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The state as ‘Guardian of the common good’ and the constitution of Ireland

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ABSTRACT

This article begins by noting the strong correspondence between the usages of the term ‘the State’ in The Constitution of Ireland and the current language of constitutional reform in Ireland. But the increasingly frequent uses of this concept in referendum campaigns and in the media raise a simple question: has the 1937 constitution a clear and coherent conception of the State? Given the strong corporatist influence on the document, I argue that it does. Beginning with a comparison with the 1922 constitution, the article traces the conceptual history of the concept of the State since independence by applying a framework of conceptual development found in R.G. Collingwood. It stresses the sociological approach to the State in the 1937 constitution compared to its 1922 predecessor, and also explains why decades of constitutional reform have not really revised the former’s language of statehood. The article concludes by discussing the current usages of ‘the State’ in the media. These stress its central role in economic development and public policy, in language uninfluenced by those religious and philosophical ideas which justified a limited state in 1937.

KEYWORDS Catholicism. Conceptual history; constitution; the state; Ireland

The subject is the State. No other spelling (ie without capitals) would do justice to the ubiquity with which this expression is used in Ireland or the affirmative way it is deployed in legal and political argument. That the State has become important to constitutional life particularly, is suggested by Justice Marie Baker, chair of the Electoral Commission, having to publicly explain the difference between the State ‘striving’ and ‘endeavouring’ to support social care in the 39th amendment to the constitution (Irish Times 19 February, 2024f). The relevant articles from the 1937 constitution read ‘The State recognises’ and ‘the State pledges’. The Citizen’s Assembly wanted the State to ‘take reasonable measures to support care’, while the

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(failed) 39th amendment states only that ‘the State shall strive to support’ care. Leo Varadkar’s claim was that the 39th amendment would place an obligation, not just on successive Irish governments, but on the State to strive to support care (*Irish Times*, 12 February 2024e). Similarly to the text, state is distinguished from government and the more abstract of the two is invoked as the higher authority.

Although the parallels between the language of statehood in the text and that of constitutional debate are strong, ‘the Irish contribution to political theory, in general, and to the theory of the State in particular has not been recognised’ (MacMillan, 1993, p. xxx). Since law is the language the State uses to speak to the public, it is appropriate that the constitution be the place where that contribution is examined. Yet not much scholarly attention has been paid to the role of the State in the constitution. This may be due to its internal organisation. In *Byrne v Ireland* (1972) Judge Kingsmill Moore Jr commented that ‘nowhere in the constitution is the legal or philosophical nature of the State explained or defined’. Judge Murnaghan complained that ‘Ireland’ and ‘the State’ are used interchangeably and indiscriminately throughout the text. Judge Birmingham argued, that while the constitution clearly differentiated between two ideas, the sovereign authority is ‘the People’, from whom is derived the sovereignty of ‘the State’.¹

There is a need for re-assessment. Accepting a verdict of indiscriminacy – Ireland being employed in some places, the State in others; on no principle that is apparent – (Hogan & Whyte, 2006, p. 85), we will find it hard to explain the conceptual standing the State enjoys today. If lacking definition and explanation, how could the State become a central part of a patterned vocabulary? The 1930s were an era of state worship, and the drafters had to say something meaningful about this issue. Hence the corporatist influence. Yet while the constitution tells us a lot about what a state is, we are left to discover this indirectly from the various articles (Kingsley Jr, *ibid*, p. 88). The most relevant sections are those on Fundamental Rights and the Directive Principles of Social Policy where there are 39 mentions of this idea. Most are capitalised.

The conceptual history of the State in Ireland’s constitutional order will be analyzed employing a theory of language development outlined by the philosopher, R.G. Collingwood. The sources are his two books on aesthetics (1925/1994 and 1938/2011), his 1944 *The New Leviathan or Man, Society, Civilisation and Barbarism* and some critical studies (Boucher, 1989; Donegan, 1962; Johnson, 1998; Kemp, 2021; Tomkin, 1953). His work suggests that in a stable constitutional order concepts can develop through stages that are intelligible. The first task is that of naming the State. As this ceases to be simply a whole, or a political unit (such as ‘Ireland’), during the second stage the State becomes a manifold: ‘a network of things with relations between them’ (Kemp, 2021). This change in meaning came about when the Irish state had to be defined in terms of social relations. And after these social relations are

codified in law, we can reflect on them in language that is interpretive, the third stage. And finally, there is possibly a fourth level of consciousness; concepts and generalisations come to the fore. While each stage represents a progressive sophistication in its use, shifting to a later stage does not mean that the earlier uses of the State are abolished: they are simply incorporated into a different form of understanding (Johnson, 1998, p. 41).

Although there are four stages, this article's main focus will be on the second, where the constitution does express a theory of the State. The generic language of statehood is present throughout, but in the Fundamental Rights and the Directive Principles sections, corporatist thinking gave it sociological and philosophical meaning. This ideology was 'a particularly powerful' influence on the document (Costa, 2017, p. 6), and its general significance has been acknowledged (Coughlan, 1988; Hogan & Whyte, 2006; Kenny & McCann, 2022; and Keogh, 1988; Whelan, 1995). Less discussed is its influence on the theory of the State itself. But first a word of caution. I do not argue that the Irish idea of the State has its historical origins in the constitution. The Irish *Stát* may have been centuries old by 1937. Neither did the concept of the State come to matter only in 1937. The civil war of 1922–1923 was 'The Conflict that formed the State' (Clifford, 1995), and the persistence of the Westminster model afterwards reflected an established conception of the State as being unitary and centralised. In this sense there was no break in 1937, but a process of conceptual specialisation and intellectualisation, especially in terms of the state-society relationship.

The state as a conceptual variable 1922–1937

The State has not always had the conceptual standing it enjoys today. Initially, there was a reluctance among politicians to embrace the *de facto* state, based on the idea that the purpose of *Sinn Féin* had been to found a polity based on the idea of 'the Gaelic State', a polity markedly different from the centralised system that actually emerged in 1922–1923 (Knirck, 2023, p. 43). Lee (2000) has argued that the Irish did not, in any case, have a State, as opposed to a political tradition; the idea of the nation inspired people more. Moreover, O' Dowd (1991, p. 99) suggested that the Irish state was seen, (by its critics), as a centralised and rigid institution, presided over by 'a neo-colonial elite' which benefited from economic and political stagnation. Finally, during the last financial crisis, Mair argued that 'the problem here is that we don't respect our State' (Irish Times, 2011).

Perhaps none of this is a surprise. Nettl (1968) wrote of the State as 'a conceptual variable' and suggested that, as 'a socio-cultural phenomenon' the State might not flourish even in a society where it was the most important institution. If 'stateness' involves a cultural disposition 'to allot recognition to the conceptual existence of the State', the Irish may have lacked this

disposition (*ibid*, p. 566). Indeed, in 1931 William Cosgrave, first President of the Executive Council, lamented 'the absence of the state sense' among part of the Irish population (1985, p. 187). And Prager thought that the manner in which the State subsequently exercised authority, 'can hardly be viewed as an example of pre-modern, traditional convictions giving way to modern universalistic ones' (1986, p. 110). Kearney (1985, p. 9) went further, claiming that 'From the earliest times, the Irish mind remained free, in significant measure, of the linear, centralising logic of the Greco-Roman culture which dominated most of Western Europe'.

If the sense of 'stateness' was initially weak, why it was so important to constitution-makers in 1922 and 1937? The full name of the 1922 constitution is 'The Constitution of the Irish Free State, *Saorstát Éireann*'. The 1937 constitution begins with a section on Nation, followed by one on State. The very explicit uses of the State in an English-speaking country are interesting in itself. The Australians also define their nationalism in opposition to Britain, but they did not have to struggle to achieve their independence. As proponents of an Australian republic have found to their costs, nationalism brought little credit to the Australian state itself (Hirst, 2009). Australian national identity is more about sport, being a more open society and making superior soldiers. In contrast, the Irish have not been indifferent to the State as the symbol of their independence. Article 15.2.1. of the *Bunreacht* states that 'the sole and exclusive power of making laws for the State is hereby vested in the *Oireachtas* (parliament). This was intended to stress that the Crown was no longer part of the legislature, that there was no body which could veto legislation. The constitution also created the Presidency, a Head of State who is directly elected by the people, and who chairs the Council of State. The President's diplomatic and ceremonial role in international affairs highlights the distinction between government and state in a very public way.

The strength of Irish separatism also explains why the State was more prominent in 1937 than in 1922. Article one of the 1922 constitution began 'The Irish Free State (otherwise hereinafter called or sometimes called *Saorstát Éireann*) is a co-equal member of the Community of Nations forming the British Commonwealth of Nations'. While the Irish Provisional Government described the other dominions as Commonwealth states; the British preference was for nations of the Commonwealth. And there was ambiguity. Article 5 refers to the Irish government as 'the Executive Council of the State', while article 51 suggests that the executive authority of the State is vested in the King. Arguably, the Free State's dominion status inhibited the full expression of the State in 1922. In British constitutional theory and practice the Crown was both the personification of the State and the supreme authority within it (Doyle, 2018, p. 33). This is one reason for the marked

British reluctance to use the State in constitutional debate. The Australian Head of State is King Charles 11.

In contrast, 'the State', Council of State, the State, state, states or *Saorstát Éireann* are mentioned 114 times in the 1937 constitution. This inflated use reflected the drafters' desire to emphasise that this *was* the constitution for an independent state (Kissane, 2020, pp. 7–9). Article 5's statement that Ireland was a sovereign, democratic, and independent state could not have been made with such confidence in 1922 (Doyle, 2018, p. 31). But if nationalism was one influence, the Catholic Church was another. To the original view of the State as the protector of basic rights was added a moral one in which the State became a moral stance. Article 40.6.1° of the 1937 constitution states that 'the State shall endeavour' to ensure that 'the organs of public opinion' such as the radio, 'shall not be used to undermine public order or morality or the authority of the State'. The Catholic influence gave the idea its sociological character. The clauses on personal rights mention the State seven times, that on the family eight times, that on education eight times, and that on private property four times. The 1922 constitution had no such sub-sections.²

In establishing an inter-connection between constitution, rights, and state these sections said a lot about the state – society relationship, as it was in 1937. Yet this comparison need not imply that the State was unimportant in 1922. The pro-Treaty position rested on two legal pillars: (1) the right of the State established by the Treaty to full law-making powers and (2) the use of law to protect a number of basic rights. The comparison has been intended to show only why the 1937 constitution had a different conceptual character.

Stage one: naming the state

For Collingwood (1944, pp. 40–46) all language made its appearance in the act of naming things. In the first and simplest level of consciousness we become conscious of an emotion as we name the feeling. When we are conscious of our attending to a particular feeling, we move beyond this level of consciousness, and the linguistic act which initiates the transition from the first to the second level of consciousness is conceptual thinking (*ibid*, p. 45). After names language moves forward to the grasp of abstract terms, to the understanding of concepts, to applying propositional thinking and, finally, to the language of practical reason (Johnson, 1998, p. 60).

Just as naming can be a condition for literature, it can be a condition for constitutionalism. From the beginning the dominant elite preoccupation was cultural and political 'self-definition against Britain' (Foster, 1988, p. 516). The 1922 constitution was called 'The Constitution of the Irish Free State': it was replaced in 1937 by '*Bunreacht na hÉireann* or 'The Constitution

of Ireland'. Naming is the first act in any act of self-definition. Garvin (1995, p. 54) traces the process back to the first *Dáil's* proclamation (in January 1919) as, in Irish *Saorstát Éireann*, in English 'Republic of Ireland'. During the negotiations over the Anglo-Irish Treaty Lloyd George, having spotted the linguistic ambiguity, offered the *Sinn Féin* negotiators *Saorstát Éireann*, as a direct translation of Irish Free State. The Irish Free State/*Saorstát Éireann* was subsequently mentioned thirty-eight times in the 1922 constitution.

When Éamon de Valera first considered drafting the 1937 constitution, he jotted down some initial ideas on a squared draft paper. Article one read 'The Name of the State is *Éire*'. Yet naming could mean re-naming. While before 1937 the head of the government was 'The President of the Executive Council', this office was renamed *Taoiseach*. Such changes were part of a fairly systematic 're-naming of constitutional parts' that year (Garvin, 2004, p. 21). De Valera's 'Squared Draft Paper' was not extensive enough to further define the nature of the State. Only in civil servant John Hearne's draft heads of a Constitution from May 1935 is the regime form defined: '*Saorstát Éireann* is an independent sovereign State'. The process of renaming is evidenced by its replacement with *Éire* in the handwritten comments, and the addition that 'the name of the State shall be *Éire*'. By substituting *Éire*, calling the constitution *Bunreacht ha hÉireann* and drafting an Irish language text, language was used to symbolise a more complete break with Britain.

Reconstructions of the drafting show 'the State' becoming central late in the process. Keogh and McCarthy (2007) reproduces five drafts; a 'Preliminary Draft of Heads of a Constitution for *Saorstát Éireann*', by John Hearne, finalised in May 1935; The 'Squared Paper Draft' produced by de Valera (no date); the 'Draft Constitution Considered at Cabinet' October 1936; the 'First Draft Updated' Late 1936; and the 'first Official Draft' from March 1937. The early drafts they reproduce did not use the State much. The first draft considered at cabinet in October 1936 does not use the word state in new ways either, although 'Part One' is entitled 'The State'. When updated in late 1936, this draft then included 'the right of the Sovereign Irish people 'to determine the form of the state, and of the constitutional organs of the state'. This right was vested in the people 'to the exclusion of every other power or authority whatsoever'. One can become free from something by naming and defining.

The psychologist Bruno Bethelheim (1992, p. 66) noted that names had a special significance in the lives of children. In constitutions too names can be an important anchor for developing selfhood. If for a child the obvious link a name provides is with the immediate family, names introduce a state to the family of nations. When the Irish state joined the League of Nations in 1923 Ireland was the name then used for the new member. In 1937 Ireland was then sometimes used in the 1937 constitution where State could have

been. For example, article 29.3 states that 'Ireland accepts the generally accepted principles of international law as its rule of conduct in its relations with other states'.

The 1937 constitution did not mention the Republic. *Sinn Féin's* commitment to Irish cultural distinctiveness and to a national economy had always required the establishment of a state for them to be realised (Mitchell, 1995, p. 338). Yet a variety of names had been suggested – *Saorstát*, *Poblacht na hÉireann*, Republic of Ireland, *Ríocht* and Ireland. Wedge concepts, such as Republic, were intended to mark symbolically the break with the Crown. But for de Valera *Poblacht na hÉireann* was 'a sacred term' which could not be used in 1937 while the island remained partitioned (Coffey, 2018, p. 63). The State was a generic legal concept compared to these alternatives. Collingwood's argument that the early stages of language development are dominated by emotion is reflected by the importance of wedge concepts between 1916 and 1923. As the relationship with Britain stabilised, the usages of the State in 1937 constituted a step into a more analytical legal language.

When asked to define existentialism the philosopher Sartre (1968, p. xxxiii) remarked that to name and define something 'is to wrap it up and tie the knot'. This was not true. The final version of article 4 was 'The name of the State is *Éire*, or in the English language, Ireland'. British governments remained unhappy with Ireland being put on Irish diplomatic correspondence, while Dublin opposed the British use of the United Kingdom of Great Britain and Northern Ireland (Daly, 2007). Neither were all satisfied by the declaration of a Republic in 1948; some continued to refer to the Free State or 'the Twenty-Six counties'. Arguably, the emotional undercurrent to the act of naming still exists. At the Easter 1916 Arbour Hall commemorative march in 2024, *Sinn Féin* President, Mary Lou McDonald, remarked 'here in the South as the Free State is called' (<https://vote.sinnfein.ie/mary-lou-mcdonald-speech-at-sinn-feins-annual-easter-rising-commemoration/>). Nothing has been wrapped up.

Stage 2: the state as the centre of a network of things

In the second stage the State appears in the constitution, not just as a name for the polity, but as a manifold concept: an idea at the heart of 'a network of things with relations between them' (Kemp, 2021). It does so mainly in the Fundamental Rights and in the Directive Principle sections. Here a distinctive combination of legal, religious and sociological language required 'the State' to cohere. The process of self-definition continues, with a change. Initially, the self was the Irish nation: the question was what form of state its appropriate political expression would be. However, there was more consequential self-definition when the social purposes of the Irish state were considered.

The Catholic Church had not been involved in the drafting of the 1922 constitution. In 1937 a small group of civil servants played the key role (see Coffey, 2018; Hogan, 2012; Keogh & McCarthy, 2007), but there was clerical influence on the Fundamental Rights and the Directive Principles. In these sections, the State became an idea that allowed the interests of the clerics and the politicians to merge. The Vatican had already identified education, the family, and the socio – economic order, as three spheres to remain subject to Church authority (Fliz, 2000, pp. 42–43). And the obsession of the Irish Catholic Church with sexual morality, gender roles, and the family in general, had given sanction for the State to involve itself in these areas. The Church’s teaching had a demonstrable influence on the constitution’s provisions on the family, education, and private property.

Stylistically, the articles on the Family are representative. Each begins with ‘the State’. There follows a verb (recognises, guarantees, endeavour, pledges) which indicates the State’s commitments. And an abstract noun makes these commitments sociological (Society, authority, the home, Marriage). The same style can be found in the articles on Education, Private Property, Personal Rights, and Religion.

THE FAMILY

The State recognises the Family as the natural, primary and fundamental unit group of Society. (A41 1 1)

The State, therefore, guarantees to protect the Family in its Constitution and authority. (A41 2)

The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home. (A 41 2 2)

The State pledges itself to guard with special care the institution of Marriage. (A 41 3 1)

This sociological approach continues in The Directive Principles. Each clause typically begins ‘the State’, a variety of verbs (strive, direct, favour, endeavour, pledge to) follow; but the objects are economical: (occupations, material resources, competition, credit, welfare, industry and commerce, and land ownership). This section accepts the existence of a market economy but suggests its negative effects can be ameliorated by legislation inspired by ideas of the Common good. The Principles support the hypothesis that the Catholic influence was more sociological than religious. They make distinctions between different groups in society in a way that the 1922 constitution largely did not.

This drafting involved conceptual change of a particular kind. The constitution did not change the word state itself; there were changes in the applications of the terms by which the State was expressed (Skinner, 2002, p. 179).

Expressions such as 'The State 'guarantees', 'pledges itself', 'shall see to it' did not change the meaning of 'the State'; they concern the range of circumstances in which people are prepared to apply it (*ibid*, p. 186). This mode of conceptual change, retaining its generic meaning, while changing the range of circumstances in which people are empowered to apply it, allowed the fusion of secular and Catholic ideas of the State. But without the underlying Catholic social philosophy, the changes to the State's terms of reference, to its criteria for application, and to its use as an indicator of approval or disapproval in 1937 would certainly have been less extensive (*ibid*, p. 9, p. 41).

The uses of the State were inflated in terms of the number of times the concept was used, the different stylistic expressions that accompanied its usages, and the policy areas the State became a key concept for. The State's legal powers were also strengthened. The 1922 constitution had expressed the rights to freedom of expression, opinion and association briefly in one article (9), but the idea of the State was absent from them. Article 40. 6.1° from 1937 reads 'The State guarantees liberty for the following rights, subject to public order and morality'. The language is affirmative of the role of the state in creating conditions in which rights can be realised. The State is not just an abstract idea, but a legal decision-maker which provides a framework for social life in which the individual had duties and responsibilities.

From an Aristotelian perspective, the specific ends to which any community aspires are essential to its identity. In the Preamble the determination of these ends, requires, first of all, an acknowledgement of God as the ultimate authority. All actions, 'both of men and States' must be referred to Him. But if the ends are inspired by religious ideas, they include assuring the dignity and freedom of the individual, attaining true social order, restoring the unity of the country, and establishing concord established with other nations. Since all contribute to 'the common good', the corporatist influence clearly influences the constitution's conception of the State.

De Valera's conception of political authority was steeped in Thomist and natural law traditions (Casey, 2025, pp. 9–12). Article 42.3.2° defines the State as 'as guardian of the common good'. For Casey this common good is 'the state of affairs where the political community and the part-wholes constituting it – associations, families and individuals – are flourishing' (*ibid*, p. 10). The constitution uses communitarian language (the whole people, the national life, the social order and the community) to describe Irish society, alongside the 'part wholes' (families, men and women, children, workers, the infirm, the widow, the orphan, and the aged) who might need state support. The role of the State is to allow for the flourishing of society, to balance the relationship between its constituent parts and if necessary to support them.

Since the Principles commit the State, *inter alia*, 'to strive to promote the welfare of the whole people', to provide an 'adequate means of livelihood, to divide land fairly, and to prevent exploitation of people in the promotion of private enterprise' they espouse a 'third way' approach to the problems of modern society (Kenny & McCann, 2022, p. 208). The approach was Catholic as well as contemporary. Thomism had been treated in Pope Leo XIII's 1891 *Rerum Novarum* as 'the Catholic philosophy par excellence', and sections 91–91 of Pope Pius XI's 1931 *Guadragesimo anno* were titled 'the Corporatist State' (Pollard, 2017, p. 48). By 1937 authoritarian regimes, all influenced by corporatist ideas, had been established in Austria, Hungary, Italy, Lithuania, Poland, and Portugal. Croatia, Slovakia, Spain, and part of France (also Catholic) would soon follow. Yet in Ireland 'a rather diluted form of corporatism' found its way into the text (*ibid*, 49). Despite the limited concession to such ideas in the rules for election to the Senate, the legislative process remained based on the Westminster model. De Valera had little interest in 'social corporatism': basing the system of political representation on groups, families or professions in order to achieve an 'organic' fit between state and society (Costa, 2017, p. 5).

Girvin (2002, p. 141) argues that Article 9.2, which declared that fidelity to the nation, and loyalty to the State are 'fundamental political duties of all citizens', reflected the tenor of authoritarian nationalism in 1937. Yet nowhere is the State taken to be an end in itself. Articles 40–44 on Fundamental Rights assume that while institutions such as the Family are foundational, the State is not. And one can find other more liberal ideas: of the State as the protector of rights; as a power that limits itself; as the institution that reconciles competing claims; and as the source of legal recognition. On private property the constitution reads:

Article 43

- 1 The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
- 2 The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
- 3 The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
- 4 The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

The role of the State is strongly affirmed; a philosophical justification, in alignment with Catholic thinking, is given, but the state's authority is limited both by natural law and the fact that the state is expressly denied the right to abolish private property. Consistent with its natural law basis, and the Catholic principle of subsidiarity, this would be a limited state which nonetheless attempts to reconcile individual rights to ownership with ideas of social justice and the common good. De Valera himself suggested,

The Solution must be based upon the correct application of the function of the State in relation to the individual. As Catholics, we conceive of the function of the State to be not to submerge, but to aid the individual and the family which we acknowledge to be prior to and more fundamental than the State. (De Valera, 1937a)

There was nothing Catholic in de Valera's definition of his constitutional draft as 'the foundational law of the State' (1937c). Yet when it came to the limited state there was. In his St Patrick's Day speech in March 1938, de Valera spoke of 'a Christian and Catholic nation 'in which 'none of the forms of State worship prevalent in our time' would flourish. The Irish state would be confined to its proper functions: the guardian of the rights of the individual, the co-ordination of his activities with those of his fellow citizens, and the guide in common effort' (De Valera, 1938). His conception of the State was a blend of liberal and communitarian ideas.

In summary, the 'Catholic turn' of the 1930s helped make the State a basic concept in the constitutional order. The idea became sociological: 'a manifold concept' at the heart of a network of social relations. And because these sections were informed by Catholic thinking on the common good and on the relationship between the individual and society (Hogan & Whyte, 2006, p. 2079; Whelan, 1995), it was here, particularly, that the drafters explored the appropriate scope and limits to State action in society. While those who preceded de Valera in power had seen the 1922 constitution mainly in terms of the structure and mechanisms of government, the 1937 constitution was also interested in the ends and purposes of the State (MacMillan, 1993, p. 201). Hence its more developed conception of the State.

Stage 3: Amending and interpreting the constitution

Those who drafted the 1937 constitution were part of a generation whose primary purpose was to establish an Irish state. The more it was made secure in the eyes of the international community, the greater the attention fixed on the question of what type of state Ireland would be (Finn, 2017, p. 220). What followed from the 1960s onwards were decades of amendment to, and interpretation of the constitution.

The election of Mary Robinson as President in 1990 was a symbolic turning-point. The removal of the constitutional ban on divorce five years later suggested that 'From Fusion to Separation' was now the direction of change (White, 2007). The uses of the State in 1937 had suggested that everything social was religious: the two words were almost synonymous. Increasingly, science has taken over the cognitive aspects of knowledge, and political, economic and scientific functions gradually broke free from the religious purview in Ireland, taking on a markedly temporal character (Durkheim in Parkin, 1992, p. 56). This temporality gave a teleological dimension to how recent changes in Church State relations, (notably the legalisation of same-sex marriage in 2015, and the repeal of the eight amendment on abortion in 2018) were seen. Finally, a succession of official reports into Catholic institutions; Ferns (2005), Ryan (2009), Murphy (2009) and Cloyne (2011), suggested that when dealing with allegations of sexual abuse, the Catholic Church 'did its best to avoid any upholding of the law of the State' (O' Coráinn, 2018, p. 763). The State, finally, had to assert itself.

What of the constitution? Before 1960 there was only one attempt to amend it by referendum: it failed. The subsequent changes: EU membership, more prosperity, the influence of television, and women's greater involvement in the workplace would largely dissolve 'the protectionist walls that surrounded Irish Catholicism' (O' Coráinn, 2018, p. 739). More people became committed to the dismantling of the extensive legal supports for the Catholic social ethos in the text. The Northern Ireland conflict, which began in 1969, also posed the question of whether a state with a Catholic ethos could accommodate a large Protestant minority. In particular, the constitution's recognition of the 'special position' of the Catholic Church was seen as problematic. The fifth amendment removed article 44 on the status of religions after a referendum in 1972. Much later, (in 1998), changes to articles two and three, which had defined the whole island as 'the national territory' of the Irish state were also accepted in a spirit of reconciliation.

Yet if Church State relations became controversial in this period, the theory of the State expressed in the constitution did not. The long process of liberalisation has left intact a particular conception of the State with its roots in the teachings of Aristotle, Thomas Aquinas and Pope Pius XI. One reason was that corporatist ideas were not taken very far in 1937. 'Political corporatism' meant placing the State at the apex of the new legislative structure and leaving executive power totally in the hands of a dominant leader and a single party (Costa, 2017). This hardly describes the Irish political system where the President, despite being popularly elected, has a largely ceremonial role, and only rarely adjudicates between different institutions. Elsewhere corporatist ideas led to dictatorial regimes in which there was no difference between the leader of the government and the head of State (Finchelstein,

2020, p. 87).³ Yet since Ireland remained a multi-party democracy, corporatism was not a regime-defining influence there (Costa, 2017, p. 6).

The Directive Principles are also unjusticiable. Although intended as 'a guide' for it, they have largely been ignored by the *Oireachtas*. Kenny and McCann (2022) suggest that if they had been really intended to serve as a guide in this way the Principles have been 'a complete failure'. But this lack of legal teeth also meant that, for the most part those seeking economic development or social justice did not have their ambitions thwarted by this part of the constitution. Either way, since the Directive Principles have not served as an actual source of legislation, their treatment of the State has been inconsequential. In contrast, the liberalisation of the constitution has impacted the Fundamental Rights provisions. Several amendments (on abortion in 1983, 1992, and 2018, divorce in 1986 and 1995, children's rights in 2012 same-sex marriage in 2015, the status of women, social care and the family in 2024), have been put to the people, resulting to eight amendments to articles 40-44. With one exception these changes either enlarged individual freedom or achieved a greater degree of gender equality.

Yet in what ways did such amendments alter the language of statehood in the text? Since the constitution is the place where the relationships between Church and State were codified, the conceptual effects of social change ought to be visible. One expectation might be that they should reflect a logic of polarisation. Yet because the text had hardly used 'Church', and made the State legally responsible for the policy areas the Catholic Church thought its own, there was little revision of the generic language of statehood. The drafting had privileged not Church, but State (Kissane, 2020, p. 17). Throughout the text we find the basic western conception of the latter as the sole source of law and as the legitimate possessor of force within its territory (Richter, 1995, p. 133). Hence, while many liberals saw the constitution as an obstacle, the uses of 'the State' did not stand in their way.

More generally, the constitutional referendum has enabled the constitution's language of statehood to be communicated and imposed. Consider international relations. As a consequence of a raft of European agreements, going back to Ireland's accession to the E.C.C. in June 1972, article 29 now retains the three original uses of 'Ireland', alongside twenty mentions of 'the State'. The ratification of the Lisbon Treaty alone resulted in eight new uses of this concept. The wording, 'The State may' ... , suggests that the public was being asked to give the State permission to participate further in European integration. In total, thirty-eight amendments have been voted on in referendums. In just over twenty, the electorate have been asked to approve a wording involving 'the State'.

Stylistically too, the wording of amendments often reflects the original text. In 1983 a pro-life amendment was passed which stated that 'the State

acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right'. Much later, in a different climate of opinion, in 2012 voters accepted the 31st amendment which stated that 'The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights'. In a failed referendum, the 39th amendment proposed that the State recognises ... , and (for article 41.3.1°) the fortieth began, 'the State pledges to guard with special care' The amendments have simply reproduced the constitution's own language of staterhood which remains generative. Skinner (1978, p. x) suggests that 'the clearest sign that a society has entered into the self-conscious possession of a new concept is that a new vocabulary came to be generated, in terms of which the concept is then articulated and discussed'. This has been true of the constitution.

Constitutional change also occurs through interpretive changes in the courts. Since the 1960s the Supreme Court's powers of judicial review have been exercised more assertively, sometimes involving judgements as to what kind of state the constitution provided for. The most legally significant article has been 40.3.1°, which reads 'The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of its citizens'. In 1979 one Supreme Court judgment found that the fundamental rights included not only those specified in article 40, but all those rights which result from 'the Christian and democratic nature of the state'.⁴ So, the higher courts have paid some attention to the State, adding a degree of specialisation to the concept.

Although consensus on 'the Christian state' has broken down (Finn, 2017, p. 225), the generic European concept of the State has become influential. In *The State vs Byrne* (1972) the Supreme Court ruled that an individual could sue the State for the actions of its agents, that the State did not possess legal immunity, and that the Crown Prerogative from the British past did not carry over into the independence period.⁵ Henceforth the State was a juristic person, and was vicariously liable for the actions of its servants. The change was seen as historic: the State was now a servant of the people 'rather than a repository of sovereign rights and immunity inherent in the Crown' (Binchy, 2016).

The change has brought Ireland in line with the broader European tradition of conceiving the State as an artificial person. This idea had as its core the metaphor of a body politic in which the head of state ruled over the members of the polity, ideally according to the dictates of right reason (Ringmar, 1996, pp. 443–446). Article 6.2 of the constitution states that the power of the State is exercised by 'the organs' of government, a bodily metaphor. In articles 40–44 and the Directive Principles, a variety of verbs are then

used to delineate the appropriate scope of state action, and to suggest that the State, like a person, actually makes legal decisions. And such decisions can have the personal qualities of being considered, just and responsible. When the Catholic Bishops made their opposition to the amendments on care and the family known in March 2024, they complained that the changes diminished the unique importance of the relationship between marriage and the family 'in the eyes' of society and the State (*Galway Pulse*, 2024, 27 February). Such a state is like a person that grants or withholds recognition to specific parts of society.

The conceptual history of the Irish state could also be explored in the fields of foreign relations and of changing conceptions of citizenship. But one reason for focussing on the constitutional world is that the text's language of the State is still with us. When, after being asked about the two failed amendments in March 2024, Mary Lou McDonald's initial reply was that in a re-run, her government would 'vindicate' the rights' of carers and those with disabilities.⁶ Perhaps in the cut and thrust of political life, we think less with words and concepts than they think themselves through us (Sands, 2014, p. 18) Yet neither the specific conception of the State in the constitution, or the corporatist philosophy behind it have been at issue. When reading the Preamble people notice 'In the Name of the Most Holy Trinity', but not the conception of the State in what follows. Indeed, there is a dominant religious prism, according to which the State is seen mainly in terms of the *de facto* alliance between Church and State. Ireland has also been called a 'Catholic' (Bowen, 1983; Mennell et al., 2000), 'confessional' (Clarke, 1984), 'Catholic corporatist' (Adshead & Millar, 2003) and 'post-colonial carcereal' state (McAuliffe et al., 2021). The classic legal antinomy, 'Church and State', has had a stabilising function in the sense that it has allowed people to organise their knowledge of the past in a coherent way. Yet the State is seldom considered in its own right. The poet Nualla ní Dhomhail once defined the Irish state as a non-military totalitarian 'Church-State' as if the State was not a distinct institution (ní Dhomhail and Randolph, 2010, p. 91). As Collingwood himself believed, the greater place for concepts in the later stages of language development need not bring anything like detached neutrality. Church and State is not a conceptual pair that begins as an emotion and ends as a thought; the thought is never shorn of its emotional husk (Collingwood, 1994; Kemp, 2021).

A fourth stage? The state in the media

The State has been a useful concept to explore how transitions in language can reflect stages of constitutional development. Yet is hard to identify a distinct fourth stage. People did not begin thinking about the State recently. The developments behind the third stage: the loss of Church authority,

referendums on moral issues, and the greater involvement of the State in the economy have simply continued. On the other hand, Collingwood's framework is not a causal sequence, but 'an overlapping chain in which each successive stage both confirms and extends the one before' (*ibid*, p. 27). Either way, in this latest stage considerable frustration with the limitations of the Irish state has emerged.

In just one week in February 2024 the following headings appeared in the *Irish Times*; 'What we need today is a much bigger State' (*Irish Times*, 2024a); 'the State should pledge to protect the lives of all citizens' (*Irish Times*, 2024b); 'John Bruton: a remarkable record of service to the State' (*Irish Times*, 2024c); 'the State must recognize and support vital role played by carers' (*Irish Times*, 2024d). Those who work in the media are less dependent on the State, have an international market for their work, and find employment opportunities outside Ireland (O' Dowd, 1996, pp. 13–14). This makes their commitment to the State noteworthy.

While the approach in 1937 was to use the language of statehood to explore the appropriate limits of state action, the media identifies new policy areas for the state to expand into. A state with more expertise, staff, and especially revenue can be promoted as an agent of change. A consequence is that the 1937 approach is being bypassed. The Directive Principles took for granted a capitalist social order but articulated a reluctant kind of modernism. They express neither a positive view of the market nor of capitalist development in general. The Principles rested on ethical ideas of the Common good which become less relevant when the State is embraced as the primary agent of economic development and social progress. Perhaps there is an objective threshold of development beyond which a limited State becomes anachronistic. Economist David MacWilliams argues that the current level of state intervention, given the revenues now at its disposal, is obsolete, and believes that 'the State has to take the lead to protect the economic and social template that Ireland has created' (*Irish Times*, 13 July 2024j). A certain kind of state-led capitalism is key to Ireland's future. This approach, neither left-wing or conservative, has more appeal in a country with a weak tradition of New Right or libertarian thinking.

What the fourth stage also suggests is that part of the Irish elite is moving towards a more materialistic understanding of this concept. This approach is at odds with the ideology of corporatism which, together with a certain amount of liberalism justified the limited State in 1937. Fintan O' Toole argues that the collapse of the Catholic Church and the decline of *Fianna Fáil* has opened the way for Irish Social Democracy, a regime form which would mean an 'active', 'coherent' and 'greatly expanded state' (*Irish Times*, 5 March 2024g). More of the State could resolve, for example, the problems of the 'chronic institutional mess' that is the Health Service: 'part private business, part religious charity, part national service, part insurance

scheme' (*Irish Times*, 26 March 2024i). O' Toole is typical of the mainstream media, which promotes a growing belief in the ethically superior nature of a polity in which the State plays a greater role. And there is a historical shift in conception, between an older view of society where institutions like the traditional family, but not the State, were seen as foundational, to one where the State is being enjoined to take more and more responsibility for providing for social order and individual freedom.

Yet the immediate context is one of policy failure. Those who experienced the financial crash, the housing crisis, and renewed emigration are 'fuelling a new sense that governments need to be held to account for a wider range of public provisions' (Farrell and Hardiman, 2021, p. 46). Yet whether or not we conceive of the State as a coherent actor with the capacity to achieve policy ends, the question is whether an effective response to these problems depends on the State, the state-society relationship, or something to do with the wider society. Political scientists have stressed the Irish state's weak and inconsistent capacity (Hardiman & MacCartaigh, 2010), its' failure to reinvent itself over time (Hayward & MacCartaigh, 2007), and the State's historical lack of autonomy (Adshead et al., 2008). So, there is no historical reason to believe that the State is the ready-made solution to all these challenges. For Labour leader, Ivana Bacic, the problem is more political: 'we have government parties which do not believe in the power of the State' (*Irish Times*, 24 March, 2024h).

On the other hand, a concept is more than a word, and media rhetoric does not amount to an alternative conception of the State. For example, the idea of state capacity is also central to the frayed social contract discussed in Ferriter's (2024) *The Revelation of Ireland*. Yet if there is a yardstick according to which failures in health and housing can be assessed, the question is where such a social contract was ever written down. Ferriter goes back to the 1919 'Democratic Programme' of the First *Dáil*, which assumed an interventionist state, but talked about the nation not the State. In contrast, the 1937 constitution defines the State, outlines the ends which should inspire it, mentions its constituent parts and idealises a particular state-society relationship. Like the Democratic Programme, it was silent on how its ideals could be realised, but the contrast suggests that the general bemoaning of weak state capacity is insufficient for there to be a new conception of the State.

For De Valera (1937b) the Irish state was democratic, founded on reason and individualism: 'the only states where liberalism is possible'. The two cornerstones of nineteenth century liberalism, the protection of rights and the existence of a written document that is not easy to amend, were achieved by his constitution. Yet contemporary critics maintained that the state – society dualism this liberal tradition presupposed was no longer valid. The 'society turned state' resulted in Soviet, social democratic, or welfare states.

But on the European periphery the 'State as the self-organization of society' intervened in all aspects of social life and also ended the old dualism in corporatist states like Portugal (Slagstad, 1988). The 1937 constitution also projected an image of 'the State as the self-organization of society' and provided for a limited state. The language of the media suggests a growing desire to move beyond it, not in order to return to nineteenth century liberalism, but perhaps to create 'a society-turned state' in some shape or form. As a historical phenomenon social democracy followed the rise of dominant Social Democratic parties and was geographically limited to small Protestant countries in the Nordic region. Neither condition obtains in Ireland.

Conclusion

The idea of the State expressed in the 1937 constitution reversed the dominant tendency of European societies in the nineteenth century towards the institutionalisation of a basic distinction between the private social realm and the public political realm (Poggi, 1978, p. 14). Rather the constitution assumes that what was social must be the concern of the State, and that the classical liberal rights – with respect to private property, religious freedom and freedom of expression for example – could be qualified in terms consistent with this more social idea of the State (Whelan, 1995, pp. 100–101). It is not a surprise therefore to find that the most extensive mentions of the State are in those sections most concerned with the nature of Irish society, or that the language of statehood became very sociological in 1937.

The clear rejection of the classically liberal dichotomy between the private and the public sphere underpins the conception of the State in the 1937 constitution. Since the State saw the defense of a certain type of society as its role, there is a strong tension between its liberal and communitarian commitments in the later sections of the constitution. While it is common to see this as a result of the attempt to blend liberal values with those of Irish Catholicism, behind the Catholic influence was a broadly communitarian, more specifically corporatist, philosophy, which saw the State's role in society as both positive and limited at the same time (Whelan, 1995, pp. 100–101). And since this social role could justify the limitation of individual rights in pursuit of public purposes, it is not surprising that the Fundamental Rights sections of the constitution became a battleground from the 1960s onwards.

This conception of the State was part of a broader European attempt to find a 'third way' solution to the problems of modern society, a response very different both from collectivist ideologies of the left and right, and from the earlier liberal ideology which stressed the primary value of individual freedom. Yet no Irish third way would have been practical without the Catholic Church, and for the most part public debate about the nature of

the Irish state after 1921 has been conducted through a religious prism. This has meant that the general value of communitarianism as a philosophy of the State, and its actual influence on the constitution have been obscured. Since there has been little focus on this aspect of the constitution, any conclusion about its ultimate value must be tentative. Although the specifically religious thinking behind the constitution is becoming outmoded, what about its sociology? My hunch would be that while the religious idiom in which the Irish idea of the State was expressed in 1937 loses its appeal, the communitarian philosophy behind it won't be so easily dismissed.

Notes

1. *Byrne V Ireland* (1972), <https://ie.vlex.com/vid/byrne-v-ireland-804955225>.
2. Note however that draft C of the 1922 constitution had two such sub-sections, 'Family, Education and Religion' (articles 53-60), and 'Economic Life (articles 61 to 67). Drafted by James Murnaghan and principally Alfred O' Rahilly, this draft was not taken seriously by the Provisional Government. Like the 1937 constitution however, they tried to incorporate Catholic social teaching into these sections and also used 'the State' at lot. Draft C thus pointed to a Catholic and sociological conception of the State that was drafted with more finesse and legal sophistication in 1937.
3. The period dating from 1918 to 1945 had given rise to twenty-four authoritarian and corporatist regimes in Europe (Costa Pinto, Table 1.1., 2017). But all became discredited by their association with fascism, and only in Spain and Portugal did the regimes survive long after World War Two.
4. *State (M) V Attorney General* (1979) IR 73.
5. *Byrne V Ireland* (1972), <https://ie.vlex.com/vid/byrne-v-ireland-804955225>.
6. 9 March 2024, www.thejournal.ie

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