



The Influence of the Post-war European Constitutions on the Constitution of the Irish Free State

Laura Cahillane*

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Introduction

The writing of the Irish Free State Constitution was only made possible following the signing of the Anglo-Irish Treaty on 6 December 1921 by Irish and British representatives.¹ This Treaty brought an end to centuries of revolutionary struggle in Ireland and provided for the creation of a new Irish State, which would remain within the British Commonwealth but would have internal autonomy. Previous to this, Ireland had been part of the United Kingdom, a position violently resisted by the Irish. Following the seeming failure of an effort to secure Home Rule for Ireland,² a revolutionary group within the State initiated a Rising,³ which eventually led to a War of Independence which lasted from 1919 until the signing of the Treaty. However, the Treaty agreement was a controversial one and was not universally accepted in Ireland. Many of those who had fought in the War of Independence believed that a free Irish Republic could have been achieved and so they were unwilling to accept anything less than that position. In particular, they refused to take an Oath to the British King, something which had been specified in the Treaty.

* Laura Cahillane is a Post Doctoral Fellow in the Law Department in University College Cork, Ireland.

¹ For an account of the circumstances surrounding the signing of the Treaty and the discussions which led to that point, see F Pakenham *Peace by Ordeal: An Account from first-hand sources of the Negotiation and Signature of the Anglo-Irish Treaty 1921* (3rd edn Geoffrey Chapman London 1962).

² The First Home Rule Bill, introduced by Gladstone, was defeated in the British House of Commons. The second Bill was passed in the Commons but defeated in the House of Lords. With the Parliament Act of 1911, the Lords' unlimited veto was reduced to two years and finally the Irish had some hope of getting a new Home Rule Bill. In 1912, the third Home Rule Bill was introduced. Although vetoed by the House of Lords that year and the next, in 1914, the Government used the provisions of the Parliament Act 1911 to override the Lords and send it for Royal Assent. However, with the outbreak of war with Germany, the British Prime Minister, Asquith passed the Suspensory Act 1914, which ensured that Home Rule would be postponed for the duration of the conflict and would not come into operation until the end of the War. However, by the time the War had finished, the Irish people were no longer satisfied with Home Rule; they now wanted independence.

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

The Treaty agreement eventually led to a split amongst Irish Nationalists and those who disapproved of the agreement refused to recognize the authority of the new Irish State which had been created. However, the Treaty was approved by a majority of Dáil Éireann⁴ and those who were prepared to accept its terms then undertook the task of creating the Irish Free State and writing its first constitution.

It is a common misconception that that the Irish Free State Constitution was simply a British creation or that only the British and Dominion models were taken into account during the drafting stages. However, this could not be further from the truth. Following the signing of the Anglo-Irish Treaty, a Constitution Committee was established and charged with the immeasurable task of constructing, for the new State, a suitable constitution which would be based on the Treaty. This was certainly not an easy mission, as one of the main concerns was to draw up a document which would appease not only the Provisional Government and the British but also the Unionists and the doctrinaire Republicans. A unanimous point of agreement among Committee members was the desire to avoid the incorporation of the British Constitution into the Irish document. Thus, the Committee commenced an intense study of foreign constitutions. Among the documents studied, those which were to have perhaps the greatest influence on the Irish Constitution were the constitutions of the post-War European States.

The aim of this paper is to examine the reasons why the post-War constitutions were so attractive to the Irish Constitution Committee and to consider a brief selection of areas where those constitutions influenced the Irish Free State Constitution. In order to provide some context it will first be necessary to give a brief explanation of the manner in which the Irish Free State Constitution was drafted.

The Drafting of the Irish Free State Constitution

Michael Collins⁵ and Arthur Griffith⁶ invited seven men⁷ to the first meeting of the Constitution Committee on 24 January 1922 in the Mansion House; Darrell Figgis,⁸ Hugh Kennedy,⁹ James Douglas,¹⁰ CJ France,¹¹ James McNeill,¹² James Murnaghan¹³ and John

⁴ The Irish Parliament. Those members who did not approve of the Treaty walked out of the Parliament and refused to take their seats. Some of the more radical of those opposed to the Treaty later initiated a Civil War which lasted for a number of months during 1922.

⁵ Head of the Provisional Government.

⁶ President of the Dáil.

⁷ The exact basis on which members of the Committee were chosen is unclear. It appears Thomas Johnson of the Labour party was asked but did not accept a position on the Committee. See Letter from Figgis to Collins 9 March 1922, NAI Department of the Taoiseach S8952. Various other people were proposed; Griffith suggested Michael Francis Doyle, an American lawyer who was unable to attend (University College Dublin Archives, Hugh Kennedy Papers, P4/ 317). Figgis suggested Ernest Henry Alton of Trinity College Dublin but subsequently withdrew that recommendation but also proposed Lord Justice James O'Connor. See NAI Department of the Taoiseach s8952. It seems members of the clergy were also approached but none were inclined to join the Committee. See NAI Cabinet minutes PG1, 17 and 28 January 1922.

⁸ Author, journalist and member of the Irish Volunteers.

⁹ Lawyer and legal advisor to the Provisional Government. He was later the first Attorney General and Chief Justice of the Irish Free State.

¹⁰ Quaker businessman and prominent member of the Irish White Cross, which was a civilian relief organisation.

¹¹ American lawyer also involved in the Irish White Cross.

¹² Former member of the British Civil Service and brother of the revolutionary Eoin MacNeill.

¹³ Professor of Jurisprudence, Roman law, and International law in University College Dublin. He was appointed to the Supreme Court in 1925.

O'Byrne.¹⁴ Alfred O'Rahilly¹⁵ and Kevin O'Shiel¹⁶ later joined the Committee. There were also three civil servants appointed as secretaries; EM Stephens¹⁷ was the principal secretary and he was joined by RJP Mortished¹⁸ and PA O'Toole.¹⁹ Collins outlined what he wanted from the drafting Committee at the original meeting. In particular he specified that he wanted "a true democratic constitution."²⁰ Kennedy has written in relation to the Committee that:

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 ...²¹

Naturally, the constitutional experience of the members was limited. The system with which they were most familiar was of course that of the British. However, they were all in agreement that much of this system would be unsuitable as a model for the new Irish system. Leo Kohn has written that "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."²²

At the beginning of its sessions, the Committee sought and received a number of constitutions from around the world together with historical introductions on each. These were to prove quite useful to the Committee in drafting various parts of the Constitution and the documents were also made available to members of the Constituent Assembly for comparison purposes during the debates on the Constitution.²³ The collection included many constitutions²⁴ including those of the Dominions (Canada, South Africa, Australia), the older

¹⁴ He worked in the Civil Service in London and in the Irish Land Commission. He was later Attorney General and subsequently a Supreme Court Justice.

¹⁵ Professor of Mathematical Physics in University College Cork. By his writings he became a sort of spin doctor for Sinn Féin. He became Registrar of the UCC in 1920, and held the post until 1943 when he became President of the University. O'Rahilly also founded the *Cork University Press* in 1931.

¹⁶ Land commissioner and member of the Irish Volunteers. He was also assistant legal advisor to the Provisional Government.

¹⁷ He later became secretary to the Boundary Commission.

¹⁸ Later he was Irish representative at the International Labour Office at Geneva.

¹⁹ He was requested by the Committee during a meeting on 30 January. He worked for the Record Office.

²⁰ See JA Gaughan (ed) *Memoirs of Senator James G. Douglas (1887-1954), concerned citizen* (Dublin University College Dublin Press 1998) at pp 163-164. His instructions were as follows: "You are not to be bound up by legal formalities but to put up a constitution of a Free State and then bring it to the Provisional Government who will fight for the carrying of it through. It is a question of status and we want definitely to define and produce a true democratic constitution. You are to bear in mind not the legalities of the past but the practicalities of the future." Subsequently in correspondence to Douglas, Collins also specified that he wanted: "[A] constitution that would be short, simple, easy to alter as the final stages of complete freedom were achieved and only contain what was necessary to establish constitutional machinery to govern Ireland. It should omit everything already covered in the treaty and should rest solely upon authority derived from the Irish people." Collins also stated that "one thing he wished to say was that Articles 3, 4 and 6²⁰ of the Treaty could be left out of the Constitution altogether" and he made it clear that a bi-cameral legislature would be necessary in order to please the Southern Unionists.

²¹ Kennedy in the foreword to Kohn *The Constitution of the Irish Free State* (George Allen & Unwin Ltd London 1932) at p xi.

²² *Ibid* at p 78.

²³ These documents were later made into a book: *Select Constitutions of the World* (Dublin Stationery Office 1922).

²⁴ Countries included in the book which was later made (see above) are as follows: The Kingdom of the Serbs, Croats and Slovenes, The Polish Republic, The Republic of Austria, The Estonian Republic, The Czechoslovak Republic, The German Reich, The Russian Socialist Federal Soviet Republic, The United States of Mexico, The

constitutions such as the Swiss, French and American Constitutions, the post-War constitutions of Poland, the Baltic States, Germany, Austria, Czechoslovakia and Estonia as well as a mix of other countries such as Mexico, Norway, Sweden and Denmark.

The Committee was particularly impressed with the enthusiasm for democratic ideals and popular sovereignty which permeated the post-War constitutions. In particular, the German (Weimar) Constitution of 1919 was frequently referred to during Committee discussions. That the post-War constitutions had an influence on the drafters is obvious from a quick over-view of the main themes contained in those documents and while constitutions from other countries, such as the Dominions, Switzerland and the United States, may have been useful, it is from the post-War constitutions that the Committee took much of its inspiration.

But what made the post-War constitutions so attractive to the Irish Committee? In order to answer that question, it will be necessary to take a closer look at those documents.

The Influence of the Post-War Constitutions in General

Agnes Headlam-Morley has written of the post-War constitutions:

The interest of the new Constitutions lies in the fact that an attempt has been made to give to the democratic principle its most complete and logical expression. Sovereignty rests with the people; the people are not only to control the Government, they are to be the direct holders of political power. Parliament is elected by the widest possible system of universal suffrage and by proportional representation. Nevertheless, the people do not surrender their authority to Parliament. The Representative Assembly is controlled by direct legislation or by a President who has considerable constitutional powers and is himself the direct representative of the sovereign people.²⁵

Thus popular sovereignty was a major theme of those constitutions. The conception of popular sovereignty which underlay the post-War constitutions was based on Rousseau's claim²⁶ that sovereignty cannot be delegated; rather, it remains with the whole body of citizens, and for that reason, Parliament cannot be sovereign – it is only one of the organs which can be established. This idea was perfect for what the drafters wanted for the Irish Free State Constitution and it fitted in nicely with the perpetual claim (made by various figures such as James Fintan Lalor, Theobald Wolfe Tone, Thomas Davis, John Mitchel and Pádraig Pearse) that the Irish people had always remained sovereign just as Ireland had always remained a nation. Most of the associated devices found in the post-War constitutions are also found in the Irish Free State Constitution; popular sovereignty, universal suffrage, proportional representation, Referendum and Initiative and second chambers. Of course there were also other reasons and influences behind the introduction of such devices but it would

Kingdom of Denmark, The Union of South Africa, The Commonwealth of Australia, The French Republic, The Swiss Confederation, the Dominion of Canada, The Kingdom of Belgium, The Kingdom of Norway, The Kingdom of Sweden and The United States of America. In the files of the Constitution Committee, there are also documents on Bohemia, Italy and Holland.

²⁵ A Headlam-Morley *The New Democratic Constitutions of Europe; A Comparative Study of Post-War European Constitutions with Special Reference to Germany, Czechoslovakia, Poland, Finland, The Kingdom of the Serbs, Croats & Slovenes and the Baltic States* (Oxford University Press 1928) at p 2.

²⁶ *Ibid* at p 32.

have been a comfort to the drafters to know that these devices had recently been introduced in Europe with much enthusiasm. This would certainly have been a mark in favour of their inclusion.

Popular Sovereignty

Popular sovereignty was arguably the main feature and the central theme of the Irish Free State Constitution. It was introduced in Article 2 which provided that: that “all powers of government and all authority legislative, executive and judicial in Ireland are derived from the people of Ireland.” This constituted a significant departure from the British and Dominion conception of the sovereignty of the Crown in Parliament. The inclusion of the doctrine of popular sovereignty was essential in order to gain the trust of the Irish people for the new system, particularly one which had not yet freed itself completely from the shackles of the Crown. Crown, Parliament and politics were traditionally regarded with suspicion in Ireland. However, if the people were to hold the power in their own hands then perhaps the evils of the previous system could be avoided. It was one way of ensuring an autochthonous²⁷ constitution. The declaration of popular sovereignty was also seen by the people as a Republican aspect of the Constitution; a sign that the Irish Free State was not going to be controlled by the Crown. No doubt many felt comforted by that fact that their rights would be protected in a system in which it was the people who were declared to be sovereign.

The sources of inspiration for this particular provision are diverse and include the writings of the old Irish patriots, the Gaelic State, older Irish constitutional documents such as the 1916 proclamation and the 1919 democratic programme but also the post-War constitutions. The ideal of popular sovereignty was a principal feature of the post-War constitutions; every one of those constitutions begins with a preamble stating that the people of the country concerned have given themselves a constitution. And then all of them except Yugoslavia on to state that the people are sovereign and that all powers of government emanate from them.²⁸ So popular sovereignty essentially constituted the basis of all of the post-War constitutions and the Irish Free State Constitution followed this trend. Many of the other devices and themes contained in the Irish Free State Constitution are all related to this general theme. We will now consider a few of those related themes, the first of which is direct democracy.

Direct Democracy

The Irish Free State Constitution contained two important devices to secure a measure of direct democracy for the Irish people: the Referendum in Article 47 and the Initiative in Article 48. (The Referendum will be concentrated upon here as it was the more prevalent provision in the European constitutions.) The Referendum was an important feature of the Irish Free State Constitution, particularly so because it was not introduced solely as the means for effecting constitutional amendments. In addition to the constitutional amendment provision, Article 47 introduced the device of Referendum for ordinary legislation, which was in effect, a veto on legislation. So not only was there a requirement that the people decide on a change to the Constitution but also if certain legislation which had passed through the Oireachtas was not agreeable to the people, then before the measure would be signed into law,

²⁷ Meaning indigenous rather than descended from migrants or colonists.

²⁸ Headlam-Morley (n 25) at pp 89-90.

the people could bring a petition demanding a referendum on the issue. Article 47 specifically provided the following:

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 Dáil Éireann or of a majority of the members of Seanad Éireann 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 Éireann, 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.

Basically, seven days had to elapse between the passing and signing into law of a Bill to allow for the possibility of a referendum. During the seven days, two fifths of the Dáil or a majority of the Seanad could suspend the Bill for ninety days. Then, either by a resolution of the Seanad or by a petition of one twentieth of registered voters, a referendum could be demanded. Essentially, it gave to the people, the right to accept or refuse proposed laws (except Money Bills and those declared necessary for public peace and safety) and it rests on the idea of the people as the ultimate source of authority in the State.

It can be disputed as to whether the original inspiration for the provisions on direct democracy in the Irish Free State Constitution came from the Swiss Constitution or the post-War Constitutions. Undoubtedly, both had an influence but the similarity of the Irish provisions to some of the post-War provisions is obvious. The Reich (Weimar) Constitution of 1919 contained specific provisions providing for the Referendum. Article 73 of that Constitution stated:

A law passed by the Reichstag shall, before its promulgation, be submitted to the decision of the people, if the President of the Reich so decides within one month. A law the promulgation of which is deferred on the motion of at least one-third of the Reichstag, shall be submitted to the decision of the people, if desired by one-twentieth of those entitled to the franchise.”²⁹

The similarities between this and the Irish provisions are evident. In addition, under Article 74 of the Reich Constitution, the President could call a plebiscite³⁰ because of a disagreement on a law between the two Houses of Parliament. Article 75 stated that a decision of the Reichstag could be annulled by the decision of the people if a majority of voters take part. Constitutional

²⁹ Article 73 of the Constitution of the German Reich, taken from *Select Constitutions of the World* (Stationery Office Dublin 1922). The Third paragraph of this article also introduced the Initiative.

³⁰ It appears there is no real significance in the difference between the words referendum and plebiscite.

amendments, although permitted by ordinary legislation, could be made the subject of a referendum by Initiative of the people, according to Article 76. Article 43 of the Austrian Constitution of 1920³¹ stated:

If the National Council so resolves or if the majority of members of the National Council so demands, every enactment of the National Council shall be submitted to a referendum upon conclusion of the procedure pursuant to Art. 42 above but before its authentication by the Federal President.

Article 44 stated that any total revision of the Constitution would also be submitted to Referendum.

A Referendum for ordinary legislation was also included in the Czechoslovak Constitution of 1920; Article 46 provided: "Should the National Assembly reject a Government Bill the Cabinet may resort to a Referendum to decide whether the rejected Government Bill shall become law ..." However, here the right to resort to a Referendum lay in the hands of the Cabinet only.

Nicholas Mansergh, writing in the 1930s, noted that: "In modern Europe direct legislation is regarded as the necessary postulate of democracy: it is almost universally accepted as a logical corollary to the theory of popular sovereignty. It is by the means of such machinery that the final expression of the people's will, of the *volonté générale*, can be ascertained."³² Undoubtedly, the idea of ensuring popular sovereignty was utmost in the minds of The Irish Committee members but as Mansergh also notes, the device of the Referendum had another function; that of acting as a safeguard for individual rights.³³ This would also have been quite significant in a country which had seen little or no vindication of individual fundamental rights for centuries.

Functional Representation

Another common theme is that of Functional Representation. The idea of introducing Functional Councils was provided for in the Irish Free State Constitution in Article 45, which states:

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 Éireann).

The idea was to bring politics closer to the people by having ordinary people involved in politics. It was envisaged that councils based on trades, employment and other aspects of life could be established and gradually become directly involved in the political process. The idea had a dual-inspiration; it seems to have been inspired by ancient Ireland, where these sorts of Councils played a major role in governance and also by the post-War constitutions. It appears that there were two possible visions for the idea of functional representation in the Free State Constitution; one involving the executive and the other involving the legislature.

³¹ The *Bundes-Verfassungsgesetz (B-VG)* available at http://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf

³² N Mansergh *The Irish Free State: its government and politics* (Allen & Unwin London 1934) at p 137.

³³ *Ibid* at p 138.

The first, involving the executive was the scheme which was actually chosen in 1922 and the second scheme involving the legislature was eventually incorporated into the 1937 Constitution in Article 15.3.

Professor Joe Lee has acknowledged the influence of Article 165 of the Weimar Constitution in relation to functional representation in the Irish Constitution.³⁴ The relevant parts of Article 165 provide the following:

For the protection of their social and economic interests, workers and salaried employees shall have legal representation in Workers' Councils for individual undertakings and in District Workers' Councils grouped according to economic districts and in a Workers' Council of the Reich.

The District Workers' Council and the Workers' Council of the Reich shall combine with representatives of the employers and other classes of the population concerned so as to form the District Economic Councils and an Economic Council of the Reich, for the discharge of their joint economic functions and for co-operation in the carrying-out of laws relating to socialization. The District Economic Councils and the Economic Council of the Reich shall be so constituted as to give representation thereon to all important vocational groups in proportion to their economic and social importance.

All Bills of fundamental importance dealing with matters of social and economic legislation shall, before being introduced, be submitted by the Government of the Reich to the Economic Council of the Reich for its opinion thereon. The Economic Council of the Reich shall have the right itself to propose such legislation.³⁵

Basically, the idea was that vocational councils would be established and out of them would be created the Economic Council of the Reich which would be so constituted as to give representation to all important vocational groups in proportion to their economic and social importance. Then, all Bills of fundamental importance dealing with matters of social and economic legislation would, before being introduced, be submitted to the Economic Council of the Reich for its opinion thereon and the Economic Council of the Reich would have the right itself to propose such legislation.

A further source of inspiration for this provision may have been Article 68 of the Polish Constitution of 1921. That provision states:

In addition to territorial autonomy, a special law shall provide for autonomy in the various branches of economic life by the establishment of councils representing agriculture, commerce, industry, skilled labour, salaried employment, etc., which shall form together the Supreme Economic Council of the Republic. The co-operation of the Supreme Economic Council with the State in common control of economic affairs and in legislation shall be determined by law.³⁶

³⁴ J Lee "Aspects of Corporatist Thought in Ireland: The Commission on Vocational Organisation, 1939-43" in Cosgrave & McCarthy (eds) *Studies in Irish History* (Dublin University College 1979) at p 324.

³⁵ *Select Constitutions of the World* (Stationery Office Dublin 1922) at pp 238-239.

³⁶ See *ibid* at p 95.

It seems that in March 1922, Figgis brought this provision to the attention of Collins in order to demonstrate his idea in relation to functional/vocational representation.³⁷

There are further related themes which could be discussed in relation to this topic.³⁸ However, the final two themes chosen are slightly different and thus were chosen for that reason.

Judicial Review

Many people may be unaware of it but the 1922 Constitution contained a judicial review provision in Article 64, which gave that jurisdiction to the High Court. It has been described as “the most arresting provision of the Irish Free State Constitution”³⁹ because of the fact that judicial review was not widely recognised at the time. While undoubtedly the United States would have been a major source of inspiration for the introduction of judicial review in 1922, the fact that a few of the post-War constitutions had recently introduced it would have been very persuasive. The German (Weimar) Constitution of 1919 allowed for judicial review in a very narrow realm. Article 13 s 2 provided that the *Reichsgericht*⁴⁰ was empowered to review the validity of state statutes which were alleged to be in conflict with the federal law.⁴¹ However on the question of whether the courts could adjudicate on the constitutionality of federal statutes, the Constitution remained silent. This meant that judicial review in the broad sense was neither prohibited nor sanctioned.⁴² However, in 1925 it was decided that the *Reichsgericht* did in fact have that jurisdiction.⁴³ In the Austrian Constitution of 1920, judicial review was specifically provided for and a constitutional court (*Verfassungsgerichtshof*)⁴⁴ was established to exercise this function.⁴⁵ Although not included in its Constitution, a constitutional court was also established in Czechoslovakia by statute on 9 March 1920 on the authority of an earlier statute (29 February 1920), which governed the introduction of the Constitution.⁴⁶ The idea of judicial review was widely debated at the time but it was only

³⁷ University College Dublin Archives, Hugh Kennedy Papers, P4/309.

³⁸ Such as the issue of State-intervention, equality, religious provisions etc.

³⁹ Professor Felix Frankfurter from Harvard University in a letter to Lionel Curtis. According to Gerard Hogan, Frankfurter was enquiring as to whether this article was based on the American experience of judicial review and also whether this was insisted upon by the Irish or the British. Curtis apparently passed the letter on to Kennedy but tantalisingly, due to the difficulties which the State was experiencing at the time, the letter apparently went unanswered. See G Hogan “Development of Judicial Review of Legislation and Irish Constitutional Law 1929-1941” Trinity Thesis 6150 (2001) at p 1, citing a letter written on 10th August 1922 to Lionel Curtis.

⁴⁰ Federal Supreme Court.

⁴¹ See *Select Constitutions of the World* (n 35).

⁴² The debate as to constitutional review raged on into the mid 1920s. However, in 1925 the *Reichsgericht* decided that it did have authority to question federal statutes (111 RGZ 320 (1925)) and in 1929 it declared a statute unconstitutional (124 RGZ 173 (1929)). For more on judicial review under the Weimar Constitution, see G Casper “Guardians of the Constitution” (1979-80) 53 S Cal L Rev 773; Heinrich Nagel “Judicial Review in Germany” (1954) 3(2) American Journal of Comparative Law 233; B J Hartman “The Arrival of Judicial Review in Germany under the Weimar Constitution of 1919” (2003-2004) 18 BYU J Pub L 107, and M Stolleis “Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic” (2003) 16 (2) Ratio Juris 266.

⁴³ Ibid.

⁴⁴ Arts. 137-148; and law of April 4, 1930, Bundesgesetzblatt, No. 112.

⁴⁵ For more see J A C Grant “Judicial Review of Legislation under the Austrian Constitution of 1920” (1934) 28 (4) American Political Science Review 670.

⁴⁶ See S L Paulson “Constitutional Review in the United States and Austria:Notes on the Beginnings” (2003) 16(2) Ratio Juris 223 who also recommends the following; F Weyr “Der Tschechoslowakische Staat” (1922) 11 *Jahrbuch des öffentlichen Rechts der Gegenwart* 351.

beginning to be adopted in Europe.⁴⁷ The next country to adopt the doctrine was the Irish Free State. Surprising an addition as it may have been, the precedent had already been established in Europe.

Private Property

The final theme which has been included here is the right to private property. While one might argue that this comparison does not stand up as the post-War constitutions included this right while the Irish Free State did not, it is submitted that the manner in which this right was granted in the post-War constitutions is significant. While many of the constitutions of the post-War states contain private property guarantees, many of these are also subject to significant exceptions; the constitution of the Kingdom of the Serbs, Croats and Slovenes⁴⁸ guarantees a right to private property in Article 37 but only if it is not injurious to the interests of the community and the scope, extent and limits to that right are regulated by law. Article 24 of the Estonian constitution⁴⁹ guarantees private property but then specifies that this may be expropriated without the consent of the owner if public interest so requires. In the German (Weimar) constitution, Article 158 states that while property is guaranteed, this also imposes obligations and its use must at the same time serve the common good. The majority of the post-War constitutions also contain provisions which claim all resources, forests, mineral wealth, water etc for the state.⁵⁰ This type of provision was included in Article 12 of the Irish Free State Constitution.

While the principle reason for the failure to include the right to private property in the Irish Free State Constitution was probably the memory of the Land War and the ancient Gaelic idea of public ownership of land and resources, it is likely that these restrictions in the post-War constitutions were also in the minds of the Committee when it considered land and property in the Irish Free State.

Conclusion

As indicated at the beginning of this article, the Constitution Committee in 1922 had a very difficult job of trying to create a constitution which would be acceptable to all sides and which would adequately represent the new Irish State. Essentially, they had to decide what the new Irish State would be. Irish patriots had been writing for years about freeing Ireland from Britain but there was very little scholarship on what should actually happen once independence was obtained. The writings which did exist on this subject were very idealistic and philosophical. However, certain principles could be drawn from those writings and the central theme was in relation to the importance of the people in the political and legal system; the idea of bringing politics closer to the people so that the people would trust in the State. This is essentially why the post-War constitutions were such suitable models for the Irish Constitution Committee – they represented, in a practical and real way, what the Irish patriots had always wished for the Irish State. Because of this, the Committee could happily draw on Irish history and modern developments in Europe at the same time in order to create the new Irish order because the same ideals were represented by both.

⁴⁷ See D Deener “Judicial Review in Modern Constitutional Systems” (1952) 46 (4) *The American Political Science Review* 1079 at 1085.

⁴⁸ Adopted in 1921.

⁴⁹ Adopted in 1920.

⁵⁰ See generally *Select Constitutions of the World* (n 35).

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