

‘Lemass’s brainchild’: the 1966 Informal Committee on the Constitution and change in Ireland, 1965–73

Seán Lemass remains an enigmatic figure in the study of contemporary Ireland. He became taoiseach in 1959, after a long and successful career in the leadership of Fianna Fáil. Notwithstanding this, he is widely associated with the transformation of Irish life that began under his stewardship between 1959 and 1966.¹ In 1966, he convened the Informal Committee on the Constitution, often considered to be the most surprising initiative of his career. While change had not occurred by the time he died in 1971, the constitution had by this time become the focus for discussion, controversy and in some cases vilification. The questions this article seeks to answer are why Lemass promoted constitutional change and what were the consequences of this decision. More generally, it will assess the nature of constitutional change in a stable democratic state that is undergoing modernisation.

I

The Irish constitution was first amended by referendum in May 1972 when the electorate ratified the decision to join the E.E.C. The constitution has been frequently amended since then and taoiseach Enda Kenny announced in November 2011 that he would convene a constitutional convention to advise on what further changes should be considered.² In the context of such constitutional activism, it is worth recalling that in 1966, when the Irish state celebrated the fiftieth anniversary of the 1916 Rising, Éamon de Valera was president and *Bunreacht na hÉireann* (The Constitution of Ireland) remained unchanged by the referendum process.³ In 1966 the constitution still bore the indelible influence of its architect and Fianna Fáil maintained a proprietorial attitude to what was still popularly known as ‘de Valera’s constitution’. A recent account suggests that the constitution ‘reflected and perpetuated the party’s hegemony’.⁴ Fine Gael opposed the new constitution in 1937, but effectively reversed this position when the inter-party government led by John A. Costello declared Ireland a Republic in 1949. Over the next decade the constitution acquired widespread acceptance

¹ John Horgan, *Seán Lemass: the enigmatic patriot* (Dublin, 1997).

² *Irish Times*, 30 Nov. 2011.

³ Two amendments were introduced by parliamentary vote under transitional rules in 1939 and 1941.

⁴ Brian Farrell (ed.) *De Valera’s constitution and ours* (Dublin, 1988); Bill Kissane, *New beginnings: constitutionalism and democracy in modern Ireland* (Dublin, 2011), p. xvii.

and former critics such as Patrick McGilligan now acknowledged both its legitimacy and its importance in legal terms.⁵ Moreover, the Supreme Court and the High Court declared important government legislation unconstitutional and identified implicit rights in the constitution that were not explicitly in the text.⁶ The electorate also took a proprietorial attitude to the constitution, reflected most clearly in 1959 when it rejected a Fianna Fáil proposal to abolish proportional representation and replace it with a ‘first past the post’ electoral system.

Lemass had devised the slogan for the 1959 referendum and the presidential election, ‘Vote Yes and de Valera’, though the electorate narrowly delivered a more sophisticated verdict by voting no to the constitutional amendment and yes to de Valera as president.⁷ Lemass was not satisfied with the status quo and on a number of occasions expressed reservations about the Seanad, the presidency and the referendum process itself.⁸ In a conversation with Justice Brian Walsh in 1961 he suggested that the Supreme Court should be ‘flexible and creative in its interpretation of the constitution’. Walsh believed that this was a personal view and unlikely to be shared by Lemass’s Fianna Fáil colleagues. The legal scholar John Kelly complained in 1967 that there was no evident public demand for constitutional change but tellingly added that he believed there was a powerful group in Fianna Fáil advocating change.⁹ By 1966 little had changed politically but a number of factors combined to give the question renewed urgency. The decision to apply for membership of the E.E.C. in 1961 led to the establishment of the attorney general’s Legal Committee on E.E.C. Problems in 1962. While detailed consideration of the constitutional implications of E.E.C. membership was postponed there was an awareness that membership would require an amendment to the constitution.¹⁰ Lemass’s initiative on Northern Ireland also had implications for certain articles in the constitution.

Lemass’s personality is an important factor in these considerations. He was by nature an interventionist and often impatient with his colleagues’ more cautious attitudes.¹¹ Another prompt for change came from developments in the Catholic Church after John XXIII became pope. Evans has noted that Lemass was more

⁵ David McCullagh, *The reluctant taoiseach: a biography of John A. Costello* (Dublin, 2010), pp 197–231; Donal Barrington, ‘The constitution and the courts’ in Frank Litton (ed.) *The constitution of Ireland 1937–1987* (Dublin, 1987), pp 110–27; Brian Walsh, ‘The constitution and constitutional rights’ in Litton, *The constitution of Ireland*, pp 86–109 at p. 91.

⁶ These cases include *National Union of Railwaymen v. Sullivan* [1947] I.R. 77 which struck down a section of the Trade Union Act 1941, *O’Donovan v. Attorney General*, 1961 which declared the Fianna Fáil legislation on constituencies unconstitutional, and *Ryan v. Attorney General*, 1965.

⁷ Horgan, *Seán Lemass*, pp 181–2

⁸ Lemass to Attorney General, 25 Aug. 1966 (N.A.I., DT 97/6/515); Kissane, *New beginnings*, p. 91.

⁹ Walsh cited in Horgan, *Seán Lemass*, p. 202; J. M. Kelly, ‘The nation and the state’ in *Irish Times*, 25, 26 and 27 Dec. 1967.

¹⁰ ‘First report of the attorney general’s Legal Committee on E.E.C. Problems’, 26 Oct. 1967 (N.A.I., DT 2002/8/282). This was an inter-departmental group and included the parliamentary draftsman, representatives of the Attorney General’s Office, and the Departments of External Affairs and Justice.

¹¹ Notes prepared for obituary of Seán Lemass, 16 May 1971 (T.C.D., Erskine Childers papers, MS 9959/17/22); Horgan, *Seán Lemass*, pp 194–202, 348–57.

deferential to the Catholic Church in Ireland than his biographers allow.¹² This claim should be balanced against Archbishop McQuaid's view that Lemass was anti-clerical and his documented hostility to some of Lemass's policies.¹³ Lemass was also sensitive to the changing intellectual climate in the Catholic Church in the early 1960s. He commended the encyclical *Mater et Magistra* to his colleagues and cited it extensively in a public address in 1961.¹⁴ He welcomed the liberalising impact of the Second Vatican Council and in a rare public intervention in 1964 emphasised the influence that these discussions were having in Ireland. He criticised the conservatism of the Catholic hierarchy in Ireland:

The Irish Catholic hierarchy is probably the least inclined to change, but the lay leaders among the Catholics, and the public at large, are in advance of their Church in this respect. They would accept new dogma, if decided upon by the Vatican Council, without demurring, I think.

Lemass wanted the Church to adapt and modernise though he claimed that the separation of church and state was a 'cardinal principle' in Ireland, concluding that he would add his own voice to the debate as a private citizen.¹⁵

Lemass was somewhat disingenuous to claim he was a 'private member' of the Church or simply a citizen of the Republic. He was much more than that; he was also taoiseach and leader of the largest political party and a politician who was viewed with some suspicion by the archbishop of Dublin. Nor was Lemass the only politician to be influenced by these changes. Members of the Labour Party, and particularly its leader Brendan Corish, were deeply influenced by these developments, as was Fine Gael's Declan Costello whose 'Just Society' programme bears the hallmark of the council's deliberations.¹⁶ Lemass believed that the Vatican Council's deliberations on tolerance and freedom provided an opportunity to review aspects of the Irish constitution. He wrote to the minister for Justice Brian Lenihan asking 'whether the Vatican Council Decree on Religious Liberty calls for any action by the government' adding:

I have in mind particularly our divorce laws. Do the provisions of the Council Decree oblige or permit us to change this law so as to allow divorce and remarriage for those of our citizens whose religion tolerate it?

While Lemass was cautious he was clearly testing the waters in an area where previous governments had been reluctant to become involved. He further recommended Lenihan to approach members of the hierarchy informally to discover 'their views as to the implications of the Vatican Council Decree in respect of our legislation in this matter and generally'.¹⁷

The Department of Justice sent a letter to Archbishop McQuaid in late November asking 'if consultation at a working level might be established for the

¹² Bryce Evans, *Seán Lemass: democratic dictator* (Cork, 2011), pp. 63, 149-50, 235.

¹³ Archbishop McQuaid to papal nuncio, 14 April 1956 (D.D.A., AB/6/8/XVII/678); Robert Savage, *Seán Lemass* (Dundalk, 1999), pp 62-78

¹⁴ Speech by Seán F. Lemass at Muintir na Tíre rural week, Cavan 15 Aug. 1961 (N.A.I., DT, S. 13384K/61).

¹⁵ *Catholic Herald*, 28 Aug. 1964.

¹⁶ Niamh Puirseil, *The Irish Labour Party 1922-73* (Dublin, 2007), pp 213-14, 230-1; Fine Gael policy document, 'Towards a just society' (Dublin, 1965). I am grateful to Dr Ciara Meehan for a copy of this document and for discussing Declan Costello with me.

¹⁷ Lemass to Lenihan 25 Sept., 16 Nov. 1965 (N.A.I., DT 96/6/364).

purpose of getting authoritative views as to the implications of the Vatican Council Decree in respect of our legislation in this matter and generally'. Archbishop McQuaid was unlikely to be sympathetic to these initiatives. He had returned from the Vatican Council in December 1965 clearly a worried man and he was very critical of liberal readings of the council decrees.¹⁸ In a handwritten note, McQuaid asked where the demand for change was coming from, adding that it was unlikely to be from the other churches. He wondered if the pressure was more political and stemmed from concerns over Northern Ireland: Lemass had made an historic visit there in January 1965. The issue of divorce was quickly dismissed on the grounds that 'divorce is not a religious belief. Religious liberty ... not in any way curtailed i.e. liberty to practise their religion'.¹⁹ Lenihan met the Rev Dr Gerard Sheehy, the chancellor of the Dublin archdiocese, shortly after this, who confirmed that he had discussed the matter with 'others'; Lenihan took this to mean Archbishop McQuaid. There would, Sheehy informed the minister, be 'violent opposition' to any change in the divorce situation in the Irish Republic. Sheehy claimed that the issue of religious freedom did not come into the question of divorce. He also told Lenihan that a meeting with McQuaid would 'not achieve anything'. Lenihan reported this to Lemass, adding that 'in view of above there would not appear to be much point in pushing the matter any further'.²⁰

Despite this rebuff, Lemass returned to the question of constitutional change just a month later. In an address to a Fianna Fáil cumann in Limerick, he told them he wanted to reflect on the constitution rather than discuss controversial political matters during the anniversary celebrations for the 1916 Rising. Yet his intentions were more radical than his careful and technical speech suggested. Lemass acknowledged that there was little criticism and no demand for a review of the constitution. He maintained that 'this position will continue only if we take the precaution of looking at it every now and again to consider whether any improvement is possible or desirable'. Recognising this, Lemass phrased his suggestion in conciliatory terms: '[t]he manner in which these principles were expressed and the procedures by which it was decided to apply them may not, however, be as suitable to our present circumstances as they were when they were adopted thirty years ago.' More specifically he argued that the constitution should be reviewed every twenty-five years or so, suggesting 'it is now that this precedent could be set up'. Lemass's speech is cautious: he does not mention issues of church and state but stresses the challenges posed by E.E.C. membership and economic development. He does register unease in respect of the Supreme Court: 'in a few instances the Supreme Court has interpreted some provisions in a way that its drafters had not expected or intended'. These misgivings were set aside as 'in no such case yet has any very serious problem of public interest been created'. Finally, he asked if the constitution 'could now be modified in the light of our own experience or that of other countries in the intervening years'.²¹

¹⁸ Cited in F. X. Carty, *Hold firm*, (Dublin, 2007), p. 95.

¹⁹ Handwritten note dated 14 Feb. 1966, emphasis in the original (D.D.A., McQuaid papers, AB8/B government box 3).

²⁰ Lenihan to Lemass, 17 Feb. 1966, reporting on his meeting with Sheehy (N.A.I., DT 96/6/364).

²¹ Speech by Seán F. Lemass to Fianna Fáil annual dinner, Limerick, 25 March 1966 (N.A.I., Office of the Attorney General, 2002/15/024).

Lemass's ambitious plans for the constitution were disguised by his caution and his judicious use of language. In August, after consultation with party leaders, he established the all-party Informal Committee on the Constitution with an extensive remit. In addition, he requested the attorney general to set up a legal committee to examine the constitution 'in conjunction but separately' from the all-party group.²² As a consequence there were three distinct groups in place by late 1966 with a remit to examine the constitution. The all-party committee was the most active and the one tasked with examining broader political and policy issues. Lemass intended that the committee would be composed of younger members of the Oireachtas and indeed the majority of Fianna Fáil members were relatively young. However, Fine Gael and Labour appointed senior members of their parties, indicating their serious intentions but perhaps also some disquiet in respect of Lemass's intentions. The committee was chaired by George Colley who was then minister for Industry and Commerce, and a majority of members had legal qualifications and expertise.²³ In a move that suggests that Lemass was not entirely happy with the committee's operation he was appointed to it by his successor as taoiseach, Jack Lynch, when he retired in November 1966. In the cabinet reshuffle that followed Lemass's resignation Don Davern was promoted to parliamentary secretary for Agriculture and Fisheries.²⁴ It is likely that Davern was promoted to make way for Lemass's appointment, though there is no direct evidence for this suggestion.²⁵

II

The first meeting of the 'Informal Committee on the Constitution' took place on 12 September 1966. In all there were seventeen meetings between then and 14 December 1967, when the report was agreed and published. The members maintained a strong commitment to cooperation on a non-partisan basis, despite obvious disagreement among them. The decision was taken at the first meeting to keep the proceedings secret, but individual members could, if necessary, take up particular points with their party leaders. It was also agreed that 'verbatim reports will not be made. The decisions reached at each meeting will be recorded and circulated as soon as possible'. Moreover, the committee decided to proceed by preparing a list 'of suggested topics for discussion'. This would be a composite list, 'giving no indication as to the political source of the various items'.²⁶ At a meeting in early January 1967, the committee addressed a

²² 'Report of the attorney general's committee on the constitution', Aug. 1968 (N.A.I., DT 2005/151/307). The attorney general invited a representative section of the legal profession to participate in this group.

²³ I am grateful to Eunan O'Halpin for bringing the legal background of the committee members to my attention.

²⁴ Minutes of Informal Committee on the Constitution (hereafter 'Minutes'), third meeting, 14 Dec. 1966 (N.L.I., Ryan papers MS 6267, box 3); I am grateful to Alan Power who directed me to this important source of information on the committee.

²⁵ I acknowledge that this is speculative but Davern was the only back-bench T.D. promoted in this minor reshuffle.

²⁶ Minutes of first meeting, 12 Sept. 1966. The committee was also supplied with a series of background papers on key issues and some sections of these were subsequently

complaint that the minutes from the previous meeting gave the impression that there had been unanimous agreement on the discussion of representation in rural Ireland:

For the purpose of removing any doubts, the Committee decided that it should now be noted in the present minutes that conclusions referred to in the records of the preliminary examination which it is now carrying out, are not to be regarded as binding on any member. They are, rather, to be taken as representative of views expressed, and as being of a tentative nature pending final agreement.

This view represented a continuing consensus on the all-party nature of the discussions and a commitment to openness on what was likely to be a controversial review. The consensual nature of the committee was reiterated at the seventh meeting when it was decided not to discuss controversial matters in the absence of most Fine Gael members on the grounds that this party's input would be essential to agreement.²⁷

During the first five meetings the committee interrogated and assessed each article in considerable detail and identified a number of major issues requiring attention. Issues considered to be too technical for the committee were forwarded to the attorney general.²⁸ After this review, it was agreed that 'the committee should now attempt to reach final decisions on the various matters raised in the composite list'. The intention was to clarify areas of substance that required further attention and avoid more detailed technical discussions. The aim would be 'to express its views on matters of substance which are likely to be of significance for at least a generation'.²⁹

As discussion progressed, the committee turned to more controversial matters. There was considerable discussion on articles 2, 3, 5 and 9 and their implications for the nature of the Irish state and its claim to Northern Ireland. In a surprising and potentially controversial move the committee agreed unanimously that article 3 should be revised to take account of unionist sensitivities while continuing to maintain the aim of achieving a united Ireland. The intention 'was to face the reality of the situation which has existed for a considerable time and also to remove one of the causes of friction in north/south relations'. Even more remarkably the committee accepted a new version of article 3 drafted by John Kelly and placed before it by Fine Gael's Gerard Sweetman. This provides further evidence for the continuing commitment of the three parties to the consensual and all-party nature of the enterprise.³⁰

incorporated into an original draft report. In the following discussion I will refer to the draft papers by number and title and to the 'draft report' to distinguish this from the final and shorter report which was published.

²⁷ Minutes of fourth meeting, 20 Jan. 1967; minutes of seventh meeting, 18 Apr. 1967.

²⁸ Minutes of second meeting, 12 Oct. 1966; minutes of third meeting, 14 Dec. 1966; minutes of fourth meeting, 20 Jan. 1967; minutes of fifth meeting, 27 Jan. 1967. The attorney general was invited to attend committee meetings and he did so on a number of occasions.

²⁹ Minutes of sixth meeting, 29 Mar. 1967.

³⁰ 'This formulation, if I may record it, was drafted by myself; I passed it to Gerard Sweetman, who got the Committee to accept it': John Kelly, 'The constitution: law and manifesto' in *Administration* xxxv, no. 4 (1987), pp 208–17, at p. 217, note 3.

Article 2 was not revised, but article 3 was reformulated in two sub-clauses.³¹ A new article 3.1 would read:

The Irish nation hereby proclaims its firm will that its territory be re-united in harmony and brotherly affection between all Irishmen.

While article 3.2 read:

The laws enacted by the Parliament established by this Constitution shall, until the achievement of the nation's unity shall otherwise require, have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect.

There is a subtle and important shift in emphasis in this recommendation, and it was unanimously agreed in the *Report*.³² The original articles challenged the United Kingdom's sovereignty over Northern Ireland, whereas the reformulation focused on the need to achieve consensus among those who live on the island. National unity was now to be expressed 'in terms which would be regarded as less offensive in the North'. This could be achieved by 'referring to intention and will rather than desire'. The committee was also conscious that such a recommendation could have 'undesirable repercussions', recognising the controversial move being taken.³³

The committee agreed that the Irish language version of the constitution should remain the fundamental text and that article 5 should be reformulated to give expression formally to the Irish state as a democratic republic. Some concern was expressed that article 9.1.3, which held that no person could be excluded from nationality and citizenship because of sex, could be interpreted in such a way that individuals could be discriminated against on other grounds (race, religion or ethnicity for example). After consideration it was agreed that 'discrimination of any kind should not be entertained, but on the other hand the danger of misapprehension arising if the existing provision is merely deleted are not to be under-estimated'.³⁴

III

The recommendation to amend article 3 was potentially controversial but was not divisive in the committee. What was controversial and divisive were the discussions on the electoral system, the presidency and rural representation. The committee acknowledged that it could not revisit the issue of proportional

³¹ The original Article 3 read, 'Pending the re-integration of the national territory, and without prejudice to the right of the parliament and government established by this constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect.'

³² Informal Committee on the Constitution, *Report of the committee on the constitution* (Dublin, 1967), pp 5–6.

³³ Minutes of sixth meeting, 29 Mar. 1967; appendix I to this meeting contains Kelly's re-draft. In its original form Kelly redrafted article 2 and added the section that became 3.1 in the committee's reformulation. As a consequence Kelly's article 3 became article 3.2. It is worth comparing this suggestion with the amendment endorsed in the May 1998 referendum on articles 2 and 3.

³⁴ Minutes of sixth meeting, 29 Mar. 1967.

representation directly as, ‘it would hardly be desirable to put a similar proposal before the people again in such a short space of time’. This did not prevent detailed discussion on other methods to change the electoral system. A number of background papers were circulated providing information on electoral systems around the world. The working assumption in the committee was that a suitable electoral system should provide the government with a working majority and the rights of the electorate took secondary position in this context. The alternative vote (A.V.) found favour with a majority of the committee but it was recognised that there would be opposition to change within all the parties. Nevertheless, change was promoted on the grounds ‘that the effort should be made as the introduction of the alternative vote would help to create a better political environment for parliamentary representatives and the public at large’.³⁵ There was considerable acrimony in respect of proposals to vary the number of voters required to elect a T.D. in a rural constituency. Fianna Fáil’s Electoral (Amendment) Bill, 1959 had been declared unconstitutional in the High Court in 1961. This legislation would have permitted a lower ratio of voters to T.D.s in rural areas and in effect discriminated against urban Ireland.³⁶ The division on this occasion was between Fianna Fáil and all the other parties. Those promoting change suggested that using population as the basis for representation was inadequate and other factors needed to be taken into account. It was further argued that the impact of demographic change on rural areas needed to be countered and that the traditional electoral balance between urban and rural Ireland should be maintained. Rural representation, it was urged, should be maintained at an ‘adequate’ level though it is never clarified what this might mean in practical terms. The fear was expressed that a shift in the weight of political representation from rural to urban Ireland would ‘unbalance’ the system and that this was not something that the majority would want. It is surprising that Lemass should be associated with such a scheme as he is traditionally characterised as an urban politician with little understanding or sympathy for rural Ireland. However, the politics of Fianna Fáil and its political supremacy may be the important factor in these considerations and Lemass had to deflect criticism from rural colleagues that he was paying too much attention to industrialisation and urban issues.³⁷ These arguments were conservative and defensive, if not also self-serving. The counter-argument emphasised the constitutional right of one man, one vote and emphasised the need to recognise that socio-economic change might be regrettable but it could not be restricted in the way suggested. Agreement could not be reached and both sides of the argument were subsequently presented in the *Report*.³⁸

Lemass’s influence is also evident when the committee discussed the presidency. He had publicly indicated his preference for the president to be elected by an electoral college comprising members of the Seanad and the Dáil.³⁹

³⁵ ‘Paper no. 1: PR systems’; ‘Paper no. 2: election methods for single member constituencies’; minutes of tenth meeting, 19 July 1967. The *Report* acknowledged these differences by presenting both sides of the argument, pp 21–6.

³⁶ *O’Donovan v. the Attorney General* [1961] I.R. 114.

³⁷ Gary Murphy, *In search of the promised land* (Cork, 2009), pp 208–35.

³⁸ Minutes of ninth meeting, 16 May 1967; *Report*, pp 1–21.

³⁹ *Irish Times*, 12 July 1966.

The issue was pushed further during the committee's deliberations and the abolition of the post itself was seriously considered and included in the final report. Fears were expressed that a president with a popular mandate could on occasion challenge the legitimacy of the government. While these fears may appear farfetched, the matter was discussed in great detail, suggesting that changes were being actively promoted by some members. The committee agreed that nominating candidates for the presidency should be the monopoly of the political parties. There was however a recognition that 'serious misunderstandings' might result if the post was abolished, as popular election was well established in the public mind. It was objected that opposition to this recommendation could lead to general opposition to other changes as a result of public suspicion. Despite some caution, it was 'ultimately agreed' that the majority position was that the office of the president should be retained and that an electoral college should be established to replace direct election of the president. It is likely that this was Lemass's position and that of the Fianna Fáil members, but it is specifically noted that not all members of the committee were in agreement with this and the case for and against change would be included in the draft report.⁴⁰

Lemass's influence can be detected in a number of other recommendations. It was suggested that the Seanad should be abolished on the grounds that it 'does not serve a useful purpose', but opinion within the committee supported its retention. Another proposal was that the president's prerogative to refer legislation to the Supreme Court should be removed but again this did not receive significant support.⁴¹ These changes reflect Lemass's impatience with constraints that various institutions and groups placed in the way of government and economic development. What also emerges from these discussions is sensitivity to parliamentary sovereignty, the status of Dáil Éireann and the privileges that these accord. The committee agreed that 'improper press comment', needed to be addressed and recommended that consideration be given to prosecution in such cases.⁴² This drew the ire of journalist John Healy who pointed out when the report was published that such comment was practically unknown in Ireland.⁴³ The committee was also cautious on the matter of reducing the voting age to eighteen, though it did concede that there was 'no good reason why they could not also be trusted to behave responsibly at the polls'. Scepticism prevailed and it was feared that if the voting age was reduced there might be pressure to reduce it to sixteen, and 'no one could be sure where the line ought to be drawn'. One suggestion was that the vote could be extended to those between the ages of eighteen and twenty-one who were married but no general change would take place. More intriguingly, the point was made that 'countries which granted the right to vote at 18 are not of a kind on which we would wish to model ourselves'.

⁴⁰ Minutes of eighth meeting, 2 May 1967; minutes of sixth meeting, 29 Mar. 1967; minutes of eighth meeting, 2 May 1967; *Report*, pp 8–12 for summary of both positions which broadly reflects the discussion in the minutes.

⁴¹ Minutes of eleventh meeting, 12 Oct. 1967; 'Paper No. 8: proposals for a new form of Seanad'.

⁴² Minutes of ninth meeting, 16 May 1967. The published report did not pursue this particular position but it did recommend that the judicial process should be used where these matters were concerned: *Report*, pp 14–16.

⁴³ 'Backbencher' column in *Irish Times*, 30 Dec. 1967.

The committee seemed reluctant to engage with the question of the rights involved and decided to provide alternatives in the *Report*.⁴⁴

IV

When finalising its report the committee agreed that a distinction should be drawn between issues on which there was consensus and those where there was not:

As regards those matters on which the committee were unanimous, it was agreed that this could be indicated in the report. On matters where the committee were unable to agree, the report should set out the proposition considered and then go on to refer, under appropriate headings, to the arguments which had been adduced for and against.⁴⁵

This position was reinforced at a subsequent meeting when it was emphasised that the committee had made no recommendation in respect of the electoral system and this view could be presented to the individual political parties.⁴⁶ There is an implication that the committee anticipated specific policy action in respect of unanimous recommendations on the part of the government once the report was published. The suggested change to article 3 falls into that category as do two other sensitive areas: divorce and the special position of the Catholic Church. If account is taken of Lemass's initiative in 1965 and its failure, it is surprising that the divorce issue re-appeared in such a stark form in the committee's considerations less than two years after Archbishop McQuaid's rejection of change. Michael O'Kennedy recalled thirty years later that Lemass 'drove the deliberations of the committee', suggesting also that the position on divorce was Lemass's.⁴⁷ When the committee discussed article 41, 'Reference was made in this connection to the inequity of depriving by law certain denominations of divorce rights to which their religious rules would entitle them'. Two further points in favour of change were advanced. The first was that the prohibition on divorce was employed by those opposed to a united Ireland to challenge nationalist claims. The second emphasised recent developments in the Catholic Church, suggesting that attitudes 'might not be as rigid as ... formerly'. It was decided at an early point in the consideration of this article that 'discreet enquiries' would be made to ascertain Catholic opinion on the matter.⁴⁸ The views on this issue contained in the minutes are very similar to those expressed by Lemass in his correspondence with Brian Lenihan in 1965 and it would be remarkable if his input was not decisive. It also qualifies the claim made by the secretary of the committee J. C. Holloway, who told John Horgan that he 'created' the section on divorce. Holloway may well have drafted the wording, but Lemass's direct influence can be seen when it is compared with the earlier

⁴⁴ The argument for and against votes at eighteen can be traced in the *Report*, pp 15–17.

⁴⁵ Minutes of thirteenth meeting, 29 Nov. 1967.

⁴⁶ Minutes of sixteenth meeting, 12 Dec. 1967.

⁴⁷ John Horgan interview with Michael O'Kennedy, 22 June 1996 (original in possession of John Horgan).

⁴⁸ Minutes of fifth meeting, 27 Jan. 1967. A number of members were absent from this initial discussion, but all were in attendance at the next meeting when the minutes were agreed without division.

correspondence.⁴⁹ Holloway is the likely author of the background papers provided to the committee and in this context the one on marriage is of particular interest as it is a comprehensive expansion of the key ideas originally outlined to Lenihan by Lemass.⁵⁰

The suggested reformulation of the article read:

In the case of a person who was married in accordance with the rites of a religion, no law shall be enacted providing for the grant of a dissolution of that marriage on grounds other than those acceptable to that religion.

This wording, it was claimed ‘would not give offence to any of the religions professed by the citizens of this country’, a significant claim in light of Archbishop McQuaid’s misgivings. The Catholic Church, it was accepted, remained opposed to divorce, but the paper developed the view that Vatican II provided a space where alternative solutions to moral problems could be developed. Also, pluralistic approaches to religious questions were now more acceptable as a consequence of Vatican II. The working assumption was that the reasoning behind article 41.3.2 rested on the proposition that the overwhelming Catholic majority in the state justified prohibiting divorce and that no allowance would be made for non-Catholics because it was feared that individuals in marriage difficulties might change religion.⁵¹ This was no longer considered satisfactory, as it failed to take account of the fact that the constitution had been devised for a thirty-two county state, where Catholics would no longer be in an overwhelming majority. The committee wrestled with conflicting influences, including the new theology of Vatican II, a commitment to republican values and a belief in liberal solutions and a continuing acceptance of the denominational character of much of Irish life. This conflict was never reconciled and one consequence was that the committee agreed that individuals should be prevented from changing religion to obtain a divorce. How this would be achieved was never made clear in the documentation but the overall intention was to liberalise the position on divorce. Once this decision was taken, it was then suggested that a further clause might be necessary to prevent religious discrimination. The report itself went even further, hinting that further change might be possible, ‘While it would not deal specifically with marriages not carried out in accordance with the rites of a religion, it would not preclude the making of rules relating to such cases’.⁵²

The intention was to respect and tolerate differences within the Irish state and to provide a means for those who were not members of the majority faith or indeed of any religion to follow a moral path in keeping with their specific values. The proposed amendment would ‘not suffer from the rigidities of the present provision, it would answer the religious and political criticisms which have been raised, and would be more in keeping with present tendencies to promote greater harmony between different denominations’.⁵³ Tellingly, the

⁴⁹ John Horgan interview with J. C. Holloway, 2 July 1995 (original in possession of John Horgan).

⁵⁰ ‘Paper no. 23: provisions relating to marriage’.

⁵¹ Paper no. 21, paragraph 1 and draft report, paragraph 214. This article constitutionalised the existing legal situation in the Irish Free State. I owe this observation to Michael Gallagher.

⁵² Paper no. 23; *Report*, p. 44.

⁵³ Paper no. 23, p. 2.

committee decided not to include a suggestion that any change be postponed until a united Ireland was achieved. It acknowledged that to do so would deprive people in the state of such a facility, even though the Church of Ireland was opposed to divorce in general.⁵⁴

The committee looked to the Vatican Council for support, but no direct support for a change in the Catholic Church's position on divorce could be found. Nevertheless, the committee was confident that 'the whole tenor of the Council Documents', especially the Declaration on Religious Freedom, established a new relationship between church and state and also in respect of non-Catholic churches. It asserts that, 'the Church would not now seek to impose its will in a matter of this kind in a manner prejudicially affecting persons who are not Catholics'. The conclusion drawn is that the Church 'would ... wish all laws, including those relating to marriage, to be settled in accordance with the normal democratic process'. It was also urged that the 'limited law' under discussion, could not be offensive to the Catholic Church after the discussions at Vatican II because the changes did not apply to Catholics. There was agreement that the prohibition on divorce in the constitution was not only coercive, it 'amounts to the imposition by law of Catholic principles on persons who are members of other religions and it appears therefore, to be at variance with the requirements of religious liberty as declared by the Vatican Council'. The view was advanced 'that there could be no objection from any quarter to an amendment of the constitution' along the lines indicated and that 'No dissension is likely to be caused if the recommendations are put forward unanimously'. A note of caution is added, 'particularly if they are associated with the proviso that no change should be made except with the approval of the various churches'. The committee however did not include this latter sub-clause in its initial draft or in the published version of the report.⁵⁵

Despite the controversial nature of these recommendations, the committee agreed unanimously that the article on divorce and remarriage should be amended along the lines recommended. The importance of this was not lost on the committee which recorded that 'This would mean that it would be possible to have a law permitting dissolution of marriage where such dissolution was acceptable under the religion in which the parties were married'.⁵⁶ This evidence seriously questions Michael O'Kennedy's retrospective claim that 'The recommendation on divorce was dreadful – I opposed it. But probably Seán Lemass went for it on the grounds that any change was better than no change, even though the one actually proposed was full of difficulties and problems.' There is no evidence in the minutes or in other materials originating in the committee that O'Kennedy took this position. He agreed the minutes of the various discussions that took place on this matter and did not take the opportunity to have an alternative position presented in the report. In contrast to discussions on the electoral system, the presidency and voting age, no dissent is apparent on this change and this unanimity is reflected in the report.⁵⁷

⁵⁴ Minutes of fifth meeting, 27 Jan. 1967; minutes of twelfth meeting, 15 Nov. 1967.

⁵⁵ Paper no. 23, paragraph 21, p. 13; draft report, paragraphs 218–19; *Report*, pp. 43–6.

⁵⁶ Minutes of twelfth meeting, 15 Nov. 1967.

⁵⁷ *Report*, p. 44; John Horgan interview with Michael Kennedy, 22 June 1996 (original in possession of John Horgan).

The Vatican Council's emphasis on freedom, tolerance and pluralism in its published documents was welcomed by the members.⁵⁸ This influence is particularly strong when article 44.1, which recognised the 'special position of the Catholic Church', was discussed. The committee adopted the view that the article simply reflected the statistical fact that the Catholic Church was the church of the majority of citizens in the state and had no judicial effect.⁵⁹ The committee cited and adopted liberal views on this issue, rejecting those associated with a pre-Vatican II position, arguing that 'there was no preference for any particular religion' due to other articles in the constitution on discrimination. Considerable attention is paid to the Vatican Council, whose decisions 'have a profound bearing on this subject'.⁶⁰ The involvement by Jesuit John Courtney Murray in preparing the Declaration on Religious Freedom was highlighted and it was noted that Murray's writings on religious liberty 'were at one time censored by the Vatican'. Nor were these concepts seen as abstract; rather the committee believed that they applied to the Irish situation:

It is clearly to be inferred from these documents, and the comments made on them by competent persons, that the Catholic Church does not seek any special recognition or privilege as compared with other religions and that her primary interest is to see that all citizens enjoy equal freedom in the practice of their religion whatever it may be.

This is followed by an unanimous recommendation that the article be deleted, as this would 'dispel any doubts and suspicions which may linger in the minds of non-Catholics, north and south of the border, and remove an unnecessary source of mischievous and specious criticism'.⁶¹

V

After fifteen months of intensive work, the *Report* was published on 22 December 1967, though the government had received a copy about a week earlier.⁶² It generated considerable public comment and debate. John Kelly was commissioned to write nine articles for the *Irish Times* providing an incisive if conservative assessment of the *Report*. There was also extensive correspondence in the newspapers and a number of public meetings were organised to discuss the implications of some of the more controversial recommendations.⁶³ However, the *Report* was effectively stillborn, as the government in a pre-emptive action announced it would hold a referendum to abolish P.R. and another to amend

⁵⁸ 'Paper no. 28 article 28 emergency powers'. Eoin Ryan frequently underlined liberal views expressed in the Vatican documents.

⁵⁹ However, a reading of the Oireachtas reports on this issue in 1937 does not unequivocally support this stance: *Dáil Éireann deb.*, lxxvii, 1890-93 (4 June 1937).

⁶⁰ 'Paper no. 25 recognition of religions'; draft report paragraphs 226-45.

⁶¹ Minutes of twelfth meeting, 15 Nov. 1967; paper no. 25 for discussion and background detail; *Report*, pp 47-8.

⁶² *Irish Press*, 23 Dec. 1967; *Irish Times*, 15 and 23 Dec. 1967.

⁶³ *Irish Times*, 26 Jan. 1968 for report of meeting of Medico Legal Society; *Irish Times*, 31 Jan. 1968, report of meeting of Forum Discussion Group. All the newspapers carried extensive coverage of the report and included letters from the public on various aspects of it throughout January 1968.

article 16.2.3 which provided that the ratio of T.D.s to population in each constituency ‘shall, so far as it is practicable, be the same throughout the country’. The object of this amendment was to maintain the existing number of T.D.s in rural constituencies despite population decline. Under the existing provisions, a revision of the constituencies was likely due to this decline and the government feared that this would disadvantage rural Ireland. This has been described by one source as a ‘bad decision’ on Jack Lynch’s part, but this is hardly an adequate explanation for a complex and controversial decision on the government’s part. Moreover, it is also likely that government sources briefed journalist John Healy who produced highly critical and dismissive accounts of the committee’s work at an early stage.⁶⁴ The committee had made no recommendation on either matter but they were definitely the issues that had divided the committee along party lines. Lynch’s initiative is more appropriately seen as a partisan political act to gain short term advantage and to undermine the consensus evident in the committee and the *Report*. It also represented a humiliating dismissal of Lemass and his commitment to constitutional change. The government’s intention was most likely to undermine the consensus achieved in the committee and to prevent any serious discussion about change. Thus, the prospect of changes to articles 2 and 3, the deletion of article 44 and possible reform of the divorce prohibition quickly disappeared as the constitution became the focus of partisan and party political mobilisation around the P.R. issue during the first half of 1968.

Notwithstanding these developments, changing the constitution would have faced considerable opposition. Leading members of the Catholic Church quickly voiced opposition to any change to the prohibition on divorce and there were serious misgivings within Fianna Fáil in respect of changing the existing claim to Northern Ireland.⁶⁵ There is some evidence that Lemass wanted to reconvene the committee and George Colley told Labour’s Sean Dunne in February 1968 that he intended to do so in the near future. The acrimony generated by the P.R. referendum undermined any such prospect. Most tellingly, not long after, Colley effectively and publicly disowned the committee and its report.⁶⁶

Despite this, the *Report* does have an important afterlife. When Jack Lynch reluctantly agreed to establish the All-Party Committee on the Implications of Irish Unity in 1972, the 1967 *Report* was circulated to all members for consultation.⁶⁷ This committee held thirteen meetings during the year and, though it did not produce a formal report, it forwarded a ‘résumé’ of its views to the taoiseach in December. The résumé is somewhat more cautious than the 1967 *Report* on the issue of divorce, but there are strong similarities between the two

⁶⁴ Dermot Keogh, *Jack Lynch* (Dublin, 2008), p. 153. The *Irish Press* and *Irish Times* carried reports on 15 Dec. 1967 that the government was going to move on the P.R. issue, and Healy wrote a scathing article on the committee in the *Irish Times*, 16 Dec. 1967.

⁶⁵ *Irish Times*, 15 Dec. 1967 for statement by Cardinal Conway; *Irish Times*, 21 Dec. 1967 for statement by Dr Cahal Daly, bishop of Ardagh and Clonmacnois; Dick Walsh, *The party: inside Fianna Fáil* (Dublin, 1986).

⁶⁶ *Irish Press*, 17 Feb. 1968; John Horgan interview with J. C. Holloway, 2 July 1995 (original in possession of John Horgan); interview with George Colley in *Leargas* March/April 1968 (N.A.I., DT 96/6/364).

⁶⁷ Statement by taoiseach, 4 May 1972; minutes of first meeting, 24 May 1972 (N.A.I., DT 2003/16/533).

documents on many key issues.⁶⁸ By the end of 1972 when the all-party committee had effectively ended its considerations the constitution had become the focus of public debate. The violence in Northern Ireland prompted some in the South to reconsider the nature of its claim to the North and the 'Catholic' content of the constitution was called into question. Liam Cosgrave, the leader of Fine Gael, called the constitution a 'barrier to unity' and Labour's Conor Cruise O'Brien asked 'does Fianna Fáil really want unity'. While Senator John Horgan called for 'a decent, secular constitution', the minister for Justice Desmond O'Malley provided a robust defence of the constitution on the grounds that radical change was not required.⁶⁹ The tánaiste Erskine Childers suggested that change might wait until unity was agreed while recognising that the demand for change had its origins in the violence in Northern Ireland.⁷⁰

The taoiseach agreed that the conflict in Northern Ireland required a new constitution, but he consistently placed any change in the context of a future agreement on unification.⁷¹ Despite this and other positive statements about change, Lynch and his government resisted any proposals for amending the constitution. However by 1972 other pressures had built up for change. The Labour Party was committed to a radical overhaul of the constitution, while Fine Gael was also in favour of some changes. The Commission on the Status of Women issued an influential report in 1972 and among its many recommendations a number were concerned with the constitution.⁷² The Irish Theological Association circulated a report in May 1972, which recommended significant changes, while around the same time, John Kelly, who had previously been cautious on these matters, now advocated reform.⁷³

This pressure had very little impact on Lynch or his government. Although he had publicly suggested in 1969 that article 44 might be amended, as late as October 1972 he rejected calls in the Dáil for a referendum on this topic. This despite the fact that there had been a major amendment to the constitution in May 1972 and another was proposed for November. Lynch's public argument in the past was that article 44 should await the electorate's decision on membership of the E.E.C., but his continuing reluctance to support an amendment suggests that he remained fearful of change. The referendum on E.E.C. membership was largely outside his control as the attorney general's committee on the E.E.C. had concluded in 1967 that membership was incompatible with the constitutional articles on sovereignty. This position was reiterated in 1971 when the membership negotiations had been successfully

⁶⁸ Michael O'Kennedy to taoiseach, 11 Dec. 1972 with copy of 'resumé' (N.A.I., DT 2003/16/533).

⁶⁹ *Irish Times*, 6 Dec. 1971; *Irish Independent*, 7 Dec. 1971; *Irish Times*, 2 Mar. 1971; D. O'Malley's address to the Solicitors Apprentices' Debating Society, 25 Feb. 1972 (N.A.I., DT 2005/151/207).

⁷⁰ *Irish Press*, 27 Nov. 1971; undated comment by Childers (N.A.I., DT 2002/8/358).

⁷¹ Lynch interview with B.B.C., 6 Dec. 1972 where he agreed that 'we really need a new constitution' (N.A.I., DT 2003/16/533).

⁷² Commission on the Status of Women, *Report* (Dublin, 1972).

⁷³ Irish Theological Association to taoiseach, 24 May 1972 enclosing the report (N.A.I., DT 2005/151/207); *Irish Press*, 20 May 1972. Members of the working party included Seán MacBride, Mary Robinson and Enda McDonagh.

concluded.⁷⁴ Additionally, in February 1971 the government agreed to sponsor a referendum to reduce the voting age to eighteen, which received all-party support.⁷⁵ Under pressure from the opposition and in response to the conflict in Northern Ireland, the government finally agreed to support an additional referendum to delete article 44. The two referendums took place on 7 December 1972.

Consequently, when Ireland joined the E.E.C. on the 1 January 1973, the 1937 constitution had been amended by referendum on three occasions. The vote on E.E.C. membership was the most significant as it diluted de Valera's emphasis on national sovereignty. The vote on article 44 reflected concerns about Northern Ireland as much as any wish to radically change the constitution. The vote on reducing the voting age placed Ireland in line with developments elsewhere in Europe. By 1973 the constitution had also become the focus of intense debate in respect of Northern Ireland, the relationship between church and state and the role of women in society. It is unlikely that Lemass could have anticipated the deep divisions that would appear in Irish politics on these issues over the next twenty years. He was well ahead of his time and most of his party colleagues in recognising the need to amend the constitution to meet the challenge of change and modernisation. However, his decision in 1966 to establish the committee and its subsequent *Report* provided the first serious review of the constitution. It also provided the stimulus for further debate and controversy over the following decade.⁷⁶

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⁷⁴ 'First Report of the Attorney General's Committee on E.E.C. Problems', 26 Oct. 1967; John Hurley, secretary to the committee, to the taoiseach, 7 July 1971 (N.A.I., DT 2002/8/282).

⁷⁵ Department of local government, 'Amendment of the Constitution Bill, 1971 – reduction of the voting age', 10 Oct. 1971 (N.A.I., DT 2002/8/282).

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