Petition of Right, to which the judgment referred, was not in its effect limited to a "condition of peace," and its framers, who were quoted as having known "what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure," have actually been shown to have expressly rejected

[1] Cf. Sir F. Pollock: *What is Martial Law?* L.Q.R. Vol. 18, p. 152.

an attempt on the part of the House of Lords to impose such a limitation.[1] The essential object of the Petition was to protect the citizens against trial by the military in times of internal disturbances. Nor would the other authority quoted in the judgment, the decision of the Privy Council in the case of *Elphinstone* v. *Bedreechund*,[2] where it was held that a municipal court had no jurisdiction in a case of hostile seizure by the Military Authorities during war, bear out so general a contention as that during war the acts of the military are in no way justiciable by the Civil Courts, a contention which would clearly open the gates to complete anarchy, since it would deprive the citizens of all legal protection against such arbitrary acts of the military authorities as are not capable of remedy *post factum*. The judgment represented not a statement of established Common Law, but a naked pronouncement of the neo-absolutist doctrine of State Necessity. In vain did Dicey urge that "the very width of the language used by the Privy Council in *Ex Parte Marais* warns us that it must be limited to the circumstances of the particular case";[3] the warning was not heeded. In the case of *The King* v. *Allen*,[4] the Irish Court of King's Bench placed on the historically unfounded generalisations of the *Marais* judgment the even more far-reaching interpretation that the Civil Courts have no power during war or insurrection to interfere with the decision of a Military Court sitting in a martial law area, even where a capital sentence has been pronounced and is about to be executed for an offence not punishable capitally under the ordinary criminal law, an offence, moreover, for which a much milder penalty had been provided by a specific statutory enactment expressly passed for the emergency in question.[5] This truly revolting decision, which led to the infliction of the death penalty on the prisoners

[1] Professor E. Jenks, in *The Times* of January 7, 1902, at p. 6.
[2] 1 Knapp, P.C. 316.
[3] Dicey: *Introduction* (8th ed.), p. 546. [4] [1921] 2 I.R. 241.
[5] The Restoration of Order (Ireland) Act, 1920 (10 and 11 Geo. V, c. 31).

and scandalised legal opinion both in Ireland and in England, was upheld by several further decisions in the same Court.[1] A judgment to the opposite effect was subsequently delivered in the Chancery Division in an exactly identical case[2]—an amazing instance of two Courts of equal rank giving two diametrically opposed decisions on the same capital issue within the space of a few months, the one leading to the execution of the prisoner, the other to his instant liberation. It was subsequently explained by the Master of the Rolls in a similar case during the period of the Irish Civil War,[3] that his decision in Egan's case had turned entirely on the effect of the Restoration of Order Act, 1920, which in his opinion had applied only to the British Army. The most objectionable feature of the judgment in Allen's case, the toleration accorded by the Civil Courts to the assumption by the Military Authorities of judicial powers over civilians and to the application of this arbitrary and irregular jurisdiction to capital cases, was thus in principle not rejected.[4]

It is in the light of such precedents that the provisions of the Constitution and of the temporary regulations adopted prior to its enactment by the Provisional Parliament must be interpreted. In June 1922 civil war broke out, and the demand soon arose for the grant of extraordinary judicial powers to the Military Authorities charged with the suppression of the rising.

[1] Cf. *The King* (*Garde and Others*) v. *General Strickland and Others*, [1921] 2 I.R. 317; *The King* (*Ronayne and Mulcahy*) v. *Strickland and Another*, [1921] 2 I.R. 333.

[2] *Egan* v. *Macready and Others*, [1921] 1 I.R. 265.

[3] *The King* (*Childers*) v. *The Adjutant-General of the Provisional Forces*, [1923] 1 I.R. 5.

[4] It is not easy to reconcile this interpretation of the judgment with the official report of the decision. The latter would seem to indicate that the Master of the Rolls regarded the criticism to which the *Marais* judgment had been subjected by Egan's counsel as "very proper." He further expressed himself "immensely struck" by the latter's contention that the judgment in that case, which referred merely to the arrest of a prisoner during a state of war—"a minor punishment, if a punishment at all, possibly a mere act of precaution"—ought not to be held to govern one in which the death sentence had been imposed, referring in particular to Dicey's warning comment,

The constitutional position was one of great delicacy. The Provisional Government could not be certain whether its provisional status would entitle it in the eyes of the judges of the preceding régime to those prerogative powers which had been accorded in so generous a measure to their predecessors, while the prevailing uncertainty as to the legislative authority of the Constituent Assembly prevented it from obtaining any requisite statutory authority. In this dilemma the Provisional Government decided to rely on the general power vested, as had frequently been asserted in British Courts, in any executive authority to take exceptional measures for the restoration of public order, but, in addition, to obtain for the establishment of such Military Courts as seemed to be required in the absence of Civil Tribunals, the sanction of the Provisional Parliament. Such, however, was the uncertainty of the legal position that the Government, while actually applying for parliamentary authorisation, preferred to treat this departure as a confirmation of inherent authority rather than as a constitutional innovation. A motion was introduced in the Provisional Parliament to the effect that the Government, having entrusted the Army Authorities with the duty of "securing the public safety and restoring order," and having been advised by the latter of the necessity for the establishment of Military Courts with full powers of inflicting punishment on offenders and for the detention of arrested persons, had authorised the establishment of such Courts, and requested the Provisional Parliament to ratify and approve the grant of these powers. The competence of the Courts included the infliction of death and other penalties for participation in any attack on the National Forces, the destruction and seizure of property, the unlawful possession of firearms and the breach of any general order made by the Army Authorities. The Military Authorities were further authorised to detain and deport arrested persons and to control the traffic in arms. After a lengthy debate the motion was adopted, subject to several amendments, the most important being that no sentence of death be executed except under the

unter-signature of two members of the Army Council, and at as regards the infliction of any penalty for the breach of a neral order made by the Army Council—as distinct from the fences specifically mentioned in the motion as above recited such general orders should specify the maximum penalty flictable under their provisions, and should come into force ly after having lain on the table of the Parliament for four ys, unless disallowed by the latter. The regulations were thus effect, if not in form, a parliamentary measure.[1]

The validity of the judicial powers thus entrusted to the ilitary Authorities was tested in two habeas corpus cases, at of Mr. Erskine Childers, which was decided by the Master the Rolls in the Chancery Division,[2] and that of *Johnstone* v. *Sullivan*, which was heard in the first instance by the Lord ief Justice in the King's Bench Division and subsequently the Court of Appeal.[3] In both cases the defectiveness of the gal status of the Provisional Government was pleaded on half of the imprisoned Republicans, while it was, on the her hand, denied that the Irish Provisional Parliament had e legislative power to enact such regulations. The defence of e Provisional Government was based on its *de facto* position a body empowered, with the assent of the British Govern-ent, to ensure the maintenance of order in the Free State. n this formal ground the position of the Provisional Govern-ent and of the Military Authorities was upheld in the three urts. In the uncertainty of the legal position then prevailing, e Provisional Government found itself unable to plead before e judges of the preceding régime the actual constitutional sition: that Dáil Eireann, being the elected Parliament of e people of Ireland and hence the fully competent, indeed e only competent authority to legislate for Ireland, had anted these powers to the Government. This line of defence prived these cases of their constitutional significance. The

[1] *Dáil Debates*, Vol. 1, cols. 802–882 and 888–932 (September 27 and , 1922).

[2] [1923] 1 I.R. 5. [3] [1923] 2 I.R. 13.

discretionary powers of the Irish Provisional Government were upheld on the strength of the precedents of the former régime, and the constitutional progress involved in the novel departure of the Irish Executive in seeking the authorisation of Parliament for the grant of such exceptional powers to the Military Authorities could not receive judicial appreciation. It was only the Constitution which invested it with the character of positive law.

In the light of such precedents the concrete scope of the provisions of the Constitution governing the exercise of martial law will be apparent. The proviso attached to Art. 6 is not to be interpreted as a sweeping authorisation for the establishment of military rule during war or rebellion in the sense of the doctrine of the Marais case. The clause, as was emphatically asserted by one of the spokesmen of the Government in the Constituent Assembly, refers exclusively to the question of arrest and detention. "Nothing in it could, by any stretch of the imagination, be held to authorise or accord liberty to the military to do anything other than arrest and detain persons."[1] It is only under the provisions of Art. 70 of the Constitution that the extension of the jurisdiction of military tribunals over the civil population in time of war or armed rebellion, and for acts committed during the latter, was authorised, subject, however, to the proviso that its exercise was to be governed by "the regulations to be prescribed by law." By this qualification parliamentary control of the law and procedure of these Extraordinary Courts was effectively ensured. The influence of the Marais doctrine is traceable in the introduction of a more rigorous test as to the existence of a state of public disturbance justifying the application of military law to civilians. It is only in an area in which *all* Civil Courts are open or capable of being held that military jurisdiction cannot be exercised over civilians. Any arbitrary extension of the sphere of such military jurisdiction, however, was precluded by a further proviso pro-

[1] Speech of the Minister for Local Government, *Dáil Debates*, Vol. 1. col. 1691.

hibiting the removal of a person from one area to another for the purpose of subjecting him to military jurisdiction.

Taken in their entirety, the provisions clearly represent a compromise. The extension of the scope of martial law to cover the exercise of military jurisdiction over the civil population, and the adoption of the test of the availability of *all* Civil Courts, indicate the influence of the doctrines of the Marais judgment in the wide interpretation given to them by the Anglo-Irish Courts. It is only in part mitigated by the requirement of a statutory enactment of the regulations under which such exceptional jurisdiction is to be exercised. It is not easy to reconcile the extension of military jurisdiction over civilians with the doctrine of the Rule of Law. It is true that as in the sphere of external relations the anarchical device of war is still regarded as a category of international "law," so in internal disturbances resort to armed force has still to be accepted as the *ultima ratio* for the maintenance of public order. The moral authority of the State is, however, gravely threatened when the principle of force is transported from the passionate scene of open conflict into the deliberative atmosphere of judicial proceedings. It has been urged by the protagonists of the doctrine of State Necessity that these "Military Courts" are not of judicial character; that they are merely "committees formed for the purpose of carrying into effect the discretionary powers assumed by the Government," in other words, agents of the Executive merely acting in the "decorous" forms of a court of law.[1] It is the logical corollary to the doctrine similarly enunciated that "that which is called martial law is not law at all." These arguments imply the abandonment of the basis of legality of the State. The maintenance by the State of an objective judicial system completely independent of its Executive is a vital source of its moral authority. If this fundamental guarantee is undermined by the introduction of the principle of force into the judicial sphere, the transcendent authority

[1] Lord Halsbury in the case of *Tilonko* v. *The Attorney-General of Natal*, [1907] A.C. 461.

of the State is gravely imperilled. No emergency, however urgent, can justify the investment of the representatives of force with the functions of the guardians of justice: the conception that conditions of public disturbance necessarily require the establishment of Military Courts is an atavistic relic of the absolutist State. However grave the disturbance, it is only in the *execution* of judgments, but not in their *making*, that in the absence of civil organs the assistance of the military power may be required. If the acceptance by the Irish Constitution of the institution of military jurisdiction over civilians is, therefore, to be regretted, the progress involved in the imposition of the requirement of statutory authority deserves to be noted. The characteristic feature of the Military Tribunals set up during the last phase of the British régime was not merely that the judges were military officers, but that the law which they administered was made *ad hoc* by military commanders. Executive, legislative and judicial functions were vested in a single authority, from whose acts no appeal was admitted by the Civil Courts. In subjecting the law and procedure of these exceptional courts to the approval of Parliament, the Irish Constitution made a distinct advance to more rational and democratic standards. The joint effect of the provisions of Arts. 6 and 70 is to impose effective limitations on the wide discretionary powers previously claimed for the Military Authorities on the strength of an undefined prerogative. The common law authority of the Executive in time of internal disturbance to repress force by force in open conflict retains its latent validity. Its military organs are, under the terms of the proviso of Art. 6, entitled to arrest and detain civilians, but the power to subject civilians to military jurisdiction which had latterly been claimed on the strength of executive prerogative was, by the provision of Art. 70, effectively subjected to the authority of Parliament.

(*d*) THE PUBLIC SAFETY ACTS

The abnormal political conditions which followed in the aftermath of the Civil War led to a comprehensive extension of the scope of martial law by a series of statutory enactments. In the course of the military operations a considerable number of prisoners had been taken by the forces of the Provisional Government and were being detained on the strength of the exceptional powers vested in the Military Authorities. Under the terms of the Constitution, however, these could be exercised only as long as a state of public disturbance could be proved to prevail. With the gradual cessation of open conflict it became increasingly doubtful whether the Courts would continue to defer to the plea of the existence of a state of armed insurrection, with which all applications for habeas corpus had hitherto been successfully countered. The Government maintained that although open hostilities had ceased, a state of latent conflict continued and that it would be detrimental to public safety if it were compelled to release the prisoners indiscriminately or deprived of the power to order further arrests. It was to provide for this special emergency and to prepare for the gradual assumption of the responsibility for public order by the civil forces then in the course of formation that the first Public Safety Act[1] was passed. The reality of the problem had been demonstrated by a judgment obtained by one of the prisoners in the High Court on the very day of the enactment of the measure, in which it had been held that the state of insurrection no longer prevailed, and the immediate release of the applicant had been ordered.[2] The Act

[1] Public Safety (Emergency Powers) Act (No. 28 of 1923).

[2] In the promulgation of the Act the provision of Art. 47 of the Constitution, under which a Bill passed by the Oireachtas cannot become law unless declared by both Houses to be necessary for the immediate preservation of the public peace, health or safety, was ignored. The omission of the declaration was on the following day successfully pleaded in the Court on behalf of the prisoners, and a second measure —the Public Safety (Emergency Powers) Act No. 2 (No. 29 of 1923)

invested the Government during the state of latent insurrection with extensive powers of arrest and detention. It gave power to any member of the Executive Council to order the arrest and detention of persons suspected of being or having been engaged in acts connected with the rebellion, or whose detention was regarded by the Military Authorities as a matter of military necessity or considered by a Minister as necessary in the interests of public safety. In addition the Act authorised the arrest and detention by the Military and Civil Authorities for a period not exceeding one week of persons found committing or suspected of having committed ancillary offences. Persons so detained were to be released or charged with a specific offence within one week, but might also be detained indefinitely by an order of the Minister. The Act further authorised the continued detention of the prisoners taken by the Military Authorities during the conflict prior to the passing of the Act. Provision was made for the establishment of Appeal Councils, whose procedure was to be subject to the control of Parliament, for the purpose of examining applications for release and advising the Minister on their merits. Severe penalties (including capital punishment) were instituted for acts of violence connected with the revolt, while a special clause enabled the Attorney-General by application to the High Court to obtain a change of venue in criminal cases coming within the purview of the Act.[1] The exceptional powers of the Military Authorities in regard to the suppression of actual "rebellion" were specifically preserved.

In three directions the Act extended the scope of the martial

—had to be introduced and passed on the same day to remedy the default and authorise the retention of the prisoners. Cf. *The King (O'Brien)* v. *The Military Governor of the Military Internment Camp, North Dublin Union, and the Minister for Defence*, [1924] 1 I.R. 32.

[1] The duration of the Act was limited to a period of six months. Its main provisions were re-enacted in the following year by two measures, the Public Safety (Powers of Arrest and Detention) Temporary Act (No. 1 of 1924), and the Public Safety (Punishment of Offences) Temporary Act (No. 15 of 1924).

aw provisions of the Constitution. The exercise of the special powers which it vested in the Executive was left entirely to the discretion of the latter. It was not made dependent on any judicial finding as to the existence of a state of public disturbance. In contrast to the exclusively military character of the regulations adopted by the Provisional Parliament, the new powers were entrusted in equal measure to the Civil and Military Authorities. Their scope was defined in specific terms, and though the extraordinary powers of the Military Authorities in regard to the suppression of actual rebellion were preserved, their powers in so far as derived from the Act were limited to the same extent as those of the Civil Authorities.

The innovation of a specific enactment of the extraordinary powers of the Executive in time of national emergency was carried a step further by the Public Safety Act of 1926.[2] The Act, though produced by the continuance of spasmodic disturbances of the public peace, was, unlike its predecessor, not intended to meet an immediate emergency. It represented a statutory extension, designed to be of permanent character, of the powers of the Executive during a state of public disturbance, somewhat on the lines of the Continental codes of the "State of Siege." It gave power to the Executive Council to declare by proclamation a state of national emergency, such proclamation, unless revoked or renewed in the interval, to expire after the lapse of three months. The effect of the proclamation was, on the one hand, to empower any member of the Executive Council to order the arrest and detention of persons suspected of being or having been engaged in subversive or criminal activities, not, however, it may be noted, merely on grounds of "military necessity" or "public safety," as in the previous Acts. Similar powers of arrest and detention on suspicion were vested in the Police and Military Forces. While, however, persons arrested by the latter were to be either charged or released within one week, Ministers were invested with the power to order the continued detention

[2] No. 42 of 1926.

without trial of persons arrested on their instructions or by the Civil or Military Authorities, provision being made, as in the preceding Acts, for the setting up of Appeal Councils to advise on the release of the detained. On the other hand, the proclamation of a state of emergency was to operate as a convocation of both Houses of Parliament—if not sitting at the time of the proclamation—within five days, a distinct advance on Continental precedents. By a resolution of either House—an unusual procedure under a bicameral Constitution—the proclamation might be repealed with immediate, though not retrospective, effect. No powers of interference were, on the other hand, conceded to the Courts, the issue of the proclamation being tantamount to a suspension of habeas corpus within the terms of the Act.

While the Act of 1926 represented a statutory codification of permanent character, a comprehensive exceptional measure passed in the following year—the Public Safety Act, 1927 (No. 31)—was again designed to meet a special emergency. It was enacted as a result of the intense public excitement provoked by the assassination of Mr. Kevin O'Higgins, the Minister for Justice. The murder was believed to have been inspired by secret organisations, and the new Act was accordingly directed in a large measure to the suppression of illegal bodies. The Executive Council was empowered to declare unlawful any association aiming at the subversion by force of the authority of the State. Membership of such associations was made liable to rigorous penalties of imprisonment and penal servitude. The publication, distribution and importation of seditious literature was subjected to severe penalties. The police were authorised to arrest and detain persons suspected of being or having been engaged in the commission of any offences under the Act or under the Treasonable Offences Act,[1] or in any murderous conspiracy against the Governor-General, the Members of Parliament or the Judges. Persons so arrested might, pursuant to an application to a District Judge, be de-

[1] Treasonable Offences Act (No. 18 of 1925).

tained for a period not exceeding three months. In addition, power was given to the Minister for Justice to expel from the Irish Free State any person who in his opinion had been associated with the activities of an unlawful association or concerned in treasonable action and whose continued presence in the country he regarded as prejudicial to the public safety. Parents and guardians of juvenile persons connected with unlawful associations—unless able to prove that they had not "conduced to the commission of the offence by neglecting to exercise due care of the offender"—were made liable to penalties of imprisonment on summary conviction, while conviction of any offence under the Act was to involve the loss of any public appointment or pension and to disqualify the offender for a period of seven years from holding any official position.

While these provisions were intended to come into force immediately on the passing of the Act, the novel procedure introduced by the Act of 1926 was followed in regard to the establishment of a system of Extraordinary Courts to try offenders under the Act. The Executive was given discretionary power—"in order to secure the due administration of justice and the sure punishment of crime"—to issue a proclamation by which, on the one hand, Extraordinary Courts were to be established and, on the other, Parliament, if not sitting at the time, was to be summoned, either House being empowered, as under the previous Act, to revoke the proclamation by a resolution. These Special Courts, consisting of higher military officers with the addition of one member who might also be an officer certified by the Attorney-General as possessing "legal knowledge and experience," were invested with jurisdiction, in priority to the Civil Courts, to try all offences under the Act. The procedure of these Special Tribunals was to be modelled on the lines of the Central Criminal Court,[1] but their judgments were not to be subject to appeal, nor could proceedings before them be removed by certiorari to any other

[1] *Dáil Debates*, Vol. 20, col. 1486.

Court. All sentences pronounced by them, however, were to be subject to confirmation by a military officer of high rank, appointed by the Government and assisted by a legal assessor, similar to the Judge Advocate-General under English military law. The patent incompatibility of the far-reaching restrictions on personal liberty embodied in the Act with the provisions of the Constitution rendered it necessary to invest it with the legal character of a constitutional amendment. The Act was not in its title described as such, but a general clause inserted in its opening section (s. 3) provided that any of its provisions which was repugnant to the Constitution should to the extent of such contravention operate, while in force, as an amendment of the latter. The general form of the amendment was the subject of much legal criticism in the parliamentary debates, even by supporters of the measure,[1] but the Government declined to specify the Articles of the Constitution affected by the amendment, the temporary character of the latter being pleaded in defence of its general form.[2] The limitations imposed by the Act on the freedom of association and of literary expression were patent enough, but the refusal of the Government, despite strong pressure in the Dáil, to specify the scope of the amendment would seem to indicate that the repugnancy was felt to extend also to the Articles guaranteeing the liberty of the person and the security of the dwelling,[3] which, by a literal construction of the term "law" as used in Articles 6

[1] Cf. also the adverse criticism of Mr. Justice Hanna in *Attorney-General* v. *McBride*, [1928] I.R. 451, where the unspecified form of the amendment is described as "contrary to the spirit of Art. 50 of the Constitution" and as "a precedent that should not be followed."

[2] Cf. Statement of President Cosgrave, *Dáil Debates*, Vol. 20, col. 1152: Modern German constitutional theory similarly distinguishes between a "Verfassungsänderung" and a "Verfassungsdurchbrechung," the former term connoting a permanent, the latter a temporary and limited amendment.

[3] Cf. speech of Deputy Rice, who specifically referred to Arts. 6 and 7 as being amended by the Bill, as opposed to Professor Thrift, who upheld the formal interpretation of the two Articles (*Dáil Debates*, Vol. 20, col. 1153 *et seq.*).

and 9, had previously been held to be capable of amendment by ordinary legislation.[1]

The Public Safety Act of 1927 was intended to be in force for a period of five years. It was repealed, however, as early as December 1928.[2] Three years later a revival of revolutionary activities led to the enactment of a further exceptional measure of even more rigorous character, which, as it was designed to be of permanent force and clearly involved a far-reaching restriction of constitutional rights, was introduced and passed in the form of a constitutional amendment,[3] the entire measure being inserted as a new Article (2A) in the body of the Constitution. As in the Public Safety Act of 1927, the amendment was effected in general terms: the new Article was inserted prior to the Fundamental Declarations and given priority over all subsequent provisions of the Constitution. The precedent of the Act of 1926 was followed in that the coming into force of the exceptional powers granted under its several sections was made dependent on the issue of special orders by the Executive Council in relation to each of the latter, but no corresponding requirement of parliamentary assent was imposed. The most characteristic innovation of the Act—justified on account of the breakdown of the jury system in the rural districts as a result of intimidation—was the establishment of a special Tribunal of five military officers of high rank, to be appointed by the Governor-General on the advice of the Executive Council, with very comprehensive powers of extraordinary jurisdiction. It was empowered to try and convict all persons charged for offences against the Treasonable Offences Act,[4] the Juries (Protection) Act,[5] the Firearms Act,[6] for seditious libel, for offences against special provisions of the Act, in particular membership of unlawful associations, and finally, for any offence certified by a Minister as having been committed "with the object of impairing or impeding the machinery of government or the administration of justice." It was invested

[1] Cf. Chapter III (*b*), *supra*. [2] Public Safety Act (No. 38 of 1928).
[3] Constitution (Amendment No. 17) Act (No. 37 of 1931).
[4] No. 18 of 1925. [5] No. 33 of 1929. [6] No. 17 of 1925.

with all the powers of the Civil Courts, and authorised to inflict more severe punishment—including the death penalty—than provided by the ordinary law, if regarded as necessary or expedient. On application by the police the Tribunal might order the transfer to its jurisdiction of a trial for an offence under the Act instituted in the Civil Courts. No appeal was to lie from its decisions, but the Executive Council might at their absolute discretion grant a free pardon or remit a sentence passed by the Tribunal. The Act further invested members of the Police and the Defence Forces—the latter only if authorised by the Minister for Defence—with comprehensive powers of arrest and detention on suspicion and of examination of arrested persons, including the right to question prisoners in regard to the commission or intended commission of any of the offences under the Act, a power extended also to other persons in custody or prison. Persons detained under these provisions must be notified within three days that they will be charged before the Tribunal and brought before the latter within one month from such notification. The Act further gave power to the Executive Council to prohibit public meetings, if regarded as likely "to lead to a breach of the peace or to be prejudicial to the maintenance of law and order," and authorised the Military Tribunal to declare as seditious and order the seizure of any publications or documents, and similarly to order the closing for a period not exceeding six months of premises used for unlawful purposes. Apprehensions of acts of violence and intimidation against Members of Parliament finally inspired the insertion of a provision of very unusual character. Power was given to the Governor-General, acting on the advice of the Executive Council, in case of the death in consequence of an act of violence or the prevention of attendance in Parliament of a Member of either House, to appoint a temporary substitute "having regard to the known opinions of the Member so deceased or so prevented," and furthermore to adjourn either or both Houses for a period not exceeding one month. The

of one week after a bitter parliamentary struggle, was almost immediately brought into operation by an order of the Executive Council.[1] It remained in force until the change of Government in March 1932, when the order was rescinded by the new Cabinet.[2]

It will be seen that the effect of the several Public Safety enactments was to create a new form of martial law, partly of merely temporary emergency nature, partly, however, of permanent statutory character. The Acts of 1926 and 1931 embody a code of rules similar in character to the law of the *état de siège* of Continental legal systems capable of being brought into operation by an order of the Executive—in the former case with, in the latter case without, the assent of Parliament—and not subject in its administration to the control of the judiciary. It may be asked whether and to what extent this new form of statutory martial law replaced the older powers claimed for the Executive at Common Law. In the Acts of 1926 and 1931 no reservation in favour of the latter was inserted. Yet the Act of 1926 was designed to govern essentially the same state of public disturbance to which previously the powers of martial law had been regarded as applicable. It would hence appear—in accordance with the general rule, as reaffirmed in *Egan* v. *Macready*, that a statutory enactment involves *quoad hoc* a restriction of the prerogative at Common Law—that the powers of martial law vested in the Executive under Common Law were in effect abrogated by these specific enactments. It can hardly be maintained that Parliament having devised a comprehensive system of regulations to govern a special emergency and having entrusted the Executive with the power to set these provisions in operation when it regarded the emergency as having arisen, it would be within the competence of the latter to ignore these enactments and to fall back on the wide and unspecified martial law powers of the Common Law. The scope of the latter must be held to have been restricted

[1] Constitution (Operation of Art. 2A) Order, 1931.

[2] Constitution (Suspension of Art. 2A) Order, 1932.

by the two Acts to such matters as do not specifically come within the purview of their provisions, such as, in particular, all acts committed in open conflict.

If the new martial law created by the enactments of 1926 and 1931 is thus to be regarded as a permanent feature of Irish constitutional law, it may in conclusion not be inappropriate to enquire into the merits of the new system as compared with the English Common Law rules which it replaced. It is true that the latter system, by investing the Civil Courts with the power to decide as to the existence of the alleged state of disturbance, provides an initial check to the natural tendency of executive bodies in time of emergency to assume whatever powers may be at their disposal. The permanent existence in Continental States of a comprehensive code of regulations designed to govern a state of emergency may act as a ready temptation to an executive to bring it into operation even though the actual situation may not yet justify it. The defect of the English system, on the other hand, would seem to lie in the unlimited character of the powers claimed for the military organs when once the Civil Courts have admitted the existence of a state of war or disturbance. The Courts may retain the power to sit in judgment over the acts of the Military Authorities when peace has been restored, but this will clearly not remedy irretrievable acts. Nor will the definite expectation of Acts of Indemnity based on a long experience of parliamentary condonement tend to repress rash instincts. But the most invidious feature of the system is the imposition upon the guardians of objective justice of the essentially political tasks of deciding on the existence of a state of emergency and of interpreting the unspecified powers of the executive organs during internal disturbances. There have been shining examples in the history of English law of high-minded judges who have stood out valiantly for the protection of civil liberty against encroachment by military officers. Such instances, however, will not invalidate the basic objection that the transformation of the judges into arbiters of political issues cannot but detrimentally affect the

moral authority of the judicial system. If the political organs of the State, the Parliament and the Executive believe that in a special emergency it is essential for the maintenance of its authority to invest its civil or military agents with exceptional powers, it is incumbent upon them to specify and delimit the scope of such encroachment, but not to impose this invidious task upon the representatives of an order which derives its peculiar authority from its very divorce from the sphere of political conflict. The rigid definition by legislative enactment of the scope of executive interference, subject to an effective measure of parliamentary control, is as essential a safeguard of the fundamental sanctity of the judicial system as it is the most effective protection of civil liberty.

(*e*) MILITARY LAW (ARTS. 70, 71 AND 72)

The provisions of the Irish Constitution relating to the special law and legal procedure governing the disciplinary organisation of the military forces of the Free State are based on the fundamental rule of the English Common Law that membership of the Army does not in principle involve a *capitis diminutio* from the status of citizenship. A man, on entering the Army, accepts special duties and liabilities beyond the ordinary obligations of citizenship, but he remains fundamentally a citizen entitled to all civic rights except in so far as their exercise is precluded by the special requirements of military service and discipline, the scope of which is fixed by statutory enactment. The most characteristic expression of this basic conception is to be found in the preservation of the jurisdiction of the Civil Courts over military men. Though special Military Tribunals may be established under the authority of the Army Act to deal with military offenders, their jurisdiction is essentially of a subordinate character. A soldier acquitted or convicted by a Civil Court cannot be tried again by a Military Court in respect of the same offence, while trial by Military Court Martial is no plea to an indictment for the same offence at assize.

It is significant that the only concrete provision of the Irish Constitution relating to military law is the prohibition in principle of the subjection of members of the armed forces not on active service to trial by Military Tribunals for offences cognisable by the Civil Courts (Art. 71). In the Draft Constitution the prohibition was not qualified by any limitation, but in the course of the deliberations in the Constituent Assembly a restrictive clause was inserted on the motion of the Government enabling the trial of such offences to be brought by subsequent legislation within the jurisdiction of Courts Martial or other Military Tribunals. It was urged that it would be impossible to enforce discipline in the Army in time of peace if Parliament were precluded by the terms of the Constitution from making civil offences of military men triable by Military Courts.[1] For the rest, the Constitution merely preserved the general rule that Military Tribunals may be authorised by law for dealing with military offenders against military law and exempted the hearing of such cases from the general requirement of trial by jury (Arts. 70 and 72).

The statutory implementation of these general rules has been effected by the Defence Forces (Temporary Provisions) Act, 1923,[2] which has been continued in force by annual re-enactment on the principle of the English Army Act. Under s. 69 of the Act every person subject to military law who commits an offence against the general criminal law of the Free State is liable to be tried by Court Martial and on conviction to be punished either in accordance with the general law or—for having committed "an offence to the prejudice of good order and military discipline"—under the special provisions of the Act. The jurisdiction of the Military Courts was, however, excluded in trials for murder, manslaughter, treason, felony, rape or buggery, unless committed while on active service.[3]

[1] *Dáil Debates*, Vol. 1, col. 1427. [2] No. 30 of 1923.

[3] Under s. 244 of the Act all members of the original forces of the Free State (designated in the Act as the "National Forces") were deemed to be on active service and hence liable in all cases to be tried

The supremacy of the Civil Courts was maintained by the provision of s. 89 (2) that a military person acquitted or convicted of an offence by a competent Civil Court shall not be liable to be tried again by Court Martial in respect of that offence, while s. 195 (1) preserved the right of the Civil Courts to try a person sentenced by Court Martial for the same offence, the Court being merely enjoined in awarding punishment to pay regard to the military punishment which the offender might already have undergone. Similarly, the general liability of all members of the Military Forces to proceedings in the ordinary Courts of Law and the duty of officers to assist the Civil Authorities on pain of conviction for misdemeanour are expressly preserved.

(*f*) THE INVIOLABILITY OF THE DWELLING (ART. 7)

The provision of the Irish Constitution guaranteeing the security of the dwelling against administrative interference is drawn up on the model of the Continental declarations, though more cryptically worded than most of the latter. The inviolability of the dwelling is, next to freedom from arrest, the oldest personal right recognised by the State; it has been one of the first to be embodied in the formal records of such recognition.[1] English law, though expressed in so characteristic a phrase as that "the Englishman's house is his castle," has not in this instance produced so specific a remedy as that provided by the writ of habeas corpus against unlawful imprisonment. The inviolability of the dwelling is safeguarded by the law of trespass, which affords as effective a protection against the organs of the executive power as against common intruders. The general rule as stated in a recent case is that "just as a subject has a right to personal freedom, so also has

by Court Martial. Their legal status was normalised by the Defence Forces Establishment Order, No. 11 of 1924, as from October 1, 1924, since when the general provisions of the Act apply.

[1] Cf. the examples of mediaeval Flemish statutes quoted in J. J Thonissen: *La Constitution Belge Annotée* (1879), p. 30.

he the right to prevent others entering his house without justification."[1] In ordinary cases the necessary authority for forcible entry is obtained by a search warrant issued by a magistrate; the scope of such warrants was confined by the Courts within increasingly narrow bounds. In the great constitutional case of *Entick* v. *Carrington*, which turned essentially on this question, the principle was firmly established that a general warrant to break into a house and search for the papers of a person not named was invalid.[2] Under the Larceny Act[3] the police are entitled to obtain a search warrant to enter and search for stolen property, but the place of search must be specified. New powers of search have been introduced in recent years under the Public Health Acts, to enable the inspection of houses by the sanitary authorities.

The general principle is embodied in Art. 7 of the Irish Constitution in the traditional tenor of the Continental declarations. The dwelling of each citizen is declared inviolable, and forcible entry permitted only "in accordance with law," the latter term, in conjunction with the general preservation of the existing law under Art. 73, operating as a maintenance of the legal restrictions of English Common and Statute Law. The model of Continental constitutions is also followed in extending the protection specifically to the "citizen," a curious divergence from the French Constitution of 1848, the prototype of most of these declarations, which declared inviolable "the residence of every person dwelling in French territory" [Ch. II, Art. 3]. The use of the term might be read to imply a contra-distinction to Art. 6, which specifically refers not to the "citizen" but to the "person," and to deprive persons not of Irish citizenship of the legal protection afforded by the Article. The interpretation—which would imply that the Constitution had effected a restriction in the legal status of aliens as compared with the earlier law—can hardly be maintained in the light of the general purpose of these declarations. The security of the

[1] *Chester* v. *Bateson*, [1920] 1 K.B. 829.
[2] 19, St. Tr. 1030.
[3] 6 and 7 Geo. V, c. 50.

dwelling, as the liberty of the person, is an essentially non-political right; there is, as previously shown,[1] no ground of principle or policy why it should not be accorded in equal measure to persons not members of the political community.

The general rule of Art. 7 is, in contra-distinction to that of Art. 6, not qualified by any reservation in favour of the powers of the Military Authorities in time of war and insurrection. It would hence appear to operate as a restriction on the scope of military action in the domestic sphere. If the framers of the Constitution held that the military prerogative during a state of public disturbance was not affected by the fundamental declarations of the Constitution, there was clearly no need for the insertion of the saving clause of Art. 6. If, on the other hand, the inclusion of a specific reservation was regarded as necessary to safeguard the powers of arrest of the military forces, it would seem to follow that a similar reservation was required to authorise forcible entry and search by military officers. The gap has indeed been filled by the provisions of successive Public Safety Acts.

(*g*) RELIGIOUS LIBERTY (ART. 8)

The freedom of conscience and of religious profession represents in the metaphysical order the primary sphere of individual liberty, though it was not in the order of time the first to obtain legal protection. The rights of freedom from arrest and of the inviolability of the dwelling were secured by the mediaeval freeman at a time when his spiritual life was not yet in need of protection by the law. It was only when the Reformation in destroying the uniformity had destroyed the unity of Christendom that the temporal power of the State had to be invoked to extend external protection where the internal security of the spiritual order had ceased to prevail. When every effort of force and conciliation had failed to heal the schism, the principle of religious toleration became the basis of the spiritual readjustment of the

[1] Part IV, Chapter I, *supra*.

secular State. It invested the mediaeval conception of civic rights and privileges with a new metaphysical inspiration. The inherited rights of the citizen became the inborn rights of man.

The prime movers in the cause of the legal enactment of the principle of religious liberty were naturally those who by their convictions were condemned to permanent non-conformity. A direct line leads from the "Agreement of the People" of the Independentist Levellers, which first demanded the withdrawal of the sphere of religious liberty from parliamentary control, and from the teachings of Roger Williams, as exemplified in the Constitution of Providence, to the First Amendment of the American Constitution. By the end of the seventeenth century the principle of religious liberty had become a recognised rule of public law in the greater part of Europe, at least as far as the several Christian denominations were concerned. Not so in Ireland. The penal laws imposed during the post-Reformation era deprived the great mass of the native population of all active share in the political life and public administration of the country; they even invaded the sphere of private law. It was not until the advent of Catholic emancipation that the mass of the Irish people obtained full civic rights in their native country, while another generation had to pass before the constitutional anomaly of the State endowment of the Church of the minority was abolished. But the virus of religious intolerance, while thus removed from the sphere of law, remained a potent factor in the political struggle which for another half century centred round the issue of Irish Home Rule. Fear lest an autonomous Irish Parliament might impose legal disabilities on non-Catholics remained one of the principal motives of the opposition to Irish self-government. Every one of the several Home Rule Bills was qualified by restrictive clauses designed to meet these insistent apprehensions. Provisions to the same effect were, as previously shown, incorporated in the Treaty, and were re-enacted in the body of the Constitution.

The re-enactment was effected in a form which divested it of the purely negative character of the Home Rule precedents

Liberty of conscience and freedom of religious practice and profession were guaranteed in the traditional tenor of the Continental declarations, the inhibitory injunctions of the Treaty being attached as exemplifications of the general principle. The rights guaranteed by the Article are threefold. Freedom of conscience represents the minimum of religious liberty. It enshrines a sphere so intangible as hardly to be capable of legal protection. No one may be compelled to accept or to abandon any belief, any creed, any opinion: such is the injunction implied in the prohibition. Freedom of conscience, however, would be of merely passive significance if it were not supported by further guarantees for the unhampered expression of spiritual conviction in word and action. It is not the abstract principle but its articulate forms of profession and practice which require to be protected against administrative or legislative restriction. Freedom of profession connotes the right of the believer to state his creed in public and propagate it in speech and writing, freedom of practice his right to give it practical expression in forms of private and public worship. Both imply a right to active intervention in the public sphere. Hence the imposition of the restriction that the exercise of such liberty must not conflict with "public order and morality." In the Draft Constitution the Article was not qualified by this restriction; freedom of conscience and the free profession and practice of religion were declared the inviolable rights of every citizen. In the deliberations of the Constituent Assembly the addition of the restrictive words was moved in order to preclude the invocation of the protection of the Constitution for such illegal ceremonial practices as those of Mormonism.[1] The formula adopted was "subject to public order and morality," which is that applied in many Continental constitutions. It is not free from ambiguity. Its effect is not so far-reaching as the rule embodied in certain constitutions, that religious practice must not violate the law (Czechoslovakia), or that the general laws of the State "remain unaffected" by the constitutional

[1] *Dáil Debates*, Vol. 1, col. 695.

guarantee of free religious practice (Germany). The issues of conflict between Church and State may be of fundamental character, and the subjection of the freedom of religious profession and practice to the laws of the State may involve its virtual abrogation. "Public order and morality" is a formula less dogmatic, but its elasticity may allow of as restrictive an interpretation as the requirement of conformity with "the law." Might it be held to permit of the expulsion of a religious order whose teachings were regarded as subversive of the "public order" of the State, such as the Swiss Constitution authorised against the Society of Jesus and other religious orders "whose activity is inimical to the State or disturbs the peace between different religions"? Might it allow, in the case of an Act of compulsory military service, of the use of force against Quakers pleading conscientious objections in defence of their refusal to serve?[1] The arguments advanced in support of the clause would seem to suggest that its sole purpose was to prevent the abuse of religious liberty by practices directly involving a breach of the peace or offensive to public decency. It is in essence little more than a re-statement of the old maxim of the American Bills of Right that every believer has a natural and inalienable right to freedom of religious practice and profession "provided he doth not disturb the public peace or disturb others in their religious worship."[2]

The exemplifications attached in Art. 8 to the general principle of religious liberty are a literal reproduction of the provisions of Art. 16 of the Anglo-Irish Treaty, qualified by a more specific interpretation of the term "public utility purposes," for which, on payment of compensation, a diversion

[1] Under the Danish Constitution no person may plead religious conviction in defence of non-fulfilment of his duties as a citizen (Art. 77); while similarly the Constitution of Esthonia provides that religious belief may not be pleaded "in justification of the non-fulfilment of civic duties" (Art. 11).

[2] Bill of Rights of the State of New Hampshire, cf. B. P. Poore: *The Federal State Constitutions, Colonial Charters and other Organic Laws of the United States* (Washington, 1877), p. 1281.

of the property of a religious institution is permitted. The prohibitory injunctions both of the Treaty and of the Constitution are addressed to the Legislature, but it follows *a fortiori* that they apply equally to the administrative organs of the State. The form of a specific limitation of the legislative scope of Parliament is to be found in the Constitution only in one other instance—the prohibition of *ex post facto* legislation (Art. 43). Both principles are of the fundamental order, but that of religious equality has the additional sanction of the Treaty.

(*h*) FREEDOM OF EXPRESSION AND OF ASSOCIATION (ART. 9)

The constitutional guarantee of the rights of free expression of opinion, of peaceable assembly and of freedom of association extends the principle of toleration from the metaphysical to the political sphere, but the extension involves a subtle change of ethos. The transcendental authority with which metaphysical conviction is invested will not as readily be accorded in a sphere where opinion is shaped much more by self-interest than by the dictates of conscience. Regard for the abstract principle fades in the shadow of the political potentialities of these forms of liberty. Personal liberty in the sense of the unrestricted freedom of movement and action may become dangerous to society only in the case of the criminal; in the matter of freedom of political expression society always lives dangerously. In passing from the sphere of personal, domestic and spiritual liberty to that of public expression and combined action, we enter the armoury of political change. Inasmuch as the organised expression of the political will may vitally affect the maintenance of the public peace, the State is entitled to interpose its regulating authority in the exercise of these liberties, but such interference must clearly be directed to the sole object of all such regulation: to preclude the resort to physical force, to prevent the infringement of the identical rights of others, and to assure equal opportunity of expression to all. If its objective

authority is to be maintained, the intervention of the State may not overstep the bounds of technical organisation and control.

The provisions of Art. 9 would seem to embody this fundamental delimitation. The rights of free expression of opinion, of assembly and of association are guaranteed in principle. The claim of the State to regulate the exercise of the two latter is implicitly acknowledged, but the purely technical character of such regulation is indicated by the restriction that the rules governing that exercise "shall contain no political, religious or class distinction." Two important limitations, however, are imposed on the substance of these liberties. Freedom of assembly is guaranteed on condition that it is exercised peaceably and without arms. This is essential for the safety of non-assemblants. The test is that those who assemble be peaceable in their conduct; an assembly does not cease to be peaceable because others feel impelled to attack it. To maintain that view is to put a premium on intimidation.[1] A more stringent restriction is imposed both on the freedom of expression and on the liberty of assembly and association by the further proviso that their exercise, if it is to enjoy the protection of the Constitution, must not be "opposed to public morality."

The Article has been the subject of a comprehensive interpretation by the Censorship of Publications Act (No. 21 of 1929) intended, according to its title, "to make provision for the prohibition of the sale and distribution of unwholesome literature." It provided for the establishment of a "Censorship

[1] Cf. Z. Chafee: *Freedom of Speech* (New York, 1920), p. 172. "The breach of the peace theory is peculiarly liable to abuse. It makes a man a criminal simply because his neighbours have no self-control, and cannot refrain from violence. The *reductio ad absurdum* of this theory was the imprisonment of Joseph Palmer, one of Bronson Alcott's fellow-settlers at 'Fruitlands,' not because he was a Communist, but because he persisted in wearing such a long beard that people kept mobbing him, until law and order were maintained by shutting him up."

of Publications Board," consisting of five members to be appointed by the Minister for Justice to advise the Minister on the desirability of the prohibition of indecent or obscene publications and of literature advocating methods of birth control. In formulating its judgment, the Board is required to consider "the literary, artistic, scientific or historic merit" of the publication, its general tenor, the language of its production, the nature and extent of its circulation, the class of its readers, and other relevant points; it may also communicate with the author, editor or publisher, and hear their representations. The effect of the prohibition order made by the Minister —which has to be published in *Iris Oifigiuil*, the official gazette of the Free State—is to make unlawful the sale, offer, distribution, keeping for sale or distribution, or the importation for the same purpose of the prohibited publications, any act of contravention rendering the offender liable to fine or imprisonment. The Act further prohibited the publication of indecent details of judicial proceedings, the sale or importation of indecent pictures, and finally the publication, sale and distribution of any book or periodical, whether prohibited by the Board of Censors or not, advocating methods of contraception.

The constitutional guarantee of freedom of expression, assembly and association is not qualified by any proviso allowing of its restriction "in accordance with law," such as is frequently attached in Continental Declarations. Yet the provision is clearly not without concrete legal import. Is the guarantee of an unrestricted freedom of expression—subject only to public morality—to be interpreted as an implicit amendment of the law of libel and of seditious utterance? Can it be held to extend a general immunity to spoken and written utterances even though their result, if not their intent, be the breach of the law? It is clearly only by reference to the general purpose of the enactment of fundamental declarations in the body of the Constitution that the legal import of the Article can be defined. The avowed object of these constitutional declarations has been, ever since their enactment, to protect

the sphere of individual liberty against encroachment by the State. These guarantees are not designed to re-state or reform the law as between the individual members of the community; they do not purport to enact new rules of private law. They cannot, therefore, affect the law of slander and personal libel, which is designed to protect the personal honour of the individual against attack by his fellows. Nor can the guarantee of the liberty of expression be regarded as extending immunity to any direct incitement to a breach of the law. It affords legal protection to free criticism of the organs of the State, but it cannot be held to exempt from legal responsibility utterances directly inciting to physical violence against the latter, which are as illegal as similar incitements against private citizens. On the other hand, the Article would seem to imply a restriction of the scope of "seditious libel." In the light of its emphatic assertion of the freedom of expression of opinion an attempt "to bring into hatred or contempt or to excite disaffection" against the Government, or "to promote feelings of ill-will and hostility between different classes of citizens," can hardly be held to be unlawful—as long as, in the opinion of a jury, it was not designed to produce actual violence.

The Article is, finally, not restricted by any preservation of the exceptional powers of the Military Authorities in time of war or insurrection. It follows that, if such powers are required during an emergency, they must be provided by special legislation which, as it involves *quoad hoc* an amendment of the Constitution, would require to be enacted in accordance with the special provisions governing the latter. As previously shown, the public safety measures of 1927 and 1931, which restricted these liberties, were specifically designated as amendments of the Constitution.

(*i*) THE PROHIBITION OF *EX POST FACTO* LEGISLATION (ART. 43)

The rule embodied in Art. 43 of the Irish Constitution, that the Irish Parliament "shall have no power to declare acts to be

infringements of the law which were not so at the date of their commission," implies in its practical import not so much a technical limitation of the scope of the Legislature, as a fundamental safeguard of individual liberty; it is accordingly included in most modern constitutions in the declaration of fundamental rights. It represents, indeed, one of the most fundamental guarantees of personal freedom designed to preclude that most insidious form of arbitrary interference which abuses the legislative function of the State. The claim of the community to inflict punishment for an anti-social action can in equity be sustained only if the character of the acts prohibited and the scope of the penalty inflicted are authoritatively defined before the infringement is committed. No principle, perhaps, is more deeply embedded in the legal consciousness of humanity; few yet have suffered greater violation. In a rudimentary legal order the rule may be expressed in so primitive a declaration as that of the thirty-ninth chapter of Magna Carta; a more advanced system will from the general principle of legalism infer the impropriety of retrospective penalisation, as expressed in the famous dictum of the Digests: "*Poena non irrogatur nisi quae quaque lege vel quo alio jure specialiter huic delicto imposita est.*"[1] The doctrine of the Law of Nature invested the rule with the character of a fundamental principle. It was that teaching and the insidious practice of Bills of Attainder—a legal device by which Parliament, acting at once as legislator and judge, inflicted arbitrary punishment "on a named individual for an unnamed crime"—which inspired the insertion of the prohibition of *ex post facto* legislation in the American and the French Declarations and into most Continental constitutions and penal codes. It has well been described as one of those *principes généraux de droit reconnus par les nations civilisées* which the Constitution of the Permanent Court of International Justice prescribes as guiding rules for the decisions of that international tribunal.[2]

[1] D. 50, 16, par. 131.

[2] R. Thoma: *Die juristische Bedeutung der grundrechtlichen Sätze*, 1929.

The prohibition of *ex post facto* penalisation in the Irish Constitution differs from the similar declarations in Continental constitutions in that it is imposed on the Legislature and not, as in the latter, on the Judiciary.[1] In this respect the model of the American Constitution has been followed, which prohibits both the Federal and the State Legislatures from passing Bills of Attainder or *ex post facto* laws. The American Declaration has been the subject of very extensive interpretation. The Courts have held that the prohibition of *ex post facto* laws covers not merely the creation with retrospective effect of new types of crime, but also any subsequent alteration of the law which aggravates the crime or the penalty and which alters the rules of evidence to the detriment of the accused. It has by later decisions been so broadened as to include "all laws which in any way operate to the detriment of one accused of a crime committed prior to the enactment of such laws."[2] The more specific phrasing of Art. 43 of the Irish Constitution, which in this respect conforms more to Continental Declarations, would not seem to allow of so wide an interpretation. On the other hand, it must, like the American prohibition, be held to extend merely to criminal and not to civil enactments.

[1] Cf. Constitution of Germany, Art. 116; Constitution of Yugoslavia, Art. 8; Constitution of Esthonia, Art. 9.

[2] W. W. Willoughby: *The Constitutional Law of the United States* (1929), p. 1135.

CHAPTER III

PROGRAMMATIC DECLARATIONS

(ARTS. 10 AND 11)

OF the declarations embodying a programme of social, economic or educational reform, which are so characteristic of modern Continental constitutions, the Irish Constitution contains only two, a declaration asserting the right of all citizens of the Free State to free elementary education and a general provision postulating the nationalisation of the natural resources of the country. Both were inspired by those socialistic tendencies which, as shown in a preceding chapter, exercised a potent influence on the framing of the Irish revolutionary programme. Efforts were made by the Labour Party in the course of the debates in the Constituent Assembly to secure the inclusion in the Constitution of the radical postulates of Connolly's creed as reaffirmed in the "Democratic Programme" of the first Dáil, but the outlook of the majority of the Assembly was too positivist to favour the enunciation of far-reaching principles. Similarly, the endeavours made from the same quarter to secure the insertion in the Article providing for free elementary education of a proviso designed to enact compulsory education and to regulate the establishment of private schools somewhat on the lines of the German Republican Constitution was resisted in the same spirit by the plea that the detailed regulation of education should be left to subsequent legislation.[1]

The provisions of Art. 11, proclaiming the succession of the Free State to the beneficiary rights in the lands, waters and mineral resources previously vested in the British Crown and its title to the control of all the natural resources of the country and the income derived therefrom, represent only a very incomplete realisation of the socialistic postulates of the "Democratic Programme" of 1919. The Article, which in the

[1] *Dáil Debates*, Vol. 1, col. 696 *et seq.*

Draft Constitution merely prohibited the alienation of State rights in natural resources of national importance and subjected their exploitation by private agencies to State supervision, was considerably amplified in the Constituent Assembly. In its present form its legal import is twofold. It establishes, in the first instance, the legal succession of the Free State to all the rights in lands, waters, mines and minerals within the territory of the Free State which were previously vested in the British Crown or any Department of State or held for public use or benefit. In the second place, the Free State is invested with a general title to the control of all natural resources of the country, including the air and all forms of potential energy and of all royalties and franchises derived from their exploitation.[1] The transfer was not to involve any immediate change in the tenure of these rights, for the continuance of all existing trusts, grants, leases, concessions or other valid private interests was specifically safeguarded. The control and administration of these national trusts were vested characteristically not in the Executive, but in Parliament, which from time to time was to fix by legislation the regulations and provisions governing their exercise. Important restrictions were, however, imposed by the Constitution on the scope of parliamentary control. None of these rights and titles was to be alienated in perpetuity; they were to be granted merely "in the public interest" from time to time by way of lease or licence and to be exercisable subject to the control of Parliament. No such lease or licence was to be made for a term exceeding ninety-nine years. Finally, no such grant was to be renewable by the terms thereof. The practical effect of these provisions was to sanction the maintenance of existing forms of tenure, but to subject the terms on which they were held to a progressive measure of direct parliamentary control, to be exercised for the public benefit.

[1] It was held by the Supreme Court in *Robert Lyon Moore and Others* v. *The Attorney-General, William Goan and Others*, [1930] I.R. 471, that the Attorney-General alone could be heard making any claim on behalf of the State or community of citizens of the Irish Free State under Art. 11 of the Constitution.

Though this falls considerably short of the comprehensive postulates of the revolutionary programmes, the terms of the Article are wide enough to enable a progressive nationalisation of the natural resources of the country to be effected.

The provisions of the Article have received legislative interpretation by the enactment of the State Lands Act, 1924 (No. 45), and the State Lands (Workhouses) Act, 1930 (No. 9). The former empowered the Minister for Finance, if he considered it to be in the public interest, to grant leases or licences in respect of lands and buildings, but not of mines and minerals contained therein, for periods not exceeding ninety-nine years, subject—except where public interest dictated otherwise—to the payment of fines or rents and to such conditions as the Minister might in the public interest think proper to impose. Such leases or licences were to take effect only after their submission to Parliament, and after having either been authorised by a resolution of each House or having lain on the table for a fixed period. The Act of 1930 applied these general principles to lands formerly vested in the Local Government Board of Ireland. It authorised the Minister for Local Government to grant leases or licences in respect of such property on the same terms and subject to the same conditions of parliamentary control as provided in the Act of 1924, which was repealed *quoad hoc*. It further empowered the Minister to authorise local authorities entrusted with the administration of poor relief—in particular, Boards of Guardians and Boards of Health—to grant such leases or licences, subject to terms to be approved by him for periods not exceeding five years, the income from such grants to be applicable for purposes of maintenance or general poor relief in the area concerned. Art. 11 has further been implemented by the Mines and Minerals Act (No. 54 of 1931), which empowered the Minister for Industry and Commerce to grant leases in respect of State Mines for periods not exceeding ninety-nine years and to authorise qualified applicants to exploit non-State Mines which are not worked because of technical legal difficulties.

PART V

THE LEGISLATIVE POWER

CHAPTER I

STRUCTURE AND COMPETENCE OF THE LEGISLATURE

(ART. 12)

THE formal framework of the Irish Legislature — the "Oireachtas" — is shaped on the archaic model of the British Constitution. Parliament consists of the King and two Houses, the Chamber of Deputies ("Dáil Eireann") and the Senate ("Seanad Eireann"). Contrary to British and Dominion precedent, however, the Chamber in actual status and in constitutional formalism takes precedence over the senatorial House. In the two instances when the Free State Parliament was opened by a speech of the Governor-General, it was in the Dáil that the ceremony took place, the Senate having been invited to attend. The English designation of the House as "Chamber of Deputies" marks an innovation characteristic of the tendency to adopt Continental forms. Apart, however, from the general definition of Art. 12 the title is not used in the Constitution, the Irish designation of the House as "Dáil Eireann"—indicating the continuity of the native parliamentary tradition—being applied also throughout the English text.

"The King in Parliament" is a peculiar conception of the British constitutional system. It reflects the actual structure of the mediaeval parliament, which was the "Magnum Consilium" of the King and his estates. This organic relationship, which was characteristic of the feudal order throughout Europe, was shattered by the royal absolutism of the seventeenth century. The mode and the effect of that transition, however, differed fundamentally in England and in Continental Europe. In England Parliament, after having been temporarily relegated to a secondary position by the last Tudor and the

first Stuart monarchs, succeeded in the great constitutional conflict of the seventeenth century in establishing itself as the sovereign power in the State. The circumstance, however, that the defeat of royal absolutism was achieved not by a revolutionary populace, but by a conservative aristocracy, produced a peculiarly unreal framework of settlement. The mediaeval constitutional structure of "the King in Parliament" was formally maintained, but the fundamental declarations of the Bill of Rights and the Act of Settlement left little doubt as to the actual depositary of constitutional power. By a system of legal fictions the framework of a "Constitutional Monarchy" was erected which, by its structural elasticity, has for over two centuries survived all the revolutionary theory and practice of Continental Europe. In contrast to this evolutionary transformation the break-up of the feudal order on the Continent proceeded with all the radicalism of the "dialectical process." The absolutist conception was carried into effect with ruthless consistency. The Prince, by successive steps, became the exclusive fount of legislation, the mediaeval "estates," in so far as their continuance was tolerated, being reduced to impotent agencies of the royal power. A subservient political philosophy, applying to the new order the political categories of the later Roman law, invested it with the authority of a metaphysical system. The feudal King of the mediaeval polity was elevated into a sovereign by divine right; the executive, legislative and judicial functions became the emanations of a supreme will rooted in the transcendental order. It was to this conception of a deified autocracy that the French Revolution opposed the equally metaphysical postulate of the divine right of the people. In the revolutionary Constitution of 1791, the monarchy was still preserved, but the sovereign by divine right was reduced to a king by the grace of the people. In the subsequent cataclysm the institution of the monarchy was for a time entirely submerged. When the storm of the Revolution and of the Napoleonic dictatorship had subsided, it reappeared in two distinctive forms. In the constitutional prototype of the Restoration

Period—the French *Charte* of 1814—the King was re-established as a sovereign by divine right; the Legislature appeared as but a gift emanating from his supreme authority. But in the new Continental constitutions which arose after the July Revolution—notably in the Belgian Constitution of 1831—the revolutionary conception of 1791 of a monarchy derived from the sovereign people became the basis of a new framework of public law.

It is the latter conception which the Free State Constitution has introduced into the legitimist structure of the British constitutional system. It would appear from such light as was thrown on the original Draft of the Provisional Government in the debates of the Constituent Assembly that the Irish draftsmen had omitted the Crown from the framework of the Legislature, an interpretation which was undeniably in accord with the substantial reality of the Treaty status. British conservatism, on the other hand, had—in accordance with the strict letter of the Treaty—insisted on the preservation of the formal framework of the Dominion constitutions, qualified by a subsequent enunciation of the actual "practice and constitutional usage." The result of the amalgamation was an inorganic construction inspired by tendencies diametrically opposed to each other. The revolutionary principle of the sovereignty of the people was enunciated in Art. 2 as the basis of the entire framework of government, while in Art. 12 the formalism of the British monarchical system was maintained in its full archaic tenor. The effect of the innovation was to dematerialise the monarchical frame both in form and in substance. The status of the King of the Free State Legislature is in form not that of the British King, but of a popularly constituted monarch, such as the King of the Belgians. In substance it is even less, for the interpretative clauses of the Constitution divest the royal power of every vestige of reality. The functions of the Crown in the legislative sphere are fourfold. It is in the name of the King that Parliament is summoned and dissolved by his Representative (Art. 24). A

message of the Representative of the Crown is required for the appropriation of funds by the Legislature (Art. 37). It is again in the name of the King that his Representative signifies assent to a Bill or reserves it for his pleasure, and it is finally that Representative who formally invests the Bills passed by the Legislature with the force of law by attaching his signature to them (Arts. 41 and 42). In each of these instances the express provisions of the Irish Constitution have deprived the royal power of all but technical import. The exercise of the power to convene and dissolve Parliament was subjected to the vital condition that the dates of reassembly and of the conclusion of the sessions are to be fixed by Dáil Eireann (Art. 24); no discretionary power, moreover, is allowed to the Representative of the Crown in regard to the dissolution of Parliament (Arts. 28 and 53). In recommending financial appropriations to Parliament, the Representative of the Crown is expressly instructed to act on the advice of the Executive Council (Art. 37), while the exercise of the power of assent and reservation was subjected to Dominion "law, practice and constitutional usage," which amounted to its virtual abrogation. The function of promulgation vested in the Representative of the Crown was thereby reduced to a mere technical formality.

The joint effect of these restrictive interpretations was the maintenance, both in form and in substance, of the basic postulate of the Irish Revolution. The King of the Irish Legislature is but a static agency in a constitutional system which derives its authority exclusively from the will of the Irish people. He is the symbolic embodiment of the permanent legal order of the State, in whose name—but at the instance of a Parliament and of an Executive responsible to the Irish people—the formal functions of convention, dissolution and promulgation are exercised by a Representative who, in constitutional reality, is the indirect nominee of that people. The King is in no sense an agent of the Imperial Association, of which the Free State is a member, a point emphatically reasserted in the supplementary declaration of Art. 12, that the

"sole and exclusive power of making laws for the peace, order and good government of the Irish Free State" is vested in the Irish Parliament, which has no precedent in any of the Dominion Constitutions. The declaration is not strictly in accord with the subsequent introduction of the machinery of direct legislation, which vests a measure of legislative power in the electorate itself. Its object was not indeed to fix the position of Parliament in the general framework of the Constitution, but to exclude any form of legislative interference by the British Parliament. In this respect the declaration may, *prima facie*, appear to be contraverted by Section 4 of the British "Irish Free State Constitution Act," which expressly maintains the power of the British Parliament "to make laws affecting the Irish Free State in any case where, in accordance with constitutional practice, that Parliament would make laws affecting other self-governing Dominions." The contradiction is, however, more apparent than real, for none of the inter-imperial concerns, in respect of which the British Parliament, at the time of the enactment of the Constitution, retained a technical legislative prerogative, affected in substance the internal "peace, order and good government" of the Free State. Moreover, whatever trace of formal superiority still remained vested in the British Parliament was swept away by the subsequent reinterpretation of inter-imperial relations by the Conferences of 1926 and 1930, in which the Free State was a prime mover. Apart from certain reserved matters, in regard to which the legislative prerogative of the British Parliament is still extant in consequence of specific restrictions originally inserted in some Dominion Constitutions—notably in regard to constitutional amendment—the right of the British Parliament to legislate for the Dominions could, until the enactment of the Statute of Westminster, still be said to be of latent force in consequence of the limitation of the extra-territorial operation of Dominion legislation, in respect, furthermore, of measures designed to establish a uniform body of law throughout the Commonwealth, such as British citizen-

ship or copyright law, in regard further to the control of British Forces throughout the Commonwealth and in reference to the enforcement of international or inter-Commonwealth obligations not recognised by the Dominions.[1] It further extended to the domain of Merchant Shipping law and Colonial Admiralty legislation and to the law governing the Succession to the Throne and the Royal Style and Titles. Finally, the overriding legislative prerogative of the British Parliament was preserved in general terms by the Colonial Laws Validity Act (1865), which declared void any Colonial law repugnant to the provisions of a British Act, expressly or impliedly extending to that Colony. None of these restrictions any longer fetters the legislative autonomy of the Dominions. The limitation on the extra-territorial operation of Dominion legislation and the restrictions of the Colonial Laws Validity Act have been formally removed by the Statute of Westminster.[2] Similarly, in regard to the law regulating the Succession to the Throne and the Royal Style and Titles, the preamble of the Statute of Westminster declares that any change of the existing law shall in future require the assent of the Parliaments of all the Dominions. The same Statute exempted the Dominions from the formal limitations of the Merchant Shipping Act and the Colonial Courts of Admiralty Act (ss. 5 & 6). The power of the Imperial Parliament to pass legislation in regard to matters of common concern constitutes in effect no limitation upon the legislative autonomy of the Dominions, as such enactments acquire validity in the latter only if ratified by corresponding legislation of their respective parliaments.[3] Similarly, the power of the British Parliament to legislate for the control of British Forces throughout the

[1] Cf. A. B. Keith: *Responsible Government in the Dominions*, 1928 p 1032 *et seq.*

[2] 22 Geo. V, c. 4, Session 3.

[3] The power of the Irish Parliament to make Acts passed before the enactment of the Constitution in respect of the Dominions applicable to the Free State is specifically preserved in s. 3 of the Irish Free State Constitution Act, 1922.

Commonwealth involves no infringement of the internal sovereignty of the Free State. Under the present constitutional practice of the Commonwealth such forces can be stationed in the Free State only with the assent of the Irish Government, except in the localities and under the circumstances specified in the Treaty. British forces so stationed would enjoy an extra-territorial status not essentially different from that of foreign troops stationed in any country with the approval of the native Government.[1] In regard, finally, to the enforcement of international or Commonwealth obligations, the pronouncements of the Imperial Conference of 1926 have made it clear beyond doubt that no such obligations can be validly undertaken in respect of the Dominions except with the express assent of their respective Governments. In practice, in so far as legislation has been enacted in pursuance of obligations assumed by the Free State by virtue of its membership of the League of Nations or of international agreements, it has been passed by the Irish Parliament.

[1] Cf. *Report of the Conference on Dominion Legislation*, 1930 (Cmd. 3479), s. 44, and *Summary of Proceedings of the Imperial Conference*, 1930 (Cmd. 3717), p. 26.

CHAPTER II

FRANCHISE AND ELIGIBILITY

(ARTS. 14–16)

THE franchise to the Dáil and the right to vote in a Referendum or Initiative are vested by the Constitution in all citizens of the Irish Free State without distinction of sex who have attained majority and comply with the prevailing electoral laws. The franchise to the Senate is restricted to persons who have reached the age of thirty years. The ballot is secret, and plural voting is prohibited.

The higher age qualification prescribed for the franchise to the Senate was the subject of much critical comment in the Constituent Assembly. The distinction, which, as explained by the Provisional Government, had been introduced as one of the clauses of agreement with the Southern Unionists, was intended to raise the status of the Second Chamber, in which special representation was provided for the spokesmen of the latter section. The concession was of small significance, for the functions of the Senate were so limited as to divest it in any real sense of the character of a cooling chamber. The provision was eliminated by the sixth Constitution Amendment (No. 13 of 1928), which entrusted the election of Senators to the Dáil and the Senate voting together on principles of Proportional Representation.

The provisions of the Constitution contain no reference to electoral disqualifications, beyond a general requirement of compliance with prevailing electoral laws. The Electoral Act (No. 12 of 1923), by which the system of election was comprehensively regulated, maintained the existing disabilities, but excluded receipt of poor relief and employment by candidates as grounds of disqualification. Additional restrictions were imposed by the Prevention of Electoral Abuses Act (No. 38 of 1923), which disfranchised all persons found guilty of

corrupt and illegal practices[1] for periods of seven and five years respectively, the Registration Officer in each electoral district being charged with the annual publication of a list of persons so disqualified.

Membership of Dáil Eireann is open to all citizens who have reached majority and are not subject to legal or constitutional disabilities. The grounds of disqualification for membership of the Dáil were comprehensively restated by the Electoral Act (1923), which replaced the older law. Under its provisions elegibility is denied to persons undergoing sentences of imprisonment with hard labour for over six months or penal servitude, imbeciles and persons of unsound mind, undischarged bankrupts and persons convicted of corrupt and illegal practices at elections. Furthermore, Judges,[2] Civil Servants and active members of the Military and Police Forces are not eligible to sit in either House of Parliament. Eligibility to the Senate is restricted to persons qualified for membership of the Dáil who have reached the age of thirty-five years. Membership of one House is, under the terms of the Constitution, incompatible with election to the other, the latter being interpreted as implying resignation of the former.

[1] The term "corrupt practices" comprises the offences of bribery, personation and abetting of the same, treating, undue influence, and false announcement of the withdrawal of a candidate. Excessive employment or payment of election agents, voting by prohibited or disqualified persons, repeated voting in one election, the publication of false statements concerning a candidate, and disorderly conduct at election meetings constitute "illegal practices" under the Act.

[2] Art. 69 of the Constitution.

CHAPTER III

MODE OF ELECTION AND COMPOSITION OF BOTH HOUSES

(1) DÁIL EIREANN (ARTS. 26–29 AND 81)

THE system of election to the Dáil both in general and bye-elections is that of Proportional Representation, introduced, as previously noted, in fulfilment of a promise given by the Chairman of the Irish Peace Delegation to the spokesman of the Unionist section that the latter would be assured of a fair mode of representation in the Free State Parliament. The system adopted is that of the single transferable vote,[1] which ensures personal contact between members and their constituents. Any vacancy occurring in the interval between elections is filled by a local bye-election. The number of members was not rigidly fixed by the Constitution, but left to decennial readjustment by the Oireachtas, subject to the general provision that one member shall represent not less than twenty thousand and not more than thirty thousand of the population, and that the proportion between the population of a constituency and the number of members representing it shall in general be kept on an identical level throughout the country. In addition to the members elected by local constituencies, each of the two Universities existing at the time of the enactment of the Constitution was given the right to elect three representatives to the Dáil. The Constitution further provided that, apart from university constituencies,

[1] The term is defined in the Electoral Act (1923) as meaning: (*a*) capable of being given so as to indicate the voter's preference for the candidates in order; and (*b*) capable of being transferred to the next choice when the vote is not required to give a prior choice the necessary quota of votes, or when, owing to the deficiency in the number of votes given for a prior choice, that choice is eliminated from the list of candidates.

the polls at a General Election be held on the same date throughout the country within one month from the dissolution, the day to be proclaimed as a public holiday,[1] and that Dáil Eireann meet within one month from the election.

These general regulations were the subject of elaborate interpretation by the Electoral Act (No. 12 of 1923), which regulated the exercise of the franchise, the formalities of registration, the technical details of election under the proportional system and the allocation of constituencies. The total membership of the Dáil was fixed in the first instance at 153, of whom 20 were to be elected by the three borough constituencies, 127 by the 25 county constituencies, and 6 by the two Universities.[2] The prohibition of plural voting embodied in the Constitution was reinforced by the provision that registration, while admissible in residential, occupational or university constituency, could be effected in only one of these. The provision for the representation of the Universities in the Dáil was only introduced in the Constituent Assembly. In the Draft Constitution university representation had been relegated to the Senate. Its transposition to the Dáil was urged in the Constituent Assembly by the spokesmen of the two Universities, and carried against the votes of the Labour Party, the Provisional Government—being itself divided on the issue—refraining from giving any lead to the Assembly.

The allocation of special representation in the Legislature to the Universities represents a characteristic legacy of the British parliamentary system. The institution is intelligible only in the light of the corporate conception of university

[1] The latter provision was deleted by the Constitution (Amendment No. 3) Act (No. 4 of 1927).

[2] Under Art. 81 of the Constitution the third Dáil, which was elected in June, 1922, and formed the Constituent Assembly, was continued as the first Dáil of the Free State Parliament for a period of one year. Professor Swift MacNeill has drawn attention to the constitutional parallel of the transformation of the unicameral English and Scotch Conventions of 1688 and 1689 into the Lower Houses of the subsequent Parliaments. (J. G. Swift MacNeill: *Studies in the*

organisation which the British universities alone have retained from mediaeval days. James I, in 1603, granted two seats each to Oxford and Cambridge. He conferred the same privilege ten years later on Dublin University, which retained it until the Union, when its representation in the United Parliament was reduced to one seat; the Reform Act of 1832 re-established it as a two-member constituency. In the Home Rule Act of 1914 two seats were assigned to Dublin University, while the Government of Ireland Act of 1920 allocated four seats each to Dublin University and to the National University of Ireland. In the Draft Constitution on which agreement had been reached with the British Government, each of the Universities in the Free State was granted two seats in the Senate. The concession was one of those agreed clauses by which it was sought to reconcile the "Southern Unionists," closely attached to Trinity College by political, religious and social traditions. The inclusion of university representation in the Senate would indeed have been more in accord with the democratic spirit of the Constitution, but political and sentimental considerations combined to bring about its transference to the Dáil. The need of expert advice in the First Chamber, the improbability in the existing order of political organisation of the election of members of the professorial type, ancient Gaelic regard for the representatives of learning and a similarly inspired attachment to the concept of vocational representation, were urged in favour of what in reality was but the uncritical adoption of a peculiarly impressive archaism of the British Constitution. The political plea was added that the additional mode of minority representation secured by the inclusion would smooth the entry of Northern Ireland into the Free State, while the exclusion of university representation from the Dáil would tend to fan anew the flame of discord. In vain was it urged by Labour members that party had been as active an agency in the selection of university representatives as in other constituencies, that if any special privilege was to be conferred on education there was no reason

why it should be accorded to the representatives of university education alone; finally, that the assumption that the inclusion of university representation in the Dáil might be a factor in inducing Northern Ireland to join the Free State was devoid of any foundation. In vain was it pointed out by the Minister in charge of the Bill that ample scope for the expert revision of legislative measures, such as it was hoped to obtain from university representatives, was provided in the Senate. The advocates of university representation in the Dáil carried their motion, the number of representatives allocated to each of the existing two Universities being even increased to three. The undemocratic nature of the provision may be mitigated by the fact, which was emphasised in the Constituent Assembly, that the general prohibition of plural voting divests the university franchise of the character of an additional vote, which it has in Great Britain. Irish University electors are merely offered the option of recording their vote in the "vocational" constituency of their University. None the less, in granting to the university as such a special representation in the creative chamber of Parliament, the Constitution invested it and its representatives with a political privilege for which there is no justification in the conditions of the modern State. The graduates of a modern university, living under widely diverse economic and social conditions, occupied in multifarious vocations frequently quite unrelated to their academic past, do not represent any common outlook which on account of its distinctiveness or distinction is entitled to a special hearing in the counsels of a nation. Proximity of dwelling may be a tie of much greater civic reality than the romantic bond of a common university allegiance. Nor can it be maintained that it is only through special university representation that a Parliament can obtain the expert help of academic advisers. Quite apart from the fact that it is capacity for affairs rather than technical knowledge which qualifies a man for legislative office, experience has shown that it is not necessarily the most austere nor the most learned luminaries

of universities who are generally entrusted with their representation in parliament. The choice invariably falls on the professor-politician, who, if he is not officially attached to any political party, differs in no way in his political complexion from any other independent member of parliament. On the other hand, the experience of all parliaments has shown that this type of learned politician has little difficulty in finding his way into parliament through the medium of existing parties. The percentage of professorial members of parliament is high in all parliaments of Europe. In few it is lower than in the British Parliament, which has university representation. The invidious effect of the system is merely to invest the spokesmen of these unreal constituencies with the appearance of a special authority derived from the superior dignity of the intellectual order which they are said to "represent," and to induce the notion that the exercise of their legislative functions is inspired by considerations of a more objective nature than those which guide the representatives of more terrestrial constituencies. It is true that in the actual practice of the Free State the institution has ensured a definite representation in the Dáil to the Unionist minority, but it is difficult to see why—especially under P.R.—minority representation should require to be ensured by such an anachronism.

(2) SEANAD EIREANN (ARTS. 30–34 AND 82)

The mode of election and composition of the Second Chamber represents one of the most original features of the Irish Constitution. It had its roots in the complex political conditions under which the Constitution was framed. Definite assurances had been given by the Chairman of the Irish Peace Delegation to the Southern Unionists and to the British Government that in the Free State Constitution provision would be made for the establishment of a Second Chamber in which that section would be assured of special representation. A system had to be devised whereby this special object might be brought into conformity with the general democratic trend of the

Constitution. The available models suggested two methods for the constitution of the Second Chamber: nomination or election. Nomination, though it might have offered an easy mode of fulfilling the promises given to the Unionist minority, was clearly contrary to the democratic radicalism of the Constitution. A nominated Senate would be either the servant of the Executive, if accident had enabled it to fill a majority of vacancies, or its obstructionist opponent, if in league with the Opposition. Election, on the other hand, might be either by direct vote of the electorate, in which case the Second Chamber would be as much a reflex of popular feeling as the first—though of a different and possibly contrary phase—or through the intermediary of regional agencies, as in America, France and Germany, a method devoid of any constitutional significance in a small and homogeneous country such as the Irish Free State. Neither method seemed to fulfil the essential requirement of investing the Second Chamber—if it was to have any functional scope at all—with both popular authority and senatorial status. A solution was found in a combination of both principles: the election of the Second Chamber was vested in the electorate, but their choice was limited to a panel nominated by the two Houses of the existing Parliament. The *rationale* of that limitation is indicated in the provision that candidates shall be proposed either on the ground of their having rendered useful public service, or because they represent important aspects of national life, an injunction reinforced by the requirement of a statement of the qualifications of each candidate who is proposed for inclusion in the panel. Its inspiration is revealed in a further proviso that in devising the method of proposal and selection for nomination special consideration should be given to the necessity "for the representation of important interests and institutions in the country," which clearly refers to interests and institutions not represented in the Dáil. It was the same conception of the inadequacy of territorial representation that inspired the subsequent introduction of non-parliamentary Ministers and Vocational Councils, which led the framers of the Irish Con-

stitution to adopt a method of composition of the Second Chamber which was pre-eminently designed to render it the representative of those functions and interests which were held to be incapable of expression through the medium of popular elections. The term of office of Senators was fixed at twelve years. Their number was limited to sixty, of whom one-quarter were to vacate office every three years in rotation. The vacancies were to be filled by a general election under Proportional Representation—for which the whole of the Free State was to form a single constituency—from a panel composed of the names of Senators submitting themselves for re-election and a list comprising three times as many candidates as there were vacancies to be filled. Two-thirds of these candidates were to be nominated by the Dáil and one-third by the Senate, both Houses voting by Proportional Representation. Under a system so devised, bye-elections would be impossible; hence it was provided that any vacancy arising during the interval between elections be filled by co-option until the next election of Senators, when it would be added to the vacancies normally occurring. Special provisions for the constitution of the first Senate were embodied in Art. 82 of the Constitution. One-half of its members were to be nominated by the President with special regard to the provision of representation for groups not adequately represented in the first Dáil, the other half to be elected by the latter on principles of Proportional Representation. In accordance with the understanding reached with the Unionist section, the nominations were made after consulting with the Chambers of Commerce, the Royal Colleges of Physicians and of Surgeons, the Benchers of King's Inns, the Incorporated Law Society and the Corporations of Dublin and Cork.

The rules governing the composition and election of the Senate have been the subject of more amendment than any other provisions of the Constitution. The first Constitution Amendment Act (No. 30 of 1925) was merely of a supplementary character. It provided that the terms of office of the

first Senators be calculated as from the date of the enactment of the Constitution, and those of Senators subsequently elected as from the appropriate triennial anniversary of that day. It further enacted that the election of new Senators be held within three months before or after the conclusion of the triennial term. It finally provided that the terms of office of Senators co-opted to fill vacancies arising between elections be calculated not in accordance with the order of the vacancies that had occurred, but according to the respective length of the unexpired terms of office of their predecessors. Consequential provisions for modifying the electoral procedure and fixing the order of election were embodied in the Electoral (Seanad Elections) Act (No. 34 of 1925), which was simultaneously passed. The first election to the Senate was held in 1925. Its progress and result were considered to have proved the impracticability of the electoral system introduced by the Constitution. Only one-quarter of the electorate had participated in the voting, a fact attributed in part to the technical complication of the transferable vote system when applied to a lengthy list of preferences, in part to the treatment of the whole country as a single constituency, which precluded any personal contact between candidates and voters. A joint Committee of both Houses was set up, which recommended the abolition of the system. Its proposals resulted in a comprehensive amendment of Articles 31, 32 and 33 of the Constitution, joint election by both Houses on Proportional Representation principles from a panel nominated by them being substituted for the elaborate scheme embodied in the Constitution.[1] The effect of the amendment was to divest the Senate of the element of popular authority which it might have claimed under the previous system. The motive of the amendment may in part be found

[1] Constitution (Amendment No. 6) Act (No. 13 of 1928), Constitution (Amendment No. 7) Act (No. 30 of 1928), Constitution (Amendment No. 8) Act (No. 27 of 1928), Constitution (Amendment No. 9) Act (No. 28 of 1928), Seanad Electoral Act (No. 29 of 1928), Constitution (Amendment No. 11) Act (No. 31 of 1928).

in the simultaneous abolition of the right of the Senate to invoke a Referendum: the excision of its power to appeal to the electorate rendered it less urgent that its authority be derived from a direct vote of the latter.

The single instance in which the elaborate scheme embodied in the Constitution was applied offers insufficient material for an appreciation of its merits. Its ineffectiveness on that occasion would indeed appear to be traceable less to its cumbrous technique than to the assumption underlying it of the practicability of an electoral system without the formative mechanism of Party. Election on grounds of personal merit is not practical politics in the diversified conditions of a modern democracy. A system such as that envisaged by the framers of the Irish Constitution will either not elicit any real electoral response or it will result in the election of persons who, without being possessed of the ideal qualifications enjoined by the Constitution, possess other agencies of electoral support in the country It is not difficult to constitute a Second Chamber of distinguished worthies by a process of nomination, but once the dynamical factor of public election has been introduced, it is clearly not by non-political merits, but by intense political competition that the issue will be decided.

If the scheme of election embodied in the Constitution ignored the dynamics of a popular election, the fault of the new system would seem to lie in a defective application of the electoral principle. Election of the Second by the First Chamber may, as the Norwegian example shows, produce an authoritative and effective senatorial house, identically inspired though functionally limited. The growth of that organic relationship is, however, precluded under the amended Irish system by the retention of the scheme of rotation under which only one-quarter of the Senate is triennially elected. Its effect must be to render the Senate in ever-growing measure a composite reflex of succeeding Dáils, in its totality representative of none, and to divest it of that identity of direction with the co-existing Dáil which alone can justify such a mode

of election. It gives to the Senate—despite its election by the Dáil—the character of a separate and independent entity and involves a relationship between the two Houses which, unless the elected Senate maintains the same reserve as its nominated predecessor, is almost inevitably bound to give rise to tension and conflict.[1]

[1] In the course of the debates in the Constituent Assembly the Labour Party introduced a proposal for the constitution of the Senate on vocational lines. It was suggested that the Senate be composed of one hundred and fifty members, representative of the principal economic functions, and be elected directly by the citizens, each elector to choose the vocational group in which he would desire to be registered. The proposal was withdrawn in deference to the plea of the Provisional Government that the scheme required more detailed consideration and might be brought up at a later stage by way of constitutional amendment. Experience elsewhere has shown that, apart from the inherent difficulty of devising an equitable mode of composition on vocational lines, a Chamber so constituted is not capable, as a composite representative of "Production," of contributing any distinctive measure of co-operation in the sphere of legislation, invaluable as may be the technical advice tendered on any specific measure by the section concerned. There is no special viewpoint common to all branches of production as such which could give any reality to their joint representation as a revising agency of legislation. (Cf. *Dáil Debates*, Vol. 1, col. 1141.)

CHAPTER IV

THE FUNCTIONAL RELATIONSHIP OF THE TWO HOUSES

(ARTS. 35–40)

THE provisions of the Constitution governing the functional relationship of the two Chambers were conceived on advanced democratic lines: the centre of gravity was fixed in the First Chamber, the Senate being invested merely with a limited power of amendment and delay reinforced by the more powerful, but in practice rarely applicable weapon of a direct appeal to the electorate through the medium of the Referendum.

The definition of the respective competencies of the two Houses is governed by the traditional distinction of Money Bills and general legislative measures. The Constitution provides that in relation to Money Bills the Dáil shall have legislative authority exclusive of the Senate. That exclusiveness is in fact, however, by no means so absolute as that general declaration would seem to imply. While the British House of Lords is debarred from amending any measure certified as a Money Bill by the Speaker of the Commons, the Irish Constitution allowed the Senate within twenty-one days from the receipt of such a Bill to adopt recommendations on the subject of its provisions, which, if accepted by the Dáil, would become law. The difference in the powers of the Second Chamber in regard to other than Money Bills was merely one of form and degree. The Senate was empowered to amend any Bill passed by the Dáil, and the latter was to consider any such amendment, but the Bill was to become law not later than nine months from its first introduction in the Senate—or such longer period as might be agreed upon by the two Houses—in the form in which it had last been passed by the Dáil. The "exclusive" competence of the Dáil, if the term be

applicable at all, was hence not limited, as might be inferred from the general declaration of Art. 35, to Money Bills alone. In two respects, however, the distinction between the two categories of Bills was maintained with the force of principle: Money Bills were not allowed to be made the subject of a Referendum or of a joint sitting of the two Houses, such as might be convened on a resolution of the Senate in regard to a contentious issue of any other Bill—a revival of a long obsolete practice of the British and the former Irish Parliaments. The term "Money Bill" was defined on the lines of the British Parliament Act of 1911 as comprehending all legislation affecting the substance and the form of the financial administration of the State, financial transactions of local authorities or bodies for local purposes being similarly excluded. The power to certify a Money Bill as such was, as in the British Parliament, vested in the Chairman of the First Chamber. While, however, the decision of the Speaker of the House of Commons is conclusive, it being left to his free discretion to consult, if practicable, two members from the Chairman's panel, the Irish Constitution allowed an appeal by two-fifths of the members of either House from the decision of the Chairman of the Dáil to a Committee of Privileges consisting of three members of each House under the Chairmanship of the senior judge of the Supreme Court, who was invested with a casting vote.

The grant to the Senate of a limited measure of amendment and of a right of appeal in regard to the certification of Money Bills was defended in the Constituent Assembly on the ground that it was desirable to afford competent members of the Second Chamber an opportunity for expressing their views and recommending improvements of financial measures. The power of delay conferred by these provisions was so limited, and the structure of the Senate of such complexion, as to preclude any apprehension of senatorial obstruction such as had inspired the framing of the British Parliament Act of 1911. If, indeed, the case for a purely advisory Second Chamber is conceded,

there would seem no reason why the sphere of financial legislation should be excluded from the purview of its deliberations. The framers of the Irish Constitution, having *ab initio* excluded any element of ambiguity in the relationship of the two Chambers, could approach the problem from a more objective angle than was possible to the British parliamentary reformers in their struggle with an hereditary chamber of great material power and influence and of wide and undefined rights and privileges.

The status of the Senate as shaped by these provisions was that of an advisory chamber invested with powers of recommendation and delay, very limited in the sphere of finance, more extensive in that of general legislation, and reinforced by the indirect weapon of the appeal to the electorate. In the latter respect the Senate was invested with a twofold power. It might, by the vote of a majority of its members, effect the temporary suspension of a measure passed by the Dáil with a view to its submission to a Referendum, and it might, consequent upon the suspension, itself invoke the Referendum by a resolution supported by three-fifths of its members. The provision was designed as a check on the tendency—assumed to be inherent in an elected chamber—to overstep its mandate from the electorate, an apprehension characteristic of the modern distrust of legislative assemblies. Yet it would seem that the remedy against parliamentary self-sufficiency can hardly be found in a device which places the control of the popularly elected Chamber into the hands of its non-representative partner. The only effective guarantee of the loyalty of a legislature to its mandate lies in the account it will ultimately have to render, for action as for omission, at the ensuing election. It is a guarantee the more effective as the verdict will be given not on any isolated issue, but on the entire record of a legislative period. A legislator may clearly not act in direct contravention of a specific pledge given to his electors on any particular issue, but Parliament would be deprived of all initiative and of all creative scope if it were to be denied the

right to embark on new legislative experiments—possibly beyond the expressed or even the implied mandate of the electorate—to present new issues of controversy and growth and thereby to elicit a progressive intensification of political life. Such, however, must be the effect of its subjection to the anarchical interference of the Referendum at the instance of a non-representative Chamber. In the German Constitution, from which the device of what German political theorists have designated as the "devolutive veto" was adopted, the power of appeal to the electorate in case of a disagreement between the two Chambers is vested in the permanent Head of State, who might be competent to judge objectively whether the issue was such as to elicit a rational response from the electorate. The transfer in the Irish Constitution of that power to a Second Chamber, which, while deriving from the same electorate as the First, was yet relegated to a status of functional inferiority—hence especially prone to the temptation of its use—increased its authority in a manner at once invidious because unrelated to its general constitutional status and obnoxious because detrimental to the continuity of representative government. Such an appeal to the electorate, even if unsuccessful, would not affect the constitutional status of the Senate, while, on the other hand, the mere existence of the weapon constituted a subtle challenge to the authority of the First Chamber. The attempt was in fact never made, but it does not follow that in any serious conflict a Senate not nominated as was the first, but popularly elected and conscious of its representative character, might not have felt tempted to test the weapon, however unwieldy and costly its use.

In the course of events the contingency of such a conflict was precluded long before it could materialise. Simultaneously with the system of the popular election of Senators the "devolutive" veto of the Senate was swept away. The cause of the reform was not connected with the Senate. It was consequential upon the abolition of the Referendum, which in its turn was inspired by the apprehension that the latter might be

used for the repeal of the Treaty clauses of the Constitution. The abolition of the Referendum and the consequent withdrawal of the power of the Senate to appeal to the electorate resulted in a comprehensive constitutional amendment.[1] To compensate the Senate, as was explained in the Dáil,[2] for the loss of its power to invoke the Referendum in case of disagreement with the Dáil, an increase of its power of delay and initiative was conceded. The period for which the Senate might delay the enactment of a Bill passed by the Dáil was extended from nine months to eighteen months. In case of an intervening dissolution, however, the period of delay was to end on the date of the assembly of the new House, the motive underlying the distinction clearly being that the vote of the electorate must be presumed to have decided the contentious issue. In the sphere of financial legislation the period during which the Senate might adopt recommendations remained limited to three weeks, but a minor concession was involved in the extension of the time-limit, within which an appeal might be lodged against the decision of the Chairman of the Dáil certifying a measure as a Money Bill, to seven days and by the grant of this power of appeal to a majority of Senators at a sitting attended by not less than thirty members. The form of a joint meeting of both Houses for the discussion of a contentious issue was simultaneously abolished, while, on the other hand, the right of the Senate to reintroduce a Bill rejected by the Dáil was admitted by the excision of the prohibitive clause of the Constitution. The status of the Senate was further raised by the provision that one Senator might be appointed to the Executive Council; he might not, however, hold office as President, Vice-President or Minister for Finance.

[1] Constitution (Amendment No. 12) Act (No. 5 of 1930), Constitution (Amendment No. 13) Act (No. 14 of 1928), Constitution (Amendment No. 14) Act (No. 8 of 1929), Constitution (Amendment No. 15) Act (No. 9 of 1929).

[2] *Dáil Debates*, Vol. 24, col. 968.

The virtual effect of these amendments was to invest the Senate with a real power of delay instead of the indirect weapon of the appeal to the electorate, which could clearly have been invoked only on major issues. Coupled with the reform of the electoral system, which transformed the Senate into an assembly of active politicians, the extension of its powers involved a fundamental change in the constitutional relationship of the two Chambers.

CHAPTER V

THE ASSENT OF THE CROWN

(ART 41)

(*a*) DISALLOWANCE

OF the three restrictive powers reserved to the Crown in the Dominion Constitutions—dissent, reservation and disallowance—the last-named was omitted altogether from the Free State Constitution. Professor Keith has expressed doubt as to the legal validity of the omission on the ground that it constituted a departure from Canadian precedent, which, under Art. 2 of the Treaty, is binding on the Free State.[1] So rigid an interpretation of the Treaty, however, would, as previously suggested, invalidate every provision of the Irish Constitution which avowedly departed from the Canadian model, including the very Repugnancy Clause of the Constituent Act which, in requiring the Irish Parliament to rectify any deviation of the Constitution from the Treaty, ascribed to it a power of amendment not possessed by the Canadian Parliament. In practice, even if the power of disallowance had been formally embodied in the Irish Constitution, subject, in accordance with the terms of the Treaty, to the constitutional usage of Canada, it would not have invested the Crown or the British Government with any such power of retroactive interference. The power of disallowance has not been exercised in Canada for more than half a century. In the Report of the Inter-Imperial Conference on Dominion Legislation of January, 1930,[2] the present constitutional position is defined to the effect "that the power of disallowance can no longer be exercised in relation to Dominion legislation." Yet it is intelligible that the framers of the Irish Constitution should have resisted the insertion

[1] *The Sovereignty of the British Dominions*, 1929, p. 213.

[2] Cmd. 3479.

even in form of that most anarchical form of external interference.

(*b*) REFUSAL OF ASSENT AND RESERVATION

As distinct from the power of disallowance those of refusal and reservation of assent were formally preserved in the Constitution, subject, however, to the vital qualification that in their exercise the Representative of the Crown be bound to act in accordance with "the law, practice and constitutional usage" governing their use in Canada. Of the two powers that of the Governor-General to withhold assent and thereby to invalidate an Act of Parliament is at present entirely obsolete, so obsolete, indeed, that in the Report of the Committee on Inter-Imperial Relations of 1926 and of the subsequent Conference on Dominion Legislation it is not even mentioned. Prof. Keith, instancing precedents of the past, has, indeed, asserted that in certain emergencies that dormant power might still be exercised.[1] Assent, he suggests, might be refused to a Bill which by some accident had passed through Parliament in an unsatisfactory form. Furthermore, the power of dissent might be exercised on the advice of the Government of the day in regard to a private Bill, not a Government measure, or in reference to a Bill introduced by a previous Ministry, if the Government in power was opposed to certain clauses, even though it had taken up the Bill as a whole. Yet it would hardly seem open to doubt that in none of these hypothetical instances would the remedy—even before 1930—have been sought in the revival of the obsolete power of dissent. The appropriate method, as indicated in the Canadian Senate,[2] for preventing the coming into force of a Bill defectively framed would be its immediate repeal by an Act to which assent would be given simultaneously with the faulty measure. As regards the enactment of private Bills, it would clearly be a

[1] *Responsible Government in the Dominions*, 1928, p. 749.
[2] Keith, *loc. cit.*, p. 750.

matter for the Government of the day to prevent the passage or to secure the amendment of any Bill to which it objected. If it failed, it could not but resign; if it omitted to press its objections, it would certainly not be entitled to remedy its default by resort to the Royal Veto. Nor could that dormant power be invoked by the Executive in power to deny the force of law to a Bill introduced by its predecessor, to which it was in part opposed, after it had allowed its passage through the Legislature. None of these hypothetical instances would seem to justify the assertion even in theory of the retention by the Representative of the Crown of a discretionary power of dissent.

It is in the power of reservation that the ancient Royal Veto has retained a last semblance of reality. The Irish regulations are shaped on the archaic model of the Dominion Constitutions, but there are characteristic deviations of detail. There is no reference to any Royal Instructions governing the exercise of the power, such as embodied in the Canadian Constitution, nor to any specific class of Bills requiring reservation as in that of South Africa. No scope is allowed to the Governor-General for recommending amendments, as in the Constitutions of Australia and of South Africa. The period during which the Royal Assent to a reserved Bill must be given is reduced from two years, the term fixed in the Canadian and Australian Constitutions, to one year, as in that of South Africa. But the old Canadian formula is maintained in its full rigidity in the requirement that assent be given by the King in Council, which is, of course, but a technical paraphrase for the British Cabinet. This detail alone would suffice to illustrate the unreality of the elaborate regulations mechanically transposed from the constitutions of the Dominions. Their meaninglessness in the Irish Constitution was, however, formally enunciated by the provision that in the exercise of the power of reservation the Representative of the Crown was to be governed by the law, practice and constitutional usage of Canada. That compound formula was nothing short of a declaration

of nullity. The power of reservation has not been applied in regard to Canadian legislation since 1886. The earlier practice of specifying classes of Bills requiring reservation in the Royal Instructions to the Governor-General had been discontinued nearly a decade earlier. It was clearly on account of this non-usage that the precedent of Canada was chosen in preference to that of Australia, where the power of reservation had still been exercised at a fairly recent date, and to that of South Africa, where the Constitution specifically provided for the reservation of Bills dealing with certain subjects. In so far as Canadian enactments were of wider than domestic import, the modern practice was to insert a suspensive clause making them inoperative until brought into effect by a special proclamation, a method which provided scope for further consultation before their actual enforcement. It is clear that membership of an Association of States imposes certain limitations on the legislative and executive acts of each associate, but if the reality of its internal autonomy is to be maintained it is by self-imposition, not by external veto that the enforcement of that limitation must be effected. The application to the Irish Free State of the "law, practice and constitutional usage" governing the exercise of the power of reservation in Canada was hence tantamount to the exclusion of the power in relation to the Free State, despite the very elaborate phraseology by which it was nominally maintained in the Constitution. The essential object of that application —the conversion of Canadian *practice* into Irish *law*—would be misconceived if its effect were construed as having subjected the Free State in the ultimate legal resort to the restrictive forms of the written Canadian Constitution of 1867. On no point were the negotiators of the Treaty more clearly agreed: it formed, as previously shown, the keystone of the entire Settlement. The very phrasing of the Repugnancy Clause of the Constituent Act, as reaffirmed in the preamble of the British Act, proves beyond doubt that no residuary power of veto was held to be vested in the Irish Governor-General.

The Clause imposed on the Irish Legislature a specific obligation to remedy by legislative enactment any repugnancy that might be discovered to exist between the Treaty and any enactment of the Irish Parliament. If the veto had been regarded as applicable to Irish legislation, it would clearly not have been necessary to insert a provision of such unusual character. It would then have been the patent duty of the Governor-General to reserve any legislation suspected of such repugnancy.

In view of the criticism to which the framework of the Treaty and the Constitution had been subjected in Ireland and the legalistic interpretation which had been placed on them in England, the Irish representatives at the Imperial Conference of 1926 felt impelled to obtain an authoritative declaration of the freedom of Irish legislation from any trace of external interference or control, and to that end pressed for an authentic definition of the actual constitutional practice in Canada. The reply was designed to remove the last vestige of uncertainty. The Report of the Committee on Inter-Imperial Relations placed on record that apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it was recognised that legislation could be reserved in any of the self-governing Dominions only on the advice of its Government, that the British Government had no power to advise the Crown to exercise the power in contravention of the views of the latter and that the appropriate procedure in regard to legislation affecting the interests of any other Member State of the Commonwealth was previous consultation, but not, as was the obvious implication, reservation on the advice of the British Government. The scope of the exception was clearly defined. It referred exclusively to those specific provisions embodied in existing constitutions and statutes which could not on formal grounds be abolished without more detailed inquiry, for which the appointment of a special Committee was simultaneously recommended. The declaration was hardly open to the interpretation which

was placed upon it by Professor Keith,[1] that the exception extended also to measures which, while not technically requiring to be reserved, affected important Imperial enactments. The subsequent statement, that the appropriate procedure in regard to legislation affecting the interests of other self-governing parts of the Commonwealth was previous consultation, indicates that the device of reservation was conclusively ruled out as a possible remedy. It would, under the terms of the Declaration of 1926, not have been constitutional for the British Government to advise reservation in regard to a measure imposing disabilities on the nationals of other Member States, as was done in regard to the Australian and New Zealand Bills of 1906 and 1910 respectively, any more, indeed, than in regard to a confiscatory measure, such as the Queensland Act of 1920, in the case of which the British Government considered that the power could no longer be exercised although that Act infringed vital interests of other Member States of the Commonwealth.

The declarations of the Imperial Conference of 1926 vindicated the view consistently upheld by the Free State Government that the Treaty and the Constitution, by investing Canadian practice with the force of law in the Free State, had rendered any exercise of the power of reservation in regard to the latter not merely unconstitutional, but definitely illegal. Professor Keith, in pursuance of the argument quoted above, has contested the Irish interpretation of the declarations of 1926 on the threefold ground that "the practice and constitutional usage" applying to the Free State was that of 1922, not that of 1926; that "it was fairly certain that the Conference did not mean its pronouncements to be read in the sense claimed in the Free State" and that the Irish Government was aware of it; that if the Report had been taken in its literal sense the Irish Government, being radically opposed to the Privy Council Appeal, would have abolished the latter by constitutional amendment, making any attempt to test the

[1] A. B. Keith, *Sovereignty of the Dominions*, 1929, p. 216.

validity of such amendment by appeal to the Privy Council punishable by fine or imprisonment. "The fact that no such measure has ever been proposed is sufficient to show that the Irish Government is not prepared to put to an acid test the theory that the Imperial power of disallowance through reservation by the Governor-General and refusal of assent is absolutely dead."[1]

In reply to the first of these arguments it has to be pointed out that while the application of Canadian practice was, in fact, most clearly understood by the signatories of the Treaty to refer not merely to a certain phase, but to extend to any future advance of Canadian rights, the point can hardly be said to affect the issue, seeing that the Imperial Conference of 1926 did not profess to introduce any new principle, but merely to enunciate the established constitutional usage. That the resolutions of the Imperial Conference were understood by all concerned in the sense interpreted by the Irish Government is conclusively proved by the Report of the Conference on Dominion Legislation of 1930. Nor can the omission of the Free State to abolish the Privy Council Appeal by constitutional amendment be interpreted as an implied admission of the power of reservation. To have abolished the right of appeal by unilateral action after it had been embodied in the Constitution as an agreed interpretation of the Treaty and while it was still regarded as part of the recognised constitutional usage and practice of Canada which the Canadian Parliament was not entitled to abrogate, could not but have been regarded as an infringement of the Treaty, the revocation of which the British Government might have been entitled to claim under the Repugnancy Clause of s. 2.

The issue has been finally settled by the authoritative declaration of the Conference on the Operation of Dominion Legislation of 1930,[2] as approved by the subsequent Imperial Conference,[3] which established that the power of reservation

[1] Keith, *Sovereignty*, p. 218 *et seq.*

[2] Cmd. 3479.

[3] Cmd. 3717.

could be exercised by the Governor-General exclusively on the advice of the Government of the Dominion, ruled out any form of interference by the British Government and left it to the discretion of the Dominions to abolish the relevant provisions of their Constituent Acts by constitutional amendment.

In the Irish Constituent Assembly the Provisional Government, while insisting on the purely "nominal and theoretical" character of the royal veto in relation to "ordinary domestic legislation," admitted that the same could probably not be asserted in regard to an Act repealing the Treaty or repudiating the Crown.[1] It would seem, however, that the Resolutions of the Imperial Conference of 1926, as interpreted by the Conference on Dominion Legislation, implied the negation of even that assumption. If the Governor-General is prevented from exercising the power of reservation except on the advice of the Executive of the Dominion and the British Government is precluded from tendering any advice contrary to the views of the latter, it is difficult to see how the power of reservation could be exercised in regard to an Act which was passed, as it inevitably must be, with the support of that Executive. In none of the exhaustive statements of the last Imperial Conferences on the new constitutional position of the Dominions —adopted at a time when the issue of secession had already assumed concrete form in more than one of the latter—can any foundation be found for the assumption of any such residuary power of the Representative of the Crown. The issue differs only in degree from that which would be presented by any Bill explicitly or implicitly revoking a provision of the Treaty or any of the "agreed clauses" in which the elements of the Treaty are embodied. It would clearly not fall within the competence of a constitutional officer of the status of the Governor-General to adjudicate on his own authority upon the complex legal question of repugnancy. His position in relation to the administration of public affairs in the Dominion having been assimilated to that held by the King in Great Britain, he

[1] *Dáil Debates*, Vol. 1, col. 1169.

clearly has no other official adviser than the head of the Ministry. It is only the Courts which under Art. 65 of the Constitution are competent to pronounce on the validity of the impugned legislation. That the Royal Assent has to be given by the Representative of the Crown even to a Bill which appears to contravene a provision of the Treaty would indeed seem to be implicit in the phrasing of the Repugnancy Clause itself, which refers to a possible repugnancy of any law—i.e. of a measure passed and promulgated—to the Treaty, an assumption which can have any meaning only if the assent of the Governor-General is presumed to be mandatory even where such repugnancy exists. In constitutional reality, it would clearly be idle doctrinarism to maintain that when an Irish Parliament had enacted legislation expressly or implicitly opposed to the Treaty, repudiating the Crown or renouncing membership of the Commonwealth, its action could effectively be invalidated by a legalistic resort to a power which derived what force it had from the constitutional framework which it was thus sought to displace.

CHAPTER VI

PROMULGATION

(ART. 42)

THE Constitution provides that after any law has received the Royal Assent the Clerk of Dáil Eireann shall have two copies prepared, one in Irish and one in English, of which one shall be signed by the Representative of the Crown and be enrolled for record by an officer of the Supreme Court, and that in case of conflict between the two versions that signed by the Governor-General shall prevail. The provision would thus appear to imply a twofold interposition of the authority of the Governor-General, firstly in signifying the Royal Assent, and secondly in affixing his signature to the Bill. In practice the Bill, after having been passed by both Houses, is printed on vellum, certified as correct by the Clerk of Dáil Eireann and forwarded to the Secretary of the Executive Council for transmission to the Governor-General. Having been signed by the latter, it is sent back to the Secretary of the Executive Council, retransmitted to the Clerk of the Dáil and handed over by the latter to the Registrar of the Supreme Court for file deposit in his custody. In practice all legislation has so far been introduced and passed in English only, and consequently only the English version has been submitted to and signed by the Governor-General, the Irish version being subsequently prepared in the Clerk's Office and published simultaneously with the English original. It is clear from the phrasing of Art. 42, that the Bill becomes law only in the form, and this implies also in the language, in which it has been passed by Parliament, but not as subsequently translated. It would hence not be permissible, if the Bill had been passed in one language, for a copy containing a subsequent translation into the other language to be signed as a true record of the Bill as passed by the Oireachtas. The procedure embodied in Art. 42 would in

practice be applicable only if either the Bill had been introduced and formally passed in both languages or if, after having been passed in one, the translation into the other had received the formal assent of the two Houses.

It would implicitly follow that the Governor-General is invested with the right and duty, before signing the copy submitted to him, to satisfy himself that the formal requirements laid down by the Constitution in regard to the enactment of legislation have been duly complied with. Though, as shown above, not empowered to question the legal validity of any enactment having regard to the provisions of the Constitution or of the Treaty, he would clearly be entitled to refuse his signature if he detected any formal defect in the parliamentary procedure, such as, for instance, the non-observance of the time limits allowed to the Senate for the amendment of the Bill, or the omission of the Speaker's certification of a Money Bill.[1]

[1] The omission of the declaration of Art. 47 in the case of the First Public Safety Act, which resulted in its being declared invalid in the Courts, would seem to indicate that the contingency of such technical errors is not to be ruled out.

CHAPTER VII

THE MECHANISM OF PARLIAMENT

THE forms and modes of procedure of a parliamentary assembly represent more than a mere technique of organisation. They constitute an integral part of the functional organism of the Legislature, they shape the translation of the dynamics of political life into the statics of legal norm. A rule of procedure, such as the famous standing order that the introduction of financial legislation rests exclusively with the Executive, or that the latter has the monopoly of the allocation of parliamentary time, is as characteristic a feature of a parliamentary system as the constitutional provision that the Executive is subject to the control of the Legislature. The former may, indeed, be the more effective, for, having its origin in actual parliamentary life, it may possess a degree of specific reality denied to an abstract definition of function. Standing Orders may allow to a minority a measure of influence not warranted by the majoritarian principles of a constitution; they may equally reduce the Legislature to an impotent organ of registration of the decrees of an all-powerful Executive. They enshrine the armoury of parliamentary conflict: their skilful use has made and unmade Governments, has saved and defeated fundamental measures. In the framework of constitutional rules they represent a category of their own. They embody a system of restrictions which the Sovereign Parliament imposes upon itself. They clearly possess no higher legal status than its legislative acts; they can indeed be amended with much less formality than the latter. Yet such is the inherent authority of this body of formal regulations that any alteration beyond minor detail is regarded as almost akin to a constitutional amendment.

There is no sphere in which the influence of the British system on the Irish Constitution was more marked than in

that of parliamentary procedure. A new constitution may indulge in the introduction of new constitutional devices or of new forms of electoral expression. It will not as readily embark on novel experiments in the working of traditional forms, especially where function and practice are so closely interwoven as in the British system, by which alone Irish experience of parliamentary government had been shaped. The Irish Constitution and the Standing Orders adopted under its provisions did, indeed, eliminate certain archaic features of the British system, but that very simplification only reveals the essential acceptance of the British model. The characteristic feature of that system is the rigid concentration of the initiative and the control of parliamentary business in the hands of the Executive, which is practicable only when the latter is able to rely on a permanent and effective majority. It is the product of the two-party order, and it is significant that it was followed in the Free State, although the framers of the Irish Constitution clearly envisaged the growth, under Proportional Representation, of a parliamentary group system. In practice, owing to the alignment of parties on the Treaty issue, that system has not hitherto evolved, the Government having, during the first decade of the Free State, enjoyed in fact a position analogous to that of a majority Government in the British Parliament. It is clear, however, that with the gradual disappearance of that cleavage and the progressive emergence of a parliamentary group system on Continental lines the relationship between Executive and Legislature will undergo a consequent transformation, and that this will inevitably affect also the framework of parliamentary procedure.

(*a*) THE VENUE OF PARLIAMENT (ART. 13)

The Irish Parliament meets in Dublin, the capital of the Free State, but the Constitution empowers it to transfer its venue to such other places as in its discretion it may determine.

Ambulating parliaments existed in mediaeval Ireland as in England and on the Continent. The growth of the machinery of Parliament and its close association with the Administration have compelled fixity of venue, transfer being but an ultimate resort in time of national emergency. It is the latter contingency which is met by the permissive clause of Art. 14 of the Constitution, though an additional motive of that provision may be found in the desire of its framers to enable alternate sittings to be held in Dublin and Belfast should Northern Ireland agree to enter the Free State.

(*b*) THE OATH (ART. 17)

The Constitution prescribes that the oath embodied in the Treaty shall be taken and subscribed by every member of both Houses before taking his seat therein before the Representative of the Crown or some other person authorised by him. In actual practice the ceremony takes place in the office of the Clerk of each House, the latter being the person authorised by the Representative of the Crown. The practice represents a characteristic deviation from modern British usage. In the House of Commons the oath is taken by every member at a formal sitting of the House in the presence of the Speaker. In the Constituent Assembly an amendment was moved by one of the signatories of the Treaty, with the support of members of the Labour Party, for the deletion of the last clause of Art. 17, which makes it mandatory for every member of the Oireachtas to take the oath before taking his seat. The amendment, which was inspired by the desire to pave the way for the entry of the opponents of the Treaty into the Dáil, was based on the phrasing of Art. 4 of the Treaty as compared with that of the corresponding provisions of the Dominion Constitutions. The Article, it was urged, did not provide for an oath to be taken "by every Member of the Parliament" nor even "by the Members of the Parliament," but merely "by Members of the Parliament." This, it was argued, implied that the

taking of the oath was not designed to be compulsory on every member. The constitutions of the Dominions by contrast contained specific clauses, providing in indisputable terms that the oath had to be taken by every Member before taking his seat. The fact, moreover, that Art. 4 of the Treaty was not, like other Articles of the Treaty, qualified by any reference to Dominion practice, indicated that the constitutional usage of the Dominions was not intended to apply in this instance and that the taking of the oath was not designed to be mandatory, as in the latter.[1] The amendment was opposed by the Government on the ground that the circumstances surrounding the insertion of the oath in the Treaty left no doubt that it was intended to be taken by all members, "as a condition precedent to their taking their seats and acting and voting in the Parliament."[2] It was a contention untenable "in commonsense and public honesty" that the oath, which had been the subject of so much debate in the course of the negotiations, was merely an optional declaration which Members of Parliament were not obliged to take unless so inclined. Mr. Kevin O'Higgins, the spokesman of the Government, challenged the mover of the amendment as to whether at the time when the oath was discussed he had considered it as anything but an obligatory oath to be taken by every Member. The challenge was not answered, but Mr. Duggan, another of the signatories, stated emphatically that "when we were putting our names to that Treaty we agreed that that form of oath should be taken by every Member of the Parliament." The same view, he said, had been held by Mr. Griffith and Mr. Collins. If the oath had been conceived as merely optional, there was surely no reason why so much effort had been spent on finding an acceptable form, since all concerned knew that, unless it was mandatory, no Member of the Dáil would take it. In reply to the argument based upon the different phrasing of the Dominion constitutions, the Minister insisted on the inherent distinction between a Treaty and a constitution which precluded the

[1] *Dáil Debates*, Vol. 1, col. 1041 *et seq.* [2] *Ibid.*, col. 1040.

suggested comparison. The Treaty had merely prescribed the general obligation of Members to take the oath and the wording of the formula to be used, while the Constitution had to prescribe when and in what manner it was to be taken. The absence of a restrictive reference to Dominion usage, it was further urged, arose from the distinctive character of the oath prescribed in the Treaty, which differed materially from that taken by Members of the Dominion Parliaments.

It is indeed hardly possible to maintain that the oath was not mandatory under the terms of the Treaty. Apart from the strong circumstantial evidence adduced—and it is clearly inconceivable that the question of the form of the oath should have played so major a part in the negotiations as at times to threaten their complete breakdown if it had been regarded as merely optional—the phrasing of Art. 4, read, as it must be, in conjunction with the preceding Articles, leaves hardly any loop-hole for doubt. Art. 1 of the Treaty provided that the Free State should have the same constitutional status as the Dominions. Art. 2 supplemented that general definition by the provision that the relationship of the Free State to the British Crown and to the British Parliament and the Government should, subject to certain exceptions subsequently specified, be governed by Canadian law, practice and constitutional usage. Since an Oath of Allegiance to the King has to be taken in Canada, as in all the Dominions, by every Member of Parliament before taking his seat, it implicitly followed that the same obligation was imposed on Members of the Free State Parliament. To meet Irish objections to the form of oath taken by Members of the British and the Dominion Parliaments a novel formula was devised and embodied in Art. 4. The clear import of the Article was that the oath, which by virtue of the adoption of Dominion practice under Arts. 1 and 2 would have to be taken by Members of the Irish Parliament, should be taken in the form subsequently prescribed. This does not imply that the translation of the provision of the Treaty into a rule of parliamentary procedure need necessarily have been effected

in the body of the Constitution. A provision to that effect might equally have been embodied in the Standing Orders of both Houses; such, indeed, may have been the design of the framers of the first constitutional Drafts which were averred in the Constituent Assembly to have contained no provision corresponding to that of Art. 17 of the Constitution. Of the reality of the obligation, however, which was imposed by the terms of the Treaty on Members of the Free State Parliament to take the oath as a condition precedent to their taking their seats and voting, there can, it would seem, be scarcely any doubt.

No provision of the Constitution has more deeply influenced the course of the parliamentary history of the Free State than Art. 17. For nearly five years the opponents of the Treaty refused to take the oath and abstained from attendance in the Dáil. It was the enactment in August 1927, as a sequel to the assassination of Mr. Kevin O'Higgins, of the Electoral Amendment (No. 2) Act,[1] which required parliamentary candidates prior to their nomination to swear a declaration of their readiness to take the oath, if elected, and disqualified elected members who failed to do so within the specified period, which brought the issue to a head. The group of radical republicans which had adopted the old slogan of Sinn Fein as its party designation, maintained their policy of abstention, but the Fianna Fáil Party, which represented the bulk of the opponents of the Treaty, chose to subscribe to the oath rather than face permanent exclusion from the Legislature, maintaining that the prescribed declaration was not an oath, but 'an empty formula," that the signing of it implied no contractual obligation and that it had no "binding significance in conscience or in law." Their entry into the Dáil led to a revival of the controversy, the Labour Party and the National League, who were ready to form an Administration with the support of Fianna Fáil, having pledged themselves to negotiate with the British Government, with a view to securing an

[1] No. 33 of 1927.

agreed modification of the compulsory imposition of the oath. These plans were defeated by the victorious return of the Cosgrave Administration at the General Election of October 1927, but a successful attempt was made by their opponents in the ensuing months to organise a Petition under Art. 48 of the Constitution for the enactment of legislation setting up the machinery of the Initiative with a view to its utilisation for the amendment of Art. 17. This effort led in its turn to the abolition by constitutional amendment of both the Referendum and the Initiative.[1] The issue, however, remained the principal object of contention between the two parties, and the first legislative measure introduced by the Fianna Fáil Administration after its assumption of office in March 1932 was a Bill for the deletion of Art. 17.[2]

(*c*) THE CHAIR (ART. 21)

The first business of the Dáil after its formal opening by the Clerk of the House and the reading of the Proclamation convening the Oireachtas and of the Election Report is the election of the Chairman, An Ceann Comhairle. The election is moved by a leading member of the Government Party. In the first three Dáils after the enactment of the Constitution the British tradition of the unopposed re-election of the Chairman of the preceding House was followed. In the Parliament which met in October 1927, after the entry of the Fianna Fáil Party into the Dáil, the same practice was observed, the leader of the Fianna Fáil Opposition declaring that they would not oppose the re-election, though critical of the high salary attached to the office. In the seventh Dáil which met on March 9, 1932, however, the Fianna Fáil Party, which had become the strongest in the Dáil, moved the election of a new Speaker from its ranks. The motion was opposed by the President of the outgoing

[1] Cf. Part V, Chapter VIII *post.*

[2] Constitution (Removal of Oath) Bill, 1932; Cf. Conclusion, p. 371 *post.*

Administration and a division challenged, which resulted in the election of the candidate of the new majority. The innovation implied the abandonment of a characteristic tradition of the British system, indicative of the detachment of the office from party associations. The Standing Orders provide that the Speaker, unless removed by a special Resolution of the House, shall hold office for the duration of the Dáil by which he is elected, and until the election of a successor in the next House. The unwritten convention of modern British constitutional usage that the Speaker is not opposed at a General Election was invested in the Free State with the force of law by the Constitution (Amendment No. 2) Act (No. 6 of 1927), which provided that the Speaker, unless declining re-election, shall be deemed to be re-elected as a Member for the constituency which he previously represented.[1]

In general terms, the status and the functions of the Ceann Comhairle may be said to conform to those of the Speaker of the House of Commons, though free from the archaic formalism which attaches to the office of the latter. He assumes office immediately on his election; his nomination is not submitted for the approval of the Representative of the Crown. There is none of the conventional ritual of the British Parliament, no mace and no wig and gown. The range of his functions is slightly more comprehensive than that of the Speaker of the Commons. He issues the form of summons to ordinary sessions and may, at the request of the head of the Government, convene the Dáil at an earlier date than that fixed on the adjournment. Unlike the Speaker of the Commons, he presides also over Committees of the whole Dáil. The closure can only be applied when he is in the Chair; he is hence required to be present in the precincts of the House whenever it sits. There is

[1] The suggestion of Professor Keith that the measure was designed to save from opposition the member on whom was incumbent the unpopular duty of administering the oath is clearly without foundation, since the latter function is performed not by the Ceann Comhairle, but by the Clerk of the House. (A. B. Keith: *Responsible Government in the Dominions*, 1928, p. xxi.)

further a characteristic distinction of rank from his British counterpart: unlike the Speaker of the House of Commons, the Ceann Comhairle takes precedence over the Chairman of the Second Chamber. For the rest, his powers are as wide and as discretionary as those of the British Speaker. He has the same authority to prevent obstruction, irrelevance and repetition at question time and in debate, to refuse acceptance of dilatory motions, to maintain order, to suspend Deputies for disorderly conduct for the remainder of a sitting, and if regarding this as inadequate punishment, to "name" the offender with a view to his suspension by the Dáil for a longer period,[1] which, however, has so far never been done. He may, finally, in case of great disorder, adjourn the House or suspend a sitting for a period to be named by him. He has the same wide power as the Speaker of the Commons to refuse amendments of an irrelevant or obstructionist character, a power which in the reality of parliamentary business may be fraught with considerable import. He has, on the other hand, also the power to refuse a motion of closure if he feels that the effect of its application would be to infringe upon the rights of a minority or to force through the House a measure inadequately discussed.

The Chairman of the Dáil, like the Speaker of the House of Commons, never takes part in debate either in the House or in Committee. Normally he does not vote, but the Constitution has invested him with a casting vote, which he must exercise in the case of a tie. It has so far been cast on two occasions. In the first case, on May 30, 1923, a motion had been introduced calling upon the Government to compensate farmers for the loss of their crops occasioned by a plant disease. An equal number of votes was given for and against the proposal, and the Chairman gave his casting vote against the motion on the ground that a motion calling for the expenditure of public

[1] The period of suspension under the Standing Orders is one week for the first, a fortnight for the second and a month for the third or any subsequent offence.

funds for a particular purpose must command a majority of votes in the Dáil independent of the Chairman.[1] The second instance occurred on the memorable occasion of August 16, 1927, when the fate of the Government was in the balance, a motion of censure having been introduced by the joint Opposition parties and the voting having resulted in a tie. In casting his vote against the motion, the Chairman followed the British rule that the Speaker's vote should be so exercised as to preserve the *status quo* and leave the question open for reconsideration by the House,[2] adding that so far-reaching a proposal as a motion of censure on the Government must be affirmed by a majority of Deputies and should not be passed merely by the casting vote of the Presiding Officer of the House.[3]

The position of the Vice-Chairman, An Leas-Cheann Comhairle, differs in several respects from that of his British counterpart, the Chairman of Ways and Means. He is not, as the latter, nominated by the Government, but elected by the Dáil immediately after the appointment of the Speaker. He is in every respect a permanent deputy of the latter, presiding both over the House and over Committees of the whole House. He holds office, like the Speaker, for the whole term of the Dáil, unless removed by a Resolution of the House, differing in this respect from his British colleague, who holds a somewhat hybrid position in that he retires from his post when the Government which has nominated him leaves office. The Standing Orders of the Dáil, like those of the British House of Commons, finally provide for the nomination by the Speaker of a panel of members from whom he may, whenever necessary, appoint a temporary deputy to preside over the Dáil or over a Committee of the whole House.

The status of the Chairman of the Senate, An Cathaoir-

[1] *Dáil Debates*, Vol. 3, col. 1331.
[2] Cf. J. Redlich: *The Procedure of the House of Commons*, Vol. II, pp. 136 and 237.
[3] *Dáil Debates*, Vol. 20, col. 1750.

leach, is closely akin to that of the Speaker of the First Chamber. Like the latter, and in contradistinction to the English Lord Chancellor, his position is that of an independent Chairman of proceedings, appointed by the Senate after every triennial election of new Senators. A slight deviation of procedure from the Dáil, somewhat reminiscent of the position of the Lord Chancellor in the Lords, may, however, be found in the practice—established by the first occupant of the office—of the Chairman addressing the Senate, when not in the Chair, on controversial matters. For the rest, his powers, discretionary and disciplinary, do not differ materially from those of the Ceann Comhairle. A revision of the Standing Orders of the Senate in 1925 produced a formal enunciation of the unwritten rule of British parliamentary usage that the interpretation of the Standing Orders in regard to the maintenance of order rests exclusively with the Chair.[1]

(*d*) MESSAGES FROM THE CROWN

It is the common practice in the British and in the Dominion Parliaments and, indeed, in the legislative assemblies of most constitutional monarchies, for the Sovereign or his deputy to deliver a message at the opening session of Parliament, in which the principal measures and policies to be submitted by the Executive are enumerated and summarised. In the Free State addresses were delivered by the Governor-General in the first two Parliaments after the enactment of the Constitution, on December 12, 1922, and October 3, 1923. On both occasions the ceremony took place in the Dáil, to which the Senate had been invited, a characteristic departure from the custom of the British Parliament. No "Loyal Address" was moved in reply, a Resolution of Thanks merely being adopted on the subject matter of the Address. No speech has been delivered by or on behalf of the Governor-General since the opening of the second Parliament. The motive of the discon-

[1] Standing Order 36 of June 11, 1925.

tinuance of the practice may probably be found in the desire to divest the Crown of any reality in the Legislature. Its effect, however, has been to deprive the mechanism of Parliament of a useful device for giving a central direction to the legislative work of the session. In respect of financial legislation the Constitution imposed the requirement of its recommendation by a message from the Representative of the Crown, a function in the exercise of which he was expressly required to act on the advice of the Executive Council (Art. 37). It is a purely formal mode of introducing financial measures, designed to emphasise the exclusive initiative of the Executive in this sphere of legislation.

(*e*) THE RULES OF PROCEDURE (ARTS. 20, 22, 25 AND 37)

The rules of procedure of both Houses of the Free State Parliament are modelled very closely on those of the British House of Commons. The more archaic features of the latter have been eliminated, though the Standing Orders of the Senate, having been framed by men more in contact with the practice of the British Parliament, retain a greater measure of the formalism of the latter.[1]

The forms of parliamentary etiquette and rules of conduct are essentially those of Westminster, and equally dissimilar from those of Continental Chambers. Speeches still have to be addressed to the Chair, though nothing would probably be further from the minds of speakers in the Dáil than the notion, which underlay the origin of the practice in the English Parliament, of regarding the Speaker as the interpreter of the wishes of the House to the Crown. There is, as at Westminster, no list of speakers, but members who wish to address the House must catch the Chairman's eye. There is the same mode of division and the same ceremonial of reporting the

[1] The original Standing Orders of Dáil Eireann were adopted on September 11, 1922, those of Seanad Eireann on January 25, 1923. Both have been the subject of repeated amendment and revision.

result. There are the same categories of Bills, the same forms of committee organisation, the same distinctive formulae for introducing, amending and opposing legislative proposals. Yet in nearly every particular characteristic modifications of the antiquated forms of British procedure have been effected. In the conduct of the business of the House the Chairman has the assistance of a consultative "Committee on Procedure and Privileges," consisting of himself and eleven members, with wide powers to consider matters of procedure and questions of privilege and to recommend additions and amendments of the Standing Orders. Its scope is very extensive, ranging from the arrangement of small details of parliamentary business to the examination of a member's claim to sit in the House.

Sittings in both Houses are public, not as in the British Parliament by virtue of tolerant usage, but under the express terms of the Constitution (Art. 25). The public may be excluded, but this is not effected by the antiquated device of espial, but by a motion for which the support of two-thirds of those present is required, as distinct from the practice at Westminster, where a simple majority suffices.

The most fundamental rule of the British system of procedure, that the allocation of parliamentary time is the privilege of the Executive, has been adopted in its full import. Government business takes precedence over every other, only three-and-one-half hours a week being allotted by the Standing Orders to private members' Bills, unless, indeed, the Government moves to take all the time of the House.

The unwritten rule of the British Constitution that all questions are settled by a majority vote is formally embodied in Art. 22 of the Irish Constitution. Even the amendment of the Constitution, as long as it can be effected by way of ordinary legislation, is not subject, as in many Continental constitutions, to the requirement of a qualified majority. On the other hand, the exclusion of the public can be ordered only with the assent of two-thirds of the members present, while a unanimous vote

of the Dáil is required for the suspension of the Standing Orders without previous notice (Standing Order 17).

The procedure on Bills differs in one formal respect from the British practice. Consideration on Report and in Committee of the whole House count as special stages, so that a Bill passes altogether through five stages, the first and second stages corresponding to the first and second readings at Westminster, the third (Committee) stage to the British Committal, the fourth stage to the British consideration on report and the fifth to the British third reading. All Bills, excepting private members' Bills, are considered in a Committee of the whole House. The special rules governing the procedure of the House when in Committee are the same as at Westminster, the only difference being that the Speaker may preside also when the House is in Committee, and that no formal Resolution is required to transform the House into Committee, the change being effected automatically whenever the Committee stage of a Bill is reached. The Standing Orders of the Dáil provide for the appointment, on the lines of procedure at Westminster, of Select, Special and Joint Committees of both Houses and for the setting up at the commencement of each session of a Committee of Selection to nominate the members of the latter bodies. Similarly, at the beginning of each Financial Year a "Committee of Public Accounts" is appointed. In the Constituent Assembly a proposal was introduced on the lines of recent Continental innovations for the appointment at the end of each session of a Joint "Committee of Public Safety" of both Houses, to deal with urgent matters arising during the recess or in the interval between a dissolution and the assembly of the new Parliament.[1] The motion, which was modelled closely on Art. 54 of the Czechoslovakian Constitution, was designed to entrust the Committee with wide powers of control over the Executive, including even a limited power of provisional legislation. In this form, as was inevitable, the proposal was opposed by the Provisional Government as

[1] *Dáil Debates*, Vol. 1, col. 1097.

incompatible with the conception of executive responsibility. Excess here proved detrimental to a useful innovation, for a purely consultative Committee like that of the German Reichstag, not invested with legislative or executive powers, might clearly have been of considerable utility during long periods of parliamentary recess.

British models were again followed in the forms and formulae of opposition. Objection to the introduction of a Government measure may be raised at the first reading; its second reading may be opposed by a motion that the Bill be read "This day six months"; finally, its progress in Committee might be hampered by motions "to report progress," though this has in fact never been done. The Government may be compelled, subject to the Chairman's discretion, to render account for any administrative act by a motion "for the adjournment of the Dáil on a definite matter of urgent public importance," if supported by twelve members. In practice, this has occurred only very rarely. On the other hand, a Minister's policy cannot be made the subject of attack by a motion to reduce his salary, as Art. 59 of the Constitution precludes the reduction of the remuneration of Ministers during their term of office. In its stead, Irish practice allows of the introduction of a motion to refer an estimate back for reconsideration, which affords scope for a debate on policy.

The Government controls the elaborate machinery of compulsion evolved in the British House of Commons when its time-honoured conventions were challenged by Irish obstruction. The Closure is moved in the simple form: "that the question be now put." In practice, the weapon is used only very rarely. Closure by compartment, known as the guillotine, can be and has been applied under the Standing Orders. On the other hand, the Chairman has not the discretionary power of the British Speaker to select amendments, known as the "Kangaroo."

The fundamental rule of the British Constitution that the introduction of financial proposals is the prerogative of the

Executive has been embodied in Art. 37 of the Irish Constitution, which provides that money shall not be appropriated by Parliament unless the purpose of the appropriation has been recommended in the same session by a message from the Representative of the Crown. The Article is framed closely on the model of the corresponding provisions of the Dominion constitutions, but characteristically qualified by the injunction that the Governor-General shall act on the advice of the Executive Council, which, of course, is the actual practice also in the Dominions, though never before so expressly stated. The rule is implemented by Standing Order 101 (1), which provides that no amendment to a financial motion proposing to increase the amount of any grant or charge may be moved by any Deputy not a member of the Executive Council. The provision represents a vital safeguard of representative government against corruption. It does not preclude the introduction by private members of legislative proposals involving expenditure of public funds, but the financial Resolution giving effect to the proposal must originate with the Executive Council.[1] A slight deviation from the technique of the House of Commons has been introduced in the procedure on financial legislation. The rigid division between the consideration of income and expenditure exemplified in the constitution of two separate Committees of the whole House—the Committee of Supply and the Committee of Ways and Means—which in theory maintain a pretence of mutual incognisance, has not been upheld, all financial business of the Dáil being considered in one Committee of the whole House, known as the Committee on Finance.

[1] On March 27, 1930, the Dáil passed the second reading of an Old Age Pensions Bill by a majority of two after the Government had indicated their opposition to the financial expenditure involved in the measure. The Executive Council refused to undertake the financial responsibility for the Bill and tendered their resignation. They were subsequently re-elected. (*Dáil Debates*, Vol. 34, cols. 241, 276 *et seq.*)

(*f*) PRIVILEGE (ARTS. 18, 19, 20 AND 23)

The wide sphere of parliamentary privilege, the repository in the British Parliament of latent powers of extensive scope, has been restricted by the Irish Constitution within the narrow limits of practical expediency. Of the two fundamental privileges of the individual member—liberty from arrest and freedom of speech—the former is guaranteed in the terms of the old formula, *eundo, morando et exinde redeundo.* This is in fact less than the immunity accorded under English law, which protects members, wherever present, from arrest during the session and for forty days before and after. On the other hand, parliamentary immunity is excluded only on grounds of treason, felony and breach of the peace, as was the old English and American rule, but not, as in modern British usage, in every case of an indictable offence.

Freedom of speech is guaranteed to members of both Houses in the famous terms of the Bill of Rights. All utterances made by members in either House, which must be presumed to include also any Committee of the House, are exempt from judicial proceedings in any court of law. They can merely be made the subject of disciplinary action by the House itself, which is limited by the Standing Orders to the suspension of a member for varying periods not exceeding one month at the utmost.

In extending the scope of parliamentary privilege to all reports and publications of Parliament and to all parliamentary utterances wherever published, the Irish Constitution has gone some way to clarify a subject of much controversy in the history of the British Parliament. It was not till the enactment of the Parliamentary Papers Act of 1840 that even publications issued by order of Parliament were accorded the protection of law, which the decisions of the Courts have since then extended to newspaper reports of parliamentary proceedings. Even a correct report, however, if published with malicious intent, might still expose the publisher to prosecution for libel, and in the words

of President Lowell, "it is never safe to go to a jury on a question of intent."[1] The Irish Constitution expressly protects every publication of parliamentary utterances. It is not quite clear, however, whether that general formula implicitly excludes judicial consideration of malicious intent. The Minister in charge of the Constitution Bill explained that the Article would not protect "garbled or malicious accounts" of parliamentary proceedings.[2] It is, however, an open question whether it would cover a correct reproduction of parliamentary utterances if inspired by malicious intent, which might be evident from the manner of selection. The interpretation of the corresponding provisions of Continental constitutions has been the subject of much judicial ingenuity. Continental jurisprudence, on the whole, favours a rather extensive interpretation of the scope of parliamentary privilege, even though it involve a curtailment of legal protection from libel. It is true, as Professor Redlich has emphasised, that such licence has frequently led to the exploitation of parliamentary immunity for slander against third parties. It would seem, on the other hand, to be of paramount public interest that serious charges of a public nature be ventilated in public through the reproduction of parliamentary debate, when any other form of their expression might be estopped by fear of civil or criminal proceedings for defamatory libel.

Both Houses of the Oireachtas have full power to regulate their procedure by making and amending their Rules and Standing Orders. In this sense the Irish Parliament, like the English, enjoys the privilege of "exclusive cognisance of matters arising within it." Despite some ambiguous phrases in the Constitution, the Irish Parliament, however, retains none of the semi-judicial attributes which are still regarded as vested in the British "High Court of Parliament" by virtue of privilege. It is true that the Constitution authorises both Houses, in making their Rules and Standing Orders, to attach penalties

[1] A. L. Lowell: *The Government of England*, Vol. I, p. 244.
[2] *Dáil Debates*, Vol. 1, col. 1079.

for their infringement and to protect their members agains interference, molestation or attempted corruption. It is, how ever, clear from the Standing Orders that the power to attac penalties must be interpreted as limited to the disciplinar measures of suspension authorised by the latter, and that n power of actual trial or of commitment, such as was sti exercised at Westminster in the case of Bradlaugh, is vested i the Irish Parliament. Nor can the injunction empowering th Legislature to protect its members against molestation o corruption be interpreted as investing it with judicial power over persons not members of the House. Parliament may b legislation specify the offence and enact penalties, as was don by the Prevention of Electoral Abuses Act (No. 28 of 1923) but proceedings can only be taken before the ordinary Court of Law, and there is no implied authority to call offenders t the Bar of the House. A nominal residuum of quasi-judicia power over members of Parliament might appear to have bee retained in the provision of Art. 18 that a member shall i respect of any utterance made in the House not be amenabl to any action or proceeding "in any Court other than th House itself." The clause was introduced in the Constituen Assembly, its purpose being defined by the Minister in charg of the Bill as the preservation of the right of Parliament a "the highest Court" to commit any member for what it con sidered gross contempt.[1] A subsequent explanation of th President, however, made it clear that the object was not t invest Parliament with any judicial powers, but merely t preserve its right to make Standing Orders to enable disciplinary action to be taken against any member responsible for disorder or contempt.[2] There is, moreover, it would seem, nothing in the Constitution or in the Standing Orders of either House to authorise Parliament to call a member to account for any utterance made by him outside the House in reference to proceedings or to other members of the House, such as is still regarded as the privilege of the House of Commons. Discip-

[1] *Dáil Debates*, Vol. 1, col. 1078. [2] *Ibid.*, col. 1078.

linary action against a member, it would appear, can only be taken for misbehaviour in Parliament; its scope is restricted under the Standing Orders to a limited period of suspension. The Irish Parliament has, under its Standing Orders, no authority to inflict any other form of penalty nor the power to expel a member, which is still the undoubted privilege of the House of Commons. It is inevitable that there should be a certain tendency to view the Oireachtas in the light of the conceptions inherited from the House of Commons; but it is evident from the context of the Constitution that the Irish Parliament is not the omnipotent assembly for which Dicey could claim that its powers "make a near approach to an authority above that of the ordinary law of the land."[1] Its scope is so rigidly fixed by the terms of a written Constitution, its functional relationship to the other organs of the State so clearly defined, that it is not permissible to invest it with those attributes of "sovereign" authority which have accrued to the House of Commons during its conflicts with the Crown. It is invested by the Constitution with comprehensive and adequate powers to regulate its business and to maintain its authority. It has none other.[2]

The Constitution authorises the payment of the members of both Houses and their provision with free travelling facilities. Under the terms of the Oireachtas (Payment of Members) Act (No. 18 of 1923), amplified by subsequent amendments,[3] members of either House are entitled to a monthly allowance of thirty pounds free of income tax. In addition, members of the Dáil enjoy free travelling facilities between Dublin and any part of their constituency, and Senators between Dublin and their place of residence.

[1] Dicey: *Law of the Constitution*, p. 56.

[2] It may be noted that the Dáil has declined to receive petitions; the ancient privilege of the City of Dublin to present petitions at the Bar of Parliament has thereby been abrogated. Cf. *Dáil Debates*, Vol. 5, cols. 998 and 1450 *et seq.*

[3] Oireachtas (Payment of Members) (Amendment) Act (No. 29 of 1925), and Oireachtas (Payment of Members) (Amendment) Act (No. 17 of 1928).

In regard to the resignation of members Irish practice has eschewed the antiquated and fictitious procedure of the House of Commons. As in the old Irish Parliament before 1704, members of either House are permitted to resign by giving notice in writing to the Chairman, the resignation taking effect upon its announcement by the latter to the House.[1] Similarly, the archaic rule of the British Constitution introduced by the Act of Settlement, which required members to resign their seats and seek re-election upon appointment to office, has been expressly excluded by the terms of Art. 58 of the Constitution.

(*g*) CONVOCATION, DURATION AND TERMINATION OF SESSIONS (ARTS. 24, 28 AND 53)

In accordance with British and Dominion precedent, the convocation and dissolution of Parliament is vested nominally in the Representative of the Crown. Its exercise, however, is expressly subjected to the will of Dáil Eireann, which is empowered by the Constitution to fix both the date of the reassembly of the Oireachtas and that of the conclusion of the session of each House, subject to the proviso that the sessions of the Senate shall not be concluded without its own consent. The provision invests the First Chamber with a greater measure of direct control over the exercise of these formal functions than that possessed by the British Parliament, where the decision lies essentially with the Cabinet. The power of dissolution is similarly vested in the Representative of the Crown, but it may be exercised only on the advice of the Executive Council, and the latter is precluded from tendering such advice when it has ceased to retain the support of a majority in the Dáil (Arts. 28 and 53). Under the latter provision a Government which has been defeated in the Dáil has no alternative but to resign and leave the task of forming a new Executive to its parliamentary opponents. The provision

[1] Section 53 of the Electoral Act (No. 12 of 1923), Standing Order 124 of Dáil Eireann Standing Order 103 of Seanad Eireann.

reveals a curious gap in the Constitution, for if the Opposition proves unable to form an Executive capable of commanding the support of the majority, a deadlock must arise, for which no solution is provided. It would seem that the only way out of such an *impasse* would be for the dissentient parties in the Dáil to agree on the formation of a Government for the exclusive purpose of advising the dissolution.[1]

A similar point of constitutional nicety has been raised in regard to the provision of Art. 24 that the Dáil shall fix the date of the conclusion of the session of each House. This has been construed as implying that the Dáil, while in session, could not be dissolved without its explicit assent, a construction to which the actual interpretation of the term "session" as co-terminous with the entire duration of a Parliament offers some support. Official countenance has been lent to the argument by the fact that at the first two dissolutions which took place on the expiration of the parliamentary term, those of August 8, 1923, and May 20, 1927, the dates of the conclusion of the session—i.e. of the dissolution—and of the reassembly were fixed by the Dáil on the basis of a Resolution introduced by the President. The Chairman, in closing the session, declared the Dáil "dissolved in accordance with the Resolution."[2] On the first occasion when a dissolution took place during the parliamentary vacation—in August 1927—the new Parliament was convened for the same day which its predecessor on adjourning had fixed for its reassembly. This precedent, however, was not followed in the dissolution of January 1932, which also took place during the parliamentary vacations, the

[1] This rather cumbrous solution presupposes a fundamental loyalty to the Constitution whose absence may be the very cause of the crisis which had produced the dilemma, the opponents of the existing order on opposite wings combining to discredit the system by exploiting the defects of its mechanism, as has happened repeatedly in Germany. The contingency, however remote, might be precluded by the addition of a proviso to Art. 53, authorising a defeated Ministry to advise a dissolution if no alternative Executive can be formed in the existing Dáil.

[2] *Dáil Debates*, Vol. 4, col. 2008.

new Parliament being convened for a month later than the date fixed by the preceding House for its reassembly. The explanation of the import of the Article given in the Constituent Assembly by the Minister in charge of the Constitution would indeed hardly seem to lend itself to such extensive interpretation. He stated that "Parliament itself fixes its date of reassembly and the Executive Council fixes the date of its dissolution."[1] This would seem to imply that Art. 24 is not to be understood as requiring the assent of the Dáil to its dissolution. On that reading the provision would appear to apply primarily to the conclusion of the annual session—such was the interpretation given to it by the Chairman of the Senate[2]—but it would not prejudice the power of the Executive to advise a dissolution. It would merely imply that if the Dáil were in session at the time of the dissolution it would be empowered to fix the date of the assembly of the new Parliament. The latter construction seems to have been placed on the Article in the case of the dissolution of August 1927—though a slight concession to the former interpretation was implied in the convention of the new Parliament on the date fixed for the reassembly of the old—and still more definitely in that of the dissolution of January 1932.

The provision that a Ministry which had lost the support of a majority in the Dáil was precluded from advising a dissolution represented a marked departure from the constitutional usage both in England and in the Dominions. While in England it is now firmly established that the Prime Minister, even if merely the head of a Minority Government, is entitled to claim a dissolution when defeated in Parliament, constitutional usage in the Dominions had allowed the Governor-General to decline such advice if he felt confident of being able to find advisers capable of forming an alternative Government commanding the support of a majority in the existing House. The

[1] *Dáil Debates*, Vol. 1, col. 1082.
[2] *Seanad Debates*, Vol. 1, col. 2214.

exclusion of the discretionary power of the Governor-General[1] involved in the Irish innovation was challenged by Professor Keith as being *ultra vires* in that it contravened Art. 2 of the Treaty, according to which the relationship of the Crown to the Free State was to be governed by the law, practice and constitutional usage of Canada, where the prerogative of dissolution was unquestionably still extant, as evidenced by Lord Byng's subsequent action in 1926.[2] The argument rests on a literal interpretation of Art. 2 of the Treaty, which, as shown in the analysis of the Repugnancy Clause, is incompatible with the terms of the Clause itself.[3] The resolutions of the Imperial Conferences of 1926 and 1930, which, in assimilating the position of the Governor-General to that of the King in Great Britain, implicitly deprived him of any discretionary power in regard to the exercise of the prerogative of dissolution, have divested the issue of any semblance of inter-Imperial import.

The unwritten rule of the British Constitution that Parliament must hold at least one session each year, which is secured by the requirement of the annual passing of the Army Act and of the appropriation votes, was formally embodied in the Irish Constitution. The normal length of Parliament was limited by the Constitution to four years. It was extended by the Constitution (Amendment No. 4) Act (No. 5 of 1927) to "six years or such shorter period as may be fixed by legislation." Under the latter proviso the term was reduced by the Electoral Amendment Act (No. 21 of 1927) to five years.

An interesting deviation from British practice was, finally, embodied in Rule 99 of the Standing Orders of the Dáil, which provided that the termination of a session was not to

[1] The functional significance of the innovation will be examined in connection with the general problem of the constitutional relationship of Executive and Legislature. (Cf. Part VI, Chapter III *post.*)

[2] *Journal of Comparative Legislation*, Vol. V, p. 121; *Responsible Government in the Dominions*, 1928, p. xxiii; *The Constitution, Administration and Laws of the Empire*, 1924, p. 202.

[3] Cf. Part III, Chapter III *supra.*

be destructive of Bills the consideration of which had not been completed on the termination of the session. The provision, which has been interpreted as extending also to the dissolution of Parliament, enables a lapsed Bill to be restored to the Order Paper of the new Chamber, where its reconsideration is commenced at the stage reached in the preceding Dáil, an innovation particularly favourable to private members' Bills, which are the principal victims of what parliamentary colloquialism has come to term "the Slaughter of the Innocents."

CHAPTER VIII

REFERENDUM AND INITIATIVE

(ARTS. 47 AND 48)

THE introduction of the machinery of direct legislation into the structure of the Irish Constitution reflects the democratic radicalism of its framers. The records of the Constituent Assembly, indeed, throw little light on the motives underlying the innovation. The desirability, especially under Irish conditions, of an active association of the people with the function of law-making was the only argument adduced in its support; yet its place in the general design of the Constitution leaves little doubt as to its inspiration and purpose. Its model is to be found less in the older American, Australian and Swiss precedents than in the post-War Constitutions of the new Continental Republics. In the latter democratic zeal, political doctrinarism and distrust of the mechanism of parties and Parliaments had combined to produce a highly involved design of direct legislation interwoven with the fabric of representative institutions. On that elaborate pattern the Irish system was framed. The introduction of the Referendum was designed on the one hand—as in the German Constitution—as a device for enabling a substantial minority in the First Chamber to appeal to the electorate against a Bill passed by the majority, and, on the other hand, as a solution of conflicts arising between the two Chambers. The scheme adopted provided, like its Continental prototypes, for a procedure in three stages: (1) A Bill passed by the Oireachtas was to be suspended for ninety days if a written demand to that effect was addressed within seven days of its passage to the head of the Government either by two-fifths of the members of the Dáil or by a majority of the Senate. A formal request presented to the President of the Executive Council by either

of the two mentioned groups was to render the suspension mandatory; no discretionary power of disallowance—such as the German Constitution confers upon the Imperial President in order to prevent an obstructionist suspension—was provided. (2) As a further preliminary to the holding of a Referendum on the disputed Bill a formal demand for the latter had to be submitted within the prescribed period of suspension either by a resolution supported by three-fifths of the Senators or by a petition signed by not less than one-twentieth of the registered voters. (3) In the Referendum thereupon to be held a majority of the votes recorded was to decide the issue. No requirement of the participation of a definite percentage of the electorate—the German Constitution requires that of a majority —was imposed.[1] In accordance with authoritative precedent, Money Bills were excluded from the scope both of the suspension and of the Referendum. A similar exemption might be effected in the case of any other Bill if a declaration was adopted by both Houses that such Bill was "necessary for the immediate preservation of the public peace, health or safety."[2] In the emergency legislation of the early years of the Free State frequent resort was made to the latter declaration. Its omission in one important instance—the passing of the first Public Safety Act—was promptly pleaded in the Courts and had to be rectified by special legislation qualified by the declaration of urgency.[3]

[1] The Electoral Act (No. 12 of 1923), s. 9, provided that the voting should be held on one day throughout the country, and authorised the Minister for Local Government within six weeks of the receipt of the formal request to fix the date of the voting by proclamation, the Referendum to be held within not less than seven nor more than twenty-one days of the issue of the latter. With the assent of both Houses of Parliament, the date of voting might be postponed for a period not exceeding nine months from the submission of the demand.

[2] The provision that the assent of *both* Houses was required was designed further to strengthen the position of the Senate as the guardian of minority protection. It was not to be overruled by the governmental majority in the Dáil.

[3] *The King (O'Brien)* v. *The Military Governor of the Internment Camp, North Dublin Union, and the Minister of Defence*, [1924] 1 I.R. 32.

These provisions, as comparison will show, are drawn up on the general lines of the German Constitution; they differ from them mainly in so far as the latter bestows a discretionary power of disallowance on a popularly-elected President, who, of course, has no counterpart in the Irish Constitution. But the mechanical application of the numerical tests of the German regulations to the small electorate of the Free State inevitably transformed their practical import. The requirement of a petition signed by one-twentieth of the registered voters in support of the taking of a Referendum assumed an entirely different significance when that condition might be fulfilled by the collection not of a million, but of approximately 100,000 signatures. Moreover, the Irish regulations were not qualified by the requirement, imposed under the German provisions, of the participation of a majority of the electorate. The cumulative effect of these provisions was to invest an active minority with a very real power to thwart the will of Parliament if the issue were not such as to arouse a very considerable section of the electorate from its inherent inertia.

The framers of the Constitution showed greater reluctance in regard to the introduction of the Initiative than in regard to that of the Referendum. Whether regarding the establishment of a complete system of extra-parliamentary legislation as more menacing to representative government, or whether apprehensive of the effects of so venturous an innovation in the still unsettled conditions of the country, they hesitated to sanction its introduction and merely provided for its potential adoption —possibly only at the instance of the electorate—by the Legislature, whose discretion in this respect was restricted within very rigid limits. In the first instance Parliament might on its own initiative pass legislation for the initiation by the electorate of proposals for laws and constitutional amendments. Should it fail to do so within two years from the enactment of the Constitution, the introduction might itself be effected through the medium of a popular Initiative. On the petition of not less than 75,000 voters on the register, of whom

not more than 15,000 belonged to one constituency—a qualification designed to prevent the issue being forced by local agitation—it was made incumbent upon Parliament either to set up the machinery of the Initiative or to submit the question to a Referendum. Yet it was merely the question of principle which might be so submitted: if the majority of those voting in the Referendum supported the demand, it was left to Parliament—so it would appear from the context—to fix the details by legislation. But its scope in this respect was narrowly limited. It was not allowed to sanction the initiation of proposals for laws or constitutional amendments unless these were supported by a petition of 50,000 registered voters. A proposal so initiated would first have to be introduced in Parliament and, only if rejected by the latter, to be submitted to a vote of the electorate, which would have to be taken in accordance with the general regulations governing the Referendum. If Parliament enacted the proposal so initiated, the measure would be subject to the general rules governing parliamentary legislation. If a law, it might be suspended under Art. 47 and made the subject of a Referendum; if an amendment of the Constitution, it would, after the lapse of the initial period of eight years during which constitutional amendments might be effected by ordinary legislation, have to be sanctioned by a Referendum to be held under the special provisions governing constitutional amendments (Art. 50).

It will be seen that these provisions show an even greater minoritarian bias than those governing the Referendum. An active group of less than five per cent. of the electorate might raise the issue. A very small minority of the electorate might, if faced by an indifferent majority, force the adoption of the prescribed legislation. Under the latter, again, it might be within the power of an even smaller minority to initiate legislative proposals and constitutional amendments, and, unless opposed by the majority of the electorate, to force its nostrum on to the Statute Book. Despite the patent reluctance of the Constituent Assembly to sanction the immediate introduction

of the Initiative, the provisions adopted went further than those of almost any of its Continental models in enabling an extra-parliamentary system of legislation to be set up.

During the first six years from the enactment of the Constitution only one attempt was made by a minority in the Dáil to effect the suspension of legislation with a view to its submission to a Referendum.[1] The effort failed, as the support of the prescribed minimum of five per cent. of the electorate could not be enlisted. A Cabinet Sub-Committee, which was set up in 1924 to consider desirable amendments of the Constitution prior to the expiry of the eight years' term during which, under Art. 50, they could be effected by parliamentary legislation, reported in favour of the abolition of both the Referendum and the Initiative. No active step, however, was taken until the campaign of the Fianna Fáil Party to enforce the setting-up of the machinery of the Initiative by means of a Petition, with a view to its subsequent utilisation for the abolition of the parliamentary oath, brought the issue to a head. An intense propaganda organised by the Party throughout the country, after its entry into the Dáil, resulted in a Petition signed by 96,000 registered voters being submitted to the Dáil on May 3, 1928. The latter, after a lengthy debate, adopted a motion to the effect that the question of granting leave for the presentation be postponed until the Oireachtas had prescribed the necessary procedure.[2] It appears that it was intended to move for the appointment of a Joint Committee of both Houses to consider the procedure to be adopted in the presentation of such petitions.[3] Before this stage had been reached, however, the Government introduced a Bill, notice of which had been given before the preceding General Election, providing for the abolition of the Referendum and the Initiative and for making consequential amendments in the

[1] This was in regard to the Electoral (Amendment) (No. 2) Act (No. 33 of 1927).

[2] *Dáil Debates*, Vol. 23, col. 2539 *et seq.*

[3] *Ibid.*, Vol. 24, col. 720.

Constitution.[1] The introduction of the Bill led to the fiercest parliamentary struggle which the Irish Parliament had yet seen. The Opposition contended that it was *ultra vires* for the Government to introduce a Bill abolishing the Initiative after a petition for its introduction had been signed in strict accordance with the terms of the Constitution. The postponement of the reception of the petition by the Dáil and the proposal for the appointment of a Joint Committee to consider the *modus operandi* were attacked as acts of bad faith and a passionate resistance offered at every stage of the Bill. The merits of direct legislation were painted in glowing colours. It was described as the sole means which the people had of checking the doings of Parliament, of revising the action of the Legislature, of expressing its views on special questions not connected with the general issues of politics. Representative government, it was claimed, had broken down since the autocracy of Cabinet rule had usurped the functions of every other constitutional agency; every safeguard of individual liberty and of minority protection had been subjected to its arbitrary interference. The introduction of direct legislation alone could ensure an effective democracy and protect the liberties of the individual and the rights of the minority. In reply to these arguments the spokesmen of the Government contended that the Dáil was not precluded by the presentation of the petition from amending the Constitution, since the decision to introduce the contested legislation had been announced before the preceding election and the return of a majority for the Government in the latter must be held to imply the approval of the measure by the electorate. In regard to the merits of the proposal, it was urged that a system of representative government such as established by the Constitution, based on a wide suffrage, Proportional Representation and a fair distribution of constituencies was as effective a safeguard of individual and political liberty as could be devised and that the machinery of direct legislation would not increase that security. The latter, on the

[1] Constitution (Amendment No. 10) Act (No. 8 of 1928).

other hand, was subversive of the authority of Parliament, destroyed the coherence of representative government, and substituted crude voting under the influence of demagogic agitation for the deliberative methods of an elected Assembly. The provisions of the Irish Constitution in particular rendered the machinery of direct government an easy tool for obstructionist tactics. It would not be difficult to obtain the signatures of a minority for suspending legislation for a considerable period, while five per cent. of the electorate were given the power to involve the State and the community in the enormous expenditure connected with the holding of a Referendum. On the other hand, the constitutional problems of the Free State were such as to accentuate the perils of direct government. The issues which it was proposed to refer to the people affected the very foundations of the State. They were the issues which had decided the alignment of parties in Parliament, and their submission to a special vote of the electorate could only be designed to impose upon the Government responsible to the elected Chamber the execution of a policy directly opposed to the one which they had been placed in office to carry out. The presence of these Articles in the Constitution had engendered the belief that they could be used for nullifying an essential part of an international settlement: their abolition was thus imperative for the political pacification of the country.

After a strenuous parliamentary struggle lasting over three weeks, during which a stubborn opposition was offered at every stage of the proceedings, the Bill was passed in both Houses, accompanied by a declaration of urgency designed to preclude its submission to a Referendum, which under the terms of Art. 50 might then still have been possible. The fierceness of the struggle was clearly due not so much to an abstract cleavage of opinion on the merits of direct legislation as to the fact that the conflict had raised afresh the basic issues of the Treaty Settlement. The case against direct legislation has in recent years been vindicated in ever-growing measure both by political experience and by theoretical analysis. Its

crudeness in the face of the highly complex problems of modern legislation, its exclusion of the vital factor of authoritative deliberation, its anarchical interference with representative government, its inevitable production of incoherent legislation, its intolerance of religious and racial minorities—these and kindred defects of the system have often been stressed. Recent experience in Continental countries has emphasised its most insidious feature: the irresponsibility of the anonymous legislator. Popular support may easily be mobilised by skilful agitation for a law or petition embodying a high-sounding postulate, but a second Referendum or Initiative designed to introduce consequential legislation and possibly entailing material sacrifices, may be ignominiously defeated by the sponsors of high principle. The chief merit of the representative system is that it engenders responsibility: both the individual member and the party group working in the glaring light of parliamentary publicity are compelled to display consistency at the risk of losing the support of the electors. The effect of the system is primarily formative: it fuses the amorphous mass of heterogeneous opinion into concrete programmes of political action, coherently developed and consistently maintained. It invests the corporate embodiments of the political will with the dynamic element of personality It compels coherence and responsibility. It inevitably transforms also the standards of political action. In the background of a vigilant public opinion majorities and minorities alike are compelled to justify word and action by reference to the common weal, however insincere the profession may often appear to be. By contrast, the return to direct government in an age and a society where "directness" can no longer have any reality, involves a reversion both to atomism and egotism. The anonymous legislator in his polling booth may to-day support one law and to-morrow refuse assent to a consequential measure inherently bound up with it because he has changed either his mind or his identity—for the anonymous legislator, be he voter or abstainer, seldom retains his identity. Nor is he in the

secrecy of his voting booth swayed by those impersonal motives which of necessity govern the mind of the parliamentary legislator. Inevitably, his isolated decision will be influenced by the egocentric standards of personal interest and material comfort. No country could equal the war enthusiasm of Australia; yet thrice was Conscription defeated there by Referendum. Whatever democratic merit may have been inherent in the Irish Constitution as originally enacted, it can hardly be said to have been diminished by the abolition of the machinery of direct legislation.

CHAPTER IX

DEVOLUTION

(ARTS. 44 AND 45)

THE distrust of the traditional forms of representative government which underlay the introduction of the machinery of direct legislation and the problem of partition inspired a twofold experiment in devolution. The Referendum and the Initiative might offer scope for the assertion of the popular will as a direct legislative agency in special and necessarily exceptional circumstances. If that will, however, was to be given more concrete influence on the shaping of legislation than experience had shown to be practicable under the established forms of parliamentary representation, more permanent and more sensitive instruments of articulation would have to be provided. It has been noted in an earlier chapter how deeply the revolutionary faith of some of the most creative minds of the Irish Renaissance was permeated with syndicalist thought and how strongly the latter shaped the framing of the official programme of nationalist and revolutionary labour. Nor, as previously shown, was such scepticism of the traditional forms of representative government confined to the ranks of the revolutionary parties. It was this scepticism combined with the democratic impetus of the Revolution, the influence of guild socialist conceptions and the example of Continental innovations which combined to inspire the introduction of alternate modes of popular representation. A suggestive model was found in Ireland itself. The Council of Agriculture established under the Act of 1899, though nominally merely advisory in scope, had attained a far greater reality in the lives of those affected by its labours than the organs of political representation at Westminster. It was not merely a new form, it embodied a new spirit. The new

agricultural co-operativism fostered by the Irish Agricultural Organisation Society had evolved a new civic orientation. It had, in the words of George Russell, fused "the agricultural atoms" into an organism inspired by "that consciousness of identity of interest which was the ancient Greek conception of citizenship."[1] Gaelic romanticism invested it with the halo of ancient national ideals. It evolved the conception of an ancient Irish "corporate state" which, however mythical its foundations, offered a potent incentive at a moment when the new liberty would seem all the more real if inspired by the traditions and moulded by the forms of the ancient national culture.

It was thus that the conception of "Functional or Vocational Councils representing branches of the social and economic life of the Nation" found entrance into the Irish Constitution (Art. 45). Their introduction, however, was made merely optional. It was left to the discretion of Parliament to make provision for their establishment. A suggestion of the spokesman of the Labour Party to render it compulsory was resisted by the Government on the ground of the absence of any crystallised thought or definite scheme. The conception underlying the scheme is, however, clearly indicated by the further proviso that the law establishing any such Council shall determine not merely its powers, rights and duties, but also its relation to the central government. It would appear from this, and still further from the subsequent provisions governing the structure of the Executive Council, that the scheme was conceived on complex and ambitious lines. Councils, if and when established, were to form part of the central machinery of the State. They were clearly designed not as advisory committees, but as representative bodies of such authoritative status as to be entrusted, if Parliament so decided, with the recommendation of Extern Ministers from among their members. When it is considered that these Ministers

[1] "Twenty-five Years of Irish Nationality," by Æ, in *Foreign Affairs*. New York: January, 1929.

were, under the terms of the Draft Constitution, to form a majority of the Cabinet and to enjoy a more permanent tenure of office than their parliamentary colleagues, the significance of that authorisation may be inferred. It is noteworthy that their powers in this respect were not reduced in the comprehensive revision which the Articles governing the appointment and status of the Extern Ministers received in the Constituent Assembly. It was perhaps the wide scope of the scheme which militated against its practical application. The creative urge from which it sprang has faded away since the enactment of the Constitution, and its realisation now seems more remote than ever. It was a characteristic product of the experimental period of constitutional innovation following the War, differing from the German Imperial Economic Council in that it envisaged not a "Parliament of Industry," but a group of separate "Vocational" Councils of representative character, connected with the more technical departments of the Administration. It may well be that the scheme, like the correlated innovation of Extern Ministers, might have foundered on the rock of executive financial control, but it seems not inconceivable that, faced with concrete tasks, the Councils might have resolved themselves into less powerful, but more effective representative organs of specialised advice offering scope for the articulation of important aspirations and eliciting informed advice and constructive initiative both in the framing and in the application of policy from the interests most directly affected by its effects.

Of entirely different scope was the measure of regional devolution embodied in Art. 44 of the Constitution. Power was given to Parliament to create subordinate legislatures of fixed competence. In the Draft Constitution the establishment of such bodies had been subjected to comprehensive restrictions: no power might be conferred on them in respect of defence, financial legislation, civic status, postal and railway administration, patents and copyright and related subjects. In the Constituent Assembly the elimination of these restric-

tions was moved by the spokesman of the Labour Party and accepted by the Government. Curiously enough, both the provision and the elimination of the restrictive clause were the subject of suspicious criticism on the part of the opponents of the Treaty in the British House of Commons.[1] It was suggested that the provision would enable local soviets to be set up in the Free State, to whom the Irish Executive might be compelled to transfer vital functions of government, the excision of the restrictive proviso contained in the Draft Constitution at the instance of Labour being cited in support of the allegation. The argument was devoid of all foundation. The debates in the Constituent Assembly throw no light on the motives underlying either the Article or the elimination of the restrictive clause. It seems, however, to have been generally understood that, so far from being devised to pave the way for a regional sovietism in Ireland, the actual purpose of the provision was to enable the grant of a limited measure of local self-government to "Northern Ireland" if it were prepared to enter the Free State, of which at that time there still seemed some measure of hope. Subsequent developments might have made it appear undesirable to restrict the offer by specific limitations, hence the agreed deletion of the restrictive clause in the Constituent Assembly. As the contingency which it had been designed to meet did not eventuate, the Article has not been implemented.

[1] Hansard, Vol. 159, cols. 538 *et seq.*

CHAPTER X

AMENDMENT OF THE CONSTITUTION

(ART. 50)

IN a written Constitution the provisions governing its amendment constitute the acid test of its legal status. An organic law which can be altered, perhaps even radically transformed, by the ordinary mode of parliamentary legislation, can hardly lay claim to be of the fundamental order connoted by that designation. It seems indeed an essential attribute of the sovereignty of the State that its framework be invested with a higher authority than the ephemeral creations of its legislative and executive organs. The public order of the mediaeval State was sacrosanct; it could be destroyed, it could not be changed. Fundamentally, the modern State has not advanced beyond such rigidity: basic transformation can still be effected only by revolution. But the organism of modern society has become too diversified to allow of too frequent a resort to that ultimate lever of change. The inevitability of constitutional amendment has become recognised, but it is in nearly every system only by machinery of special complexity that it can be effected. Even an unwritten Constitution like the British, which is so generally quoted as the extreme embodiment of parliamentary sovereignty, is in the matter of amendment subject to conventional restrictions none the less real because never dogmatically formulated. No fundamental change in the existing balance of the system could be effected unless it had been approved by the electorate in a special General Election, which in such an emergency would scarcely differ from a Referendum.

The Irish Constitution has followed the Australian model in adopting the Referendum as the method of constitutional amendment. The proposed amendment must first pass through the ordinary channels of legislation, but before becoming

law, the Constitution requires its submission to a special Referendum. The provisions governing the latter differ from those of the ordinary Referendum as previously described in that the participation of a majority of the registered voters and the support of a majority of the latter or of two-thirds of the votes recorded are required. An important qualification was added in the course of the deliberations in the Constituent Assembly. It was generally felt that in view of the short time available for the drafting of the Constitution and the experimental nature of many of its provisions the need for amendments would inevitably arise at an early stage, and that it was imperative that the latter should be capable of being effected without having to be submitted to the cumbrous process of the Referendum. It was, therefore, provided that the provision requiring every constitutional amendment to be submitted to a Referendum should not apply during the first eight years after the enactment of the Constitution, i.e. during the lifetime of the first two Parliaments. During that period the Oireachtas was authorised to enact constitutional amendments by ordinary legislation which, like any other, might, under Art. 47 of the Constitution, be made the subject of a Referendum. Both the temporary and the normal mode of amendment have not been affected by the comprehensive constitutional revision of 1928. The tenth Constitution Amendment Act, which abolished the Referendum in relation to ordinary legislation, effected no change in its constitutional position as a necessary preliminary to constitutional amendment. On the other hand, the term of amendment by ordinary legislation has been extended for a further period of eight years by the sixteenth Constitution Amendment Act.

The investment of the Irish Legislature with the power of constitutional amendment represented a characteristic deviation from the Canadian Constitution and, as previously shown, implicitly refutes the contention that Art. 2 of the Treaty implies a requirement of literal adherence to the Canadian model. On the other hand, the overriding force of the Treaty

is maintained in the qualification embodied in Art. 50 that amendments can only be effected "within the terms of the Scheduled Treaty." The question has been raised on repeated occasions whether this proviso covers also the "Agreed Articles" of the Constitution in which the formal elements of the Treaty Settlement are embodied. The effect of the latter construction would clearly be that these clauses could not be made the subject of constitutional amendment as long as the Treaty had not been either revoked or amended by agreement. The introduction of the Constitution in the Irish and the British Parliaments as an agreed interpretation of the Treaty may lend superficial support to that view, but a close analysis of the complex circumstances of its enactment will not bear out such a restrictive construction. The view upheld by the Irish Government in the Constituent Assembly was that these clauses represented an authoritative interpretation of the Treaty status accepted by the two Governments, that the Irish Government was consequently bound to uphold their retention in the Constitution, but that the Constituent Assembly had the power to amend them, though such amendment might in all probability have the effect of causing the breakdown of the Settlement. The position maintained by the British Government in the House of Commons, on the other hand, was that the Constitution had to be framed by the Irish Parliament, that the function of the British Parliament was merely to ascertain and declare that it was in conformity with the Treaty and that the House of Commons had no power to effect any amendments in its context by unilateral action. It is certain that agreement on these clauses was regarded at the time as an essential condition of the coming into force of the Treaty Settlement This transient political factor, however, can hardly be held to have imposed upon the Irish Parliament a permanent legal obligation to abstain from any amendment of the "Agreed Articles," provided such amendment is "within the terms of the Scheduled Treaty," an issue on which, under Art 65, the Courts alone are competent to adjudge.

The extension of the period during which constitutional amendments may be enacted by ordinary legislation for a further term of eight years has intensified a problem of interpretation which fundamentally affects the legal status of the Constitution. If, during the initial period, the Constitution is not invested with higher authority than any act passed by the Oireachtas, the question inevitably arises whether it may not be regarded as implicitly amended by the enactment of any law which contravenes its provisions. The question is clearly of basic importance, for if the view were taken—which cannot be refuted from anything in the text of the Constitution—that any law passed during the initial period may, if repugnant to the Constitution, be construed as an effective amendment of the latter, a position of grave insecurity must inevitably arise. The question was first raised when the first Public Safety Act was introduced in the Dáil. It was then urged that in view of a possible repugnancy of the provisions of the Bill to the Fundamental Declarations of the Constitution, an express clause be inserted in it to the effect that anything contained in the Act which might be found to contravene the terms of the Constitution should be void. It was pleaded that without such a proviso, it might be maintained in the Courts that the relevant provisions of the Bill had been intended by Parliament to operate as an amendment of the Constitution. The Speaker ruled the proposed amendment out of order on the ground that "the Constitution is a fundamental matter in connection with which all legislation passed in the Dáil must be construed," and that if the Courts should find that any of the sections of the Public Safety Act contravened the Constitution, those sections would thereby become null and void.[1] Yet it would seem that during the initial period several judges of the former Court of Appeal in an important case leant towards the view thus rejected. The official record of the case—*Rex (O'Connell)* v. *Military Governor of Hare Park Internment Camp*[2]—contains no reference to the question, but from questions and answers in the Dáil it

[1] *Dáil Debates*, Vol. 4, col. 420. [2] [1924] 2 I.R. 104.

would appear that the problem formed an important issue in the arguments, though not in the judgment. In reply to a question in the Dáil in relation to this decision, the President of the Executive Council stated that the Court of Appeal was not the competent authority to define the interpretation of the Constitution and that the Attorney-General, on behalf of the Government, though pressed by the Court, had refused to adopt the view that the Public Safety Act amended the Constitution, though not purporting to do so expressly. Certain of the judges had pressed upon the Attorney to argue that the Constitution was itself an ordinary statute and subject to amendment by any subsequent statute, but the Attorney in open Court had unequivocally declined to argue this point of view or submit any contention founded upon it. He had advised the Government that the Constitution could not be amended incidentally, but that any amendment must be by legislation directed expressly to that purpose. The President rejected the suggestion that, in order to obviate judicial misconstruction, a clarifying proviso be inserted in the Constitution on the ground that this would imply that there had been some foundation for the contention thus refuted.[1] In accordance with this view, all the Constitution Amendment Acts have been formally designated as such in the title. In the single instance when a temporary suspension of certain provisions of the Constitution was intended to be effected by implication—the case of the Public Safety Act of 1927[2]—a saving clause to that effect was inserted in the Bill prior to its introduction in Parliament. The latter mode of an unspecified, though merely temporary, amendment of the Constitution was severely attacked during the debates in the Dáil, but the criticism was directed less against the procedure of a temporary suspension as such than against the vague form of its definition. The very fact that even a temporary suspension of certain provisions of the Constitution was expressly safeguarded by the insertion of a saving clause provides a strong *e contrario* argument against

[1] *Dáil Debates*, Vol. 7, col. 2022 *et seq.* [2] No. 31 of 1927.

the view that the Constitution might be implicitly amended by ordinary legislation. In the case of the comprehensive Public Safety measure enacted in October 1931, the Bill, as its provisions were patently contrary to the fundamental declarations of the Constitution, was introduced and passed as a Constitution Amendment Bill. The question has not yet come before the present Courts, nor has there been so far any case in which the power of judicial review has been applied to any statute, the adjudication of which would in itself indicate the fundamental attitude of the Courts to the problem. In the light of the opinions quoted it is clearly most unlikely that the present Courts would countenance the view of the judges of the former judicial system, inspired, as it undoubtedly was, by a reluctance to recognise the constituent character of the Provisional Parliament and the overriding authority of the Constitution.[1] It would patently be subversive of all legal order if the interpretation of the Constitution were in effect made subject to the entire statute law of the first sixteen years, possibly even of a longer period if the operation of the provisional mode of amendment is further extended. It has, on the other hand, to be admitted that there is nothing in the text of the Constitution to preclude the rejected interpretation, and in view of the importance of the issue a constitutional amendment removing all doubt might perhaps not be inappropriate.

The Constitution was the subject of considerable amendment in the course of the first eight years. In all, sixteen Amendment Acts were passed during that period. These indicate a distinct line of development. The first four Amendment Acts embodied a number of technical changes suggested by practical experience and proposed on the basis of the recommendations of a Parliamentary Committee. They related to such matters as the terms of office of the first Senators (Amendment No 1),[2] the retention by the Ceann Comhairle of his seat in the Dáil without re-election (Amendment No. 2),[3] the deletion of the provision

[1] Cf. the statement of President Cosgrave, *loc. cit.*

[2] No. 30 of 1925.

[3] No. 6 of 1927.

requiring the election day to be proclaimed a public holiday (Amendment No. 3),[1] the extension of the duration of Parliament (Amendment No. 4).[2] A period of more far-reaching changes was opened up by the fifth Amendment Act,[3] which divested the institution of Extern Ministers of its mandatory character. It was followed by five Amendment Acts (Nos. 6,[4] 7,[5] 8,[6] 9[7] and 11[8]), altering the mode of composition and machinery of election of the Senate. A most comprehensive revision of the Constitution was initiated by the tenth Amendment Act,[9] which abolished the Referendum and the Initiative. The object of the following four Amendment Acts (Nos. 12,[10] 13,[11] 14[12] and 15[13]) was to compensate the Senate for the loss of the right to invoke the Referendum by increasing its constitutional powers and allowing one member of the Executive Council to be drawn from its ranks. Finally—it would seem in deference to the demand of the Opposition—the period during which constitutional amendments might be enacted by the Oireachtas without a Referendum was extended for a further term of eight years (Amendment No. 16).[14] Since that extension one further Amendment has been passed,[15] which is in substance a Public Safety Act designated as an Amendment Act only because it involved the suspension for an unspecified period of Articles of the Constitution contravened by its provisions.

In the debates on the several Constitution Amendment Acts the question of the inherent limitation of the power of amendment has repeatedly been raised. It was urged that the provisions of Art. 50 had been designed to enable only technical improvements of detail to be effected, but not to offer scope for such comprehensive constitutional changes as have in fact been enacted. The argument raises a much debated problem

[1] No. 4 of 1927. [2] No. 5 of 1927. [3] No. 13 of 1927.
[4] No. 13 of 1928. [5] No. 30 of 1928. [6] No. 27 of 1928.
[7] No. 28 of 1928. [8] No. 34 of 1929. [9] No. 8 of 1928.
[10] No. 5 of 1930. [11] No. 14 of 1928. [12] No. 8 of 1929.
[13] No. 9 of 1929. [14] No. 10 of 1929.
[15] Constitution (Amendment No. 17) Act (No. 37 of 1931).

of modern constitutional theory. It has been asserted that the power of constitutional amendment must not be regarded as identical with the *pouvoir constituant*, that it is not within the competence of the agencies invested with the power of constitutional amendment drastically to revise the structural organisation of the State, to change a monarchical into a republican, a representative into a "direct" frame of government.[1] It is the conception underlying the French law of August 14, 1884 (Art. 2), which provides that the republican form of government cannot be made the subject of a motion of constitutional amendment. The issue inevitably raises the subtle question of the ethics of revolution. It has been forcefully urged by Professor Laski that it ought not to be possible for a fundamental change like the establishment of the Fascist State in Italy to express itself through constitutional forms.[2] Clearly every constitutional structure is the embodiment of a system of political valuations and must break down when the latter undergo a fundamental transformation. But must reconstruction necessarily be limited to revolutionary upheaval and fundamental progress be tied to the use of physical force? Or is the transformation of the constitutional framework of a State to be regarded of such basic significance to the entirety of social relationships as to warrant a temporary relapse into anarchy? Where, moreover, is a guiding principle to be found for distinguishing such structural changes as might be effected by constitutional amendment from those which require to be sanctioned by revolution? It is clear that the fundamental balance of a constitutional system cannot be changed by a vote of Parlia-

[1] W. Jellinek: *Die Grenzen der Verfassungsänderung* (1931) and B. Mirkine-Guetzévich, *op. cit.*

[2] "Men who are determined to enforce change of this kind by violence will, doubtless, resort to it if no other means lies open. But it is, it may be urged, better that their effort should be plainly revolutionary than that they should be able to pervert the Constitution to their purposes. Atheism, after all, should not be preached from the pulpit of a cathedral." H. J. Laski: *Grammar of Politics* (1925), p. 305.

ment. It is equally clear that a social organism of the infinite complexity and the subtle balance of the modern State requires rational modes of constitutional readjustment even of fundamental character. In the Irish Free State, where both the contingency and the risk of change are greater than in communities of more conservative political traditions, the problem is of particular moment. It is the more acute as the existing machinery of amendment is at once too cumbrous in its permanent and too pliable in its temporary form. The effect of a repeated extension of the initial period of amendment by legislation must inevitably be to derogate from the authoritative status of the Constitution. On the other hand, it is unavoidable that as long as a procedure so complicated and so costly as that of the Referendum is retained as the normal mode of amendment, the temptation to postpone indefinitely the date of its coming into force should prove irresistible. It seems imperative, if the present laxity is to be discontinued, that a more rational procedure of amendment be introduced, which might take the form of the requirement of the assent of a two-thirds majority of the Legislature or of the submission of the proposed amendment to two successive Parliaments before it is invested with the force of law. Its scope should extend to technical and minor structural amendments not affecting the basic framework of the Constitution, and to such emergency legislation as might involve a temporary suspension of Articles of the Constitution. On the other hand, it would appear that no fundamental change embodying a comprehensive structural reorganisation should be effected except with the assent of a Constituent Assembly specifically convoked for that purpose.

PART VI

THE EXECUTIVE ORGANS

INTRODUCTION

THE formal dualism which characterises the Irish Constitution is most evident in the structure of the Executive. Its framework is that of a constitutional monarchy, its substance that of a republic. Executive authority is "derived" from the people; it is "vested" in the King. It is "exercisable" by the Representative of the Crown; it is in fact exercised by an Executive Council—"nominated" by a popularly elected Chamber—which "aids and advises"[1] him.

[1] "The word 'advice' used in Art. 51 of the Constitution," said Mr. O'Higgins, "has a different meaning when it is used in the sense of the Executive Council advising His Excellency. In that case, the word 'advice' is a signification of the decision of the Council in matters of policy" (*Dáil Debates*, Vol. 12, col. 2154).

CHAPTER I

THE REPRESENTATIVE OF THE CROWN

(ARTS. 51, 55, 60 AND 68)

THE modern framework of parliamentary government requires at the apex of its pyramid a formal embodiment of executive authority, removed from the sphere of political conflict and symbolic of the continuity of the legal order of the State amidst the fluctuating changes of its political direction. The character of the function, whether the holder be Monarch or President, is in the main formal, but in a limited measure also discretionary. The Head of State convokes and dissolves the legislature. He promulgates its enactments, thereby converting the contentious issues of parliamentary strife into binding rules of national authority. He transmits the seals of office to the nominees of the legislature and on their recommendation appoints the judges. He interposes the permanent authority of the State in those moments of transition when the holders of executive office change their positions, being invested in most systems with a greater or smaller measure of discretion in the preliminaries to the formation of a new Administration. The character of his function is reflected in the mode of his election. The French system, under which the President is chosen by a joint meeting of both Houses of Parliament, has found few imitations in the new constitutions of post-War Europe. A growing tendency to invest the presidential office with a more authoritative status in relation both to the ministry and to the legislature has led to his election being vested in increasing measure in the electorate itself.

In approaching the problem the draftsmen of the Irish Constitution had, as elsewhere, to move within the formal framework of the Dominion Constitutions. In the latter the character of the position of the Governor-General was two-

fold. He was, on the one hand, the "Chief Executive" of the Dominion, invested with those formal functions which in England are exercised by the King and in a republic by the President. In the legislative sphere he was the competent authority for summoning, proroguing and dissolving Parliament, in the last-named of which functions he was still invested with a certain measure of discretion. He was the supreme embodiment of executive authority. He appointed the ministers and accepted their resignation. Statutory Orders and delegated legislation were promulgated by "the Governor-General in Council." He was, on the other hand, the representative of the British Government in the Dominion. It was from the latter that he received his instructions, to them alone that he was responsible. It was by virtue of such instructions that he exercised such discretionary powers as were still vested in his office. In the routine of administration he formed the official channel of communication between the Government of the Dominion and the British Cabinet. His appointment had originally been at the exclusive discretion of the British Government, but in more recent years a tacit understanding had grown up that before the nomination was submitted for the approval of the Sovereign, the assent of the Dominion Cabinet had to be obtained. Such was the position which the framers of the Irish Constitution had to bring into accord with the new constitutional conceptions which underlay the Treaty.

In regard, first, to the mode of appointment, it was reaffirmed in literal accordance with Art. 3 of the Treaty that the Representative of the Crown "shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments." The meaning of the phrase had been authoritatively interpreted in a letter addressed to the Chairman of the Irish Peace Delegation by the British Prime Minister on December 13, 1921, to the effect that "this means that the Government of the Irish Free State will be consulted so as to ensure a selection acceptable to the Irish Government before any

recommendation is made to His Majesty."[1] In the Constituent Assembly it was urged that the actual position should be expressly stated in the Constitution, and that instead of a reference to Canadian practice an express provision should be inserted to the effect that the Representative of the Crown was to be appointed with the assent of the Executive Council.[2] The amendment was resisted by the Provisional Government on the ground that the reference to Canadian constitutional practice rendered the provision more elastic, since, if Canada were to attain the power of electing the Governor-General, the Free State would implicitly benefit from that advance, while the insertion of a provision stereotyping the actual practice would preclude any such progress. Similarly, the Government defended the adoption of the title of Governor-General on the ground that the term had "an accepted signification with known functions and known limitations."[3] In the event it was not Canadian but Irish practice which led the advance to a new mode of procedure in the making of the appointment. All definitions of the existing practice, not excluding that conveyed in the letter of the British Premier, left it clear that though the assent of the Dominion Government had to be obtained before the proposal was formally submitted to the King, the initiative in making the selection lay with the British Government, and that while the latter could not impose upon the Dominion a Governor-General not acceptable to its Government, the latter had no power to offer any suggestions or otherwise positively to influence the choice of the Representative. It was, indeed, well known that the Dominions had frequently urged the appointment of local nominees, but that their requests had been invariably rejected by the British Government, and that without exception members of the Royal House or distinguished British soldiers or statesmen had been selected for appointment. It is characteristic of the general appreciation of

[1] *Treaty Debate*, p. 21.
[2] Amendment of Mr. Gavan Duffy (*Dáil Debates*, Vol. 1, col. 1775).
[3] *Dáil Debates*, Vol. 1, col. 1618.

the novel character of the Free State that it was recognised on all sides from the very beginning that no such appointment could be made in this case. The records of such delicate negotiations are not open to inspection, but the fact that for the first time a distinguished local political figure was chosen would seem to indicate that the share of the Irish Executive in the selection of the first Governor-General was more than a mere act of assent. The selection, as his successor, of an actual servant of the Free State Government—the High Commissioner for the Free State in London—proved that the departure had not been an isolated act, but that the new *modus procedendi* had come to stay. Professor Keith, commenting upon the "rather comic insistence" of the Irish Government that the selection had been made by itself, suggested that that assertion must be "reduced to its true value" in the light of the actual practice under which the recommendation lay with the British Government.[1] The elaborate provisions, however, which were adopted in the following year by the Imperial Conference in regard to the procedure to be followed in the appointment of the Governor-General left little doubt as to the substantial correctness of the Irish assertion. The import of the six rules laid down is that the appointment is made by the King on the exclusive advice of the Dominion Cabinet tendered without any intervention on the part of the British Government, and that, similarly, the Dominion Government is the competent authority for drawing up the instrument containing the appointment.[2] The new mode of a direct approach of the

[1] *Sovereignty of the British Dominions*, p. 249.

[2] *Summary of Proceedings of the Imperial Conference of 1930*, Cmd. 3717 (1930), p. 27: "Having considered the question of the procedure to be observed in the appointment of a Governor-General of a Dominion in the light of the alteration in his position resulting from the Resolutions of the Imperial Conference of 1926, the Conference came to the conclusion that the following statements in regard thereto would seem to flow naturally from the new position of the Governor-General as representative of His Majesty only.

1. The parties interested in the appointment of a Governor-

Dominion Ministers to the Crown, which was sanctioned by the Imperial Conference, offered the necessary channel for the tendering of such advice without the co-operation of the British Government. It was in accordance with the new practice that immediately after the Conference an Australian was, for the first time, appointed Governor-General of the Commonwealth on the advice tendered to the King by the Australian Prime Minister, as expressly stated in the official *communiqué*, issued not by the Dominions Office of the British Government, but by the Office of the High Commissioner for Australia in London.

While the new mode of the appointment of the Representative of the Crown in the Free State was formally sanctioned only by the Imperial Conference of 1930, the transformation of the character of the function was already indicated in the restrictive provisions of the Constitution. The clear intent of the latter was to deprive the office of any discretionary scope and to restrict it to those static functions in the exercise of which the Head of State acts as a symbolic embodiment of the general will. In the legislative sphere the Representative of the Crown was invested with the formal authority of convening and concluding the sessions of Parliament, but any semblance of

General of a Dominion are His Majesty the King, whose representative he is, and the Dominion concerned.

2. The constitutional practice that His Majesty acts on the advice of responsible Ministers applies also in this instance.

3. The Ministers who tender and are responsible for such advice are His Majesty's Ministers in the Dominion concerned.

4. The Ministers concerned tender their formal advice after informal consultation with His Majesty.

5. The channel of communication between His Majesty and the Government of any Dominion is a matter solely concerning His Majesty and such Government. His Majesty's Government in the United Kingdon have expressed their willingness to continue to act in relation to any of His Majesty's Governments in any manner in which that Government may desire.

6. The manner in which the instrument containing the Governor-General's appointment should reflect the principles set forth above is a matter in regard to which His Majesty is advised by His Ministers in the Dominion concerned."

discretion was excluded by the proviso that the dates both of the opening and of the closing were to be fixed by the Dáil. On him was conferred the power to signify the Royal Assent to the Acts passed by the Legislature, but he was required to exercise it in accordance with Canadian "law, practice and constitutional usage," which divested it of all discretionary content. Similarly, his powers in the executive domain were deprived of all but formal significance. Not only was the exercise of his authority confined in general terms within the limits of Canadian practice and constitutional usage, but each function was subjected to a restrictive interpretation which rendered it purely formal. He was empowered to appoint an Executive Council "to aid and advise in the government of the Irish Free State," but his choice of the President was fixed by the formal nomination of the Dáil, and that of the other Ministers by the nominations of the President. No power of discretion, however limited, such as even republican constitutions vest in the Head of State in connection with the formation of a new Administration, was conceded. In the exercise of the crucial power of dissolution, where Dominion practice at that time still allowed the holder of the office a certain measure of discretion, he was deprived of every vestige of influence by an express provision denying to a defeated ministry the power to advise a dissolution. The legislative practice of the Free State has further emphasised that restrictive interpretation: the "Governor-General in Council" rarely appears on the Irish Statute Book. With regard, finally, to his position as official intermediary between the Free State and the British Government, Irish practice has from the beginning tended to divest this aspect of his function of all but formal significance. In this sphere, too, authoritative approval of the Irish interpretation of the character of the office was sought and obtained at the Imperial Conference of 1926, which declared that it was "an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative

of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain."[1] Here, again, as in the adoption of the new procedure for the appointment of the Governor-General and in the elimination of the restrictions on the legislative power of the Dominions, the insistence of the Free State on a precise definition of the constitutional implications of its sovereign status produced—since it could only thus be achieved—a formal fixation of the new conventions of the Commonwealth as a whole.

The position of the Governor-General, as it emerges from the restrictive provisions of the Constitution and the formal declarations of the last two Imperial Conferences, is in all but name that of the Head of an autonomous State. He is neither the nominee nor the agent of the British Government, but a distinguished national figure nominated by the Irish Cabinet. His powers are exclusively of the formal type previously described; no President of any Republic is so limited in scope and function as the Governor-General of the Irish Free State. This radical exclusion of all discretionary authority is clearly due to the original association of the position with the semblance of external control; it is hardly in accord with the new character of the office. Its effect is to divest its holder of any claim to national leadership and to concentrate executive authority in a larger measure than in any republican system in the Cabinet and its President who, not unlike the heads of some of the new Baltic States, is virtually both President and Prime Minister.

[1] *Summary of Proceedings* (Cmd. 2768), p. 16.

CHAPTER II

THE STRUCTURE OF THE EXECUTIVE

(ARTS. 51–59)

No section of the Irish Constitution is of so novel a character as the provisions governing the composition of the Executive Council; none reveals so clearly the tendency of its framers to break away from English models. None was the subject of more comprehensive discussion in the Constituent Assembly, and none in its ultimate form illustrates so forcibly the inevitability of the structural design of the British system of parliamentary government when once its fundamental framework has been accepted. That framework, as Lord Morley has shown in a famous analysis,[1] rests on a twofold foundation: the joint responsibility of the Cabinet and the paramount status of the Prime Minister. The British Cabinet does not necessarily comprise all the holders even of the more important offices of State. It may in times of national emergency be restricted to the heads merely of the principal departments. But all Ministers, whether enjoying cabinet rank or not, form part of a governmental whole and are jointly responsible for all larger measures of policy. They are simultaneously appointed by the King on the advice of the Prime Minister; they retire when the cabinet resigns. They are, as an indispensable condition of their appointment, required to be members of either House of Parliament. The position of the Prime Minister forms the keystone of the edifice. It is he who selects his team, allots their offices and maintains the unity and central direction of executive policy. The imponderable element of personality and the equally incalculable factor of emergency have more than once tested the elasticity of the system; they have never shaken its fundamental conventions. It was these that the framers of the Irish Constitution sought to modify.

[1] *Walpole*, Chapter VII.

It has been shown in an earlier chapter how the institution of "technical" ministers first appeared in the Republican Constitution adopted by the Revolutionary Dáil of 1919. In the Draft Constitution of June 1922 the scope of the innovation had been so extended as to transform the entire framework of the parliamentary cabinet. The Executive Council, the counterpart of the English Cabinet, was to consist of two sections of Ministers, the one forming a parliamentary, the other an extra-parliamentary group. The former was intended to consist of four Ministers in a Cabinet of a total membership of not more than twelve. It was to include the President and the Vice-President of the Executive Council, who were to hold the portfolios of External Affairs and Finance respectively,[1] and the Ministers for Defence and for Home Affairs. The President was to be appointed by the Governor-General on the nomination of the Dáil, the three other Ministers on that of the President. These Ministers alone were to be bound by the traditional conventions of the parliamentary cabinet system: they were required to be members of Parliament, they were to be subject to the rule of joint cabinet responsibility, and they were to hold office only while supported by a majority in the First Chamber. They were, moreover, to be solely responsible for all matters relating to external affairs. The status and the functions of the non-parliamentary group of Ministers were conceived on entirely different lines. They were intended to form the majority of the Cabinet, not more than eight out of a total of twelve. Their extra-parliamentary status was designed to be mandatory: if a member of Parliament were appointed to a ministerial office of this category, he was, by virtue of such appointment, to vacate his seat. Only by way of exception and upon a special motion of the President might the Dáil allow a particular Minister or Ministers not exceeding three in number, to be members of either House of Parliament.[2] The principal innovation in

[1] *Dáil Debates*, Vol. 1, col. 1244.

[2] It is not clear from the phrasing of Art. 50 of the Draft, nor from the explanatory statements of the Ministers, whether the effect of this

regard to these Ministers was to be found, however, in the provisions governing the modes of their appointment, tenure of office and dismissal. They were to be nominated by a Committee of the Dáil, representative of all groups. The nomination was to be submitted to the Dáil, and, if approved by the latter, the appointment was to be effected by the Governor-General without any co-operation on the part of the President of the Executive Council.[1] The qualifications for their appointment were elaborately defined. They must be eligible to the Dáil, but in fact not be members of either House of Parliament. They were to be chosen "with due regard to their suitability for office," and be, as far as possible, "generally representative of the Irish Free State as a whole rather than of groups or of parties." It was finally laid down that if Functional Councils were established by Parliament, as foreshadowed in the Constitution, these Ministers might be members of and be nominated on the advice of such Councils. Their term of office was to be the term of the Dáil sitting at the time of their appointment. A Minister of this group might be removed during this period only if a Parliamentary Committee chosen in the same way as

proviso was to have been to make the Ministers of the latter group thus transformed into "parliamentary" Ministers members of the first-named group in the full sense of the term or whether its purpose was merely to enable them to obtain full parliamentary status without entrusting them with the special responsibilities and subjecting them to the special limitations imposed on the original group of "parliamentary" Ministers. The former might have seemed the more logical course and would have invested the system with a considerable measure of elasticity by enabling the "parliamentary" group to become the majority of the Cabinet: it seems difficult to conceive that the whole object of this permissive clause should have been merely to enable these Ministers to obtain the right of voting in Parliament. On the other hand, the provision that they might be authorised by Parliament to become members of the Oireachtas, i.e. of *either* House of Parliament, would seem to support the latter inference, since, if they became members of the Senate, they could not form part of the "parliamentary" group, which was confined exclusively to members of the Dáil.

[1] The Draft Constitution does not expressly state this, but it is clearly implied.

that entrusted with their selection had reported him guilty of either malfeasance in office, incompetence or failure "to carry out the lawfully expressed will of Parliament." On the other hand, these Ministers were not required to retire when their "parliamentary" colleagues were compelled to resign in consequence of an adverse vote in the Dáil. Their position in the Cabinet was of curiously hybrid character.[1] They were, on the one hand, to be individually responsible to Parliament—in either House of which they were entitled to speak, but not to vote—for the administration of the Departments to which they had been appointed. They were not to share in the collective responsibility of the "parliamentary" Ministers, which required the joint resignation of the latter if the President failed to retain the support of a parliamentary majority. Yet they would rank as full members of the Cabinet and would consequently be in a position to influence decisions, possibly even on larger issues of policy. A position of unusual complexity would arise. Ministers not Members of Parliament, not selected by the head of the Government, not subject to joint cabinet responsibility, would constitute an important section, possibly a majority of the Cabinet and take an active, conceivably even a decisive, share in the framing of executive policy.

In the course of the debates in the Constituent Assembly the sponsors of the scheme—it was made clear from the beginning that though the Government favoured the innovation it did not regard the issue as a "cabinet question"—based their advocacy in the main on two grounds: the inadequacy of the British cabinet system and the anticipated effects of the introduction of Proportional Representation on the working of representative government. The defects of parliamentary cabinet rule had often been analysed. Under the two-party

[1] It was intended that the eight "Extern Ministers," as they came to be known, should head the following Departments: (1) Education, (2) Justice, (3) Post Office, (4) Trade and Commerce, (5) Local Government, (6) Public Health, (7) Agriculture, (8) Labour, (9) Fine Arts (Mr. O'Higgins, *Dáil Debates*, Vol. 1, col. 1245).

system it invested the Cabinet with an almost autocratic measure of legislative and executive authority. It deprived the individual member of any effective influence on the shaping of legislation. He was compelled to support measures of which he might disapprove, in order to ensure the maintenance in office of the party to which he belonged and the realisation of the larger policies for which it stood. These evils, it was paradoxically urged, would be intensified by the introduction of Proportional Representation. That system, as experience on the Continent had shown, was bound to result in a multiplicity of parties. Under such a dispensation the executive would depend on the support of group coalitions, which would necessarily involve great instability and frequent changes of administration. No continuous policy of reconstruction, such as was urgently needed after the long period of unrest and strife, could be carried into effect under a system so insecurely balanced. These difficulties, it was claimed, would be met by the suggested device of a separation of political from technical office, for which the Swiss Constitution was cited as a model appropriate to Irish conditions. The proposed appointment to the more technical Departments of State of Ministers who, while enjoying the authority of Cabinet status, would be independent of the changing alignments of political groups, would enable the internal government of the country to be conducted by competent administrators assured of a reasonable security of tenure for the exercise of comprehensive policies of reconstruction. The exemption of these Ministers from the rigid bond of cabinet responsibility would allow the measures introduced to be examined by Parliament purely on their technical merits. Their amendment, or even rejection, would not necessarily involve the resignation of the Ministers, and would not in any event affect the tenure of office of the Cabinet as a whole. The individual member of Parliament would be able to exercise an active influence on the work of the assembly, measures would be considered on their inherent merits, and both the integrity of public life and the quality of legislation would be

enhanced by the change. Such technical devolution was the more desirable as the Government of the Free State would for a considerable time to come labour under the absence of a well-trained and experienced civil service. It was, therefore, essential that in the selection of this new type of Ministers regard should be paid exclusively to their technical qualifications and their general "representativeness." Hence the insistence on their divorcement from all political associations, as ensured by the prohibition of their entry into Parliament. Those who had neither the desire nor the qualifications for election to Parliament were by no means the least suited to administrative office. If, as was provided in the Draft Constitution, the selection of these Ministers was to rest exclusively with the Dáil, it could not, on the other hand, be pleaded that the proposal was undemocratic.

The provisions of the Draft Constitution were the subject of a lengthy and chequered debate in the Constituent Assembly. The novelty of the scheme inevitably raised much opposition. It was urged that a new State which had only recently been launched and had hardly weathered the storms of civil war should not embark on a constitutional experiment of so comprehensive and unprecedented a character. The appointment of technical Ministers to hold office for the whole length of a Parliament and not to be removable merely on grounds of policy would necessarily lead to the growth of an extra-parliamentary bureaucracy. The co-existence of two types of Ministers of different degrees of authority and responsibility would produce tension and conflict. The inclusion of the "Extern Ministers" in the Cabinet would prevent any definite location of responsibility. If, as had been urged, it was desirable to loosen the bond of joint ministerial responsibility, this object could be attained with less difficulty by a constitutional provision divesting an adverse vote on any departmental measure of the character of a vote of censure on the Government as a whole. Even supporters of the appointment of "technical" Ministers opposed the rigid exclusion of members of the

Legislature from tenure of these offices. It was indeed this aspect of the scheme which proved the principal stumbling-block to its acceptance. It was urged that it was of the essence of democratic government that those entrusted with the administration of the principal offices of State should have received an expression of the confidence of the electors by having been returned to Parliament. If this fundamental plank of the representative system were discarded, Ministers might be imposed on Parliament by the pressure of non-representative agencies, such as economic organisations or influential press magnates, who had no claim to public authority.

After a lengthy debate on the merits of the appointment of extra-parliamentary Ministers not subject to collective responsibility, the Constituent Assembly approved in principle of both aspects of the proposed innovation, and appointed a committee for revising the details of the scheme. When, however, the latter submitted a report embodying an amended set of provisions, a renewed debate on the underlying principle resulted in its rejection. The *impasse* was solved by the adoption, after further debate, of the recommendations of the committee as individual amendments to the original Articles of the Draft Constitution. Further revisions of detail were introduced on the fourth and fifth readings of the Bill. The total effect of the transformation in the Constituent Assembly was to divest the innovation of much of its original import. The appointment of "Extern Ministers" was made permissive, not mandatory, as originally conceived. They were formally excluded from the Executive Council. Membership of Parliament was not to be a bar to appointment to these offices. The number of "Extern Ministers" was not fixed, but the provision of the Draft Constitution that they were to form a majority of the Cabinet was not upheld. To that extent the criticisms which had been raised in the Debates were met. On the other hand, the principle of the exclusively individual responsibility of the "Extern Ministers," the special mode of their appointment and removal, their security of tenure during the whole length of a Parliament and

finally the innovation of the eligibility of non-parliamentarians to these ministerial offices were maintained. Similarly, the provision for the potential association of these ministries with the scheme of Vocational Councils was retained.[1] With all this, however, the effect of the amendments adopted in the Constituent Assembly was to assimilate the framework of government to the British system. The supreme authority of the central Cabinet was re-established. Only the Ministers who were members of Dáil Eireann were to form the Executive Council. Their number was to be not more than seven nor less than five, that of the entire Ministry not more than twelve; they might thus form the majority of the Ministers, but even if the "Extern Ministers" were to exceed them in number, this would not enhance the influence of the latter, as they would not be of the Executive Council. Among the Ministers whose presence in the Executive Council was made mandatory the Minister for Finance was specifically added to the President and the Vice-President of the Council. The mode of appointment of the members of the Executive Council was not altered: the President was to be appointed on the nomination of the Dáil, the Vice-President—who was to act in his place during his temporary absence, permanent incapacity, resignation or death—on the nomination of the President, while the rest of the Executive Council were to be appointed on the nomination of the President with the assent of Dáil Eireann.[2] The predominant position of the Executive

[1] The phrasing of Art. 53 of the Draft Constitution would seem to imply that in the event of the nomination of these Ministers by the Vocational Councils, the nomination was to be submitted by the Council to the Governor-General without the intervention of either the Dáil or the Executive Council. The final version of the Constitution merely provides that they might be "recommended to Dáil Eireann by such Councils" (Art. 56).

[2] No practical importance attaches to the absence from Art. 53 of a specific provision for the formal assent of the Dáil to the nomination of the Vice-President. In actual practice the nomination has always been submitted by the President to the Dáil in the same way as that of the other members of the Executive Council.

Council was emphasised by the provision that the preparation and introduction of the financial estimates was to fall within their competence, which implicitly deprived the "Extern Ministers" of any effective measure of administrative independence. The position of the President as the pivot of the Executive Council is exemplified in the provision that the Cabinet shall retire when he ceases to retain the support of a majority in Dáil Eireann.

The framework of government as it emerged from the Constituent Assembly was in the nature of a compromise. It retained the complexity of the scheme of the Draft Constitution, but it lacked its inspiration. The functional innovation of Ministers nominally independent of the Executive Council, and merely responsible for their individual departments, was maintained. On the other hand, these Ministers were not, as in the Draft Constitution, designed to form a majority of the Ministry and were divested of any effective influence on the general policy of the latter. The original exclusion of members of Parliament from these ministerial offices was not upheld; on the other hand, the view, strenuously urged in the Debates, that the holders of ministerial office must have obtained an expression of public confidence by being returned to Parliament, was equally not accepted.[1] The appointment of non-parliamentarians to ministerial office is not, in fact, so unprecedented an innovation as was considered by the members of the Constituent Assembly steeped in the British conventions of parliamentary government. Continental constitutions frequently permit of the appointment of Ministers from outside the ranks of the legislature, provided they enjoy the support of a majority in the latter. The essential novelty of the Irish scheme lay not so much in the admission of non-parliamentarians to ministerial office as in the mode of their nomination by a parliamentary committee independent of the head of the Government and in the fixity of their tenure of office

[1] Cf. the statement of President Cosgrave (*Dáil Debates*, Vol. 1, col. 1942).

during the entire length of the Parliament that had elected them.

The defects of the scheme as finally accepted were threefold. The distinction between political and non-political offices which underlay the division of the Government into "Executive" and "Extern" Ministers is devoid of any reality in the conditions of the modern State. There can be no administration on principles of "pure reason." Every legislative measure introduced, every administrative order made by a Minister, however "technical" his antecedents, is inevitably a political measure in that it affects economic and social interests, whose articulation constitutes to-day the essence of political life. The most crucial instance of that indivisibility of function is to be found in the sphere of finance, though it is by no means the only test. The work of every department, however technical its scope, involves expenditure which necessarily must fall on the central fund of the State. Its estimates have to be included in the general budget, which is introduced and defended in Parliament by the Minister for Finance and the Cabinet as a whole. In accepting the financial proposals of an "Extern Minister" into the Estimates, the Executive Council implicitly assumes collective responsibility for them and for the policy which they embody. The view which was urged in the Constituent Assembly by the leader of the Labour Party, that an "Extern Minister" might on his own authority ask the approval of Parliament for measures rejected by the Executive Council, is clearly incompatible with the cardinal principle of the financial initiative of the Executive and the entire structure of the parliamentary cabinet system. In the second place, the investment of Ministers of restricted competence with a measure of security of tenure not possessed by their more powerful colleagues must inevitably produce a tense psychological problem. Consciousness of inferiority of rank will act as an incentive to exploit superiority of tenure. Such a system must engender conflict and irresponsibility. The problem was intensified—and here lies the third defect of the scheme—by

the mode of nomination of these Ministers. The provision vesting the initiative in the making of these appointments in a Committee of Parliament and depriving the head of the Executive of any direct share in their selection must, if strictly carried out, be destructive of that personal cohesion which is the psychological foundation of all government by committee.

Actual experience of the innovation seems at an early stage to have revealed its inherent impracticability. In the first Parliament after the enactment of the Constitution three "Extern Ministers" were appointed, the Ministers for Agriculture, Postal Services and Fisheries. In the second Parliament their number was increased to four, the Department of Local Government being added to the "Extern Ministries." On the latter occasion, however, complaints were raised by the representatives of the minority parties on the Committee of Selection that the injunctions of the Constitution had not been observed in that the names recommended by the Committee represented, in fact, the nominees of the Executive Council whose supporters naturally formed the majority of the Committee—an assertion which was not denied. The recommendations of the Committee were moved individually by the President—a procedure hardly intended by the Constitution—and the nominations were adopted with the support of the Government Majority in the Chamber. The Ministers appointed were without exception active members of the Government Party in the Dáil. The most characteristic feature of the scheme was thus never brought into operation. But its application even in that restricted form seems to have revealed the technical and personal difficulties inherent in the system, for already in the second Parliament a Constitution Amendment Bill was introduced which was in effect designed to discard the entire institution of "Extern Ministers."[1] The Bill—passed after a very brief debate which revealed little of the original enthusiasm for the scheme—provided that the Executive Council might comprise the total number of twelve Ministers authorised

[1] Constitution (Amendment No. 5) Act (No. 13 of 1927).

by the Constitution. The practical effect of the amendment was that it was left to the discretion of the President of each successive Ministry to determine whether any "Extern Ministers" were to be appointed or whether all offices were to be administered by members of the Executive Council. In support of the Bill it was urged by the spokesmen of the Government that its aim was to entrust a greater measure of discretion to the head of the Government in regard to the appointment or non-appointment of Ministers of merely individual responsibility. It was indicated that the practical working of the scheme had made the Government sceptical of its merits and that, in particular, the dependence of every Department of State on the Ministry of Finance rendered the conception of an individual responsibility of certain Ministers illusory in practice.[1] The Opposition pleaded that the innovation had not been tried at all, that none of the "Extern Ministers" had yet ventured on any independent line of action and that all measures introduced by them had, in fact, been proposed with the assent of the Executive Council. The argument, though critical in intent, strengthened in effect the case for the proposed amendment. The truth was that actual experience of government had convinced the framers of the scheme of its impracticability. The principal arguments which had been adduced in its favour in the Constituent Assembly had lost much of their force. Proportional Representation had not, as had been anticipated, produced a multiplicity of parties. Continuity of government was assured, in a larger measure, indeed, and for a longer period than could then have been foreseen. On the other hand, in a small Legislature not paralysed by an overwhelming mass of business, like the British Parliament, the defects of the cabinet system, on which the arguments for the innovation had been so largely based, would be less apparent. But even in so far as they might still be appreciated—and they would inevitably be least appreciated by those in control of the system—it was realised, as evidenced by the

[1] *Dáil Debates*, Vol. 17, col. 418 *et seq.*

weak opposition offered to its virtual abolition, that the scheme of "Extern Ministers" provided no effective solution. In the three Dáils elected after the enactment of the Fifth Amendment no effort was made to maintain the institution even in appearance. It seems unlikely that it will ever be revived unless, indeed, the present alignment of parties gives place to a system of group coalitions on Continental lines, in which case the institution might sometimes offer a helpful device for the solution of delicate personal issues in the allocation of offices.

CHAPTER III

EXECUTIVE AND LEGISLATURE

(ARTS. 24, 28, 46, 49, 51, 53 AND 54)

IN the functional structure of parliamentary government the complex conventions which regulate the relationship between executive and legislature are invested with supreme significance. They govern the dynamics of the system. If the dogmatism of the eighteenth century had regarded the rigid separation of the two functions as essential to political liberty,[1] the pragmatism of the nineteenth discovered that unless an organic relationship could be evolved between them, that liberty could not become articulate. Such realisation sprang from a progressive recognition of the fact that neither function was in reality limited to what its designation connoted. In modern conditions an executive which holds almost exclusive initiative in regard to the introduction of legislation, which prepares its legislative proposals in full detail and defends them against amendment and which, lastly, has become invested with an ever-increasing measure of legislative competence in the

[1] In the first Constitution of the French Revolution the separation of powers figured significantly as a "fundamental right." The separation of the legislative from the executive function arose from a spiritual conception of the former, which has been obscured by its subsequent evolution. In the mediaeval State, as previously noted, acts of parliament were conceived as formal declarations of an abstract Law rooted not in human design but in the transcendental authority of the spiritual order. The distinctive sanctity with which this conception surrounded the legislative act survived in the postulate of the separation of powers. It was under the new dispensation not the law divine, but the will of the people from which that act derived its authority, but that will was conceived to emanate from the same metaphysical order as had been the source of the former. It was invested with a transcendental dignity akin to that of the judicial function; hence the preservation of its distinctness and its independence of the ephemeral organs of the executive power seemed as essential to a sound constitutional order as the protection of judicial integrity.

sphere of delegated legislation is in fact, if not in name, a legislative organ. In the words of President Lowell, the Cabinet "legislates with the advice and consent of Parliament." On the other hand, a Parliament which spends a substantial portion of its time discussing and criticising executive action and which has the power by questions, motions of adjournment, reductions of estimates and a variety of other devices effectively to influence executive action, and in the ultimate resort to destroy and supplant the Executive by another committee from its own ranks, is in eminent degree an executive agency. In constitutional reality both organs work in an identical sphere: legislative enactments are but political acts clothed in the legal framework of generality, executive orders but the application of parliamentary policy to individual contingency. Their tendency, in contrast to that of the judicial function, is essentially dynamic, their motive force frankly interest. A rigid constitutional separation must result either in the stultification of the legislature, as in pre-Union Ireland or pre-War Germany, or in the establishment of an extra-constitutional relationship, as in the United States.[1] If an organic relationship and an identical inspiration of the dynamic functions is thus essential, it is, on the other hand, clear that initiative and direction must be concentrated either in the one or in the other. Parliament may be the master of the Executive, as under the modern French system, or political initiative and control may rest primarily with the Executive, as in England. It is by the mode of their relationship, not by the rigidity of their separation, that the character of a modern constitutional system is pre-eminently fixed.

In this vital sphere, as in the framing of the structure of the Executive, the draftsmen of the Irish Constitution endeavoured to break away from the traditional conventions of the British system. Their aim was to strengthen the authority of the Legislature as against that of the Executive. The tendency is revealed, in the first instance, in the formal enunciation of the

[1] H. J. Laski: *A Grammar of Politics*, p. 298.

constitutional supremacy of Parliament. The principle of the responsibility of the Executive Council to Dáil Eireann is twice expressly affirmed (Arts. 51 and 54). Similarly, the basic convention of the parliamentary system that the Cabinet is required to resign when it has ceased to command the support of a majority of Parliament is invested with the force of positive law (Art. 53). More significant still is the embodiment in Art. 46 of the Constitution of the great principle of the Petition of Right that "the raising or keeping of a standing army within the Kingdom in time of peace, unless it be with the consent of Parliament, is against law," a further departure from the model of the Dominion Constitutions, in which no such parliamentary prerogative was, nor indeed could, have been claimed at the time of their enactment. The Irish Constitution invests the Oireachtas both with the exclusive right to regulate the raising and maintaining of armed forces in the Free State and with the power of their control. The tendency to raise the status of the Legislature in its relationship to the Executive is further reflected in several modifications of the traditional British conventions of parliamentary government. The power to fix the dates of the conclusion and of the reassembly of Parliament, which under the modern practice of the British Constitution falls within the competence of the Cabinet, was, as previously shown, vested in Dáil Eireann. The President of the Executive Council is appointed on the nomination of the latter. Its formal assent is similarly required for the nomination of Ministers. In so far as the members of the Executive Council are concerned the latter provision is in practice a dead letter, since any opposition that might be offered from supporters of the Government would have to be taken into account by the President before submitting his nominations, while any objections raised by the Opposition would clearly be of small avail. In practice, the effect of the provision has been to engender at the beginning of each Parliament an acrimonious personal debate hardly conducive to the enhancement of the dignity of the House. The influence of the Dáil might appear

to be greater in the selection of the "Extern Ministers," which was definitely vested by the Constitution in a Committee of all parties. The very introduction of the institution was designed to raise the status of the Legislature and to enlarge the creative scope of its individual members. Here, too, however, actual practice has, as previously shown, reduced these Ministers to nominees of the President.

Of greater moment than these formal provisions was a constitutional innovation rooted in the new postulate of the democratic control of foreign policy. Under Art. 49, the Free State cannot, except in the case of actual invasion, be committed to active participation in war without the assent of its Parliament. None of the Dominion Constitutions, few even of modern Continental Constitutions, contain an express provision to that effect. In British constitutional practice declarations of war, like other executive acts, are subject to parliamentary control, and no Government would decide upon a declaration of war if it were not assured of the support of a majority in Parliament. Yet the power to declare war remains an integral part of the Royal Prerogative and the responsibility for advising the Crown on its exercise rests exclusively with the Cabinet. In contrast to this merely indirect form of parliamentary control the Irish Constitution imposes upon the Executive Council a positive requirement to obtain the formal and explicit assent of the Oireachtas before committing the Free State to active participation in war, except in the case of an actual invasion. The import of the provision is both internal and external. It is designed, on the one hand, to restrain the Irish Government from taking any but defensive military measures on Free State territory without the consent of the Oireachtas. It constitutes, on the other hand, an implied affirmation of the constitutional right of the Free State not to be involved against its will in any external war by the action of the British Commonwealth or any of its members. In the course of the deliberations in the Constituent Assembly an effort was made to strengthen the former aspect of the pro-

vision by an amendment requiring the assent of the majority of the electorate expressed through a Referendum. It was resisted by the Provisional Government on the plea of the incompatibility of military urgency with the cumbersome procedure of the Referendum, though there was general agreement as to the efficacy of the device, if generally adopted, for preventing war. The external implications of the provision were the subject of much discussion when the Constitution came to be considered by the British Parliament. It was urged by the critics of the Treaty Settlement that the provision was in effect repugnant to Art. 7 of the Treaty, which conceded to the British Government in time of war or strained relations with a foreign power the use of such harbour and other facilities as it required for purposes of defence, inasmuch as the latter emergency would inevitably render the Free State a belligerent with or without the consent of its Parliament. The reply of the Attorney-General in the House of Commons denied the existence of any such repugnancy. He explained that the only effect of Art. 49 was that the Irish people were not to be committed to *active* participation in war—"that is to say, to become actively engaged by raising and joining fighting forces in any war"—without the consent of their Parliament, but that there was nothing in the Article which precluded their giving the promised facilities.[1] The reply, though substantially correct, can hardly be regarded as exhaustive. There can clearly be no question of any repugnancy, but it is, on the other hand, evident that the practical significance of Art. 49 of the Constitution is restricted within very narrow limits by the overruling force of Art. 7 of the Treaty. The use of Irish harbours by British Forces in time of war may lead to enemy attacks on these places, and the question would then arise of whether these would have to be considered as invasions within the meaning of Art. 49. If they were so considered, the provision of Art. 49 would be of practical effect only as long as the use, or potential use, of these facilities by the British Forces

[1] Hansard, November 27, 1922, vol. 159, col. 375.

did not expose them to attack by the enemy. It may, however, be held on the analogy of the Chinese ports which were leased to Germany and were attacked and occupied during the late War by Japanese Forces without Chinese neutrality being regarded as infringed thereby, that an enemy attack on these Irish ports or other places occupied by British Forces under the terms of the Treaty, provided it was limited to these, did not constitute an invasion in the technical sense of Art. 49, since these places were during such a state of emergency withdrawn from the control of the Irish Government. On that interpretation, unless the enemy did not confine himself to attacking those Irish places which were occupied by British Forces, the assent of the Irish Parliament would clearly be required for any active military measures against the invader. No authoritative guidance is at present available as to the official interpretation placed on the Article. The point was completely ignored in the Debates of the Constituent Assembly.

If it would thus appear that neither the conversion of the traditional conventions of the parliamentary system into positive law nor the introduction of novel forms of parliamentary control had in practice produced a marked increase in the constitutional status of Parliament in its relation to the Executive, such a result might potentially follow from the adoption of the electoral device of Proportional Representation. Proportional Representation, as previously shown, was in its origin essentially a concession to the apprehensions of the Unionist minority. The indirect effect of its introduction, however, might be to create parliamentary conditions involving a functional relationship between the Legislature and the Executive diametrically opposed to that which governs the British system. Experience on the Continent has shown that Proportional Representation tends to engender the growth of a multiplicity of parliamentary groups which precludes the evolution of any two-party system. The Executive under such a system depends on the precarious support of heterogeneous forces of dubious

allegiance. Its life cannot but be of limited duration and, except in special circumstances, it will inevitably lack both the time and the authority for comprehensive measures of legislative or administrative reform. A Cabinet under such a dispensation is in a very real sense the creature of Parliament: it has unceasingly to manœuvre for the support of a variety of groups, frequently mere minority factions, who hold the balance of parliamentary power. Such was the constitutional order which, as the framers of the Constitution clearly envisaged, might arise from the adoption of Proportional Representation.[1] In the event the unreal alignment of parties on the Treaty issue has for the time precluded the evolution of these tendencies of the proportional system. The Government, even when its own party represented but a minority of the Dáil, has been able in all major issues to command the support of a sufficient number of other groups to enable it to govern on the lines of a majority Ministry. Should the Treaty, however, lose the paramount place it still holds in the political arena, the effect of Proportional Representation on the parliamentary system of government—more particularly on the status of Parliament in its relation to the Executive—will hardly fail to make itself felt.

A more direct limitation of the authority of the Executive in its relation to Parliament is implied in the last provision of Art. 53, which denies to a defeated Ministry the power to advise a dissolution. That provision, similarly to the adoption of Proportional Representation, was in considerable measure inspired by external considerations. It was designed to deprive the Governor-General of any discretionary scope in regard to the grant or refusal of a dissolution to the Ministry in power. In the Dominions—as was to be forcibly demonstrated in 1926 in Canada—the Governor-General, unlike the King in Great Britain, was still regarded as entitled to refuse a dissolution if he felt that an alternative Ministry might be formed with the support of a majority in the existing Parliament. The

[1] Cf. the speech of Mr. O'Higgins (*Dáil Debates*, Vol. 1, col. 1246 *et seq.*).

framers of the Irish Constitution, aware of the uncertainties of Dominion practice, which under the general provisions of the Treaty might be held to apply to the Free State, were intent on excluding any such discretionary power. They retained the modern convention of the British Constitution that the right to advise a dissolution is a monopoly of the head of the Government in power, but qualified it by the proviso that he was to enjoy that supreme attribute of office only as long as he retained the support of a majority in the Dáil. When once that had been withdrawn, he was to be debarred from appealing to the electorate; no alternative was left to him but to resign and leave the election of his successor to the existing Dáil. It is necessary to stress the scope of the restriction. Its effect was not, as has frequently been asserted, to make the Dáil the master of the Executive Council. The latter retains the initiative and the monopoly of surprise.[1] It loses that position of vantage only when a decisive part of its majority has deserted it.[2] It cannot, in Bagehot's famous phrase, appeal from one Parliament to the next. The actual result produced by the provision of Art. 53 was thus twofold. On the one hand, it deprived the Governor-General of all power of discretion in the exercise of the prerogative. On the other, it shifted the struggle for the possession of that all-powerful weapon into the realm of parliamentary tactics. It did not, however, as closer analysis will show, imply a fundamental break with the British

[1] It follows from the two references to the power of dissolution in Arts. 28 and 53 that the power to advise a dissolution rests with the Executive Council as a whole and not, as is the modern British view, with the head of the Ministry alone, a distinction which is of considerable practical import in the case of Coalition Governments composed of heterogeneous groups, such as the British Cabinet formed in August 1931.

[2] The test of defeat would seem to be either the adoption of a formal vote of censure or the rejection or fundamental amendment of a measure of such major importance as clearly to indicate a withdrawal of the confidence of the parliamentary majority. There will in general be rarely any doubt as to the meaning of an adverse vote. If there were, the opponents of the Government would scarcely fail to test the position by the introduction of a motion of censure.

conception of the executive prerogative of dissolution as such.

In the modern practice of the British Constitution the power of dissolution enshrines that element of legalised anarchy which every constitutional system would seem to require as a safety-valve for change and emergency. Parliament is sovereign; the Cabinet cannot govern without the continuous support of a parliamentary majority. But when it has once been placed in office, it has the power to terminate the life of the body from which it derived its authority and to elicit a new expression of the will of the electorate on issues of its own making and in a situation of its own choice. The Legislature wields the cyclopean weapon of censure, but the Executive, superior both in agility and authority, may return the missile on its censors and compel them to defend their title under such circumstances as it considers most advantageous to itself. This paradox is the result of the peculiar origin and growth of the two bodies. The institution of Parliament constituted from its very origin an encroachment on the Executive, but the King, though he could not govern without the agency which supplied him with funds and soldiers, retained the power to convene and dissolve it at his discretion. By the ever-growing need for such support the Legislature succeeded in dominating, and finally in supplanting, the executive advisers of the King by its own nominees. No sooner, however, had these assumed the seats of authority and deprived the holder of the Crown of all effective power that, among the other attributes of the latter, they also laid claim to the anarchical prerogative of dissolution, which became their chief arm both of defence and attack against the very body from which their authority was derived. That historical process reached its consummation when the right to advise a dissolution was effectively asserted even by a minority Ministry. There seemed indeed no alternative, if the personal power of the Monarch was not to be revived; yet in this instance the "Prerogative of the Crown" was not converted into a "Privilege of the People." Its exercise became the

monopoly of the Ministry which, on the strength of its majority in the existing Legislature, held the reins of office for the time being. Yet its very character as a Party Government rendered its possession of the power of dissolution fundamentally inequitable. For the right to advise a dissolution implies the power to fix the conditions for that articulation of the popular will from which all authority in the democratic State is derived. It clearly cannot become a weapon in the hands of one of the aspirants for such popular support without the objective authority of the system being seriously impaired thereby. Such, however, is the position produced under the modern practice of the British Constitution by the absence of a supreme organ which, while enjoying impartial authority, would yet be qualified to adjudge on an essentially political issue. It vests all executive power in a Monarch who, because of the inherent limitations of his office, cannot act, and entrusts its exercise to a Prime Minister who inevitably views every question affecting the issue of power from the angle of the party he leads.

The actual application of the power indicates the perils inherent in the absence of any restrictions on its exercise.[1] Broadly speaking, under the modern practice of the British Constitution, Parliament is dissolved when the emergence of new issues has deprived the Ministry of its parliamentary majority, or when a Cabinet finds itself confronted with the necessity of introducing new policies of such far-reaching character as, in its view, to require a renewed and specific authorisation from the ultimate source of democratic authority. A Ministry deserted on a fundamental issue by a substantial section of its supporters may advise a dissolution in the hope

[1] "Dissolutions since 1829 have eight times out of twenty-seven been due to the approaching expiry of Parliament. Two were under the old rule that the demise of the Crown terminates Parliament, four were occasioned by disputes between the two Houses. One was the outcome of the desire of the King for a change of Ministry. The remaining twelve were deliberate efforts by the Cabinet to secure from the electorate a more amenable Commons" (A. B. Keith: *British Constitutional Law*, 1931, p. 49).

of re-establishing its parliamentary position, or it may hand over office to its opponents, who, in their turn, may consider it opportune to exploit the internal dissensions in the opposite camp in order to secure a solid majority at the polls rather than hold office with the support of the seceders. Again, a minority Government, thwarted by parliamentary auxiliaries in the execution of essential policies and compelled at a critical moment to choose between desertion of principle and resignation of office, may endeavour to escape the dilemma by a hazardous appeal to the polls—or its successors may be obliged to take that course to overcome the parliamentary *impasse*. On the other hand, a Government, though supported by an adequate parliamentary majority, may feel the need for a specific mandate from the electorate when about to initiate a new policy or effect a fundamental constitutional change. The mere enumeration of the several contingencies indicates the partisan abuses to which the power is liable. Nor is the contingency of abuse confined to periods of crisis. A Government may feel impelled to advise a dissolution not because its majority is slender or unreliable, nor because new issues would seem to require a new mandate from the electorate, but because it considered a given situation as opportune for obtaining a new lease of life from the electorate which might not be accorded so readily if the existing Legislature were allowed to run out its normal course. A moment of national excitement after external victory or internal commotion may offer a welcome opportunity for drowning memories of administrative blunders and unpopular legislation in a wave of legitimist or revolutionary enthusiasm and securing a lengthy extension of the term of office of the party in power. If the basic safeguard of the representative system lies in the power of the electorate to call to account those in whom it has vested its confidence after a period not too long for records to be forgotten, it is clearly essential that the electoral act should take place under such circumstances as will ensure to the voters the maximum of rational deliberation in the single decision by

which for a period of years they are capable of influencing the direction of the State. The very foundation of the system breaks down if the party in office has the power, by an unscrupulous use of the prerogative of dissolution, to mislead and escape electoral judgment. It may be objected that the Government in power will in any case be in a position so to arrange its programme of legislation as to obtain the maximum of popular support on the normal expiry of the parliamentary term. This advantage, however, can clearly not compare with that involved in the possession of an unlimited power of dissolution. It may be doubtful, indeed, whether the actual practice could have been maintained in England under the new dispensation of the three-party system if the actual electoral system had not produced the unrepresentative majorities of recent Parliaments, or the moderation of the Labour Party—itself a characteristic approach to the psychology of the group system—had not ensured so continuous a measure of Liberal support to the second Labour Government. The artificial maintenance of the appearance and constitutional forms of the two-party system has also enabled the unrestricted exercise of the prerogative of dissolution to be maintained.

Under a system of group coalitions, on the other hand, an unlimited use of the weapon of dissolution is clearly suicidal. In France, where the President of the Republic may dissolve the Chamber with the assent of the Senate, no dissolution has in fact taken place since 1877. In most Continental Constitutions the power of the Head of the State to dissolve the Legislature is limited by specific restrictions; nowhere is it, as in England, vested exclusively in the head of the Government. In the new German Constitution, where an effort has been made to break new ground, the power of dissolution is entrusted to the President of the Republic, who derives his authority from a direct vote of the electorate. He may not, however, dissolve the Reichstag in two consecutive instances "for the same reason," which implies that the cause of the dissolution must be stated. He requires, as in all other acts of

State, the counter-signature of a Minister, in this case that of the Chancellor. The fact, however, that this would in practice imply the transfer of the power to the party leader in office has impelled leading interpreters of the Constitution to concede to the President in this respect a wide measure of discretion. It is held that he may even go so far as to dissolve the Reichstag against the advice of his Ministers, dismissing the latter and appointing others ready to accept responsibility for the dissolution.[1]

It is in the light of such precedents that the practical import of the Irish provisions governing dissolution must be examined. The denial of the power of dissolution to a defeated Ministry affects in practice two of the contingencies indicated above, the case of a minority Government deprived of the support of external associates and that of a majority Government broken up by the defection of a substantial group of its party. The two cases are not of identical merit. Under a system of Coalition Ministries a limitation of the power of dissolution is clearly inevitable—though this result is in fact only partially produced by Art. 53 of the Irish Constitution, which allows even a minority Ministry to dissolve as long as it has not been actually defeated. On the other hand, the break-up of a majority Government may, both on account of the new issues from which it is likely to arise and of the parliamentary *impasse* which it may produce, well justify an appeal to the electorate. Apart, however, from the case of a sudden defeat in either of these contingencies, the power of the Government in office to advise a dissolution was fully maintained. The restriction embodied in Art. 53 offers no safeguard against the abuses to which the modern British practice is liable. Its introduction into a Constitution, which was expected to produce a group coalition system, reduced it, indeed, to absurdity. A Constitution may vest the right to dissolve in the Executive in power, as in Great Britain and in the Dominions. It may, as in certain Continental Constitutions, subject the exercise of the power to

[1] G. Anschütz: *Die Verfassung des Deutschen Reichs*, 1926, p. 124.

the control of the Legislature. It may, finally, entrust it to the Head of State, as in Germany. The system of the Irish Constitution conforms to none of these conceptions. It retained the basic principle of the modern British practice, and, in retaining it, exposed itself to the potential abuses of the latter. But it vitiated the clear alignment of the constitutional relationship between the Executive and the Legislature under the British system by depriving the former of the weapon of dissolution as soon as it had suffered defeat, and thus transferring the issue to the realm of parliamentary tactics. Under a group system such a restriction would inevitably countenance the growth of those destructive tactics for which the French Chamber is famous. It would act as an ever-present incentive to opposition groups to challenge the Executive when a critical situation might make it suspect of being ready to resort to a dissolution. Under such a dispensation Parliament might indeed, though in a rather effete sense, become the "Master of the Executive."[1]

It will be evident from the foregoing analysis that the relationship of the Executive and the Legislature in the Irish Constitution cannot be summed up in a clear-cut formula. The provisions of the Constitution were clearly designed to enhance the status and the power of the Legislature. Such was the underlying tendency of the formal affirmation of the traditional conventions of the parliamentary system, such the avowed aim of the constitutional innovations here described. It is all the more noteworthy that in the actual working of the Constitution the Irish Executive has in fact been invested with that functional superiority which is the characteristic feature of the British system. That development has been the result in part

[1] Perhaps a solution might be found in investing the Governor-General with a limited and well-defined measure of discretion. He might be authorised to grant a dissolution either in the case of a parliamentary *impasse* or when issues of such novel and fundamental character had arisen as clearly to require a new expression of the will of the electorate, the cause of the dissolution to be specifically stated in the proclamation.

of the adoption of the parliamentary traditions of the latter, in part of the peculiar alignment of parties during the first decade of the new State. The Standing Orders invested the Executive Council with the extensive powers of the British Cabinet. It controls the time-table of the Oireachtas. Its measures take precedence over any other business of both Houses. It enjoys an almost exclusive initiative in regard to the introduction of legislation and an absolute monopoly in the sphere of financial measures. It is not hampered by powerful parliamentary committees. It disposes of the autocratic weapons of closure and guillotine. It finally enjoys a considerable measure of initiative in the dissolution of Parliament. These features of the system have been intensified by the actual evolution of a two-party system of considerable coherence. In consequence of the permanence of the split on the Treaty issue, Proportional Representation has not, as expected, resulted in the disintegration of political parties. In spite of its constitutional limitations the first Government of the Irish Free State has in fact enjoyed the same degree of authority as a majority Cabinet in the British Parliament. The apprehension, moreover, that a change of Government might result in a break-up of the Treaty Settlement proved a more effective agent of cohesion than even the disciplinary weapon of an unrestricted power of dissolution could have been. The joint effect of these circumstances was to invest the system with a greater measure of unity and solidity than it might have enjoyed if it had worked itself out in accordance with its immanent tendencies. It may, however, assume an entirely different complexion when the artificial two-party system which at present dominates the Irish political scene gives way to a more rational, though necessarily more complex, alignment of parties.

CHAPTER IV

THE MACHINERY OF GOVERNMENT

THE establishment of the Free State resulted in a comprehensive reconstruction of the machinery of Irish government. It was a very complex system of administration which the new State took over. Its original structure had been overlaid during the century of the Union by successive strata of reform representative of policies sometimes diametrically opposed to each other and never fused into an organic whole. In its entirety the system exhibited the typical defects of an administration not directly responsible to those whom it governed. Comprehensive endeavours had, indeed, been made during the last phase to improve the technique of departmental administration. Nor had local influence been entirely excluded from the process of government. In essence, however, the Administration, divorced by the absence of any direct form of public control from responsible contact with those primarily affected by its acts, had failed to elicit the effective co-operation of local opinion. Its responsibility was pre-eminently to the British Parliament, and in the latter the Irish representatives formed a permanent minority. This absence of a genuine measure of public confidence and co-operation explains the essential inefficiency of the system. Its orientation was characteristically reflected in its organisation. Education, agriculture, local government were centralised in Dublin and administered in some measure with the aid of local bodies. The administration of Irish finance, however, was conducted as a branch of the British Treasury and completely withdrawn from local control.

The proclamation of Irish independence by the Revolutionary Dáil in January 1919 had, as previously shown, been followed by the establishment of a National Ministry com-

prising the principal Departments of State.[1] The scope of its activities, though conceived on ambitious lines, was necessarily restricted by the ever-growing intensity of the armed conflict. It evolved, however, a structure of administration which, when the Treaty Settlement transferred to Dáil Eireann the responsibility for the government of the country, became the executive framework of the new State. The Provisional Government formed under the terms of the Treaty was organised on the lines of the Dáil Ministry; the latter, as previously described, continued its existence until the Civil War. The Constitution, beyond fixing the number and defining the status of the two categories of Ministers and providing for the fiscal[2] and legal[3] succession of the new régime, made no provision for the organisation of the machinery of government. The framework established by the Provisional Government was maintained without specific legislative authorisation, and was not invested with statutory authority until the enactment of the Ministers and Secretaries Act (No. 16 of 1924), which was amended in 1928 by a supplementary Act of the same designation (No. 6 of 1928).

The Ministers and Secretaries Act provided for the establishment of eleven Departments of State: the Departments of the President, Finance, Justice, Local Government and Public Health, Education, Lands and Agriculture, Industry and Commerce, Fisheries, Posts and Telegraphs, Defence and External Affairs. It, moreover, placed the position of the Attorney-General on a statutory basis. Under s. 2 of the Act every Minister is a corporation sole invested with perpetual succession and may sue and—subject to the fiat of the Attorney-

[1] The first Dáil Cabinet consisted of the President and the Ministers for Finance, Home Affairs, Foreign Affairs and Defence. It was subsequently enlarged by the establishment of Departments of Local Government, Labour, Industry and Agriculture.

[2] Art. 74. Cf. the decision of the Supreme Court in *In re Reade, a Bankrupt*, [1927] I.R. 31.

[3] Art. 80. Cf. *In re Maloney*, [1926] I.R. 202.

General—be sued in the Courts.[1] The Act further provided for the appointment of Parliamentary Secretaries, whose number was limited to seven. It finally fixed the scale of remuneration of Ministers and of Parliamentary Secretaries.

(*a*) THE PRESIDENT (ART. 53)

The position of the President of the Executive Council is practically analogous to that of the British Prime Minister. He is the pivot of the governmental system. He selects his team of Ministers, and though the Constitution requires the specific assent of the Dáil before his nominations are presented to the Governor-General, that provision, as previously shown, must normally remain a dead letter. The decision as to which Ministers are to be included in the Executive Council and as to which are to hold merely "extern" rank is expressly vested in the President by the terms of the Ministers and Secretaries Act (s. 3). In a very specific manner the Constitution marks him out as the embodiment of the collective responsibility of the Cabinet: it is when *he* ceases to retain the support of a majority in the Dáil that the Cabinet as a whole is required to

[1] This provision, as pointed out by the Attorney-General in the debate on the Act, marked an important advance on the preceding English system under which actions against Ministers could be raised only on contract, but not in respect of wrong and then only by petition of right (*Dáil Debates*, Vol. 5, col. 1498). It was held by the High Court in *Leen* v. *President of Executive Council*, [1926] I.R. 456, that while members of the Executive Council sued as corporations sole were liable to the ordinary orders for discovery by way of interrogatories, a claim to privilege made by them on grounds of public interest was conclusive and must be recognised as paramount on the same principle as that underlying the recognition of a similar claim by a British Minister under the Royal Prerogative, the rule being held to be "broadbased upon the public interest" and not "dependent upon the magic of any particular nomenclature." It was further held in *Carolan* v. *Minister for Defence*, [1926] I.R. 62, that the Act, in making Ministers corporations sole, intended "to establish continuity, but not to create a liability in each Minister for all wrongful acts of all persons employed in his Department."

resign (Art. 53). On the other hand he has not, under the terms of the Constitution, the power to advise a dissolution on his sole authority, which the modern practice of the British Constitution attributes to the Prime Minister.

The Department of the President is in essence the Secretariat of the Cabinet. It is an agency of record and executive authorisation. It also forms the normal channel of official communication between the Cabinet and the Governor-General. It is further invested by the Ministers and Secretaries Act with the custody of the seal of the Executive Council, the control of official publications and the administration of such services as are not at any time specifically allocated to any of the other Departments.

(*b*) FINANCE (ARTS. 52, 61, 62 AND 63)

The Minister for Finance occupies in the hierarchy of the Irish machinery of government a position of similar pre-eminence as the Chancellor of the Exchequer in the British Cabinet. He is not, it is true, a *secundus inter pares* in the same sense as the latter, the Constitution having created the special office of a Vice-President of the Council. The paramount character of his function is, however, indicated by the constitutional requirement of his permanent inclusion in the Executive Council, while the provisions of the Civil Service Regulation Acts invest him with the administrative control of that central agency of the machinery of government.

The Department of Finance is an entirely new creation of the Free State, the financial section of the Viceregal Administration having since the absorption of the Irish Treasury in 1817 formed but an accounting branch of the British Treasury. The Constitution merely provided for the establishment of a central fund.[1] The functions and scope of the Department

[1] Section 1 (1) of the Adaptation of Enactments Act, 1922 (No. 2), provided that the fund be called "The Central Fund of Saorstát Eireann."

were comprehensively defined by the Ministers and Secretaries Act. It was entrusted by the latter with the administration of the public finances of the Free State, more particularly with the collection and expenditure of the revenue. It prepares the estimates, records the votes, regulates the machinery of payment, and exercises a comprehensive control over the financial administration of the other Departments. It has absorbed on the revenue side the functions of the former Revenue Commissioners, and in regard to the control of disbursements, those of the former Paymaster-General. It is, moreover, invested, as is the British Treasury, with the administration of a considerable number of miscellaneous services, partly ancillary to its primary objects, partly arising from its function of control, including in particular the Board of Public Works, the Ordnance Survey, the Stationery Office, the Old Age Pensions, the Registry of Friendly Societies and the Post Office Savings Bank, which is administered through the agency of the Department of Posts and Telegraphs. It is, in addition, responsible for the administration of the Public Debt and for all measures governing banking and currency. It is, finally, the Department charged with the administration of the Civil Service.

The Constitution provided for the appointment by Dáil Eireann of a Comptroller and Auditor-General,[1] with power to control all disbursements and to audit all accounts of the funds administered under the authority of Parliament, and to report thereon to the Dáil at stated periods. The tenure and status of that officer are similar to those of the judges. He may not be a member of either House of Parliament, nor hold any other position of emolument, and cannot be removed except for stated misbehaviour and incapacity on resolutions passed by both Houses. In accordance with an enabling clause of the Constitution, the terms and conditions of his tenure were fixed by the Comptroller and Auditor-General Act (No. 1 of

[1] Cf. the Resolution of Dáil Eireann of December 6, 1922 (*Dáil Debates*, Vol. 2, col. 734).

1923). His annual report is presented in the first instance to the Committee of Public Accounts of the Dáil, which examines it in detail and may send forward recommendations in regard to it to Dáil Eireann.

(*c*) JUSTICE

The Department of Justice—it was known prior to the Act of 1924 as the Ministry of Home Affairs—comprises a variety of functions formerly exercised by the Departments of the Irish Lord Chancellor and of the Chief Secretary, as well as a number of services attached to it by recent legislation. It corresponds in general outline to the English Home Office, but its organisation is conceived on more organic lines and may be said to realise certain of the postulates of reform frequently urged in regard to its English counterpart. Its scope is defined by the Ministers and Secretaries Act as comprising the administration of public services in connection with law, justice, public order and police. Schedule I of the Act includes within its sphere of administration the Courts of Justice and their officers, the Police, the Prisons, the Public Record Office, the Registries of Land and Deeds, and the functions of the Commissioners of Charitable Donations and Bequests. The work of the Department is organised in three sections, viz.: (1) Police and Prisons, (2) Courts of Justice and (3) Miscellaneous Functions.

(1) The Ministry controls the entire Police Force of the Free State. The establishment of the new State led to the dissolution of the former Royal Irish Constabulary, a semi-military Police Force outside the metropolitan district of Dublin. Its place was taken by an unarmed force, the Civic Guard (Gárda Síochána), which had its origin in the Police Force built up during the struggle by the Republican Dáil. It was organised at first as a temporary Force under the terms of the Gárda Síochána (Temporary Provisions) Act (No. 37 of 1923), and placed on a permanent basis by the Gárda Síochána

Act (No. 25 of 1924). In the following year the Dublin Metropolitan Police was absorbed in the Gárda by the Police Forces Amalgamation Act (No. 7 of 1925). The total Force consists at present of 7,000 men.[1] The functions of the Department further include the supervision of the entire Prison Service of the country, which comprises the large prisons of Mountjoy in Dublin and Portlaoighise in County Leix, and smaller prisons at Sligo, Galway, Waterford, Limerick and Cork, and of the Irish Borstal Institute. On the other hand, the administration of the reformatories has been vested in the Department of Education.

(2) The transfer of the administrative side of the judicial system, which was formerly under the control of the Lord Chancellor, to a non-judicial Department represented one of the most important reforms of the new system. The status and functions of the court officers were comprehensively defined by the Court Officers Act (No. 27 of 1926) which, while reaffirming the supremacy of the judges in the judicial sphere, vested the responsibility for the administrative establishments of the Courts in the Minister for Justice.

The Minister for Justice is invested under the terms of the Courts of Justice Act (No. 10 of 1924) with the power of making Rules of the Courts, subject to the concurrence of statutory committees for the Central Courts, the Circuit Court and the District Court respectively, composed of the judges and representatives of both branches of the legal profession. In practice the function devolves essentially on the latter bodies.

The Constitution provides for the appointment of all judges by the Governor-General on the advice of the Executive Council. The initiative in regard to the appointment of the judges of the lower Courts rests with the Minister for Justice.

[1] Members of the Force, on accepting appointment, are required to make a solemn declaration pledging themselves to "render good and true service and obedience to Saorstát Eireann and its Constitution and Government as by law established" (Schedule II of the Gárda Síochána Act, 1923).

In regard to the higher judicial appointments no definite *modus procedendi* would yet seem to have been evolved, though here a decisive share must necessarily fall to the Attorney-General, who is the legal adviser of the Cabinet and of all members of the Government the one in closest contact with the Courts, and hence the most competent to judge the respective qualifications of members of the Bar.

The Department of Justice has the initiative in the matter of legal reform. The practice hitherto has been for the preparation of comprehensive measures of legal reform to be entrusted to advisory committees,[1] though a new mode of procedure would seem to be indicated by the recent appointment by the Oireachtas of a Committee of both Houses to consider and prepare proposals for a further reform of the judicial system.

The scope of the Department of Justice further includes the administrative functions connected with the exercise of the prerogative of mercy. The prerogative is nominally vested in the Governor-General, but exercised exclusively on the advice of the Executive Council. In practice, it is the Minister for Justice who is entrusted with the administration of this function, though in all graver cases no decision would seem to be taken without the confirmation of the Cabinet as a whole. The forms in which the power is exercised are the same as under modern English practice: they include free pardons, commutations, remissions and reprieves.

(3) The third division of the Department comprises a large number of miscellaneous functions. It is the dynamic section of the office. It controls the immigration of aliens. It assists and advises the police in criminal matters of a non-routine character. It is the competent authority for dealing with all matters relating to extradition, a subject of considerable obscurity

[1] Such Committees have been set up for the preparation of legislative measures for the reform of the judicial system, the revision of the laws governing the relations of landlord and tenant and of the laws for the protection of women and children.

under the existing statutes and arrangements.[1] It controls the sale of liquors, the storage of explosives and the importation and distribution of fire-arms and dangerous drugs. It exercises functions so multifarious as the control of betting and lotteries, the regulation of vivisection and the administration of the Summer-time Acts. It is further invested with important functions under the Censorship of Publications Acts described in an earlier chapter; finally, the censorship of films, which is compulsory under the Film Censorship Act of 1928, falls within its administrative jurisdiction.

In defining the scope of the Department of Justice, it may be noted that, in contra-distinction to the British Home Office, it is not invested with the administration of the electoral system, nor with the control of criminal lunatics and criminal defectives, both of which functions have been transferred to the Department of Local Government and Public Health.[2] The administration of the Factory and Shop Acts, of the Workmen's Compensation Acts and of the Merchant Shipping Acts has been transferred to the jurisdiction of the Department of Industry and Commerce. Finally, in the sphere of judicial administration, the function of public prosecution and its ancillary branches have, except in respect of summary jurisdiction, been excluded from the competence of the Department of Justice and vested in that of the Attorney-General.

(*d*) LOCAL GOVERNMENT AND PUBLIC HEALTH

The Department of Local Government and Public Health originates from the Ministry of Local Government set up by Dáil Eireann in January 1919, which was one of the most

[1] A comprehensive statement of the actual position in regard to reciprocity with Great Britain and Northern Ireland has been issued by the Department of Justice as a White Paper under the title: "Reciprocity (Justice) 1928."

[2] Cf. the recommendations of Lord Haldane's Committee on the Machinery of Government, 1918 (Cmd. 9230), pp. 75 *et seq.*

active branches of the Revolutionary Government. The control of local administration had, under the British régime, been centralised in the hands of the Local Government Board for Ireland, a body of four Commissioners under the chairmanship of the Chief Secretary. Its functions were transferred to the Ministry of Local Government of the Provisional Government as from April 1, 1922. In addition to the functions of the Board, the new Ministry took over several services which had previously been under the direct supervision of the Lord Lieutenant: the establishment of the Registrar-General of Births, Deaths and Marriages, the Inspectors of Industrial Schools and Reformatories and the Inspectors of Lunatic Asylums. In October 1922 the Ministry was further invested with the control of roads, bridges, ferries and traffic thereon which, on the termination of the British régime, had first been transferred to the Ministry of Industry and Commerce. Its scope was further modified by the Ministers and Secretaries Act of 1924, by which it was constituted under its present designation. The principal changes then effected were the inclusion in the Department of the National Health Insurance Commission and the transfer of the control of the Reformatories and Industrial Schools to the Department of Education.

The functions of the Department are defined by the Act as comprising in general the administration of public services in connection with local government, public health, relief of the poor, care of the insane and of criminal lunatics, health insurance, the machinery of elections, both parliamentary and local, the maintenance of public roads and highways, registration and vital statistics. The work of the Department is organised in three main divisions which are subdivided into sections and branches corresponding to the preceding administrative units.

The principal division, which is immediately under the Secretary of the Department, includes major sections for Local Government, Public Health, Housing, Public Assistance, Old Age Pensions (Appeals), Roads and Elections. The second

division is in control of the administration of National Health Insurance, while the third division constitutes the establishment of the Registrar-General of Births, Deaths and Marriages. The administrative sphere of the Department also includes the activities of the General Nursing Council and of the Central Midwives Board.

The administration of local government has been the subject of a comprehensive reorganisation by successive statutory enactments. One of the first Acts passed by the Oireachtas—the Local Government (Temporary Provisions) Act (No. 9 of 1923)—was designed to remedy some of the defects of the earlier system, notably in the sphere of Poor Law administration and to pave the way for a comprehensive reform of the constitution and functions of local authorities. It empowered the Minister to dissolve inefficient or recalcitrant local bodies and to transfer their functions to nominated Commissioners. The comprehensive Act which was passed two years later—the Local Government Act (No. 5 of 1925)—effected a radical reform of the entire system. The rural District Councils, which under the preceding régime had combined the functions of Poor Law Guardians and Sanitary Authority with the administration of local public works, were dissolved and their functions transferred to the County Councils, whose powers in regard to public works and roads were comprehensively defined by the Act. Each county was constituted a Health District under the control of a County Board of Health; the functions of the latter were by a subsequent enactment[1] extended beyond the purely sanitary sphere. The powers of the Minister in regard to the administration of health services (public hygiene, mental and physical treatment, research, statistics and training) and the control of local government bodies were considerably amplified, while provision was made for the establishment, at his discretion, of consultative councils for tendering advice and assistance in the administration of health services. The sphere of local administration was further extended by

[1] Local Government Act (No. 3 of 1927).

the Local Authorities (Combined Purchasing) Act (No. 20 of 1925), designed to afford local authorities the economic benefits of combined purchasing, the Local Authorities (Mutual Assurance) Act (No. 34 of 1926), enabling local bodies to cover themselves against fire, employers' liability and injuries to their workmen by a mutual assurance scheme, and the Acquisition of Land (Allotments) Act (No. 8 of 1926), empowering local bodies to acquire land, if necessary by compulsion, for the purpose of letting it in small allotments to individuals or co-operative associations.

(*e*) EDUCATION

The Department of Education represents, like the Departments of Justice and Local Government, a comprehensive unification of services previously administered by a diverse number of educational agencies. It is rooted in the Ministry of Education of the pre-Treaty Dáil Cabinet. The energies of the latter were in the main concentrated on the promotion of the study and the use of the Irish language in the schools and in the home. It originated inquiries into the question of educational reform, and the present secondary-school programme is largely based on the recommendations of a commission set up through its agency. Under the British régime, the principal educational services had been under the control of three distinct authorities who were completely independent of each other, the Commissioners of National Education, who administered the system of primary education, the Commissioners of Intermediate Education, who controlled secondary education, and the Commissioners of Education in Ireland, who were responsible for the administration of the scheme of endowed schools. The reformatories and industrial schools were under the control of a special department of the Central Government, while the services connected with technical education fell within the jurisdiction of the Department of Agriculture and Technical Instruction organised under the Agriculture and

Technical Instruction (Ireland) Act of 1899. On the establishment of the Free State, a Ministry of Education was set up within the Provisional Government, which by successive steps took over the control of all educational branches. The present Department is responsible for the administration of primary, secondary and university education—the last-named without prejudice to the administrative autonomy of the existing universities—vocational and technical training, endowed schools, reformatories and industrial schools. Its scope further comprises the administration of the College of Science, the Geological Survey of Ireland, the National Museum of Science and Art, the National Library of Ireland, the National Gallery of Ireland, the Metropolitan School of Art and the meteorological services.

The control of the Department is most extensive in the sphere of primary education, which is almost entirely supported by the State. Practically all primary schools are under local Managers, usually clergymen, who appoint the teachers, but the Department prescribes the qualifications of the latter and controls and inspects the secular part of the educational work. The administrative powers of the Department are more restricted in the domain of secondary education, the secondary schools being for the most part owned and controlled by religious corporations, endowed bodies, or private foundations. Continuation and technical schools are administered by local committees under the control of local authorities, the Department exercising a similar measure of control as in regard to secondary schools; the same applies to reformatories and industrial schools, which are owned and managed by voluntary bodies who are in all cases members of Religious Orders.

The Department is directly responsible for the administration of the National Library, which is governed by a Committee of Trustees, of the National Museum and of the Metropolitan School of Art.[1] The College of Science has been transferred to University College, Dublin, under the

[1] These three institutions are maintained entirely by the State.

terms of the University Education (Agricultural and Dairy Science) Act (No. 32 of 1926).

(*f*) AGRICULTURE

The Department of Agriculture occupies a special place in the machinery of Irish government. It is concerned with the principal industry of the country, and it has behind it a tradition of administration which is at once more comprehensive and more Irish than that of any other government service. The Agriculture and Technical Instruction Act of 1899 was admittedly the most beneficent enactment of the last phase of the British Administration. It set up a "Department of Agriculture and Technical Instruction for Ireland" which was in effect an Irish Ministry of Agriculture. Its constitution was pre-eminently designed to enlist the responsible co-operation of the farming community both on the central Board and in the local Councils and Committees. It retained its popularity even in the troubled atmosphere of the last years of the British régime. The Dáil Cabinet set up in 1919 a Ministry of Agriculture which, however, confined itself mainly to the question of land settlement. It established a National Land Commission whose recommendations have greatly influenced the land policy subsequently adopted by the Free State Government.

On the establishment of the Free State, the Department of Agriculture and Technical Instruction was incorporated in the new Ministry of Agriculture of the Provisional Government which, by the Ministers and Secretaries Act of 1914, was converted into a "Department of Lands and Agriculture." The Act invested the Department with the functions of the Irish Land Commission, including the agricultural and land branches of the former Congested Districts Board, the agricultural services of the former Department of Agriculture and Technical Instruction and a variety of agricultural and ancillary services. A further reorganisation took place in 1927 when the services of the Irish Land Commission were trans-

ferred to the Department of Fisheries, a rearrangement which received statutory sanction by the enactment of the Ministers and Secretaries (Amendment) Act (No. 6 of 1928), which gave to the Department its present designation. The scope of the Department comprises horticulture, forestry, dairying, live-stock breeding and auxiliary industries. Its functions include the support of agricultural education, organisation and research, the publication of agricultural information and the promotion of agricultural co-operation. The work of the Department is in part conducted through the agency of statutory County Committees of Agriculture, appointed by the County Councils, which have authority to raise the necessary finance for local schemes by special rates.

(*g*) INDUSTRY AND COMMERCE

Under the British Administration the promotion of commerce and industry and of ancillary activities had been under the divided control of the Irish branches of the Ministries of Labour and Transport and of the Board of Trade. The Dáil Government originally comprised Ministries of Labour and of Trade and Commerce, which were subsequently amalgamated into a Ministry of Economic Affairs. In the Provisional Government these services were administered by the Ministry of Industry and Commerce, which was continued under the Ministers and Secretaries Act as the Department of Industry and Commerce. The functions of the Department are defined by the Act as comprising the public services connected with Trade, Commerce, Industry, Labour, Industrial and Commercial Statistics, Transport, Shipping and Natural Resources. The Department has special divisions for trade and industry, transport and marine, employment, statistics, water-power development and patents. Its administrative scope also comprises, on the commercial side, the registration of shipping, companies, and business names; on the labour side, the inspection of factories and the administration of the Unemployment

Insurance Acts; and, on the industrial side, the services of the Electricity Commissioners. The Department is further responsible for all measures connected with tariffs, subsidies, preferences, guaranteed loans and commercial treaties. It is the competent authority for the supervision of the railway system, which has been comprehensively amalgamated and reorganised by the Railways Act (No. 29 of 1924). The collection and publication of statistical information in regard to all public services has been centralised in the statistical branch of the Department and has been placed on a statutory basis by the Statistics Act (No. 12 of 1926).

(*h*) LANDS, FISHERIES AND GAELTACHT SERVICES

Under the Provisional Government the Fishery Services formed a branch of the Ministry of Agriculture. A special Ministry of Fisheries was set up after the enactment of the Constitution, whose functions were defined by the Ministers and Secretaries Act, 1924, as the administration of public services in connection with sea and inland fisheries and of their auxiliary industries. The scope of the Department was considerably expanded by the transfer to it—by the Irish Land Commission Order of July 1927, subsequently ratified by the Ministers and Secretaries (Amendment) Act (No. 6 of 1928)—of the control of land purchase and re-settlement, hitherto vested in the Department of Agriculture, and of the administration of the Gaeltacht services, an amalgamation designed to ensure a central direction of the manifold activities for the development of the congested Irish-speaking districts in the western counties. The Department thus discharges the functions exercised under the British Administration by the Irish Land Commission, the Fisheries branch of the Department of Agriculture and Technical Instruction and by the Congested Districts Board for Ireland.

The organisation of the Land Commission has been comprehensively reformed by the Land Law (Commission) Act (No. 27

of 1923), consequent upon the wide extension of the powers and functions of the Commission by the Land Act of 1923. The Congested Districts Board was abolished, its functions being transferred to the Land Commission, which, in consequence, assumed the central administration of the machinery of land purchase, including the judicial functions; the latter are exercised by a Judicial Commissioner appointed by the Executive Council.

The administration of the Fisheries Branch of the Department is governed, apart from the older statutes, by the Fisheries Acts of 1924 (No. 6), 1925 (No. 32) and 1931 (No. 33). The protection of the inland waters is vested in locally constituted Boards of Conservators working under the financial and administrative control of the Department. The development of sea fisheries has been transferred by the Act of 1931 to a Co-operative Sea Fisheries Association in the Directorate of which the Minister has a controlling voice.

The Gaeltacht services of the Department include the organisation of the harvesting and co-operative marketing of native products, the development of local industries and the administration of housing schemes. Co-operation with other Departments in the administration of the special Gaeltacht services is secured through an inter-departmental "Gaeltacht Development Committee."

(*i*) POSTS AND TELEGRAPHS

The Department of Posts and Telegraphs—the designation was introduced by the Ministers and Secretaries Act—comprises the services formerly controlled by the Postmaster-General. The Free State took over the financial responsibility for the Post Office as from April 1, 1922; the service of the British Post Office Savings Bank, however, was continued until January 1, 1923, when a new Irish Post Office Savings Bank was established.

The Department administers the Postal, Telegraph, Tele-

phone, Postal Order and Money Order services, and the Post Office Savings Bank, which it manages under an agency agreement on behalf of the Department of Finance. It is responsible for the payment of Old Age Pensions, Army Pensions and Allowances, and for the issue and repayment of National Savings Certificates. It controls the Wireless Broadcasting organisation, in which sphere the Minister has the assistance of a representative Advisory Committee, established under statutory authority.[1] The Department further acts as a central purchasing agency for all other Departments of State.

(*j*) DEFENCE

The Department of Defence has its roots in the Dáil Ministry of Defence set up in 1919, which organised and directed the several bodies of revolutionary forces which operated against the British Army. On the ratification of the Treaty, a Ministry of Defence was established within the Provisional Government, which organised a military force composed mainly of officers and men of the Irish Volunteers, under the title of "Oglaigh na hEireann." It was this body which took over the military establishments of the British troops when the latter left the territory of the Irish Free State in the spring of 1922. By the Ministers and Secretaries Act the Ministry was converted into the present Department of Defence.

In accordance with Art. 46 of the Constitution the military forces of the Free State were placed on a statutory basis by the Defence Forces (Temporary Provisions) Act (No. 30 of 1923), which has been renewed annually subject to varying amendments. It is in general drafted on the lines of the British Army Act of 1881. The character and structure of administration of the Irish Defence Forces are those of a professional army like the British, not of a civic force like the militias of the Dominions. It may be employed on active service anywhere in the territory of the Irish Free State, both against an external enemy and for

[1] Wireless Telegraphy Act (No. 45 of 1926).

the prevention or suppression of internal disorder (s. 26), which would appear to preclude its employment beyond the borders of the Free State without express parliamentary sanction. The Command-in-Chief and all executive and administrative powers are expressly vested in the Executive Council and are exercised through and in the name of the Minister for Defence. The assumption of active military functions by the Minister was precluded by a specific provision to the effect that he may not allocate to himself any executive military command and that he may not be a member of the Force on full pay. The administrative organisation of the Department was amplified by the establishment, under the Ministers and Secretaries Act (1924), of a Council of Defence on the lines of the British Army Council. It consists of the Minister, who acts as Chairman and in this capacity bears the title of Commander-in-Chief, a civil member and three military members. The civil member is required to be a member of the Dáil, in which he acts as Parliamentary Secretary to the Minister, and is in particular responsible for the financial administration of the Army. The three military members are the Chief of Staff, the Adjutant-General and the Quartermaster-General; they may hold office as members of the Council for not more than three years continuously. The designation of the Minister as Commander-in-Chief[1] is another instance of Irish insistence on the internal sovereignty of the Free State, an insistence still more forcibly exemplified in the phrasing of the military oath, which contains no reference to the Crown, but is simply a declaration "to bear true faith and allegiance to our country and faithfully serve and defend her against all her enemies whomsoever" (Defence Forces Act (No. 30 of 1923), Schedule 2). The Force comprises Infantry, Artillery, an Army Air Corps, an Armoured Car Corps, Engineers, Medical Services, Supply and Transport Services, Ordnance and Military Police. A School of Music and a Military College are attached to it. It

[1] The innovation was vigorously defended by the President in the Dáil (*Dáil Debates*, Vol. 5, col. 954).

further includes a Reserve of Officers, a Reserve Force, a Voluntary Reserve and an Officers' Training Corps.[1]

(*k*) EXTERNAL AFFAIRS

The inclusion in the framework of the Free State Government of a Department of External Affairs exemplifies more than any other functional innovation the new political status of Ireland. The Department has its origin in the Ministry of Foreign Affairs set up by Dáil Eireann in January 1919, which was followed by the Ministry of External Affairs of the Provisional Government. The Ministers and Secretaries Act, which gave to the Department its present designation, defined its function as the administration of public services in connection with communications and transactions with other Governments, diplomatic and consular representatives abroad, international amenities and the grant of passports and visas.

The Department is in the first instance the normal channel of communication between the Executive Council of the Free State and the Governments of Great Britain and the Dominions. It is the competent authority for all questions relating to inter-Imperial relations, legal, political and economic. The representation of the Free State at Imperial Conferences has in ever-growing measure devolved on the head of the External Department. The scope of the Department further includes the maintenance of diplomatic relations with foreign States, including all matters connected with passports, visas, commercial and financial relations, trade treaties, deportation, extradition and repatriation. Its official functions cover the administration of estates of nationals deceased abroad,

[1] The Defence Forces at present comprise 5 Infantry Battalions and 9 Infantry Reserve Battalions, apart from the other Corps and Services specified above. The strength of the Regular Army for 1931–32 was 508 Commissioned Officers and 5,700 other ranks, that of the Reserve 256 Commissioned Officers and 9,327 other ranks. The Officers' Training Corps had 450 Cadets. (Quoted from the *Free State Parliamentary Companion for 1932*, p. 168.)

the legalisation of documents[1] and the registration of Irish citizens. It is further the competent authority for the appointment and instruction of Irish diplomatic and consular representatives abroad. Until 1929 the Free State maintained only three diplomatic agents: the High Commissioner in London, a Minister at Washington, and a Resident Representative at Geneva. In 1929 further Ministers were appointed at the Holy See, in Paris[2] and in Berlin. The Free State further maintains trade representatives in Paris and Brussels, a Consulate-General and Passport Control Office in New York and a Consulate at Boston. The Vatican in its turn is represented in Dublin by a Papal Nuncio, France, Germany and the United States by Ministers, while Great Britain and Canada maintain Trade Commissioners. Many countries maintain Consuls-General in Dublin.

The administrative scope of the Department finally embraces the relations of the Free State with the League of Nations. The new State was admitted as a Member of the League on September 10, 1923, and in September 1930 was elected to one of the non-permanent seats on the Council. It is pre-eminently in the sphere of the League that lies the active foreign policy of the Free State.

(*l*) ATTORNEY-GENERAL

The office of the Attorney-General of the Irish Free State was formally not established until after the enactment of the Constitution, the functions associated with it having been exercised during the period of the Provisional Government by the Law Officer of the latter. It was placed on a statutory basis by the Ministers and Secretaries Act of 1924. Under the terms of the latter, it replaced the offices of the Attorney-General, the Solicitor-General and the Law Advisor to the Lord Lieutenant of the British Administration. The functions of the Attorney-General, as defined by the Act, are essentially three-

[1] Cf. The Commissioners for Oaths (Diplomatic and Consular) Act, 1931 (No. 9), which empowered Irish consular and diplomatic representatives abroad to administer oaths and perform notarial functions.

[2] The Free State Minister in Paris has recently been accredited also to Belgium.

fold. He is the chief legal adviser of the Executive Council and of the Departments. He represents the State in all legal proceedings for the enforcement of law, the punishment of offenders and the assertion and protection of public rights. He is finally responsible for the supervision of the Department of the Parliamentary Draftsman. He is appointed by the Governor-General on the advice of the Executive Council, but, contrary to British practice, he is not required to have a seat in Parliament. He is the intimate adviser of the Executive Council and in practice participates in their deliberations. On the other hand, he has no vote in the decisions of the Cabinet and is entitled to speak in Parliament only if a member, and then only—unlike Ministers—in the House to which he has been elected. It would indeed appear that the Ministers and Secretaries Act implicitly prevents his inclusion in the Executive Council,[1] except if he were simultaneously appointed as Head of one of the Departments, a combination for which there are precedents in Dominion practice. The Attorney-General is not precluded from carrying on private practice during his term of office, a freedom designed to compensate him for the loss of fees for his appearances in Court, which is the English custom. In actual practice, the official character of the position and the complexity of his duties would seem in general to have prevented him from availing himself of this liberty.[2]

(*m*) THE MECHANISM OF ADMINISTRATION

The preceding record indicates the fundamental character of the administrative transformation effected under the new

[1] This would seem to follow from s. 3 of the Act, which empowers the President to determine "which of the said Departments of State established by this Act shall be assigned to, and administered by, the members of the Executive Council." Under s. 1 of the Act, the Departments so established are those enumerated in the eleven sub-paragraphs of that Section, among which the office of the Attorney-General is not included.

[2] Cf. the debates on the Ministers and Secretaries Act (*Dáil Debates*, Vol. 5, cols. 1550–1568).

régime. The liquidation of the British system and its replacement by a native Administration directly responsible to a National Parliament offered scope for comprehensive replanning. In its general features the model of Whitehall was adopted, but in the internal organisation of the individual Departments a more rational distribution of functions was attempted, in which certain of the postulates of Lord Haldane's "Machinery of Government Committee" of 1918 found realisation. In the legal sphere the complex functions previously administered, without any very clear demarcation of scope, by four officers of the Crown—the Lord Chancellor, the Attorney-General, the Solicitor-General and the Law Advisor—were distributed according to their respective characters. The judicial powers of the Lord Chancellor were vested by the Courts of Justice Act[1] in the Chief Justice. The administration of the Law Courts was transferred to the Minister for Justice. Finally, the function of tendering legal advice to the Government and of representing the State in the Law Courts was vested in the Attorney-General. A similar redistribution was effected in the organisation of the welfare services. The control of criminal lunatics and defectives was transferred from the corrective realm of the Department of Justice to the medical sphere of the Department of Health. The administration of the Industrial Acts, which in England falls within the province of the Home Office, was entrusted to the Department of Industry and Commerce. The reformatories and industrial schools were placed under the control of the Department of Education. In the domain of rural economics, the administration of land settlement policy was separated from the technical promotion of agriculture and attached to the Ministry which is entrusted with the comprehensive task of the development of the backward districts where the problem is of major importance.

The inevitable inadequacy of any fixed allocation of functions, which is the inherent problem of all departmental organisation, has been met by an extensive system of inter-

[1] No. 10 of 1924.

departmental consultation. It is here that the advantages of an administration working in a small area are especially evident. A variety of inter-departmental conferences and committees, partly of permanent, partly of temporary character, enables an intensive system of administrative co-operation to be maintained in all matters of common concern. Fresh ground has been broken by several Departments in regard to the enlistment of the co-operation both of advisory agencies and of representative bodies of the interests concerned. The Department of Local Government and Public Health has the assistance, under statutory authority, of County Boards of Health appointed by the county councils. The Minister is also empowered to appoint Consultative Councils to advise and assist in all matters affecting public health. He is further assisted by a Roads Advisory Committee and a Local Supplies Advisory Committee, both established under statutory authority and entrusted with extensive powers of initiative. The administration of the Department of Agriculture is, as previously noted, conducted to a considerable extent through statutory County Committees of Agriculture. These bodies, appointed by the County Councils, are entrusted, subject to the general supervision of the Department, with the administration of instructional, experimental and afforestation schemes. Consultative Committees have further been set up under statutory authority to advise the Minister in regard to matters affecting the dairying, livestock and poultry industries. Similar advisory bodies have been nominated by the Minister for Lands and Fisheries to consider specific proposals in regard to the latter industry. A characteristic innovation has been the recent transfer of the functions of this Department in relation to the development of sea fishing to a co-operative association of the industry, organised under the control and with the initial financial support of the Ministry. The Department of Industry and Commerce has, in addition to the statutory Trade Boards and Juvenile Advisory Committees taken over from the British Administration, set up Advisory Committees consisting of representatives of the

principal industries of the country, whose advice is sought by the Minister in regard to all proposed legislation affecting the interests of the industrial community. In the same way the Department of Education has, before introducing important changes of legislation and administration, set up Advisory Committees to consider and report on the proposed innovations. The Department of Justice has gone even further in devolving the very preparation of legislative measures on committees composed not merely of experts, but of representatives of the general public. The tendency has, in general, been not only to seek technical advice and information, but also to take counsel, to elicit initiative and, in some cases, even to delegate authority.

The Irish machinery of government contains, on the other hand, comparatively limited provision for organised research and enquiry beyond the requirements of the making of immediate policy. A central agency of research exists only in the Statistical Branch of the Department of Industry and Commerce. Several Departments possess intelligence branches, but except in the Department of Agriculture, which maintains several experimental farms and testing stations, and the Department of Fisheries, which has a small scientific staff engaged in investigations on sea and fresh-water fisheries, all technical enquiries are conducted by the active administrative officers of the Department. Technical investigations of more important character—as in the case of the Shannon Power Scheme—have in general been entrusted to special bodies set up *ad hoc* by the Departments concerned.

CHAPTER V

THE CIVIL SERVICE

THE Irish Constitution contains none of the legal provisions on the status and the functions of Civil Servants which are to be found in Continental Constitutions. The only provisions relating to the Service are those governing the transfer to the Irish Free State of the officers of the Provisional Government and of such officers of the British Administration as had not been taken over by the former on the change of Government in April 1922—notably the officers of the Land Commission—and their compensation in case of retirement or discharge in accordance with Art. X of the Treaty (Arts. 77, 78 and 79). British officers whose services had merely been lent to the Provisional Government during the stage of transition were exempted from the latter arrangement. These Articles have been the subject of a considerable volume of judicial decisions, which have extended to all branches of the service the remedial benefits of the last-named Article of the Treaty.[1] Under these provisions the bulk of the officers of the Anglo-Irish Administration passed into the service of the Free State. In addition, the latter took over most of the officers of the Dáil Ministry and of the Republican Forces.

The organisation of the Civil Service was, contrary to the English system, placed on a statutory basis by the enactment of the Civil Service Regulations Act, 1923 (No. 35). The Act was in force only for a period of six months, and was replaced in the following year by a statute of permanent character, the Civil Service Regulation Act, 1924 (No. 5), which was in essence a re-enactment of the former measure with several amendments designed to widen the scope of the parliamentary control of Civil Service administration. The latter enactment

[1] Cf. the cases quoted on p. 70 *supra*.

was the subject of further amendments by the Civil Service Regulation (Amendment) Act, 1926 (No. 41).

The Acts of 1923 and 1924 provided for the appointment by the Executive Council of Civil Service Commissioners, not exceeding three in number, to hold office during the pleasure of the Executive Council. The function of the Commissioners was defined in general terms as that of enquiring into the qualifications of every person proposed to be appointed to any permanent position to which the Act applied, no person to be so appointed unless possessed of a certificate of qualification issued by the Commissioners. The qualifications in respect of which a certificate was to be issued were defined on the traditional lines of the British Orders in Council. Officers appointed by or on the advice of the Executive Council, the Comptroller and Auditor-General, members of the Police Force, and, finally, certain unestablished subordinate posts were exempted from the operation of the Act. No additional certificate was to be required in cases of transfer or promotion to a similar position in other branches of the service, which implicitly excluded promotion from the competence of the Commissioners. In general, the principle of competitive examinations was adopted. The Commissioners were, however, authorised to dispense with examinations in cases where the Minister for Finance or the Minister of the Department concerned represented to them that the requisite qualifications for the position to be filled were professional or that it was in the public interest that the rules in regard to age and examination should be rescinded. Every competitive examination was to be open to all persons who were born in Ireland of Irish parents, or the children of such persons, or who were citizens or the children of citizens of the Irish Free State.[1]

[1] This provision reveals the defective character of Art. 3 of the Constitution in its present unimplemented form. If admission to the Civil Service had been restricted to "Irish citizens," persons born in Ireland of Irish parents after the enactment of the Constitution would not have been eligible for appointment. Cf. p. 119 *supra*.

The Commissioners were further authorised to fix the conditions of admission to the Service in consultation with the Department of Finance, while, on the other hand, the power to make regulations for the control of the Service and the classification, remuneration and terms of service were vested solely in the Minister for Finance, subject to the proviso, added by the Act of 1924, that all such regulations had to be laid before each House of Parliament and to be annulled if both Houses passed resolutions to that effect within three weeks.

The purport of the Amendment Act of 1926 was to enable examinations for special categories to be confined to limited classes of persons possessing special qualifications and to members of one sex. The Act further extended the powers of the Commissioners to prescribe by special regulation the method of selection to be adopted in the case of situations of a special character. In regard to appointments in respect of which the earlier Acts enabled examinations to be dispensed with in the public interest on the recommendation of a Minister, the new Act provided that the question of public interest be decided not by the individual Minister, but by the Executive Council as a whole and that only on the basis of a recommendation of the latter the Civil Service Commissioners be authorised, if they thought fit, to dispense with compliance with the general provisions. The practical effect of these innovations was to widen the scope of the Commissioners and to define more clearly the modes of appointment to be adopted in cases where the ordinary methods were not likely to result in the selection of suitable candidates.

The actual organisation of the Civil Service within the framework of the Acts and the regulations issued by the Commissioners closely resembles the British system. In the lower grades, admission is by competitive written examinations, which are related to the primary- and secondary-school programmes. For the higher positions a University Honours Degree, or its equivalent, is required. The practice of holding written academic examinations for higher-grade posts, which had first

been adopted, has been abolished. Written tests are only given in summarising correspondence and for Irish. In addition, an oral examination in general knowledge is prescribed. Heads of Departments are appointed by the Executive Council on the recommendation of the Ministers concerned.[1] The exceptional mode of admission authorised by the Civil Service Acts in cases of "public interest" has been utilised for the admission of members of the Dáil Administration and the Republican Army during the initial period and, subsequently, for the re-instatement in 1927 of Republican officers who had been dismissed after the Civil War.

The Civil Service Commissioners have similarly made effective use of the powers vested in them by the Act of 1926 in regard to the application of special methods of selection. In cases where suitable candidates could not be obtained by the ordinary methods adopted for technical appointments, the Commissioners have availed themselves of the assistance of Selection Boards and have in some instances even gone so far as to allow the Departments concerned a considerable measure of freedom of selection, merely requiring them to report on the methods adopted.

Promotion rests, not with the Civil Service Commissioners, but with the heads of the Departments concerned, subject however, it would seem, to some measure of approval on the part of the Ministry of Finance. In several of the larger Departments special Establishment Officers advise Ministers in regard to promotions. The latter, moreover, frequently consult departmental Selection Boards appointed *ad hoc*.

Tenure, as in England, is formally "during pleasure"; in fact, appointments are permanent. A probationary period of two years is general. Officers may be discharged—i.e., pensioned off—for inefficiency; they may be dismissed only for misbehaviour. No statutory restrictions are imposed on the political activities of Civil Servants, but they are not allowed to stand for election to Parliament or even to local bodies, and

[1] Ministers and Secretaries Act, 1924, s. 2 (2).

they are required to abstain from active intervention on behalf of candidates or from journalistic activities of a political character.

In the lower grades, salaries are fixed at a common level throughout the Service. In the higher grades—i.e. positions of £500 and upwards—and in the case of professional and technical appointments, salaries are fixed by agreement between the head of the Department and the Minister of Finance. In regard to superannuation, the English system prevails. No provision is made for widows or children. The normal age of retirement is 65. If deemed necessary, however, officers may be kept in the Service even beyond that age.

The Irish Civil Service Joint Council, which was set up under the British Administration in 1919, has not been taken over by the new régime. A Civil Service Advisory Council, composed of an "official" and a "staff" side, has been set up under the chairmanship of the Secretary of the Department of Finance, but it has no power to adopt resolutions and its recommendations, even if supported by both sides, have no binding force on the Ministry. In similar contrast to British practice, no Civil Service Arbitration Board has been set up under the new régime. The refusal to concede the establishment of such Boards has been defended on the ground that Civil Servants were not in this matter in the same position as the employees of a private concern, that it was not a case as between employer and employed, but between what taxpayers could afford to pay and what Civil Servants required, and that on that issue the Minister for Finance was the most competent and independent arbitrator.[1] The argument has not tended to discountenance the efforts of the Service to secure the establishment of an Arbitration Board on the English model. It is, of course, true that the submission of salary disputes in the Service to the arbitration of an external board represents in some measure an infringement of the basic constitutional principle of the exclusive financial responsibility of the Cabinet,

[1] *Dáil Debates*, Vol. 39, col. 300.

but experience both in England and on the Continent would seem to indicate that the establishment of Arbitration Boards has not led to any inequitable concessions to Civil Servants and that executive control of the financial administration has in no way been impaired thereby.

PART VII

THE JUDICATURE AND THE LAW

INTRODUCTION

THE tendency to introduce new forms and institutions which marked the legislative and executive sections of the Irish Constitution is equally evident in its judicial provisions, but it was here not of theoretical but of eminently practical inspiration. In no domain of public administration, indeed, was the need for reform more urgent. The general breakdown of the authority of the State during the last phase of the British régime had resulted in a progressive paralysis of the judicial system. In the revolutionary background of Irish history the administration of justice had ever been fraught with a semi-political significance. Many of the judges had ascended the bench from the law offices of the Crown; however high their personal integrity, they would inevitably be suspect of an excessive appreciation of the requirements of the Executive. In the lower Courts the influence of the Administration, both on the selection and on the terms of office of the judges, was undisguised; the power to transfer magistrates—a power not infrequently used even in recent times—invested the Executive with an effective measure of control. Such a system was clearly doomed to failure as soon as the agitation for change assumed radical forms. The last phase of the struggle, as previously shown, was marked by a growing surrender of the judicial system to the demands of military tribunals. If such subservience undermined its authority, the breakdown of executive control, especially in the rural districts, paralysed its machinery. Petty Session Courts could no longer be held, Commissions of the Peace were resigned. To counteract the growing anarchy the Revolutionary Government had evolved a system of voluntary jurisdiction, the so-called Dáil Courts.[1]

[1] The term was defined by the Dáil Eireann Courts (Winding-up) Act (No. 36 of 1923), as connoting "any Court which was constituted under a Decree made in the year 1920 by the Ministry of Home Affairs, purporting to act under the authority of Dáil Eireann, consti-

They were designed to administer justice on principles of equity or natural justice rather than on a basis of positive law,[1] and they undoubtedly succeeded, in the period preceding the Truce, in attaining a degree of popular authority which was denied to the official system.[2] Their *raison d'être* ceased when the struggle ended, but they maintained their existence and would seem during the period of *interregnum* to have become an agency of obstruction rather than of order, producing a state of dual jurisdiction with its attendant uncertainties and abuses.[3]

Such was the political background in which a new judicial order had to be evolved. The need for reform was intensified by the technical defects of the existing system. Rigid adherence to British models had produced a ponderous judicial machinery unrelated to the concrete realities of a community of the

tuted by the Government of Saorstát Eireann and by the members who were elected for constituencies in Ireland and who first assembled in the Parliament held in the Mansion House at Dublin, on January 21, 1919."

[1] The law to be administered was to be "the law as recognised on January 21, 1919"—the date of assembly of the first Dáil—"except such portion thereof as was clearly motived by religious or political animosity." Furthermore, "pending the enactment of a code by the Dáil, citations may be made to any Court from the early Irish Law Codes or any commentary upon them in so far as they may be applicable to modern conditions, and from the Code Napoléon, or other codes, the *Corpus Juris Civilis*, or works embodying or commenting on Roman law; but such citations shall not be of binding authority. Save as aforesaid, no legal textbook published in Great Britain shall be cited to any Court" (Code of Rules, quoted in H. Hanna: *Statute Law of the Irish Free State* [1929], p. 30).

[2] The system consisted of (*a*) Parish Courts having the ordinary Petty Sessions criminal jurisdiction, with power to deal with civil claims under £10; (*b*) District Courts, the equivalent of the County Courts, having a civil jurisdiction up to £100, with circuit sittings for criminal trials and appeals from the Parish Court; and (*c*) a Supreme Court having unlimited original jurisdiction. Nine hundred Parish Courts and seventy-seven District Courts came into operation (Cf. Hanna, *loc. cit.*).

[3] Cf. the speeches of Mr. K. O'Higgins on the second reading of the Dáil Eireann (Winding-up) Bill, 1923 (*Dáil Debates*, Vol. 4, cols. 1305 and 1326).

economic and social structure of Ireland. The radical centralisation of the English system held sway. Archaisms like the Grand Jury system, the institution of travelling assizes of the High Court Judges, an antiquated mode of ineffective County Court jurisdiction, maintained a conservative hold. In a peculiar way the system reflected the character of an administration governing a dependency held in subjection.

The task of reform was further complicated by the new problems involved in the legal form of the Treaty and of the Constitution. The enactment of a written Constitution of overriding authority produced the problem of the constitutionality of legislation and the need for special provisions to ensure a uniform interpretation. The assumption of the external framework of Dominion status, on the other hand, implied the acceptance of the appellate jurisdiction of the Privy Council, which, if extensively interpreted, might involve a serious restriction of the judicial autonomy of the Free State.

It is in the light of that fourfold complexity that the judicial provisions of the Constitution must be examined.

CHAPTER I

THE STATUS OF THE JUDGES

(ARTS. 67, 68 and 69)

The place of the judicial function in the framework of the modern State is marked by a peculiar dualism. The Courts of Law form part of the general machinery of public administration. The judge derives his authority from the State; he is appointed by its political organs and holds office on terms fixed by them. He administers laws of their making and depends, in the exercise of his function and the execution of his judgments, on the co-operation of the Executive. Yet the office is in its most characteristic aspect not of the administrative order. The function of the judge is, firstly, to establish facts by lawful evidence. It is, secondly, to declare that such facts bring the question in dispute within the ambit of specific rules of law. It is, finally, to implement, where necessary, the gap between general rule and specific contingency. If the two first-named functions involve a large measure of discretionary decision, the last constitutes essentially a creative act of the legislative order, a legislative act, however, inspired not by the dynamic tendency actuating the parliamentary legislator, but by abstract standards of reason and ethics. It is in the early recognition of this dual character of the judicial power as a creative agency of public law, independent of, yet supplementary to, the dynamic organs of the State, that lies one of the distinctive features of the English constitutional system. Earlier than most European systems, it has discarded the tendency to cloak administrative action in the garb of judicial proceedings. It was one of the first to ensure the fixity of judicial tenure by laws which, in substance if not in form, were of the "fundamental" order. No system, finally, has offered such wide scope for judicial legislation and has, indeed, been so largely developed by that agency.

In this basic sphere the Irish Constitution is inspired throughout by the traditional conceptions of English public law. The

tendency of its framers was, indeed, both to enlarge the scope and to strengthen the independence of the judicial office. By the introduction of the power of judicial review of legislation the judges were invested with the guardianship of the Constitution itself. Their independence, "subject only to the Constitution and the law," was formally proclaimed; the abstract principle was reinforced by a provision depriving judges of the right to be elected to Parliament, or to hold any other office or position of emolument (Art. 69). Such specific prohibition was inspired by the peculiar anomalies of the English legal system, such as the dual position of the Lord Chancellor and the combination of minor judicial offices with membership of the House of Commons. The purport of the declaration of judicial independence was to exclude any interference either by the Executive or by the Legislature. In the exercise of their judicial function the judges are not subject to the control of the administrative departments concerned with the execution of their findings. The scope of the principle was exemplified in the Court Officers Act (No. 27 of 1926), which specifically safeguarded the unrestricted authority of the judges in the Courts, their claim to full obedience by the court officers and their effective control of all documents submitted in court (s. 65). They are equally protected against parliamentary interference. Parliament may enact rules of law; it may implement these by supplementary legislation if in its view the Courts have misinterpreted the intent of the former. It has no power, however, to intervene by amendment or "authentic interpretation" in any actual proceeding.

Judges are appointed in conformity with the English system by the Representative of the Crown on the nomination of the Executive Council. Contrary, however, to British and former Irish practice, the rule governs appointments not merely to the Central Courts, but to all judicial offices. In the Constituent Assembly it had indeed been urged that it should not apply to the lower judicial positions, but the view was not pressed in the later stages of the Bill. Appointment by a formal act of

the Head of State on the advice of the Ministry represents indeed the most effective guarantee against political favouritism and corruption. The high authority of the office, the publicity of the appointment and the definite location of the responsibility for it with the Executive tend, as English experience would seem to show, to prevent a partisan exploitation of the power to which it might in theory seem to be exposed. The system has, on the whole, produced a more independent bench than the American method of popular election or the Continental system of advancement on Civil Service lines. Its most criticised feature in England has been the practice, sanctioned by long usage, of the elevation of the Law Officers of the Executive to the Judicial Bench.[1] That practice, however, is clearly not inherent in the system as such, and it is worthy of note that in the deliberations on the Ministers and Secretaries Act the President of the Executive Council emphatically repudiated the tendency to regard judicial appointment as the reversionary interest of the Law Officers of the Government.[2]

The independence of the judges has been further safeguarded by the provision of Art. 68 of the Constitution that their remuneration may not be diminished during their continuance in office. For the rest, the terms of tenure and of the remuneration of judges were left to be fixed by subsequent legislation; the implementation was effected by the Courts of Justice Act (No. 10 of 1924). The salaries and pensions of all judges are charged on the Central Fund, which obviates their inclusion in the annual Estimates and prevents any parliamentary debate on the exercise of the judicial function.[3]

[1] Cf. H. J. Laski: *Grammar of Politics*, p. 551.

[2] *Dáil Debates*, Vol. 5, col. 1560.

[3] The original draft of the Courts of Justice Act provided for the inclusion of the salaries of the District Justices in the Supply Vote. This was hotly contested in the Dáil and the Senate, and as a result the exemption of the District Judges from the general rule was limited to a period of three years, ending March 31, 1927, after which they were to be charged on the Central Fund in the same way as the other judicial remunerations. This represents a notable departure from the British system, under which salaries of Stipendiary Magistrates appear on the annual Estimates, in consequence of which their decisions can

Under the terms of the Constitution, judges of the Supreme and High Courts hold office, as in England, *quam diu se bene gesserint*, subject to a statutory age-limit which the Constitution left to be fixed by subsequent legislation.[1] The same fixity of tenure was accorded to the Circuit Judges by the terms of the Courts of Justice Act (s. 39). The judges of the Supreme Court and of the High Court cannot be removed except for stated misbehaviour or incapacity, and then only by resolutions passed by both Houses of Parliament. This is the famous rule of the Act of Settlement which was inspired by the abuses of the Stuart régime, and reflected the newly acquired constitutional supremacy of Parliament. Whatever may be thought of the qualification of an essentially political assembly to adjudicate on a personal issue of such supreme delicacy, the extraordinary form of the procedure tends to emphasise the outstanding character of the judicial office and precludes the removal of judges save in most exceptional circumstances and with so large a measure of public support as to preclude a purely partisan intrigue. The rule does not apply to the Justices of the District Court who, under the Courts of Justice Act (s. 73), may be removed for incapacity, physical or mental infirmity, misbehaviour in office or misconduct, by a certificate under the hands of the Attorney-General and the Chief Justice, a decision not capable of being made the subject of proceedings in any court.

be made the subject of parliamentary discussion. An attempt was also made in the deliberations on the Courts of Justice Act to insert a clause providing that District Justices should not be transferred from one district to another without their consent, save in the case of a general reorganisation. This suggestion, which was prompted by the old practice of "removing" magistrates, was resisted by the Government on the ground that changes might be necessary and that the existence of a national Parliament with full power of control over the Executive effectively precluded any abuse of the power (*Dáil Debates*, Vol. 5, col. 505 *et seq.*).

[1] The Courts of Justice Act, 1924, provided that the age of retirement of the judges of the High Court and of the Supreme Court shall be seventy-two, that of the Circuit Judges seventy, and that of the District Justices sixty-five years, excepting those of Dublin metropolis and Cork, where the age limit is seventy years.

CHAPTER II

THE JUDICIAL SYSTEM

(ARTS. 64, 66, 72 and 75)

THE provisions of the Constitution governing the organisation of the Courts embody the framework of a new system of judicature to be implemented by subsequent legislation;[1] the existing judicial system being maintained by one of the transitory provisions until such implementation (Art. 75).[2] The new system was to comprise Courts of First Instance, including a High Court invested with full original jurisdiction, and a Court of Final Appeal designated as the Supreme Court. The tendency towards decentralisation, which was to govern the subsequent reform, is indicated already in these general definitions. The conception of a central "Supreme Court of Judicature," comprising both a High Court and an Appeal Division, as established by the Judicature Act of 1877 and maintained in each of the Home Rule enactments until 1920, was definitely abandoned. The line of division runs between the Supreme Court as the final Court of Appeal, on the one hand, and the Courts of First Instance on the other. The High Court is specifically included among the latter, but its authoritative position as the principal Court of First Instance is not thereby impaired. Its scope is defined on comprehensive lines, and special references in the definition of the respective competencies of the Supreme Court and of the inferior Courts indicate the proposed grant of intermediary forms of appeal. It was, moreover, invested with an exclusive original jurisdiction in regard to the question of the validity of legislation.

[1] Cf. the dictum of Mr. Justice Meredith in *Cahill* v. *Attorney-General*, [1925] I.R. 70, that the Constitution must be recognised by the Courts "as an original source of jurisdiction" (at p. 76).

[2] By Art. 76 the remedial benefits of Art. 10 of the Treaty were extended to judges not continued in office on the establishment of the new system of judicature.

The Supreme Court, on the other hand, was conceived solely as a Court of Appeal. The definition of its scope was referred to subsequent legislation, but an express provision invested it with the final decision as to the constitutionality of legislation. Finally, the appeal to His Majesty in Council was superimposed on the entire structure in a form which clearly indicated its external character.

It was within the framework of these provisions that the reform of the judicial system was effected. As a first step towards judicial order the Provisional Government had, even prior to the meeting of the Constituent Assembly, dissolved the emergency courts of the Dáil régime. The winding up of their organisation, which in the period preceding and following the Truce had assumed extensive dimensions, proved a task of considerable complexity. One of the first judicial measures passed by the Oireachtas was an Act providing for the liquidation of the system by special Commissioners invested with wide powers to settle outstanding disputes, register decrees and enforce decisions.[1] By a subsequent enactment,[2] the scope of the machinery of liquidation was extended to the "Dáil Land Court," a body established during the revolutionary period "for the purpose of carrying the Land Settlement Schemes of An Dáil into effect." The office of the Commissioners was maintained for a period of two years, after which their jurisdiction was transferred to the High Court,[3] while a further enactment authorised the grant of pensions to former judges of the Dáil Supreme Court.[4] When the new system of judicature was subsequently established, provision was further made for the incorporation of the judges of the Dáil Courts into the judiciary, and for the official recognition of the decisions and the records of the defunct system. More important

[1] Dáil Eireann Courts (Winding-up) Act (No. 36 of 1923).
[2] Dáil Eireann Courts (Winding-up) Act, 1923, Amendment Act (No. 32 of 1924).
[3] Dáil Eireann Courts (Winding-up) Act (No. 9 of 1925).
[4] Dáil Supreme Court (Pensions) Act (No. 13 of 1925).

was the practical lesson which its working during the revolutionary period had taught. It had demonstrated both the practicability and the utility of a decentralised machinery of justice. It was largely that experience which suggested the comprehensive decentralisation effected by the judicial reform of 1924.

To prepare the framework of a new system of judicature, a Committee, representative of the Bench and Bar, the solicitors and the commercial community, was appointed shortly after the enactment of the Constitution. The terms of reference issued to the Committee indicate the complexity of the task.[1] The plea for reform is based, on the one hand, on national grounds—the alien character of the existing system and the aspiration to supplant it by one framed in accordance with Irish conceptions—and, on the other, on the practical need of providing a system meeting the actual requirements of the people "especially as to accessibility, efficiency, expedition and cost." The Committee, after comprehensive investigation, issued an elaborate Report which formed the basis of the legislative proposals introduced by the Government. The reform was embodied in the Courts of Justice Act (No. 10 of 1924), which was subsequently extended and modified by the Courts of Justice Acts of 1926 (No. 1) and 1928 (No. 15). The burden of the reform which it enacted was to raise the status of the lower branches of the judicial system with a view both to relieving the pressure and delay in the Central Courts and to bringing the machinery of justice within easier reach of the mass of the people, particularly in the rural districts. It introduced new standards of qualifications and effected a comprehensive extension of the jurisdiction of the several branches of the system.

The basis of the new system is the District Court, which corresponds in part to the former Petty Sessions, in part to the

[1] Cf. the letter of the President of the Executive Council to the members of the Committee, quoted in H. Hanna: *Statute Law of the Irish Free State*, p. 17.

County Courts. The unpaid magistrate-judge of that system —who was generally assisted by a paid resident of military or police antecedents—was replaced by a paid District Judge whose qualifications are either those of a practising barrister or solicitor of six years' standing, or practical experience as a District Justice,[1] or as a judge of the Dáil Supreme Court, or as a Judicial Commissioner under the Dáil Courts (Winding-up) Acts.[2] On the civil side, the jurisdiction of the District Court which, in the case of the Petty Sessions Court, had extended merely to debts under £2, was increased to £25 in actions on contract or State proceedings and to £10 in actions for tort. Its criminal jurisdiction corresponds in essence to that of the Petty Sessions, but may be enlarged by consent that the charge be treated as a minor offence. Furthermore, the establishment of the District system in the form of one Court for the whole country extended the jurisdiction of the Justices, which, under their predecessors, had been purely local, to all districts, so that no separate proceedings were required if a defendant or delinquent moved to a different part of the State.[3]

More revolutionary still was the change effected in the organisation of the second division of the judicial hierarchy. In the place of the County Courts of the preceding régime, which exercised a strictly limited county jurisdiction, a Circuit Court was set up, which was organised on the same "extra-territorial" principle as the District Court. Eight circuits—subsequently increased to ten[4]—were established, each comprising an area averaging 400,000 inhabitants. The qualification for appointment to the Circuit bench is either ten years' standing as a practising barrister, or practical judicial experience as a Recorder or County Court Judge under the old

[1] Under the District Justices (Temporary Provisions) Act (No. 6 of 1923).

[2] The Courts of Justice Act (1928) provided for the appointment of Assistant-Justices of the District Court of equally high qualifications.

[3] Note the explanation of the Attorney-General (*Dáil Debates*, Vol. 5, cols. 473–474).

[4] Courts of Justice Act (1928), s. 9.

system or as a District Judge under the new. The most important feature of the reform was the wide jurisdiction vested in this Court. In criminal cases the Circuit Court was empowered to try all felonies and misdemeanours excepting murder, treason, piracy and its accessories.[1] More significant still was the extent of the jurisdiction vested in it on the civil side. The jurisdiction of the Circuit Court on consent is not limited to any figure of value and is final if the parties so agree. In contract and tort, or in State proceedings, it extends to claims not exceeding £300, and in probate and equity cases to the administration of personalty and assets up to £1,000. It is, moreover, invested with a wide jurisdiction in bankruptcy and winding-up proceedings, extending in the latter case to companies of a capital issue up to £10,000. On the other hand, proceedings in *habeas corpus*, *certiorari*, *quo warranto*, prohibition, information and *mandamus* are expressly excluded from its jurisdiction. The Circuit Court exercises an appellate jurisdiction from the decisions of the District Court which is final and conclusive. Its powers in regard to the subpoenaing of witnesses, enforcement of judgments, and the registration of actions are similar to those of the High Court. The total effect of these provisions was to vest in the Circuit Court not merely the jurisdiction of the former County Courts, but also to a considerable extent a concurrent jurisdiction with that of the High Court. A further important reform was effected in regard to the hearing of appeals from the Circuit Court. Under the former practice, the appeal from the County Courts, which was known as the "Civil Bill Appeal," went to a High Court Judge at Assizes held twice a year when the case received a complete re-hearing both on fact and on law. The effect of this system was to invest the proceedings in the County Court with an air of unreality. It reduced them in effect to a trial hearing, each side being afforded an opportunity of hearing the arguments and evidence of the other and of preparing an entirely

[1] The criminal jurisdiction of the former Quarter Sessions Courts had been limited to minor offences and misdemeanours.

new case for the re-hearing by the Assize Judge which, in view of the time-limit imposed upon him, could hardly be other than incomplete. The new procedure provided for the re-hearing of the Circuit Court proceedings in the High Court on the notes of a shorthand-writer, which precluded any change of the evidence previously submitted. On the other hand, the transfer of the venue of the appeal to the High Court in Dublin, where it is heard by two judges, relieved the hearing of the pressure of time which is inseparable from the Assize system. In criminal proceedings, appeals from the Circuit Court are heard not by the High Court, but by the Court of Criminal Appeal, which consists of two members of the High Court and one Judge of the Supreme Court who presides.

The reform of the Central Courts was of a more conservative character. Appointment both to the High Court and the Supreme Court was limited to practising barristers of twelve years' standing—service on the Circuit Court being treated for this purpose as practice at the Bar—and to Judges of the preceding system, of the Dáil Supreme Court and of the Dáil Winding-up Courts. The High Court, which consists of six members—a President and five Judges—exercises the jurisdiction formerly vested in the High Court of the preceding system and the additional judicial functions conferred upon it by the Constitution. It also exercises exclusive original jurisdiction in all questions relating to the constitutionality of legislation. In criminal matters, the Judges of the High Court sit as the Judges of the Central Criminal Court, a new tribunal set up by the Courts of Justice Act, which possesses original jurisdiction in those more serious crimes—murder, high treason, piracy—which are excluded from the competence of the Circuit Court. The venerable form of travelling Assize Courts was abolished[1]; so, also, was the anachronism of Grand Juries.

[1] In the Courts of Justice Act of 1924, the appointment of travelling "Commissioners of the High Court Circuit" to try criminal cases within the jurisdiction of the High Court had been envisaged. However, the institution was never put into operation, and the provision was subsequently repealed by the Courts of Justice Act of 1926 (No. 1).

The Supreme Court consists of three Judges. Its President is the Chief Justice of the Irish Free State. It exercises the appellate jurisdiction of the former Court of Appeal and that vested in it by the Constitution.[1] The latter may be limited by statute, but the Constitution expressly excludes any statutory limitations of its appellate jurisdiction in cases which involve questions as to the validity of laws. The Chief Justice has furthermore been invested with the special jurisdiction formerly exercised by the Lord Chancellor in regard to solicitors, minors and lunatics and to the appointment of Notaries Public and Commissioners of Oaths and Affidavits.[2] On the criminal side a Court of Criminal Appeal has been established, consisting of two members of the High Court and a President, who is either the Chief Justice or a Judge of the Supreme Court nominated by the Chief Justice. The Court has power

[1] It was held by the Supreme Court in *Warner* v. *Minister for Industry and Commerce*, [1929] I.R. 582, that notwithstanding the provision of s. 1 of the Unemployment Insurance Act that the appeal granted by that Act from a decision of the Ministry of Labour (now of Industry and Commerce) to the High Court shall be final, an appeal lies by virtue of Art. 66 of the Constitution to the Supreme Court in the absence of any law prescribing an exception. Cf. also *Estate of Sir C. M. Domville; Application of G. Trench*, [1930] I.R. 640. On the other hand, the Supreme Court decided in *In re Quinlan*, [1928] I.R. 548, that Art. 64 of the Constitution could not be held to imply that there was no power to extend to the Commissioners of Income Tax the sole right to make an assessment and that the amount of every assessment so made was open to review in the High Court.

[2] The Senior Judge of the Supreme Court is entrusted with the Chairmanship of the Committee of Privileges of both Houses of Parliament, which is appointed to adjudge whether a Bill is a Money Bill if the decision of the Ceann Comhairle is challenged by two-fifths of the members of either House. The Chief Justice and the President of the High Court are further required to serve on the Reference Committee of the Finance Act (Courts of Justice Act, s. 20). Finally, under the terms of the Letters Patent by which the office of the Governor-General was established, the Chief Justice, or the Senior Judge of the Supreme Court, is invested with the functions of the Governor-General in the event of the death, incapacity, removal or prolonged absence of the occupant of the office.

to hear new or additional evidence, relying for the rest on the stenographic report of the earlier proceedings. Its decision is final unless the Court itself, or the Attorney-General, certifies that a point of law of exceptional importance is involved, and that it is desirable in the public interest that the appeal be taken to the Supreme Court.

The Constitution preserved in general terms the right of trial by jury. Under Art. 72 no one may be tried on a criminal charge without a jury save in cases of minor offences triable by law before a Court of Summary Jurisdiction and certain offences triable by Military Tribunals. Under the preceding law the place of juries in the judicial system, both in civil and criminal actions, was substantially the same as in England. In civil cases either party in a common law action was entitled as of right to have the issues of fact tried and determined by a jury which might be either a "special jury" or a "common jury," the distinction being based on a property qualification. In criminal matters minor cases were heard by Justices or Magistrates under their summary jurisdiction, but all other cases were tried by Judges with juries, indictments being preferred in the first instance to a Grand Jury and going to the Petty Jury only if the former found a true bill. Women were admitted to juries for the first time under the Sex Disqualification Removal Act, 1919.

The Courts of Justice Act, 1924, introduced three important reforms into the Irish jury system. S. 95 of the Act provided that in every trial of a civil case before a Judge and Jury in the High Court or Circuit Court a majority vote of nine of the twelve members of the Jury should determine the verdict. The reform, which marked a distinct departure from the preceding system, under which a unanimous verdict was required, was to apply only to civil, but not to criminal cases, in which a unanimous verdict continued to be necessary. In the second place, the Act deprived defendants of the right to trial by jury in certain classes of civil actions, viz. actions for liquidated or fixed amounts (i.e. "in moneys numbered"), actions for the

enforcement of contracts, actions for damages for breach of contract and, finally, actions for the recovery of land. In these cases, however, the Judge may allow a trial to be held with a jury if he considers it necessary or desirable for the proper trial of the action, as, for instance, in a case in which a question of fact as to fraud appears to be involved. Finally, the Act provided that Grand Juries were no longer to be summoned and indictments were to be preferred directly to the jury which tried the accused (s. 27).

The earlier law governing the composition and functions of juries was the subject of further amendment during the following years. The Juries (Amendment) Act, 1924 (No. 18), introduced new provisions for the preparation of jurors' lists. It further provided that certain women were entitled to claim exemption from service on juries if they so desired. The Juries (Dublin) Act, 1926 (No. 37), extended the area from which panels for jury service in the Central Courts might be drawn. Further reforms were introduced by the Juries Act, 1927 (No. 23), which embodied comprehensive regulations governing the liability for service of jurors, the preparation of jurors' lists, and the registration, summoning and empanelling of juries. Two important alterations of the earlier law in particular deserve to be noted. Women were exempted in general from service on juries unless they applied to have their names inserted in the list of jurors, in which case they would be entitled and liable to serve in the same way as men subject to the same qualifications. The second important amendment of the earlier law introduced by the Act was the abolition of the distinction in *civil* cases between "special juries" and "common juries."

A very important alteration in the law governing juries was, finally, effected by the Juries Protection Act, 1929 (No. 33), which was enacted for the protection of juries in criminal proceedings of a political character. In addition to introducing a cover of secrecy as regards jury panels and the identification of jurors by numbers and not by names, exclusion of the Press and members of the public from jury (criminal) trials, the Act

provided that a majority vote of nine members of the jury should be sufficient to determine a verdict; it prohibited at the same time disclosure of the number or identification of the dissentients, save in the one case of trial on a capital charge, when it was provided that the Judge was to be privately informed whether the verdict was or was not unanimous and to be notified of the number of dissentients with a view to report to the Minister of Justice. The latter provision represented a fundamental deviation from the earlier law under which the accused could be convicted only by a unanimous verdict. While it enabled an intensification of criminal prosecution, it involved the risk of miscarriages of justice, such as are not infrequently caused through mistaken identity, which in the case of irremediable penalties might be of fatal consequence.

CHAPTER III

THE JUDICIAL REVIEW OF LEGISLATION
(ARTS. 65 and 66)

THE power vested by the Constitution in the Central Courts of the Free State to adjudicate on "the question of the validity of any law, having regard to the provisions of the Constitution," constitutes the judiciary the guardians of the Constitution. The requirement of such guardianship, whether exercised by the Courts or some other constitutional agency, would seem to be inherent in the conception of a written constitution ranking above the enactments of the Legislature and not capable of being modified except by a special procedure of amendment. Yet it is characteristic that until the new era of constitution-making which followed the European War, the conception of the review of legislation, judicial or otherwise, was not generally accepted on the Continent. The enactment of a law with the authority of the Government and its promulgation by the Head of State were regarded as adequate safeguards against even an implicit breach of the Constitution.[1] The judicial system, moreover, had on the Continent never possessed that constitutional pre-eminence and creative scope to qualify it for the exercise of this supreme function. It was essentially the American Courts—heirs to the traditions of the Common Law Judiciary—which established the doctrine that the Acts of the Legislature could be reviewed by an independent agency as to their conformity with the Constitution and that this power was

[1] In France no power of review is admitted. In Switzerland, under the Constitution of 1874, the Federal Courts are empowered to review the constitutionality of Cantonal laws, but not of Federal enactments. In Germany, where the power had been denied to the Courts before the War, an attempt was made by the framers of the republican Constitution to introduce judicial review, but in the end the question was left undecided and opinion on the issue has since then been divided fairly equally.

vested in the civil Courts.[1] The claim is intelligible only in the light of the paramount authority which the law courts had attained in the political mentality of England and the Colonies since the constitutional struggles of the seventeenth century. That tradition also explains the empirical way in which the power was first asserted and has since been maintained in the United States. The question of the constitutionality of any law can in America be raised only as an incidental issue in an ordinary judicial proceeding, the Court adjudging on the question merely in so far as it is essential to, and as part of, the decision of the case.[2] Such technical limitation has, on the other hand, not restricted the scope of the power. Its political import has been a favourite subject of recent sociological analysis. Extensive and restrictive interpretation have revealed its latent potentialities. Fundamental guarantees of individual liberty have in moments of national excitement been divested of legal reality. Individualistic interpretations of liberal principles have thwarted measures of social reform enacted with the strong support of legislature and electorate.[3] It was not surprising that recent Continental Constitutions, in accepting judicial review, should have vested it in special "Consti-

[1] The power seems to have been asserted even prior to its famous enunciation by Chief Justice Marshall in *Marbury* v. *Madison* (1 Cranch, p. 137), if indeed it had not been exercised by the State Courts already before 1787 in regard to the Acts of their respective Legislatures (cf. Chas. Warren: *The Supreme Court in the History of the United States*, Vol. 1, p. 263, and W. W. Willoughby: *The Constitutional Law of the United States*, p. 6).

[2] The Supreme Court has expressly declared that its pronouncement of the unconstitutionality of a statute must not be taken as constituting a repeal of the latter: *In re Rahrer* (140 U.S. Reports, 545). There is nothing to preclude the question from being raised afresh in a new proceeding.

[3] Thus the Courts have held unconstitutional (*a*) a State law limiting the hours of labour: *Lochner* v. *N.Y.* (198 U.S. 45, 74); (*b*) a Congress law prohibiting child labour: *Hammer* v. *Dagenhart* (247 U.S. 251, 277); (*c*) a Minimum Wage Board created by an Act of Congress: *Adkins* v. *Children's Hospital* (261 U.S. 525, 562); and (*d*) the inclusion of maritime accidents among employers' liabilities, effected by an amendment to the Judicial Code which was passed by Congress in 1917: *Knickerbocker Ice Co.* v. *Stewart* (253 U.S. 149, 166).

tutional Courts" of semi-political composition, however little such devolution represented a solution of the essential problem.[1]

The terms of the Irish Constitution invest the power of judicial review with a formal authority which it lacks in the American Constitution, but the actual scope of its application would seem to be more restricted. From the phrasing of the Constitution it would appear that the question of the constitutionality of any law could, as in America, only be raised as part of a judicial proceeding, but the latter might centre exclusively on the issue and be instituted expressly as a test case. A pronouncement of invalidity would render the statute void in fact though not in form, and if it established a repugnancy between the latter and the Treaty it would under s. 2 of the Constituent Act impose an obligation upon the Irish Government to introduce, and on the Irish Parliament to pass, legislation repealing the impugned statute. The power has so far been applied only once in the case of the first Public Safety Act (No. 28 of 1923), which was held not invalid but not immediately applicable, as the formal requirements prescribed by the Constitution for the enactment of ordinary legislation had not been observed,[2] Nor indeed is the problem likely to assume major importance—except in the case of the enactment of legistion repugnant to the Treaty—as long as the Constitution can be amended by ordinary legislation, since any doubt as to the constitutionality of a proposed measure could be met by its enactment as a constitutional amendment, as was done in the

[1] The political implications of the power would seem to have been realised in the framing of the American Constitution. Thus Virginia had suggested that enactments of the States should be capable of being reviewed by the Federal Legislature and those of the latter by a Council of Revision composed of the Executive and part of the Judiciary (cf. H. Finer: *The Theory and Practice of Modern Government* (1932), p. 209).

[2] *The King* (*O'Brien*) v. *The Military Governor of the Military Internment Camp, North Dublin Union and the Minister of Defence,* [1924] 1 I.R. 32.

case of the seventeenth Constitution Amendment Act,[1] or by the insertion of a saving clause, as in the case of the sixth Public Safety Act (s. 3).[2] Even, however, when the Constitution assumes a greater measure of rigidity, the concrete phraseology of the Irish Constitution will preclude such elastic construction as was applicable to the more abstractly formulated provisions of the American Constitution. Disputes under a unitary Constitution like the Irish will centre less on the construction of its functional provisions, which form the bulk of the American constitutional cases, than on the interpretation of the fundamental declarations and of the clauses embodying the elements of the Treaty. Its significance in the last-named sphere will hardly be more than technical as long as the framework of the Treaty commands in its essentials the support of the Legislature. When that is expressly or impliedly withdrawn—and the phrasing of the Treaty is clear enough to exclude any ambiguity in essentials—the issue will clearly pass beyond the sphere of judicial interpretation. The application of the power of judicial review would thus lie pre-eminently in the interpretation of the fundamental declarations of the Constitution, where it may indeed be fraught with profound import. The experience of the War period has shown the vital need in modern conditions for an authoritative agency invested with the constitutional power to protect the fundamental safeguards of liberty not merely against encroachments by the Executive, but no less so against panic measures of the Legislature. American precedent, on the other hand, would seem to indicate how effectively judicial interpretation may stultify the dynamics of political life. The problem clearly defies a dogmatic solution, but it may be urged that if the integral character of the judicial function is to be maintained, and, on the other hand, the creative scope of the Legislature not to be restricted by a semi-political judicial interference, the power should be so exercised as to ensure the prevalence in the substance of legislation of

[1] No. 37 of 1931. [2] No. 31 of 1927.

that principle of the rule of law in which both judicial function and fundamental declarations are rooted. So interpreted, the judicial review of legislation might form an organic corollary to the power of control exercised by the Courts over the administrative acts of the Executive.

CHAPTER IV

THE APPEAL TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

(ART. 66)

THE phrasing of Art. 66, by which the appeal to the Judicial Committee of the Privy Council is introduced, reflects the inherent repugnancy of that introduction to the general design of the Constitution. The Article provides that the decision of the Supreme Court is in all cases to be "final and conclusive," and not "capable of being reviewed by any other Court, Tribunal or Authority whatsoever." Nothing in the Constitution, however, is to "impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave." There is no parallel for such formal self-contradiction in any of the Dominion Constitutions. The provisions of the South Africa Act on which the Irish Article was admittedly modelled excluded any appeal as of right except under the Colonial Courts of Admiralty Act, but maintained the right of the King in Council to grant special leave of appeal subject to the proviso that the South African Parliament might limit the matters in respect of which application for special leave could be made. In the British North America Act the prerogative was maintained in its full extent as part of the general preservation of the existing law. The Australian Constitution similarly preserved the right of appeal to the Privy Council both as of right and by special leave, but imposed the requirement of a certificate of the High Court in all questions relating to the limits *inter se* of the constitutional powers of the Commonwealth and the States. The provision of Art. 66 of the Irish Constitution implicitly excludes any appeal as of right, while its phrasing makes it, in the words of

Lord Buckmaster, "quite plain upon the face of it that as far as possible finality and supremacy are to be given to the Irish Courts."[1]

In the light of the preceding analysis of the Settlement it need hardly be stressed that the introduction of the appeal was, to the Irish Government, the most obnoxious feature of the Constitution. Acceptance of membership of an association of States might well involve an obligation to submit disputes with other of the associates to a joint tribunal. The jurisdiction of the Privy Council was clearly not of such inter-State character. It was that of a Supreme Court of Appeal for the whole Empire available to private litigants, and though the scope of such appeal had been progressively restricted, no general rule defined its precise extent and each successive Board of the Committee retained a wide measure of discretion in the delimitation of its judicial powers. Moreover, despite a tendency during recent years to widen the representative basis of the Judicial Committee by the invitation extended to Colonial judges to sit on its Bench, it remained predominantly a Court composed of British lawyers, many of them of political antecedents, presided over by the actual or former Lord Chancellors of England. Finally, the procedure of the Committee emphasised its essentially British character. Though in fact a Court of Law, its judgments were given in the form of an advice to His Majesty and put into operation by an Order in Council issued under the authority of the British Government. Since executive authority in the Dominions had become vested in their respective Cabinets, such enforcement represented in form an infringement of Dominion autonomy. Both in form and in substance the institution was clearly incompatible with the novel conceptions which underlay the Treaty Settlement. In the legislative and executive spheres, external interference had been effectively excluded by the formal adoption of Dominion practice. In the domain of the judicial prerogative it

[1] *Hull* v. *McKenna*, [1926] I.R. at p. 409.

could not, in view of the undeniable reality of the power in the Dominions, be so excluded. The utmost that could be achieved was to restrict its exercise within the narrow confines of the South African practice. Moreover, in the negotiations which took place between the representatives of the Irish Provisional Government and of the British Government, the Irish negotiators were, according to the subsequent declarations of Mr. Kevin O'Higgins, assured that "the preservation of the prerogative would be very much more a theory than a fact and a practice," and that in so far as the latter was concerned, "the practice that would be observed in relation to the Irish Free State would be strictly analogous to the practice observed in the case of South Africa rather than in the case of other, non-unitary Dominions." Under that practice, according to the same authority, "an appeal would not lie in the case of ordinary routine domestic legislation, but only in cases where international issues were raised."[1] This interpretation was fully upheld by the Judicial Committee in the first three applications for leave to appeal. In a preliminary statement of unusually comprehensive nature Lord Haldane, after having stressed the purely judicial and Imperial character of the Court in spite of its connection with the English Privy Council, emphasised the progressive restriction of its jurisdiction. It had become the practice to grant leave of appeal only in such cases as involved great principles or questions of very wide public interest. This applied in particular to unitary Dominions like South Africa, where the practice had become increasingly strict and only exceptional cases were admitted for appeal. The position of the Irish Free State, though it was strictly not analogous to that of any other Dominion, was more in conformity with the latter category, and the Judicial Committee would therefore have to give a very restrictive interpretation to its power to grant leave of appeal from decisions of the Irish Supreme Court. The Irish Attorney-General, who attended the pro-

[1] *Dáil Debates*, Vol. 14, cols. 116–117.

ceedings on behalf of the Free State, emphasised the constitutional parallel to South Africa and the clearly expressed intention of the Irish Constitution, so far as possible, to give finality to the decisions of the Supreme Court. A suggestion by counsel for the petitioners that the application of South African practice to the Free State would be contrary to Art. 2 of the Treaty which assimilated the constitutional status of the Free State to that of Canada, was waived aside by Lord Buckmaster as devoid of "any real substance" in the light of the express wording of the Article. The first three applications for leave were accordingly dismissed.[1] In view of this restrictive definition of its competence, it is the more surprising that the Judicial Committee should, two years later, have granted leave of appeal in a case which centred on the construction of an Irish statute of purely domestic import, the Land Act of 1923.[2] It involved no great principle, nor any problem of wide public interest, but the interpretation of a technical provision on which the Irish High Court had given a decision which had been upheld by the Supreme Court. The Irish Government regarded the admission of the appeal as a breach of the assurances which it had received in 1922, and before the appeal was heard, introduced and passed a measure in the Dáil —the Land Act of 1926—declaring that the interpretation placed upon the Act of 1923 by the High Court and affirmed by the Supreme Court was, and be deemed always to have been, the law. The petitioners thereupon withdrew the appeal. The retrospective character of the measure inevitably was the subject of adverse criticism in the Irish Parliament and subsequently in the House of Lords, but the Free State Government, while admitting the unusual form of the procedure, maintained that it represented the only method by which the Free State could register its protest against that encroachment on its judicial autonomy and

[1] *Hull* v. *McKenna; The Freeman's Journal* v. *Fernstrom;* and *The Freeman's Journal* v. *Traesliberi,* [1926] I.R. 402.
[2] *Lynham* v. *Butler,* [1925] 2 I.R. 231.

preclude an unconstitutional exercise of an admittedly obsolescent prerogative.[1]

The Irish Free State Government characteristically did not oppose the simultaneous admission for appeal of a case involving the interpretation of the Treaty—the famous case of *Wigg and Cochrane* v. *The Attorney-General of the Irish Free State*.[2] The decision given by the Judicial Committee reversed that of the Irish Free State Supreme Court, but in the subsequent discussions which arose on the matter in the House of Lords, two of the judges admitted that it had been given under some misapprehension as to the effect of a relevant administrative rule, while it was similarly stated by Lord Birkenhead that the former Lord Chancellor, who had presided over the Court, had since "authorised the Prime Minister to state that in his opinion the conclusion which he had drawn was probably wrong in law," and "that, this being so, the Irish Free State in his opinion had a constitutional right to amend the error by Irish legislation agreed with the British Parliament."[3] The Dominions Secretary simultaneously stated in the House of Commons that the interpretation placed on Art. 10 by the Judicial Committee was not in conformity with the intentions of those who had framed the Settlement. The Irish Government, on its part, refused to accept the decision of the Judicial Committee, and after a further reference of the matter to the Committee,[4] the dispute was settled by an agreement between the two Governments.

[1] Cf. the debates in the Dáil on February 3rd, in the Senate on February 24th, and in the House of Lords on March 3, 1926. The admission of the appeal was defended by the English Lord Chancellor on the ground that the issue affected a number of cases and that it was therefore of general interest, a view which Professor Keith describes as "curious and rather amazing," as "it was clear from that instrument (i.e. the Constitution) that constitutional issues alone were really intended to be safeguarded, since they alone are of Imperial interest" (*Responsible Government in the Dominions*, 1928, p. 1090).

[2] [1925] 1 I.R. 149; [1927] I.R. 285; [1927] A.C. 674.

[3] Debates of the House of Lords, April 25, 1928, cols. 808–856.

[4] *In re compensation to Civil Servants under Article 10 of the Articles of Agreement for a Treaty between Great Britain and Ireland*, [1929] I.R. 44.

The right of the Privy Council to admit appeals from the Free State was formally challenged in the case of *Performing Rights Society* v. *The Bray Urban District Council.*[1] In its material aspect the case turned on the interpretation of the British Copyright Act of 1911 which, under the terms of the proviso excluding its application to the Dominions, had been held by the Irish Supreme Court to have ceased to be in force in the area of the Free State when the latter was constituted and assumed Dominion status.[2] In the course of the arguments counsel for the respondents pleaded that inasmuch as Art. 66 of the Constitution declared that "nothing in the Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave," and as no such right had ever existed in Ireland—appeals, as in England, being to the House of Lords—the Judicial Committee had no competence to admit appeals from the Free State. If there was a right of appeal to "His Majesty in Council," it was only to the Irish Privy Council that it could lie. The Judicial Committee rejected the plea as a misconstruction of the proviso of Art. 66. Under Art. 2 of the Treaty the position of the Free State in relation to the Imperial Parliament and Government and otherwise was to be that of the Dominion of Canada. This, it was argued, involved the acceptance of the appellate jurisdiction of the Privy Council, which was accordingly preserved by Art. 66 of the Constitution. By the same reasoning the proviso could only be said to refer to the Judicial Committee of the Privy Council, on whose advice the King acted in dealing with appeals from the Dominions. The Judicial Committee could hardly have decided otherwise. Though the

[1] [1930] I.R. 509.

[2] The Judicial Committee in this case reversed the decision of the Supreme Court. Prior, however, to the hearing of the appeal, legislation was passed by the Irish Parliament—the Copyright (Preservation) Act (No. 25 of 1929)—providing for the maintenance of existing copyrights. Cf. p. 367 *post.*

phrasing of Art. 66 revealed the intention of its framers to confine the grant of leave to appeal within the narrowest limits, it was clear that in view of the fact that, however limited, the judicial prerogative of the Crown was still in force in all the Dominions, the restrictive phrasing of Art. 66 could not, as in the case of the restrictive clauses attached to the legislative and executive provisions, be interpreted as implying the total exclusion of its applicability to the Free State. The contention that the introduction of the appellate jurisdiction of the Privy Council in Ireland, to be operative, should have been effected by express words and that, conversely, the absence of such words rendered the provision ineffective,[1] seems untenable. It would, on the other hand, appear that the decision of the Judicial Committee in this case did not imply, as has been suggested,[2] a departure from the earlier dictum of the Court that the South African practice was to govern the admission of appeals from the Free State. The Privy Council, challenged as to its right to hear appeals from the Free State, could clearly base its power to do so on no other authority but that of Art. 2 of the Treaty, in which the constitutional status of the Free State was defined as corresponding in general to that of Canada. There is, however, nothing in the judgment of the Judicial Committee to suggest that beyond a recital of Art. 2 as the general basis of its right to admit appeals from the Free State, it had implicitly maintained, contrary to its earlier view, that the exercise of its appellate jurisdiction in regard to the Free State was to be governed specifically by Canadian and not, as declared in the earlier judgment, by South African precedent.

The foregoing analysis would seem to indicate the practical ineffectiveness of the power in relation to the Free State. Of ten cases in which an appeal had been lodged judgment was given only in two. In the first of these—that of *Wigg and Cochrane*—no effect was given to the judgment, the issue in dispute

[1] H. Hughes: *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations* (1931), p. 38.

[2] *Ibid.* at pp. 58 and 79.

being settled by agreement between the Irish and British Governments, while in the second case—that of *Performing Rights Society* v. *Bray Urban District Council*—the findings of the Judicial Committee were forestalled by Irish legislation. At the Imperial Conference of 1926 the representatives of the Free State raised the issue of the conditions governing the admission of appeals from the Dominions in connection with the re-definition of Inter-Imperial Relations. They could not secure the abolition of the appeal, but they obtained a declaration to the effect "it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected." The Conference simultaneously enunciated the general principle that no changes in the existing system, which, while primarily affecting one part, raised issues in which other parts of the Commonwealth were also concerned, ought to be effected except after consultation and discussion, which in this connection ruled out the abolition of the appeal by unilateral action of one of the member States. The Irish delegates did not press for any immediate change in the practice, but reserved the right to raise the question again at the next Imperial Conference in relation to the facts of their particular case. The statement has been repeatedly interpreted as reflecting the failure of the Free State to secure the support of the Dominions for the abolition of the appeal. But such comment would seem to ignore the positive significance of the declaration. It implied an admission on the part of the British Government that the exercise of the judicial prerogative of the Crown was as much subject to the will of the people in each part of the Commonwealth as that of its legislative and executive functions. The declaration was essentially in accordance with the principle laid down by Lord Haldane in *Hull* v. *McKenna* that the Judicial Committee, in granting leave of appeal, must be guided by the wishes of the Dominions concerned and that it became "with the Dominions more and more or less and less

as they pleased."[1] The issue was raised again at the Imperial Conference of 1930, and though no formal result was achieved, it would seem that the Irish plea for the elimination of the appeal met with a greater measure of sympathy than at the preceding Conference. The support obtained and the abolition by the Conference of the last remaining restrictions on the legislative autonomy of the Dominions encouraged the Free State Government to a definite move towards the formal elimination of the appeal. From ministerial statements in the Dáil it would appear that a measure to that effect was prepared and formed the subject of negotiations with the British Government.[2] The resignation of the Cosgrave Administration and the subsequent emergence of more fundamental issues has for the time being relegated the question to a secondary place, but there can, in this case, be little doubt as to the "inevitability of gradualness." "It seems," writes even so conservative a jurist as Professor Keith, "that if the pressure continues the appeal must be renounced formally as it probably has been in practice. It is clearly inconsistent with autonomy, if that is pressed to its logical conclusion, and, while the other Dominions may not deem it wise or desirable thus to stress the point, they cannot be held to fetter the action of a Dominion that entertains a strong dislike to the Court."[3]

[1] [1926] I.R. 405.

[2] *Dáil Debates*, Vol. 36, col. 1229, and Vol. 41, cols. 976 and 999 *et seq.*

[3] *The Sovereignty of the British Dominions*, p. 262.

CHAPTER V

THE LAW

(ART. 73)

THE Constitution placed the entire structure of Irish Law on a new foundation. It is, in the words of a decision of the High Court, both "an original source of jurisdiction" and the "one and all-sufficient root of title" of the whole code of law to be applied in the Free State.[1] In terms similar to those of Continental Constitutions[2] the laws in force at the time of its coming into operation were preserved subject to the Constitution and to the extent to which they were not inconsistent with its provisions until repealed or amended by the Oireachtas.

The interpretation of the legal import of the provisions of Art. 73 has been the subject of much contention in the Courts and of a number of important judicial pronouncements.[3] Very complex questions of interpretation, in particular, have arisen from the constitutional problems produced by the dissolution of the political unit of the United Kingdom of Great Britain and Ireland, and, on the other hand, from the legal ambiguities of the period of interregnum which preceded the enactment of the Constitution. The question as to the effect of the establishment of the Free State on the relationship of the judicial systems of the two countries first arose in the English High Court and Court of Appeal in the case of *Wakely* v. *Triumph Cycle Co.*,[4] in an action for damages brought by an Irishman against an English firm. The defendant had pleaded that the

[1] *Cahill* v. *Attorney-General*, [1925] 1 I.R. 70.

[2] Cf. German Constitution, Article 178.

[3] Its scope was held to extend not merely to the common law and statute law but also to existing bye-laws and regulations made under statutory authority: *The State* (*O'Sullivan and Others*) v. *The Circuit Court Judge of Cork*, [1931] I.R. 732.

[4] [1924] I.K.B. 214.

plaintiff should be required to give security in the same way as the subject of a foreign country. The Master had made an order accordingly, which was reversed by the Judge of the High Court on the ground that the Judgments Extension Act of 1868 still applied to Southern Ireland and that plaintiffs from the Free State were consequently entitled to its reciprocal benefits. That decision was in its turn reversed by the Court of Appeal, which held that the latter Act had since December 6, 1922, ceased to operate in the Free State, because though it had been continued in force by the Government of Ireland Act, 1920, it had lost its force on December 5, 1922, the date of the coming into operation of the Irish Free State (Consequential Provisions) Act, 1922, which repealed the Act of 1920. Contrary to this judgment the Irish High Court decided in *Gieves Ltd.* v. *O'Conor*[1] that the certificate of an English Judge may be registered in the Free State under the terms of the Judgments Extension Act, 1868. Mr. Justice Meredith maintained that the reasoning which underlay the judgment of the English Court of Appeal implied "that if an unrepealed Act ceases for the moment to have any practical application owing to the temporary non-existence of that in respect of which it can be applied, it thereupon ceases to be in force in respect of Art. 73," which he described as "a very strained interpretation." He cited the Adaptation of Enactments Act (No. 2 of 1922) which made a distinction between an Act being "in force" and having "full force and effect." It was only the "full force and effect" of the Judgments Extension Act that could be temporarily affected by the Act of 1920 ceasing to be in operation on December 5, 1922. Art. 73 of the Constitution and the Adaptation of Enactments Act would be stultified if existing enactments were held not to have remained in force pending the coming into operation of the latter Act. It followed that Art. 73 must be construed as preserving in force unrepealed Acts of the pre-Constitution period, an interpretation which was also borne out by the reference to repeal at the end of the Article.

[1] [1924] 2 I.R. 182.

The same problem arose in the Irish Courts in two cases under the Workmen's Compensation Act, 1906, that of *R.* (*Armstrong*) v. *Wicklow County Court Judge*[1] and that of *R.* (*Alexander*) v. *Circuit Judge for Cork.*[2] In both cases claims for arbitration in regard to compensation under the Act of 1906 had been filed with Irish Courts against English firms by persons domiciled in the Free State. The respondents applied to the High Court for writs of prohibition to be directed to the Judges of the lower Courts with whom the applications had been filed, to prevent them from proceeding with the arbitration on the ground that there was no jurisdiction to hear or entertain the arbitration as the matter was without the jurisdiction of the Free State. In the former case, which was heard before the establishment of the new system of judicature by the former Court of Appeal, it was decided that there was jurisdiction in the County Court to entertain the application, as the Irish and British Legislatures had mutually agreed to bind the subjects of each other for a specified purpose and for a transitory period. The Master of the Rolls, however, though he had originally concurred in the judgment, subsequently expressed grave doubts as to whether it embodied a correct interpretation of Art. 73. Basing his argument on the analogy of the phrasing of Art. 2 of the Constitution he held that the term "in the Irish Free State" as used in Art. 73 in reference to the continuance of the pre-existing law did not imply that a law of the late United Kingdom and enforceable in every part of it by the Irish Courts was still and to the same extent enforceable by the Courts of the Free State. Art. 73, he urged, must be construed as continuing the earlier law in force only within the area of the Irish Free State, but not to impose any extra-territorial obligations. In the second case, which came before the new Courts established under the authority of the Constitution, the Supreme Court, reversing the judgment of the High Court, decided that liberty to issue the writ of prohibition be granted.

[1] [1924] 2 I.R. 139.

[2] [1925] 2 I.R. 165.

In giving judgment the Chief Justice accepted the interpretation placed on Art. 73 by the Master of the Rolls in the earlier case, to the effect "that the true meaning of the Article is that laws which are in force in the Saorstát, and to the extent to which they are in force in the Saorstát, are to continue of full force and effect in the Saorstát to the extent to which they are not repealed or amended by the Oireachtas." He held that the corresponding British legislation—the Irish Free State Constitution Act, 1922—implied merely a recognition of the Constituent Act of the Irish Parliament, but that it could not be held to embody an act of reciprocal legislation re-enacting the law and practice of the Workmen's Compensation Act as it was before the Treaty throughout the United Kingdom and to subject persons domiciled in Great Britain to the jurisdiction of the Irish Courts in such actions. That interpretation, he urged, would have startling and unexpected results when applied to other statutes formerly in force in Great Britain and Ireland. Express reciprocal legislation founded on convention or agreement was required to give the Irish Courts effective jurisdiction in such cases.

The same interpretation of Art. 73 underlies a decision of the High Court in a subsequent case[1] where it was held that laws of the United Kingdom of Great Britain and Ireland in so far as preserved by Art. 73 and the Adaptation of Enactments Act, 1922, applied to the Free State as a separate constitutional and territorial unit and that compliance with their terms in Northern Ireland did not entitle to their benefits in the Free State.

If the decisions in these cases turned essentially on the effect of the dissolution of the United Kingdom of Great Britain and Ireland on Irish law, the great constitutional case of *Performing Rights Society* v. *Bray Urban District Council*[2] centred on the new problem created by Ireland's assumption of the status of

[1] *London Finance and Discount Co., Ltd.* v. *Robert Butler and Mary Butler*, [1929] I.R. 90.

[2] [1928] I.R. 506, 512; [1930] I.R. 509.

a Dominion. In 1911 a new body of copyright law had been enacted by the British Parliament for the whole Empire subject to the provision that its operation was not to extend to any self-governing Dominion unless declared by the Legislature of the latter to be in force therein. In 1925 two infringements of copyrights held in assignment by an English Company were alleged to have taken place in the Free State. The plaintiffs took action in the High Court and obtained judgment in their favour. On appeal the Supreme Court reversed the judgment on the ground that the plaintiffs had at the time of the alleged infringement not enjoyed the protection of copyright law in the Free State since the Copyright Act, 1911, had ceased to be operative in the area of the Free State when the latter assumed the constitutional status of a Dominion. The Supreme Court held that the Free State had become a self-governing Dominion within the terms of the Copyright Act at the latest on March 31, 1922, the date of the coming into operation of the Irish Free State (Agreement) Act, 1922. From that date the Copyright Act had by the express terms of its provisions ceased to apply to the Free State and it could, therefore, not be preserved in force by Art. 73 of the Constitution, not having been in operation on December 6, 1922. The decision of the Supreme Court which implied a grave breach of continuity in an important sphere of law led to the enactment by the Oireachtas of the Copyright (Preservation) Act, 1929,[1] which expressly preserved in the Free State copyrights subsisting in the former United Kingdom of Great Britain and Ireland on December 5, 1921, provided, however, that no remedy or relief should be recoverable by reason of an infringement of any such copyright before the passing of the Act. The case was subsequently taken before the Judicial Committee of the Privy Council, which disagreed with the decision of the Supreme Court of the Free State, holding that the term "self-governing Dominion" as used in the Copyright Act, 1911, was limited to the Dominions then existing as specifically enu-

[1] No. 25 of 1929.

merated in Section 35 of the Act. As Ireland did not figure among the latter, the Act had extended to Ireland until December 6, 1922, and had been preserved in force by Art. 73 of the Constitution. The judgment of the Judicial Committee significantly admitted that the reasoning of the Supreme Court might have been accepted if the term "self-governing Dominion" had not been expressly defined in the Act, "for then any part of the Empire which became a self-governing dominion subsequent to the passing of the Act might enjoy the advantages conferred by the Act upon such territories." The disagreement of the Judicial Committee from the decision of the Supreme Court was thus not based on any fundamental divergence of interpretation of the legal and constitutional position produced by the Treaty and subsequent enactments, but merely on the phrasing of the Copyright Act, 1911, which expressly enumerated the Dominions to which the Act was not to apply. The essential view of the Supreme Court has thus not been contraverted even by the Judicial Committee—whose judgment would, as previously shown, in any case not have been regarded as binding on the Irish Courts—and must be held to govern the issue. But the passing of the Copyright (Preservation) Act, 1929, would seem to indicate that that interpretation may be fraught with serious consequences for the maintenance of the continuity of the legal system.[1]

The actual Law of the Irish Free State is thus based on the English Common and Statute Law as in operation in Ireland at the time of the enactment of the Constitution. It is not identical with that in force at that time in England, since a considerable body of Statute Law applying only to Ireland was enacted during the century of the Union. While, on the other hand, Ireland was excluded from the operation of many English

[1] An analysis of the several views tenable on the strength of the several Statutes and judicial decisions on the complex question of the date as from which the legislative authority of the British Parliament ceased and that of the Irish Legislature commenced in the area of the Free State will be found in the *Irish Law Times*, June 1, 8 and 15, 1929.

Statutes. Since the establishment of the Free State a very considerable body of new Statute Law has been created. In the first instance, the organisation of the new State itself has been the subject of a large number of enactments of fundamental import. The legislative provisions of the Constitution have been implemented by Electoral Laws, the executive by Ministers and Secretaries, Civil Service, Civic Guards and Defence Forces Acts, the judicial by Courts of Justice, Juries, Court Officers and Evidence Acts. In the sphere of economic administration comprehensive measures on land settlement, agricultural and industrial development, water power and electricity production, currency and public finance have been placed on the Statute Book. The new legislation reveals a distinct tendency to break away from English models. It is not to be expected, in view of the basic structure of the existing system, that legal codes on Continental lines will be created, but the new statutes are effecting so radical a modification of the earlier law as to be likely in time to result in the enactment of comprehensive measures of consolidation which will reveal an entirely new framework of Irish Law.

CONCLUSION

THE CONSTITUTION (REMOVAL OF OATH) BILL, 1932

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In March 1932 the Fianna Fáil Administration, which as a result of the preceding General Election took office at the beginning of the month with the support of the Labour Party, introduced as its first measure a Bill "to remove the obligation now imposed by law on members of the Oireachtas and Ministers who are not members of the Executive Council to take an Oath and for that purpose to amend the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922." Section 1 of the Bill proposed the deletion of Art. 17 of the Constitution and of the provision of Art. 55 which imposed upon "Extern Ministers" the obligation to take the Oath. Section 2 provided for the repeal of s. 2 of the Constituent Act which gave the Treaty the force of law and invested it with overriding force over the Constitution and all subsequent enactments of the Oireachtas. Section 3 deleted the restrictive clause of Art. 50 which enabled the Constitution to be amended only "within the terms of the scheduled Treaty." The title of the Act was to be "The Constitution (Removal of Oath) Act, 1932"—a departure from the earlier practice under which Constitution Amendment Acts had been designated in the title as such.

The Bill, having been opposed in the Dáil already on the first stage, was the subject of a prolonged and impassioned debate on the second reading. In his opening speech President de Valera outlined the scope of the proposed amendment and the motives underlying it. He was emphatic that his party, having announced before the election its intention to remove the Article of the Constitution which made the signing of the Oath obligatory on members of the Oireachtas, had received a mandate from the electorate to effect the proposed amendment. Their view was that Art. 17 was not required by the Treaty, that it stood in the way of national unity and willing

obedience to the law and that government by coercion had been the result of the policy of the preceding Government in imposing the obligation. The new Government was pledged not to exceed its mandate in the field of international relations and would scrupulously honour that pledge. They were quite ready to lead the Irish people towards an independent republic if the latter were prepared for that development. They felt, however, that at present they were not entitled to exceed the specific mandate for which they had asked at the preceding election. There was, he further insisted, no obligation to consult Great Britain on the subject of the proposed amendment, as the import of the measure was purely domestic. To enter into negotiations on the subject of the Bill with the British Government would imply a derogation from the status of co-equality which the previous Government had claimed to have attained.

In regard to the substance of the proposed amendments of the Constitution the President claimed that the deletion of Art. 17 was perfectly consistent with the constitutional position of the Free State as one of the co-equal partners of the British Commonwealth. Whatever the initial restrictions embodied in the Treaty might have been, the constitutional status of the Free State had, as a result of the developments of the preceding decade, so advanced that it was now on terms of co-equality not merely with Canada but with Great Britain. Would anybody deny that if the British Parliament chose it could pass a Bill removing the obligation of its members to take an Oath to the Crown? Could not Canada do the same? If the status of co-equality, which the former Government claimed to have achieved, was a reality, surely the Irish Parliament was entitled to do the same. If it were held that the liberty of action of the Free State was restricted, then the assertion of co-equality was unfounded. He held that no such restriction existed. Formal recognition had been given to the new constitutional position of the member States of the Commonwealth by the recent enactment of the Statute of Westminster. Whatever might have been the legal position in 1921, there could be no

doubt that in 1932 the Free State was fully entitled to remove Art. 17 of the Constitution without violating any contractual obligation towards Great Britain.

In defence of the proposed removal of s. 2 of the Constitution Act the President contended that it was an extraordinary legal position for the municipal law of a State to be dependent on a treaty. Treaties as a rule did not form part of the fundamental or constitutional law of States. In the case of the Free State they generally were not so embodied. Why should the Anglo-Irish Treaty be invested with an exceptional status? The Bill proposed to place the Treaty in the same position as others. In case of any conflict between Irish municipal law and other treaties the Courts were bound to hold the municipal law as invested with overriding force. The present Bill was intended to apply that general principle to the Anglo-Irish Treaty; it should not be open to the Irish Courts to declare Irish legislation invalid on the ground that it contravened the Treaty. That question was not one for the Courts of Law, but for the States involved and for the Parliaments of those States. An identical proposal, he stated, had been submitted to the previous Government by their legal advisers. The removal of the restriction imposed by Art. 50 on the power of the Oireachtas to amend the Constitution was necessary, as the purpose which was to be effected by the elimination of s. 2 of the Constituent Act could not otherwise be realised. If the restrictive clause were not deleted, the High Court would—by virtue of its jurisdiction in regard to the constitutionality of legislation under Art. 65 of the Constitution—be in a position to interpret municipal law as subordinate to the Treaty, a position which was intolerable.

In his final observations the President insisted that the Bill was necessary for the internal peace of the country. It was the duty of the Government to maintain law and order with the smallest possible exercise of coercion. Events during the preceding decade had shown that it was impossible to secure willing obedience to law by measures of repression. It was

essential that all sections of the Irish people should be free to send their representatives to the National Assembly without being compelled to forswear any opinion or give up any principle. A large section of the Irish people regarded the Oath as a matter of national significance, and, in order to secure their willing co-operation in the State, the obligation to take the Oath should be removed from the Constitution.

It will be seen that the case for the removal of the Oath was not based by the President on the earlier argument that the taking of the Oath was not mandatory under the Treaty,[1] but exclusively on the new constitutional position created by the advancement in status since 1921, which, he claimed, enabled the removal of an element incompatible with the conception of co-equality without any infraction of the Treaty being incurred thereby. In the course of the debates, however, the Minister for Finance and the Attorney-General upheld in some measure the former argument. The Minister stated that in the original Draft Constitution, which had been prepared by the most eminent lawyers in the State, no provision corresponding to that of Art. 17 had been inserted, which proved that these authorities had held, and justifiably held, that the Oath was not mandatory under the Treaty, an argument also repeatedly urged by the Leader of the Labour Party and other supporters of the Bill. It was urged by the same Minister that the identical phrase as was held in Art. 4 of the Treaty to impose the obligation to take the Oath had been used in Art. 12 to connote the obligation of the Government of Northern Ireland to appoint a representative on the Boundary Commission. Yet the latter provision had not been held to be mandatory and coercive upon the Northern Government. If, as had been urged, the Treaty had to be taken as a whole,

[1] In the course of the Debate the President stated that he had never made the contention "that the whole question of the Oath was to be determined by the meaning of Art. 4 in itself. . . . Art. 2 being assumed to imply an implication of an oath of some kind, Art. 4 indicated what the form of the oath was to be" (*Dáil Debates*, Vol. 41 col. 927).

Art. 4 could be as easily eliminated as Art. 12 had been destroyed. The Minister emphatically rejected the suggestion repeatedly made in the course of the debate by the opponents of the Bill that the latter would render the partition of Ireland permanent. Not political, but economic causes would bring about the unification of the country, and if arguments were to be based upon history, the republican form of government would offer on historical and traditional grounds a greater inducement to the Presbyterians of the North, the descendants of the Republicans of 1798, to associate with the people of the Free State and build up a united Ireland. The Bill, he contended, would make for the ultimate unity of the country.

On the subject of the proposed deletion of s. 2 of the Constituent Act the Attorney-General urged that its effect would be to make the legal status conformable to the constitutional position as established by the recent re-interpretation of inter-Imperial relations. He quoted Lord Danesfort's speech in the House of Lords debate on the Statute of Westminster, in which it had been admitted that the latter gave to the Free State the legal power to alter or abolish the Treaty. The clause of s. 2 represented a shackle upon the Constitution which had no parallel in that of Canada. It could not on legal grounds be denied that its deletion was constitutionally permissible. The Leader of the Labour Party further urged that as the Treaty imposed no obligation on the Free State to enact any Constitution at all, it could not be asserted that the deletion of individual Articles of the Constitution constituted an infraction of the Treaty.

The counter-arguments of the Opposition ranged over a wide field. It was in the first instance denied that the Government had a mandate from the majority of the electorate for the Bill as introduced. The Labour Party, on whose support they depended for the passage of the measure, had not asked for a mandate on the issue. They had always declared that they stood for the maintenance of the Treaty and that the latter might be amended only by agreement with the other

contracting party. Even the Government Party, however, had received the support of their voters only for the removal of the Oath on the strength of the assertion that such removal was not contrary to the Treaty and would not involve its violation. The Bill as introduced in the House indicated that the Government had shifted its ground, that, having realised that the removal of the Oath could not be effected within the framework of the Treaty, they had contrary to their election assurances proceeded to undermine the legal structure of the Treaty in order to be able to effect the removal. It was in order to mislead the electors that the Bill, whose essential object was to divest the Treaty of the force of law, was described as a "Removal of Oath Bill." The plea, moreover, that the Bill would establish internal peace was devoid of all foundation. The leaders of the republican bodies had emphatically declared that they regarded the Bill merely as a first step towards the secession of the Free State from the British Commonwealth, and that their opposition to any form of association with the latter would not be in the least affected by the abolition of the Oath. Inasmuch, moreover, as these bodies had given active support to the Government Party at the elections, they could no longer be said not to be represented in Parliament. The present Bill would have the effect of establishing the rule of the armed minority; it would create a precedent and, as all such precedents, ultimately lead to anarchy.

In regard to the question of the removal of the Oath itself it was urged that in view of the fact that the Oath was expressly embodied in Art. 4 of the Treaty the obligation imposed by the Constitution upon members to take it could not be abolished without violating the Treaty. The very introduction of the Bill to remove the obligation proved the absurdity of the argument that the Oath was not mandatory under the Treaty, since if that had been the case there was clearly no need to remove it by specific enactment. The mere fact that the Treaty had been given the force of law made it incumbent upon members of the Oireachtas to take the Oath. If the

legislative ratification had not in itself produced the obligation, the Parliament of the Free State was under the terms of the Treaty bound to pass the necessary legislation to give municipal effect to the external obligation undertaken by the State under Art. 4. No court of international law would hold that an Article of the Treaty which had practically caused the breakdown of the peace negotiations in London, which had been the cause of the Civil War and which both supporters and opponents of the Treaty had held to be essential, was not mandatory. In reply to the argument that the obligation imposed by the Treaty on the Free State in relation to the Oath was analogous to and identically phrased with that imposed upon the Government of Northern Ireland to appoint a Boundary Commissioner, it was denied that the British Government had not regarded that obligation as mandatory, the conclusion of the Supplementary Agreement of 1924 and the enactment of British legislation to rectify the default of the Northern Government being cited in support. In regard further to the statement that the original Draft Constitution had not contained a provision imposing the Oath it was asserted that the members of that Committee had not doubted the mandatory character of the obligation, but had considered that it would be sufficient if effect were given to the provision of Art. 4 by subsequent legislation or in the Standing Orders of the Oireachtas. As to the merits of the Oath it was urged that its character had changed as a result of the constitutional development of the Commonwealth, that it connoted no subservience or external domination, that it was sworn not to the ruler of a foreign country, but to the Crown as a symbol of the unity of the Commonwealth. That symbol was the least tangible and least oppressive link of association; if a different form of association with the British Commonwealth was to be established, much more definite and rigid obligations would have to be undertaken.

In reply, further, to the argument that the constitutional advance made since the conclusion of the Treaty, as recognised

by the Statute of Westminster, warranted the enactment of the Bill, it was asserted that that plea, which implicitly vindicated the essential policy of the former Government, ignored the realities of the actual constitutional and legal status of the member States of the Commonwealth. Canada was legally not in a position, even under the Statute of Westminster, to alter its Constitution and to abolish the Oath of Allegiance. Similarly the Constitution of the Free State was in strict legality limited by the terms of the Treaty. Even constitutionally Canada was not entitled to abolish the symbols of allegiance without consulting other members of the Commonwealth. It was further maintained that if the British Parliament itself proposed to delete the Oath and any of the other Parliaments of the Commonwealth objected to that course, the British Government would constitutionally be under an obligation to enter into consultation with the other member States before any definite action was taken, the Preamble of the Statute of Westminster relating to changes of the Royal Title being cited in support of the assertion. It was an untenable proposition that any increase in the constitutional status of the Free State could of itself have the effect of repealing or deleting the express written provisions of the Treaty, from which that status was derived, without the formal consent of the other contracting party. If that proposition were to be accepted, every other provision of the Treaty could be regarded as having been rendered invalid. It might be argued that no further compensation need be paid to discharged Civil Servants under Art. 10 of the Treaty or that the Free State Government need no longer allow British Forces to remain in the places allocated by the Treaty. It might similarly be held that the King and his Representative could be removed from the Executive and Legislature without any infraction of the Treaty being incurred thereby. With regard, finally, to the effect of the Statute of Westminster it was maintained that it was not relevant to the issue. The Statute gave no power which the Free State had not formerly possessed. It could be

adduced in support of the proposed measure only if the view were adopted that the Free State derived its Constitution from the British Parliament and that, consequently, its constitutional status could be made and remade by British statutes, a view which the Government of the Free State had always rejected.

If the arguments of the opponents of the Bill on the subject of the removal of the Oath revealed differences of outlook as between the official Opposition and the Independent Members, the opposition to the deletion of s. 2 of the Constituent Act and of the restrictive clause of Art. 50 was unanimous. The latter provisions, it was urged, represented a statutory declaration of the Treaty obligations of the Free State, just as the corresponding British legislation embodied the legal recognition of the obligations imposed by the Treaty on Great Britain. Hence, the effect of the proposed deletion of these clauses would not be merely to divest the Treaty of the force of municipal law, but to destroy entirely its binding effect. Since the last Article of the Treaty expressly required it to be ratified by national legislation—which had been enacted by s. 2 of the Constituent Act—there could clearly be no more effective method of denouncing the Treaty than the proposed deletion of that section. It indicated clearly that the Government was aware that the removal of the Oath was an infringement of the Treaty and was afraid of allowing the question to be tested in the Courts. Yet it was not for one political party to arrogate to itself the functions of the Judiciary. The deletion of these clauses was designed to pave the way for further infractions of the Treaty by unilateral legislation. The Government, it was argued, denied, on the one hand, the competence of the Irish Courts to adjudicate on the issue, and refused, on the other, to enter into negotiations with the other party to the Treaty, which was the general international practice in the case of a disagreement between States on the interpretation of a treaty or of a desire of one party to amend it. Prior consultation with the British Government, it was

urged, implied no derogation from status. There were many subjects on which the British Parliament was not at liberty on account of treaty obligations to legislate without prior agreement with another country or the formal denouncement of a treaty by which it was bound. The constitutional position created by the Anglo-Irish Treaty was not static; it could be changed by negotiation. The Irish Parliament could not, however, abolish by unilateral legislation obligations imposed by it, deprive the Treaty of the force of law and yet maintain that it still stood. Nor could the official declaration of the British Government that it regarded the proposed Bill as an infraction of the Treaty be ignored. If, as was admitted by the Government, some form of agreement between the two countries was necessary, it was clearly impossible to proceed with legislation without any concern as to the attitude of the other side. The Bill, if passed, would undermine the confidence of other countries in the Free State; no other nation would desire to make a Treaty with a State which held that its meaning was to be determined solely by the view which it itself—and any of its future Governments—took of it. It would alienate Ireland's principal customer and cause infinite economic damage to the country. It would isolate the six counties of the North and put the seal of finality on partition. Finally, it would involve the loss of the rights which the Free State enjoyed by virtue of its membership of the British Commonwealth of Nations.

The Bill was passed on the second reading by a majority of 77, composed of the Fianna Fáil and Labour Parties, against a minority of 71, consisting of Cumman na Gaedhal, the Farmers' Party and the Independents. On the committee stage an amendment was moved by the Opposition to limit the deletion of Art. 17 to its mandatory clause—added in the Constitution to Art. 4 of the Treaty—and to repeal s. 2 of the Constituent Act only in reference to the present Bill. Furthermore, an alternative form of oath was proposed, promising true faith and allegiance to the Irish Free State and

loyalty—during the continuance of the Free State in the British Commonwealth—to the partnership obligations thereby involved and to the Crown as the symbol of that partnership. Finally, an amendment was introduced to maintain the legal force of Art. 10 of the Treaty, which provided for the compensation of discharged Civil Servants. All these amendments were defeated, and the Bill was passed as introduced by the Government. It was thereupon introduced in the Senate, where, after a lengthy debate ranging over the same issues as had been debated in the Dáil,[1] it was passed by a majority of 21 against 8 votes, a considerable number of those opposing the Bill abstaining from voting. On the report stage several amendments were moved and adopted which entirely transformed the character of the Bill as passed by the Dáil. Sections 2 and 3 of the Bill, which provided for the repeal of s. 2 of the Constituent Act and of the restrictive clause of Art. 50, were eliminated. An additional section was inserted prescribing that the Act—which in the amended form provided merely for the deletion of Art. 17 and for the consequential amendment of Art. 55—shall not come into force until an agreement has been concluded between the Governments of the Irish Free State and of Great Britain to the effect that Art. 4 of the Treaty shall cease to be operative and such agreement has been ratified and approved by a Resolution of the Dáil. The title of the Bill was amended accordingly. The Bill, as amended, went back to the Dáil, which rejected the amendments of the Senate. Under the provisions of Art. 38A of the Constitution the Bill will thus not come into force until the expiry of a period of eighteen months, unless a dissolution intervenes.

The above summary indicates the complexity of the issues raised by the Bill. The legal problem reduces itself in essence to the twofold question as to whether, in view of the expansion of the constitutional status of the British Dominions since 1921, the obligation imposed by the Treaty and the Constitution in

[1] Several additional arguments advanced in the Senate in reference to the Bill have been included in the above summary.

regard to the taking of the Oath by members of the Irish Parliament can be abolished without any violation of the Treaty being involved therein, and, secondly, as to whether the proposed deletion of the clauses of the Constituent Act and of the Constitution which invested the Treaty with the character of Irish municipal law and precluded any amendment of the Constitution and any legislation contrary to its terms, implies an infraction of the Agreement. As regards the first problem it may, on the one hand, be urged that the constitutional position of the British Commonwealth, as defined by the Imperial Conferences of 1926 and 1930, is that of a sevenfold monarchy, that the Crown has been divided into seven separate entities, that, consequently, the relationship of the Executive and the Parliament of each member State of the Commonwealth to the Crown is no longer of inter-Imperial import and that the forms and symbols which govern that relationship can, therefore, be modified in each of the States by an Act of its Legislature. On the other hand, it may be held that, inasmuch as the same Imperial Conferences which had defined the new constitutional position of the Commonwealth had prescribed negotiation as the appropriate method for the settlement of questions of inter-Imperial concern and had emphasised the inter-Imperial character of the Crown whose Style and Succession might not be varied except by common agreement, no change in the relationship of the Legislature and Executive of any State to the Crown can be effected without the assent of the others. It might be urged that though the royal prerogatives of disallowance and reservation had been obsolete for more than half a century practically throughout the Dominions, unanimous agreement had been considered necessary for their formal abolition, that the same view underlay the declarations of the Imperial Conferences on the questions of the Appeal to the Judicial Committee of the Privy Council, of nationality legislation and of changes of the Royal Title, and that, in particular, for the repeal of express clauses of a formal agreement, such as the Anglo-Irish Treaty,

an equally formal act of assent by the other member States, or at least by the other contracting party to the agreement, was required.

The deletion of the clauses of s. 2 and of Art. 50 raised issues of even greater complexity. It may again be held, on the one hand, that there is no general obligation in international law to give effect to a treaty by investing it with the force of municipal law, that s. 2 of the Constituent Act of 1922 need, therefore, not have been enacted and that, consequently, its repeal constituted no derogation from the authoritative status of the Treaty. On the other hand, it may be argued that it is the general practice for treaties effecting changes in the general law and involving financial charges to be ratified by legislation,[1] and that, further, though a treaty need not in all circumstances be invested with the force of municipal law, its divestment of the character of the latter, when once it had been so enacted, constituted such a *capitis diminutio* as to prejudice its binding force. Moreover, the Anglo-Irish Treaty was not of the same character as other treaties concluded by the Free State, since it formed the basis of the entire structure of the State. Its own terms expressly provided for its ratification by legislation, which had been effected by the clause now sought to be deleted.[2] It might finally be urged

[1] L. Oppenheim, *International Law* (1930, p. 734); A. D. McNair, *When do British Treaties involve Legislation?* (in the *British Year Book of International Law*, 1928, p. 59); R. D. Masters, *International Law in National Courts* (New York, 1932), which deals with Continental practice (at p. 226).

[2] It was, as previously mentioned, urged in the debate that no Constitution need at all have been enacted under the terms of the Treaty and that, therefore, the repeal of s. 2 and of Art. 17 constituted no infraction of the Treaty. But it would appear that if no Constituent Act had been passed the legislative ratification of the Treaty would have had to be effected by another enactment, whilst similarly legislative effect would have to be given under the Treaty to the obligation undertaken by Art. 4 in regard to the parliamentary Oath. The act of approval of Dáil Eireann on January 7, 1922, did not, as emphasised at that time by President de Valera, constitute in itself an act of ratification (*Treaty Debate*, col. 353).

that the withdrawal of the force of law from the Treaty must inevitably produce a position of considerable legal uncertainty, as Irish Judges would henceforth be precluded from taking judicial notice of such of its provisions as were not subsequently converted into municipal law.

APPENDIX

APPENDIX

The original Constitution is printed in ordinary type; the portions deleted by the Constitution Amendment Acts are printed between square brackets; and those which have been added are printed in italics.

The portions to be deleted by the Constitution (Removal of Oath) Bill, 1932, are printed with a dotted line underneath them.

THE CONSTITUTION OF THE IRISH FREE STATE (SAORSTÁT EIREANN) ACT

[No. 1 of 1922]

An Act to enact a Constitution for the Irish Free State (Saorstát Eireann) and for implementing the Treaty between Great Britain and Ireland signed at London on the 6th day of December, 1921.

Dáil Eireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of the Irish Free State (otherwise called Saorstát Eireann) and in the exercise of undoubted right, decrees and enacts as follows:—

1. The Constitution set forth in the First Schedule hereto annexed shall be the Constitution of the Irish Free State (Saorstát Eireann).

2. 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 any provision of the said Constitution or of any amendment thereof or of any law made thereunder is in any respect repugnant to any of the provisions of the Scheduled Treaty, it shall, to the extent only of such repugnancy, be absolutely void and inoperative and the Parliament and the Executive Council of the Irish Free State (Saorstát Eireann) shall respectively pass such further legislation and do all such other things as may be necessary to implement the Scheduled Treaty.

3. This Act may be cited for all purposes as the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922.

FIRST SCHEDULE

CONSTITUTION OF THE IRISH FREE STATE

(SAORSTÁT EIREANN)

ARTICLE 1.

The Irish Free State (otherwise hereinafter called or sometimes called Saorstát Eireann) is a co-equal member of the Community of Nations forming the British Commonwealth of Nations.

ARTICLE 2.

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

ARTICLE 3.

Every person, without distinction of sex, domiciled in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) at the time of the coming into operation of this Constitution, who was born in Ireland or either of whose parents was born in Ireland or who has been ordinarily resident in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) for not less than seven years, is a citizen of the Irish Free State (Saorstát Eireann) and shall within the limits of the jurisdiction of the Irish Free State (Saorstát Eireann) enjoy the privileges and be subject to the obligations of such citizenship: Provided that any such person being a citizen of another State may elect not to accept the citizenship hereby conferred; and the conditions governing the future acquisition and termination of citizenship in the Irish Free State (Saorstát Eireann) shall be determined by law.

ARTICLE 4.

The National language of the Irish Free State (Saorstát Eireann) is the Irish language, but the English language shall be equally recognised as an official language. Nothing in this Article shall prevent special provisions being made by the Parliament of the Irish Free State (otherwise called and herein generally referred to as the "Oireachtas") for districts or areas in which only one language is in general use.

ARTICLE 5.

No title of honour in respect of any services rendered in or in relation to the Irish Free State (Saorstát Eireann) may be conferred

on any citizen of the Irish Free State (Saorstát Eireann) except with the approval or upon the advice of the Executive Council of the State.

ARTICLE 6.

The liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law. Upon complaint made by or on behalf of any person that he is being unlawfully detained, the High Court and any and every judge thereof shall forthwith enquire into the same and may make an order requiring the person in whose custody such person shall be detained to produce the body of the person so detained before such Court or judge without delay and to certify in writing as to the cause of the detention and such Court or judge shall thereupon order the release of such person unless satisfied that he is being detained in accordance with the law:

Provided, however, that nothing in this Article contained shall be invoked to prohibit control or interfere with any act of the military force of the Irish Free State (Saorstát Eireann) during the existence of a state of war or armed rebellion.

ARTICLE 7.

The dwelling of each citizen is inviolable and shall not be forcibly entered except in accordance with law.

ARTICLE 8.

Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen, and no law may be made either directly or indirectly to endow any religion, or prohibit or restrict the free exercise thereof or give any preference, or impose any disability on account of religious belief or religious status, or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school, or make any discrimination as respects State aid between schools under the management of different religious denominations, or divert from any religious denomination or any educational institution any of its property except for the purpose of roads, railways, lighting, water or drainage works or other works of public utility, and on payment of compensation.

ARTICLE 9.

The right of free expression of opinion as well as the right to assemble peaceably and without arms, and to form associations or unions is guaranteed for purposes not opposed to public morality. Laws regulating the manner in which the right of forming associations and the right of free assembly may be exercised shall contain no political, religious or class distinction.

ARTICLE 10.

All citizens of the Irish Free State (Saorstát Eireann) have the right to free elementary education.

ARTICLE 11.

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

ARTICLE 12.

A Legislature is hereby created to be known as the Oireachtas. It shall consist of the King and two Houses, the Chamber of Deputies (otherwise called and herein generally referred to as "Dáil Eireann") and the Senate (otherwise called and herein generally referred to as "Seanad Eireann"). The sole and exclusive power of making laws for the peace, order and good government of the Irish Free State (Saorstát Eireann) is vested in the Oireachtas.

ARTICLE 13.

The Oireachtas shall sit in or near the city of Dublin or in such other place as from time to time it may determine.

ARTICLE 14.

All citizens of the Irish Free State (Saorstát Eireann) without distinction of sex, who have reached the age of twenty-one years and who comply with the provisions of the prevailing electoral laws, shall have the right to vote for members of Dáil Eireann, and to take part in the Referendum [and Initiative.[1] All citizens of the Irish Free State [(Saorstát Eireann) without distinction of sex who have reached the

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[1] Amendment No. 10 Act.

[age of thirty years and who comply with the provisions of the pre-[vailing electoral laws, shall have the right to vote for members of [Seanad Eireann.[1]] No voter may exercise more than one vote at an election to [either House[1]] *Dáil Eireann*[1] and the voting shall be by secret ballot. The mode and place of exercising this right shall be determined by law.

ARTICLE 15.

Every citizen who has reached the age of twenty-one years and who is not placed under disability or incapacity by the Constitution or by law shall be eligible to become a member of Dáil Eireann.

ARTICLE 16.

No person may be at the same time a member both of Dáil Eireann and of Seanad Eireann, and if any person who is already a member of either House is elected to be a member of the other House, he shall forthwith be deemed to have vacated his first seat.

ARTICLE 17.

The oath to be taken by members of the Oireachtas shall be in the following terms:—

> I..... do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established, and that I will be faithful to H.M. King George V., his heirs and successors by law in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.

Such oath shall be taken and subscribed by every member of the Oireachtas before taking his seat therein before the Representative of the Crown or some person authorised by him.

ARTICLE 18.

Every member of the Oireachtas shall, except in case of treason, felony, or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of either House, and shall not, in respect of any utterance in either House, be amenable to any action or proceeding in any Court other than the House itself.

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[1] Amendment No. 6 Act.

ARTICLE 19.

All official reports and publications of the Oireachtas or of either House thereof shall be privileged and utterances made in either House wherever published shall be privileged.

ARTICLE 20.

Each House shall make its own Rules and Standing Orders, with power to attach penalties for their infringement and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.

ARTICLE 21.

Each House shall elect its own Chairman and Deputy Chairman and shall prescribe their powers, duties, remuneration, and terms of office.

The member of Dáil Eireann who is the Chairman of Dáil Eireann immediately before a dissolution of the Oireachtas shall, unless before such dissolution he announces to Dáil Eireann that he does not desire to continue to be a member thereof, be deemed without any actual election to be elected in accordance with this Constitution at the ensuing general election as a member of Dáil Eireann for the constituency for which he was a member immediately before such dissolution or, in the event of a revision of constituencies having taken place, for the revised constituency declared on such revision to correspond to such first-mentioned constituency. Whenever a former Chairman of Dáil Eireann is so deemed to have been elected at a general election as a member for a constituency the number of members actually to be elected for such constituency at such general election shall be one less than would otherwise be required to be elected therefor.[1]

ARTICLE 22.

All matters in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present other than the Chairman or presiding member, who shall have and exercise a casting vote in the case of an equality of votes. The number of members necessary to constitute a meeting of either House for the exercise of its powers shall be determined by its Standing Orders.

ARTICLE 23.

The Oireachtas shall make provision for the payment of its members and may in addition provide them with free travelling facilities in any part of Ireland.

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[1] Amendment No. 2 Act.

ARTICLE 24.

The Oireachtas shall hold at least one session each year. The Oireachtas shall be summoned and dissolved by the Representative of the Crown in the name of the King and subject as aforesaid Dáil Eireann shall fix the date of re-assembly of the Oireachtas and the date of the conclusion of the session of each House: Provided that the sessions of Seanad Eireann shall not be concluded without its own consent.

ARTICLE 25.

Sittings of each House of the Oireachtas shall be public. In cases of special emergency either House may hold a private sitting with the assent of two-thirds of the members present.

ARTICLE 26.

Dáil Eireann shall be composed of members who represent constituencies determined by law. The number of members shall be fixed from time to time by the Oireachtas, but the total number of members of Dáil Eireann (exclusive of members for the Universities) shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population: Provided that the proportion between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as possible, be identical throughout the country. The members shall be elected upon principles of Proportional Representation. The Oireachtas shall revise the constituencies at least once in every ten years, with due regard to changes in distribution of the population, but any alterations in the constituencies shall not take effect during the life of Dáil Eireann sitting when such revision is made.

ARTICLE 27.

Each University in the Irish Free State (Saorstát Eireann), which was in existence at the date of the coming into operation of this Constitution, shall be entitled to elect three representatives to Dáil Eireann upon a franchise and in a manner to be prescribed by law.

ARTICLE 28.

At a General Election for Dáil Eireann the polls (exclusive of those for members for the Universities) shall be held on the same day throughout the country, and that day shall be a day not later than thirty days after the date of the dissolution [and shall be proclaimed [a public holiday.[1]] Dáil Eireann shall meet within one month of such day, and shall unless earlier dissolved continue for [four years[2]] *six years or such shorter period as may be fixed by legislation*[2] from the

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[1] Amendment No. 3 Act.

[2] Amendment No. 4 Act.

date of its first meeting, and not longer. Dáil Eireann may not at any time be dissolved except on the advice of the Executive Council.

ARTICLE 29.

In case of death, resignation or disqualification of a member of Dáil Eireann, the vacancy shall be filled by election in manner to be determined by law.

ARTICLE 30.

Seanad Eireann shall be composed of citizens who shall be proposed on the grounds that they have done honour to the Nation by reason of useful public service or that, because of special qualifications or attainments, they represent important aspects of the Nation's life.

ARTICLE 31.

The number of members of Seanad Eireann shall be sixty. A citizen to be eligible for membership of Seanad Eireann must be a person eligible to become a member of Dáil Eireann, and must have reached the age of [thirty-five[1]] *thirty*[1] years. Subject to any provision for the constitution of the first Seanad Eireann the term of office [of a [member of Seanad Eireann shall be twelve years.[2]] *of members of Seanad Eireann shall, in the case of members elected (otherwise than under Article 32 of this Constitution) at the election held in pursuance of Article 32 of this Constitution in the year 1925, be twelve years, and shall, in the case of the members elected at the election held pursuant to the said Article 32 to fill the places of members of Seanad Eireann who are due to retire in the year 1928, be as provided in Article 32B of this Constitution and shall, in every other case but subject to the provisions of the said Article 34, be nine years.*[2]

ARTICLE 31A.

The duration of the term of office of a member of the first Seanad Eireann shall be reckoned from the beginning of the day on which this Constitution comes into operation, and the duration of the term of office of a member of Seanad Eireann elected under Article 32 of this Constitution shall be reckoned from the beginning of the appropriate triennial anniversary of that day.[3]

ARTICLE 32.

[One-fourth[2]] *Save as is hereinafter otherwise provided, one-third*[2] of the members of Seanad Eireann shall be elected every three years from a panel constituted as hereinafter mentioned at an election [at [which the area of the jurisdiction of the Irish Free State (Saorstát [Eireann) shall form one electoral area, and the elections shall be [held on principles of Proportional Representation[4]] *at which the electors*

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[1] Amendment No. 8 Act.
[2] Amendment No. 7 Act.
[3] Amendment No. 1 Act.
[4] Amendment No. 6 Act.

shall be the members of Dáil Eireann and the members of Seanad Eireann voting together on principles of Proportional Representation. The voting at such elections shall be by secret ballot and no elector may exercise more than one vote thereat. The place and conduct of such elections shall be regulated by law.[1]

At the election held in pursuance of this Article to fill the places of members of Seanad Eireann who are due to retire in the year 1928, one-fourth only of the members of Seanad Eireann shall be elected under this Article.[2]

ARTICLE 32A.

An election of members of Seanad Eireann under Article 32 of this Constitution may be held at any time not more than three months before nor more than three months after the conclusion of the period of three years mentioned in that Article.

A person who, after the day appointed by law for the completion of the formation of the panel of candidates and before the conclusion of the three years period running on that day, is chosen under Article 34 of this Constitution to fill a vacancy caused by the death, resignation, or disqualification of a member of Seanad Eireann (other than a member about to retire at the conclusion of the said period) shall hold office until the conclusion of the next three years period and shall then retire.[3]

ARTICLE 32B.

The respective terms of office of the several members of Seanad Eireann elected at the election held pursuant to Article 32 of this Constitution to fill the places of members of Seanad Eireann who are due to retire in the year 1928 shall be as follows, that is to say:—

(*a*) *the first five members so elected shall hold office for nine years,*

(*b*) *so many of the members so elected after such first five members as are necessary to fill under Article 34 of this Constitution additional vacancies (if any) originally created by the death, resignation, or disqualification of members of Seanad Eireann who were due to retire in the year 1937 shall hold office for nine years,*

(*c*) *the next five members so elected shall hold office for six years,*

(*d*) *so many of the members so elected after the last-mentioned five members as are necessary to fill under Article 34 of this Constitution additional vacancies (if any) originally created by the death, resignation, or disqualification of members of Seanad Eireann who were due to retire in the year 1934 shall hold office for six years,*

(*e*) *all other members so elected shall hold office for three years.*

The proviso to the said Article 34 shall not apply to the said election.[2]

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[1] Amendment No. 6 Act. [2] Amendment No. 7 Act.
[3] Amendment No. 1 Act.

[ARTICLE 33.

[Before each election of members of Seanad Eireann a panel shall [be formed consisting of:—

[(*a*) Three times as many qualified persons as there are members [to be elected, of whom two-thirds shall be nominated by [Dáil Eireann voting according to principles of Proportional [Representation and one-third shall be nominated by [Seanad Eireann voting according to principles of Pro-[portional Representation; and

[(*b*) Such persons who have at any time been members of Seanad [Eireann (including members about to retire) as signify [by notice in writing addressed to the President of the [Executive Council their desire to be included in the panel.

[The method of proposal and selection for nomination shall be [decided by Dáil Eireann and Seanad Eireann respectively, with [special reference to the necessity for arranging for the representation [of important interests and institutions in the country: Provided that [each proposal shall be in writing and shall state the qualifications of [the person proposed and that no person shall be proposed without [his own consent. As soon as the panel has been formed a list of the [names of the members of the panel arranged in alphabetical order [with their qualifications shall be published.[1]]

ARTICLE 33.

Before each election of members of Seanad Eireann a panel of candidates for such election shall be formed in such manner in all respects as shall be prescribed by law.[1]

ARTICLE 34.

In case of the death, resignation or disqualification of a member of Seanad Eireann his place shall be filled [by a vote of Seanad Eireann[2]] *by an election at which the candidates shall be nominated in such manner in all respects as shall be prescribed by law and at which the electors shall be the members of Dáil Eireann and the members of Seanad Eireann voting together. The voting at such elections shall be by secret ballot and no elector may exercise more than one vote thereat. The place and conduct of such elections shall be regulated by law.*[2] Any member of Seanad Eireann so chosen shall retire from office at the conclusion of the three years period then running and the vacancy thus created shall be additional to the places to be filled under Article 32 of this Constitution. The term of office of the members chosen at the election after the first [fifteen[3]] *twenty*[3] elected shall conclude at the end of the period or periods at which the member or members of Seanad

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[1] Amendment No. 9 Act. [2] Amendment No. 11 Act.
[3] Amendment No. 7 Act.

Eireann, by whose death or withdrawal the vacancy or vacancies was or were originally created, would be due to retire: [Provided that [the sixteenth member shall be deemed to have filled the vacancy [first created in order of time and so on.[1]] *Provided that the* [*sixteenth*[2]] *twenty-first*[2] *member shall be deemed to have filled the vacancy created by the death or withdrawal of the Senator, or one of the Senators, the unexpired period of whose term of office was greatest at the time of the election and so on.*[3]

ARTICLE 35.

Dáil Eireann shall in relation to the subject matter of Money Bills as hereinafter defined have legislative authority exclusive of Seanad Eireann.

A Money Bill means a Bill which contains only provisions dealing with all or any of the following subjects, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising of guarantee or any loan or the repayment thereof; subordinate matters incidental to those subjects or any of them. In this definition the expressions "taxation," "public money" and "loan" respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes.

[The Chairman of Dáil Eireann shall certify any Bill which in his [opinion is a Money Bill to be a Money Bill, but, if within three [days after a Bill has been passed by Dáil Eireann two-fifths of the [members of either House by notice in writing addressed to the [Chairman of the House of which they are members so require, the [question whether the Bill is or is not a Money Bill shall be referred [to a Committee of Privileges consisting of three members elected [by each House with a Chairman who shall be the senior Judge of [the Supreme Court able and willing to act, and who, in the case of [an equality of votes, but not otherwise, shall be entitled to vote. [The decision of the Committee on the question shall be final and [conclusive.[3]]

The Chairman of Dáil Eireann shall certify any Bill which in his opinion is a Money Bill to be a Money Bill and such certificate shall be final and conclusive unless the question whether the Bill is or is not a Money Bill is referred to a Committee of Privileges under the subsequent provisions of this Article.

If before whichever of the following events shall first occur, that is to say, the expiration of seven days from the day on which a Bill certified

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[1] Amendment No. 1 Act. [2] Amendment No. 7 Act.
[3] Amendment No. 12 Act.

by the Chairman of Dáil Eireann to be a Money Bill is sent by Dáil Eireann to Seanad Eireann for its recommendations under Article 38 of this Constitution or the return of such Bill by Seanad Eireann to Dáil Eireann under the said Article 38:—

(*a*) *two-fifths of the members of either House by notice in writing addressed to the Chairman of the House of which they are members so require, or*

(*b*) *a majority of the members of Seanad Eireann present and voting at a sitting of Seanad Eireann at which not less than thirty members are present so resolve,*

the question whether the Bill is or is not a Money Bill shall forthwith be referred to a Committee of Privileges consisting of such number (not exceeding three) of members (if any) as shall be elected by Dáil Eireann within seven days after such reference, such number (not exceeding three) of members (if any) as shall be elected by Seanad Eireann within such seven days, and a Chairman who shall be the senior Judge of the Supreme Court able and willing to act and who in the case of an equality of votes, but not otherwise, shall be entitled to vote.

Every such Committee of Privileges shall decide the question so referred to it and report its decision thereon to Dáil Eireann and Seanad Eireann within twenty-one days after the day on which the Bill the subject of such question was sent to Seanad Eireann and, upon such Committee so deciding and reporting, the decision of such Committee shall be final and conclusive, but, if such Committee fails to decide and report within such twenty-one days, the certificate of the Chairman of Dáil Eireann that such Bill is a Money Bill shall at the expiration of the said twenty-one days become and be final and conclusive.

A Committee of Privileges constituted under this Article may act notwithstanding one or more vacancies amongst its members other than the Chairman. In the event of the Chairman of any such Committee dying or becoming incapable of acting as such Chairman, the senior of the other Judges of the Supreme Court able and willing to act shall forthwith become and be the Chairman of such Committee in the place of the Chairman so dying or becoming incapable. The Chairman and one-half of the other members of any such Committee shall constitute a quorum.[1]

ARTICLE 36.

Dáil Eireann shall as soon as possible after the commencement of each financial year consider the Estimates of receipts and expenditure of the Irish Free State (Saorstát Eireann) for that year, and, save in so far as may be provided by specific enactment in each case, the legislation required to give effect to the Financial Resolutions of each year shall be enacted within that year.

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[1] Amendment No. 12 Act.

ARTICLE 37.

Money shall not be appropriated by vote, resolution or law, unless the purpose of the appropriation has in the same session been recommended by a message from the Representative of the Crown acting on the advice of the Executive Council.

ARTICLE 38.

Every Bill initiated in and passed by Dáil Eireann shall be sent to Seanad Eireann and may, unless it be a Money Bill, be amended in Seanad Eireann and Dáil Eireann shall consider any such amendment; [but a Bill passed by Dáil Eireann and considered by Seanad Eireann [shall, not later than two hundred and seventy days after it shall have [been first sent to Seanad Eireann, or such longer period as may be [agreed upon by the two Houses, be deemed to be passed by both [Houses in the form in which it was last passed by Dáil Eireann[1]: [Provided that[1]] every Money Bill shall be sent to Seanad Eireann for its recommendations and at a period not longer than twenty-one days after it shall have been sent to Seanad Eireann, it shall be returned to Dáil Eireann which may pass it, accepting or rejecting all or any of the recommendations of Seanad Eireann, and as so passed or if not returned within such period of twenty-one days shall be deemed to have been passed by both Houses. [When a Bill other than a [Money Bill has been sent to Seanad Eireann a Joint Sitting of the [Members of both Houses may on a resolution passed by Seanad [Eireann be convened for the purpose of debating, but not of voting [upon, the proposals of the Bill or any amendment of the same.[1]]

ARTICLE 38A.

Whenever a Bill (not being a Money Bill) initiated in and passed by Dáil Eireann and sent to Seanad Eireann is within the stated period hereinafter defined either rejected by Seanad Eireann or passed by Seanad Eireann with amendments to which Dáil Eireann does not agree or is neither passed (with or without amendment) nor rejected by Seanad Eireann within the said stated period, Dáil Eireann may within one year after the said stated period by resolution expressly passed under this Article again send such Bill to Seanad Eireann in the form (save only for such modifications as are hereinafter authorised) in which it was first so sent, and if Seanad Eireann does not, within sixty days thereafter or such longer period as may be agreed to by both Houses, pass such Bill either without amendment or with such amendments only as are agreed to by Dáil Eireann, such Bill shall, if Dáil Eireann so resolves after the expiration of such sixty days or longer period aforesaid, be deemed to have been passed by both Houses of the Oireachtas at the expiration of the said sixty days or longer period aforesaid in the form in which it was so

[1] Amendment No. 13 Act.

last sent to Seanad Eireann with such (if any) amendments as may have been made therein by Seanad Eireann and agreed to by Dáil Eireann.

The said stated period is the period commencing on the day on which the said Bill is first sent by Dáil Eireann to Seanad Eireann and ending at whichever of the following times is the earlier, that is to say, the expiration of eighteen months from the commencement of the said period or the date of the reassembly of the Oireachtas after a dissolution occurring after the commencement of such period.

When a Bill initiated in and passed by Seanad Eireann is amended by Dáil Eireann, such Bill shall be deemed to have been initiated in Dáil Eireann and this Article shall apply to such Bill accordingly and for the purpose of such application the said stated period shall in relation to such Bill commence on the day on which such Bill is first sent to Seanad Eireann after being so amended by Dáil Eireann.

Whenever a Bill has been sent by Dáil Eireann to Seanad Eireann nothing in this Article shall operate to restrict the right of Dáil Eireann to send such Bill on any subsequent occasion to Seanad Eireann otherwise than under this Article, and when such Bill is so sent to Seanad Eireann this Article shall apply as if such subsequent occasion were the first occasion on which such Bill was sent by Dáil Eireann to Seanad Eireann.

A Bill sent a second time by Dáil Eireann to Seanad Eireann and required for the purposes of this Article to be in the form in which it was first so sent may contain such (if any) modifications as shall be certified by the Chairman of Dáil Eireann to represent amendments made therein by Seanad Eireann and agreed to by Dáil Eireann or to be necessary owing to the lapse of time since such Bill was first sent by Dáil Eireann to Seanad Eireann.[1]

ARTICLE 39.

A Bill may be initiated in Seanad Eireann and if passed by Seanad Eireann shall be introduced into Dáil Eireann. If amended by Dáil Eireann the Bill shall be considered as a Bill initiated in Dáil Eireann. [If rejected by Dáil Eireann it shall not be introduced again in the [same session, but Dáil Eireann may reconsider it on its own motion.[2]]

ARTICLE 40.

A Bill passed by either House and accepted by the other House shall be deemed to be passed by both Houses.

ARTICLE 41.

So soon as any Bill shall have been passed or deemed to have been passed by both Houses, the Executive Council shall present the same to the Representative of the Crown for the signification by him, in the King's name, of the King's assent, and such Representative may

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[1] Amendment No. 13 Act. [2] Amendment No. 14 Act.

withhold the King's assent or reserve the Bill for the signification of the King's pleasure: Provided that the Representative of the Crown shall in withholding of such assent to or the reservation of any Bill, act in accordance with the law, practice, and constitutional usage governing the like withholding of assent or reservation in the Dominion of Canada.

A Bill reserved for the signification of the King's pleasure shall not have any force unless and until within one year from the day on which it was presented to the Representative of the Crown for the King's assent, the Representative of the Crown signifies by speech or message to each of the Houses of the Oireachtas, or by proclamation, that it has received the assent of the King in Council.

An entry of every such speech, message or proclamation shall be made in the Journal of each House and a duplicate thereof duly attested shall be delivered to the proper officer to be kept among the Records of the Irish Free State (Saorstát Eireann).

ARTICLE 42.

As soon as may be after any law has received the King's assent, the clerk, or such officer as Dáil Eireann may appoint for the purpose, shall cause two fair copies of such law to be made, one being in the Irish language and the other in the English language (one of which copies shall be signed by the Representative of the Crown to be enrolled for record in the office of such officer of the Supreme Court as Dáil Eireann may determine), and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies so deposited, that signed by the Representative of the Crown shall prevail.

ARTICLE 43.

The Oireachtas shall have no power to declare acts to be infringements of the law which were not so at the date of their commission.

ARTICLE 44.

The Oireachtas may create subordinate legislatures with such powers as may be decided by law.

ARTICLE 45.

The Oireachtas may provide for the establishment of Functional or Vocational Councils representing branches of the social and economic life of the Nation. A law establishing any such Council shall determine its powers, rights and duties, and its relation to the government of the Irish Free State (Saorstát Eireann).

ARTICLE 46.

The Oireachtas has the exclusive right to regulate the raising and maintaining of such armed forces as are mentioned in the Scheduled

Treaty in the territory of the Irish Free State (Saorstát Eireann) and every such force shall be subject to the control of the Oireachtas.

[ARTICLE 47.

[Any Bill passed or deemed to have been passed by both Houses [may be suspended for a period of ninety days on the written demand [of two-fifths of the members of Dail Eireann or of a majority of the [members of Seanad Eireann presented to the President of the [Executive Council not later than seven days from the day on which [such a Bill shall have been so passed or deemed to have been so [passed. Such a Bill shall in accordance with regulations to be [made by the Oireachtas be submitted by Referendum to the decision [of the people if demanded before the expiration of the ninety days [either by a resolution of Seanad Eireann assented to by three-fifths [of the members of Seanad Eireann, or by a petition signed by not [less than one-twentieth of the voters then on the register of voters, [and the decision of the people by a majority of the votes recorded [on such Referendum shall be conclusive. These provisions shall not [apply to Money Bills or to such Bills as shall be declared by both [Houses to be necessary for the immediate preservation of the public [peace, health or safety.[1]]

[ARTICLE 48.

[The Oireachtas may provide for the Initiation by the people of [proposals for laws or constitutional amendments. Should the [Oireachtas fail to make such provision within two years, it shall on [the petition of not less than seventy-five thousand voters on the [register, of whom not more than fifteen thousand shall be voters [in any one constituency, either make such provisions or submit the [question to the people for decision in accordance with the ordinary [regulations governing the Referendum. Any legislation passed by [the Oireachtas providing for such Initiation by the people shall [provide (1) that such proposals may be initiated on a petition of [fifty thousand voters on the register; (2) that if the Oireachtas rejects [a proposal so initiated it shall be submitted to the people for decision [in accordance with the ordinary regulations governing the Referendum; [and (3) that if the Oireachtas enacts a proposal so initiated, such [enactment shall be subject to the provisions respecting ordinary [legislation or amendments of the Constitution as the case may be.[1]]

ARTICLE 49.

Save in the case of actual invasion, the Irish Free State (Saorstát Eireann) shall not be committed to active participation in any war without the assent of the Oireachtas.

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[1] Amendment No. 10 Act.

ARTICLE 50.

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[1]] *sixteen years*[1] 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 the voters on the register shall have recorded their votes on such 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. Any such amendment may be made within the said period of [eight [years[1]] *sixteen years*[1] by way of ordinary legislation [and as such shall [be subject to the provisons of Article 47 hereof.[2]]

ARTICLE 51.

The Executive Authority of the Irish Free State (Saorstát Eireann) is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown. There shall be a Council to aid and advise in the government of the Irish Free State (Saorstát Eireann) to be styled the Executive Council. The Executive Council shall be responsible to Dáil Eireann, and shall consist of [not [more than seven[3]] *not more than twelve*[3] nor less than five Ministers appointed by the Representative of the Crown on the nomination of the President of the Executive Council.

[ARTICLE 52.

[Those Ministers who form the Executive Council shall all be [members of Dáil Eireann and shall include the President of the [Council, the Vice-President of the Council and the Minister in [charge of the Department of Finance.[4]]

ARTICLE 52.

The Ministers who form the Executive Council shall include the President of the Council, the Vice-President of the Council, and the Minister in charge of the Department of Finance. The President of the Council, the Vice-President of the Council, the Minister in charge of the Department of Finance, and the other members of the Executive Council shall be members of Dáil Eireann, save that one of such other members may be a member of Seanad Eireann.[4]

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[1] Amendment No. 16 Act.
[2] Amendment No. 10 Act.
[3] Amendment No. 5 Act.
[4] Amendment No. 15 Act.

ARTICLE 53.

The President of the Council shall be appointed on the nomination of Dáil Eireann. He shall nominate a Vice-President of the Council, who shall act for all purposes in the place of the President, if the President shall die, resign, or be permanently incapacitated, until a new President of the Council shall have been elected. The Vice-President shall also act in the place of the President during his temporary absence. The other Ministers who are to hold office as members of the Executive Council shall be appointed on the nomination of the President, with the assent of Dáil Eireann, and he and the Ministers nominated by him shall retire from office should he cease to retain the support of a majority in Dail Eireann, but the President and such Ministers shall continue to carry on their duties until their successors shall have been appointed: Provided, however, that the Oireachtas shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority in Dáil Eireann.

ARTICLE 54.

The Executive Council shall be collectively responsible for all matters concerning the Departments of State administered by Members of the Executive Council. The Executive Council shall prepare Estimates of the receipts and expenditure of the Irish Free State (Saorstát Eireann) for each financial year, and shall present them to Dáil Eireann before the close of the previous financial year. The Executive Council shall meet and act as a collective authority.

ARTICLE 55.

Ministers who shall not be members of the Executive Council may be appointed by the Representative of the Crown and shall comply with the provisions of Article 17 of this Constitution. Every such Minister shall be nominated by Dáil Eireann on the recommendation of a Committee of Dáil Eireann chosen by the method to be determined by Dáil Eireann, so as to be impartially representative of Dáil Eireann. Should a recommendation not be acceptable to Dáil Eireann, the Committee may continue to recommend names until one is found acceptable. The total number of Ministers, including the Ministers of the Executive Council, shall not exceed twelve.

ARTICLE 56.

Every Minister who is not a member of the Executive Council shall be the responsible head of the Department or Departments under his charge, and shall be individually responsible to Dáil Eireann alone for the administration of the Department or Departments of which he is the head: Provided that should arrangements for Functional or Vocational Councils be made by the Oireachtas these Ministers or any of them may, should the Oireachtas so decide, be members of,

and be recommended to Dáil Eireann by, such Councils. The term of office of any Minister, not a Member of the Executive Council, shall be the term of Dáil Eireann existing at the time of his appointment, but he shall continue in office until his successor shall have been appointed, and no such Minister shall be removed from office during his term otherwise than by Dáil Eireann itself, and then for stated reasons, and after the proposal to remove him has been submitted to a Committee, chosen by a method to be determined by Dáil Eireann, so as to be impartially representative of Dáil Eireann, and the Committee has reported thereon.

ARTICLE 57.

Every Minister shall have the right to attend and be heard in Seanad Eireann *and in Dáil Eireann.*[1]

ARTICLE 58.

The appointment of a member of Dáil Eireann to be a Minister shall not entail upon him any obligation to resign his seat or to submit himself for re-election.

ARTICLE 59.

Ministers shall receive such remuneration as may from time to time be prescribed by law, but the remuneration of any Minister shall not be diminished during his term of office.

ARTICLE 60.

The Representative of the Crown, who shall be styled the Governor-General of the Irish Free State (Saorstát Eireann), shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments. His salary shall be of the like amount as that now payable to the Governor-General of the Commonwealth of Australia and shall be charged on the public funds of the Irish Free State (Saorstát Eireann) and suitable provision shall be made out of those funds for the maintenance of his official residence and establishment.

ARTICLE 61.

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

ARTICLE 62.

Dáil Eireann shall appoint a Comptroller and Auditor-General to act on behalf of the Irish Free State (Saorstát Eireann). He shall

[1] Amendment No. 15 Act.

control all disbursements and shall audit all accounts of moneys administered by or under the authority of the Oireachtas and shall report to Dáil Eireann at stated periods to be determined by law.

ARTICLE 63.

The Comptroller and Auditor-General shall not be removed except for stated misbehaviour or incapacity on resolutions passed by Dáil Eireann and Seanad Eireann. Subject to this provision the terms and conditions of his tenure of office shall be fixed by law. He shall not be a member of the Oireachtas nor shall he hold any other office or position of emolument.

ARTICLE 64.

The judicial power of the Irish Free State (Saorstát Eireann) shall be exercised and justice administered in the public Courts established by the Oireachtas by judges appointed in manner hereinafter provided. These Courts shall comprise Courts of First Instance and a Court of Final Appeal to be called the Supreme Court. The Courts of First Instance shall include a High Court, invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal, and also Courts of local and limited jurisdiction with a right of appeal as determined by law.

ARTICLE 65.

The judicial power of the High Court shall extend to the question of the validity of any law having regard to the provisions of the Constitution. In all cases in which such matters shall come into question, the High Court alone shall exercise original jurisdiction.

ARTICLE 66.

The Supreme Court of the Irish Free State (Saorstát Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court Tribunal or Authority whatsoever: Provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave.

ARTICLE 67.

The number of judges, the constitution and organisation of, and distribution of business and jurisdiction among the said Courts and judges, and all matters of procedure shall be as prescribed by the laws for the time being in force and the regulations made thereunder.

ARTICLE 68.

The judges of the Supreme Court and of the High Court and of all other Courts established in pursuance of this Constitution shall be appointed by the Representative of the Crown on the advice of the Executive Council. The judges of the Supreme Court and of the High Court shall not be removed except for stated misbehaviour or incapacity, and then only by resolutions passed by both Dáil Eireann and Seanad Eireann. The age of retirement, the remuneration and the pension of such judges on retirement and the declarations to be taken by them on appointment shall be prescribed by law. Such remuneration may not be diminished during their continuance in office. The terms of appointment of the judges of such other courts as may be created shall be prescribed by law.

ARTICLE 69.

All judges shall be independent in the exercise of their functions, and subject only to the Constitution and the law. A judge shall not be eligible to sit in the Oireachtas, and shall not hold any other office or position of emolument.

ARTICLE 70.

No one shall be tried save in due course of law and extraordinary courts shall not be established, save only such Military Tribunals as may be authorised by law for dealing with military offences against military law. The jurisdiction of Military Tribunals shall not be extended to or exercised over the civil population save in time of war, or armed rebellion, and for acts committed in times of war or armed rebellion, and in accordance with the regulations to be prescribed by law. Such jurisdiction shall not be exercised in any area in which all civil courts are open or capable of being held, and no person shall be removed from one area to another for the purpose of creating such jurisdiction.

ARTICLE 71.

A member of the armed forces of the Irish Free State (Saorstát Eireann) not on active service shall not be tried by any Court Martial or other Military Tribunal for an offence cognisable by the Civil Courts, unless such offence shall have been brought expressly within the jurisdiction of Courts Martial or other Military Tribunal by any code of laws or regulations for the enforcement of military discipline which may be hereafter approved by the Oireachtas.

ARTICLE 72.

No person shall be tried on any criminal charge without a jury save in the case of charges in respect of minor offences triable by law before a Court of Summary Jurisdiction and in the case of charges

for offences against military law triable by Court Martial or other Military Tribunal.

TRANSITORY PROVISIONS

ARTICLE 73.

Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in the Irish Free State (Saorstát Eireann) at the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.

ARTICLE 74.

Nothing in this Constitution shall affect any liability to pay any tax or duty payable in respect of the financial year current at the date of the coming into operation of this Constitution or any preceding financial year, or in respect of any period ending on or before the last day of the said current financial year, or payable on any occasion happening within that or any preceding year, or the amount of such liability; and during the said current financial year all taxes and duties and arrears thereof shall continue to be assessed, levied and collected in like manner in all respects as immediately before this Constitution came into operation, subject to the like adjustments of the proceeds collected as were theretofore applicable; and for that purpose the Executive Council shall have the like powers and be subject to the like liabilities as the Provisional Government.

Goods transported during the said current financial year from or to the Irish Free State (Soarstát Eireann) to or from any part of Great Britain or the Isle of Man shall not, except so far as the Executive Council may otherwise direct, in respect of the forms to be used and the information to be furnished, be treated as goods exported or imported as the case may be.

For the purpose of this Article, the expression "financial year" means, as respects income tax (including super-tax) the year of assessment, and as respects other taxes and duties, the year ending on the thirty-first day of March.

ARTICLE 75.

Until Courts have been established for the Irish Free State (Saorstát Eireann) in accordance with this Constitution, the Supreme Court of Judicature, County Courts, Court of Quarter Sessions and Courts of Summary Jurisdiction, as at present existing, shall for the time being continue to exercise the same jurisdiction as heretofore, and any judge or justice, being a member of any such Court, holding office at the time when this Constitution comes into operation, shall for the time being continue to be a member thereof and hold office by the

like tenure and upon the like terms as heretofore, unless, in the case of a judge of the said Supreme Court or of a County Court, he signifies to the Representative of the Crown his desire to resign. Any vacancies in any of the said Courts so continued may be filled by appointment made in like manner as appointments to judgeships in the Courts established under this Constitution: Provided that the provisions of Article 66 of this Constitution as to the decisions of the Supreme Court established under this Constitution shall apply to decisions of the Court of Appeal continued by this Article.

ARTICLE 76.

If any judge of the said Supreme Court of Judicature or of any of the said County Courts on the establishment of Courts under this Constitution, is not with his consent appointed to be a judge of any such Court, he shall, for the purpose of Article 10 of the Scheduled Treaty, be treated as if he had retired in consequence of the change of Government effected in pursuance of the said Treaty, but the rights so conferred shall be without prejudice to any rights or claims that he may have against the British Government.

ARTICLE 77.

Every existing officer of the Provisional Government at the date of the coming into operation of this Constitution (not being an officer whose services have been lent by the British Government to the Provisional Government) shall on that date be transferred to and become an officer of the Irish Free State (Saorstát Eireann), and shall hold office by a tenure corresponding to his previous tenure.

ARTICLE 78.

Every such existing officer who was transferred from the British Government by virtue of any transfer of services to the Provisional Government shall be entitled to the benefit of Article 10 of the Scheduled Treaty.

ARTICLE 79.

The transfer of the administration of any public service, the administration of which was not before the date of the coming into operation of this Constitution transferred to the Provisional Government, shall be deferred until the 31st day of March, 1923, or such earlier date as may, after one month's previous notice in the Official Gazette, be fixed by the Executive Council; and such of the officers engaged in the administration of those services at the date of transfer as may be determined in the manner hereinafter appearing shall be transferred to and become officers of the Irish Free State (Saorstát Eireann); and Article 77 of this Constitution shall apply as if such officers were existing officers of the Provisional Government who had been trans-

ferred to that Government from the British Government. The officers to be so transferred in respect of any services shall be determined in like manner as if the administration of the services had before the coming into operation of the Constitution been transferred to the Provisional Government.

ARTICLE 80.

As respects departmental property, assets, rights and liabilities, the Government of the Irish Free State (Saorstát Eireann) shall be regarded as the successors of the Provisional Government, and, to the extent to which functions of any department of the British Government become functions of the Government of the Irish Free State (Saorstát Eireann), as the successors of such department of the British Government.

ARTICLE 81.

After the date on which this Constitution comes into operation the House of the Parliament elected in pursuance of the Irish Free State (Agreement) Act, 1922 (being the constituent assembly for the settlement of this Constitution), may, for a period not exceeding one year from that date, but subject to compliance by the members thereof with the provisions of Article 17 of this Constitution, exercise all the powers and authorities conferred on Dáil Eireann by this Constitution, and the first election for Dáil Eireann under Articles 26, 27 and 28 hereof shall take place as soon as possible after the expiration of such period.

ARTICLE 82.

Notwithstanding anything contained in Articles 14 and 33 hereof, the first Seanad Eireann shall be constituted immediately after the coming into operation of this Constitution in the manner following, that is to say:—

(*a*) The first Seanad Eireann shall consist of sixty members, of whom thirty shall be elected and thirty shall be nominated.

(*b*) The thirty nominated members of Seanad Eireann shall be nominated by the President of the Executive Council who shall, in making such nominations, have special regard to the providing of representation for groups or parties not then adequately represented in Dáil Eireann.

(*c*) The thirty elected members of Seanad Eireann shall be elected by Dáil Eireann voting on principles of Proportional Representation.

(*d*) Of the thirty nominated members, fifteen to be selected by lot, shall hold office for the full period of twelve years, the remaining fifteen shall hold office for the period of six years.

(*e*) Of the thirty elected members the first fifteen elected shall hold office for the period of nine years, the remaining fifteen shall hold office for the period of three years.

(*f*) At the termination of the period of office of any such members, members shall be elected in their place in manner provided by Article 32 of this Constitution.

(*g*) Casual vacancies shall be filled in manner provided by Article 34 of this Constitution.

ARTICLE 83.

The passing and adoption of this Constitution by the Constituent Assembly and the British Parliament shall be announced as soon as may be, and not later than the sixth day of December, Nineteen hundred and twenty-two, by Proclamation of His Majesty, and this Constitution shall come into operation on the issue of such Proclamation.

SECOND SCHEDULE

ARTICLES OF AGREEMENT FOR A TREATY BETWEEN GREAT BRITAIN AND IRELAND

1. Ireland shall have the same constitutional status in the Community of Nations known as the British Empire as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order and good government of Ireland and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State.

2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or the Representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.

3. The representative of the Crown in Ireland shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments.

4. The oath to be taken by Members of the Parliament of the Irish Free State shall be in the following form:—

> I,..... do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to H.M. King George V., his heirs and successors by law, in virtue of the common citizenship of

Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.

5. The Irish Free State shall assume liability for the service of the Public Debt of the United Kingdom as existing at the date hereof and towards the payment of war pensions as existing at that date in such proportion as may be fair and equitable, having regard to any just claims on the part of Ireland by way of set-off or counter-claim, the amount of such sums being determined in default of agreement by the arbitration of one or more independent persons being citizens of the British Empire.

6. Until an arrangement has been made between the British and Irish Governments whereby the Irish Free State undertakes her own coastal defence, the defence by sea of Great Britain and Ireland shall be undertaken by His Majesty's Imperial Forces. But this shall not prevent the construction or maintenance by the Government of the Irish Free State of such vessels as are necessary for the protection of the Revenue or the Fisheries.

The foregoing provisions of this Article shall be reviewed at a Conference of Representatives of the British and Irish Governments to be held at the expiration of five years from the date hereof with a view to the undertaking by Ireland of a share in her own coastal defence.

7. The Government of the Irish Free State shall afford to His Majesty's Imperial Forces:—

(*a*) In time of peace such harbour and other facilities as are indicated in the Annex hereto, or such other facilities as may from time to time be agreed between the British Government and the Government of the Irish Free State; and

(*b*) In time of war or of strained relations with a Foreign Power such harbour and other facilities as the British Government may require for the purposes of such defence as aforesaid.

8. With a view to securing the observance of the principle of international limitation of armaments, if the Government of the Irish Free State establishes and maintains a military defence force, the establishments thereof shall not exceed in size such proportion of the military establishments maintained in Great Britain as that which the population of Ireland bears to the population of Great Britain.

9. The ports of Great Britain and the Irish Free State shall be freely open to the ships of the other country on payment of the customary port and other dues.

10. The Government of the Irish Free State agrees to pay fair compensation on terms not less favourable than those accorded by the Act of 1920 to judges, officials, members of Police Forces and other

Public Servants who are discharged by it or who retire in consequence of the change of government effected in pursuance hereof.

Provided that this agreement shall not apply to members of the Auxiliary Police Force or to persons recruited in Great Britain for the Royal Irish Constabulary during the two years next preceding the date hereof. The British Government will assume responsibility for such compensation or pensions as may be payable to any of these excepted persons.

11. Until the expiration of one month from the passing of the Act of Parliament for the ratification of this instrument, the powers of the Parliament and the government of the Irish Free State shall not be exercisable as respects Northern Ireland and the provisions of the Government of Ireland Act, 1920, shall, so far as they relate to Northern Ireland remain of full force and effect, and no election shall be held for the return of members to serve in the Parliament of the Irish Free State for constituencies in Northern Ireland, unless a resolution is passed by both Houses of the Parliament of Northern Ireland in favour of the holding of such elections before the end of the said month.

12 If before the expiration of the said month, an address is presented to His Majesty by both Houses of the Parliament of Northern Ireland to that effect, the powers of the Parliament and Government of the Irish Free State shall no longer extend to Northern Ireland, and the provisions of the Government of Ireland Act, 1920, (including those relating to the Council of Ireland) shall so far as they relate to Northern Ireland, continue to be of full force and effect, and this instrument shall have effect subject to the necessary modifications.

Provided that if such an address is so presented a Commission consisting of three persons, one to be appointed by the Government of the Irish Free State, one to be appointed by the Government of Northern Ireland and one who shall be Chairman to be appointed by the British Government shall determine in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions the boundaries between Northern Ireland and the rest of Ireland, and for the purposes of the Government of Ireland Act, 1920, and of this instrument, the boundary of Northern Ireland shall be such as may be determined by such Commission.

13. For the purpose of the last foregoing article, the powers of the Parliament of Southern Ireland under the Government of Ireland Act, 1920, to elect members of the Council of Ireland shall after the Parliament of the Irish Free State is constituted be exercised by that Parliament.

14. After the expiration of the said month, if no such address as is mentioned in Article 12 hereof is presented, the Parliament and Government of Northern Ireland shall continue to exercise as respects Northern Ireland the powers conferred on them by the Government

of Ireland Act, 1920, but the Parliament and Government of the Irish Free State shall in Northern Ireland have in relation to matters in respect of which the Parliament of Northern Ireland has not power to make laws under that Act (including matters which under the said Act are within the jurisdiction of the Council of Ireland) the same powers as in the rest of Ireland, subject to such other provisions as may be agreed in manner hereinafter appearing.

15. At any time after the date hereof the Government of Northern Ireland and the provisional Government of Southern Ireland hereinafter constituted may meet for the purpose of discussing the provisions subject to which the last foregoing article is to operate in the event of no such address as is therein mentioned being presented and those provisions may include:—

(*a*) Safeguards with regard to patronage in Northern Ireland:

(*b*) Safeguards with regard to the collection of revenue in Northern Ireland:

(*c*) Safeguards with regard to import and export duties affecting the trade or industry of Northern Ireland:

(*d*) Safeguards for minorities in Northern Ireland:

(*e*) The settlement of the financial relations between Northern Ireland and the Irish Free State:

(*f*) The establishment and powers of a local militia in Northern Ireland and the relation of the Defence Forces of the Irish Free State and of Northern Ireland respectively:

and if at any such meeting provisions are agreed to, the same shall have effect as if they were included amongst the provisions subject to which the Powers of the Parliament and Government of the Irish Free State are to be exercisable in Northern Ireland under Article 14 hereof.

16. Neither the Parliament of the Irish Free State nor the Parliament of Northern Ireland shall make any law so as either directly or indirectly to endow any religion or prohibit or restrict the free exercise thereof or give any preference or impose any disability on account of religious belief or religious status or affect prejudicially the right of any child to attend a school receiving public money without attending the religious instruction at the school or make any discrimination as respects state aid between schools under the management of different religious denominations or divert from any religious denomination or any educational institution any of its property except for public utility purposes and on payment of compensation.

17. By way of provisional arrangement for the administration of Southern Ireland during the interval which must elapse between the date hereof and the constitution of a Parliament and Government of the Irish Free State in accordance therewith, steps shall be taken forthwith for summoning a meeting of members of Parliament elected

for constituencies in Southern Ireland since the passing of the Government of Ireland Act, 1920, and for constituting a provisional Government, and the British Government shall take the steps necessary to transfer to such provisional Government the powers and machinery requisite for the discharge of its duties, provided that every member of such provisional Government shall have signified in writing his or her acceptance of this instrument. But this arrangement shall not continue in force beyond the expiration of twelve months from the date hereof.

18. This instrument shall be submitted forthwith by His Majesty's Government for the approval of Parliament and by the Irish signatories to a meeting summoned for the purpose of the members elected to sit in the House of Commons of Southern Ireland, and if approved shall be ratified by the necessary legislation.

On behalf of the British Delegation.

(*Signed*)

D. LLOYD GEORGE.
AUSTEN CHAMBERLAIN.
BIRKENHEAD.
WINSTON S. CHURCHILL.
L. WORTHINGTON-EVANS.
HAMAR GREENWOOD.
GORDON HEWART.

On behalf of the Irish Delegation.

(*Signed*)

ART O GRÍOBHTHA.
(Arthur Griffith).
MÍCHEÁL O COILEÁIN.
RIOBÁRD BARTÚN.
EUDHMONN S. O DÚGÁIN.
SEÓRSA GHABHÁIN
UÍ DHUBHTHAIGH.

December 6, 1921.

ANNEX.

1. The following are the specific facilities required:—

DOCKYARD PORT AT BEREHAVEN.

(*a*) Admiralty property and rights to be retained as at the date hereof. Harbour defences to remain in charge of British care and maintenance parties.

QUEENSTOWN.

(*b*) Harbour defences to remain in charge of British care and maintenance parties. Certain mooring buoys to be retained for use of His Majesty's ships.

BELFAST LOUGH.

(*c*) Harbour defences to remain in charge of British care and maintenance parties.

LOUGH SWILLY.

(*d*) Harbour defences to remain in charge of British care and maintenance parties.

AVIATION.

(*e*) Facilities in the neighbourhood of the above Ports for coastal defence by air.

OIL FUEL STORAGE.

(*f*) Haulbowline, Rathmullen — To be offered for sale to commercial companies under guarantee that purchasers shall maintain a certain minimum stock for Admiralty purposes.

2. A Convention shall be made between the British Government and the Government of the Irish Free State to give effect to the following conditions:—

(*a*) That submarine cables shall not be landed or wireless stations for communication with places outside Ireland be established except by agreement with the British Government; that the existing cable rights and wireless concessions shall not be withdrawn except by agreement with the British Government; and that the British Government shall be entitled to land additional submarine cables or establish additional wireless stations for communication with places outside Ireland.

(*b*) That lighthouses, buoys, beacons, and any navigational marks or navigational aids shall be maintained by the Government of the Irish Free State as at the date hereof, and shall not be removed or added to except by agreement with the British Government.

(*c*) That war signal stations shall be closed down and left in charge of care and maintenance parties, the Government of the Irish Free State being offered the option of taking them over and working them for commercial purposes subject to Admiralty inspection, and guaranteeing the upkeep of existing telegraphic communication therewith.

3. A Convention shall be made between the same Governments for the regulation of Civil Communication by air.

A. G.

D. Ll. G. B. W. S. C. M. O'C.

A. C. E. S. O'D. R. B.

S. G. D.

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