

NATIONAL ARCHIVES

IRELAND



Reference Code:	2012/59/1597
Creation Date(s):	January-December 1981
Extent and medium:	10 pages
Creator(s):	Department of Foreign Affairs
Access Conditions:	Open
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ROINN AN TAOISIGH

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To:

From: Constitutional Review

1. The following is a brief background note on the Constitutional Review.

2. Purpose of Review.

Speaking to members of the Irish-American Lawyers Association in Dublin on 23rd September, 1981, the Attorney General said "It is now appropriate that the Constitution be reviewed in certain respects. In this context the fundamental requirements of the Constitution must be to protect the rights of the individual in the context of diverse beliefs; it must promote a truly pluralist society; it must take cognizance in addition of the rights and sensibilities of the majority of those resident in Northern Ireland and must express in intangible and positive terms the desire for reconciliation and peace on this island". In the debate which he initiated on 27th September, 1981 the Taoiseach elaborated on this theme of the need for a Constitution appropriate to all-Ireland pluralist society. In explaining its necessity, he emphasised that he was addressing not just the people of Northern Ireland but those of the South as well. As far as the North was concerned, constitutional change was necessary in order to reduce the pressures underlying the siege mentality among Unionists, thereby opening up the possibility of easier dialogue between them and the Nationalists in Northern Ireland, and with respect to some Unionists, whose numbers would grow in time, it would remove an obstacle to the contemplation of a new relationship with this State. With regard to the South, change was necessary, both from the point of view of eradicating the increasing signs of partitionist isolationism, which threatened to undermine the sense of our responsibility towards the people of Northern Ireland; and removing certain clauses which obstruct legislation in the public good e.g. measures to prevent property speculation.

3. Reaction to initiation of crusade.

In his recent interview to the Sunday Independent (copy of extract attached), the Taoiseach gave a detailed assessment in this connection.

ROINN AN TAOISIGH

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4. Progress to Date

On 20th October, the Government requested the Attorney General to undertake a review of the Constitution in the spirit outlined in paragraph 2 above with a view to identifying problem areas in the Constitution and possible solutions to them. Such solutions, as the Taoiseach indicated in replying to a P.Q. on 20th October (copy attached), ranged from amending the Constitution in certain respects to drawing up a new Constitution. [The Taoiseach privately declared himself to be in favour of the latter option at a meeting with the SDLP which was held on 7th October, 1981.] Subsequently, a Legal Advisory Committee was established to assist the Attorney General in his task. This Committee held its first meeting on 1st December, 1981 and a copy of the report of that meeting is attached. It should be borne in mind that, whereas at the meeting the Attorney General suggested that the issue of divorce should be left out of the review, since it was envisaged at that time that it would be considered by an all-Party Committee of the Oireachtas, it has since emerged that agreement has not been forthcoming in this matter.

5. Anticipated Progress

In replying to the P.Q. referred to at paragraph 3 above, the Taoiseach stressed the difficulty of determining in advance the time-scale of a review of this nature, but indicated that a minimum period of 6 months would be necessary. In the course of the first meeting of the Legal Advisory Committee, however, the Attorney General expressed the hope that the review would be completed within 12 months. Once the review is completed, of course, it will be for the Government to decide the timing of further action.

S.H

5th January, 1981.

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Extract from Interview with the Taoiseach Dr. Garret FitzGerald in The Sunday Independent 27th December, 1981.

ON your constitutional crusade, are you happy at the way it is developing? By the manner in which you launched it, you appeared to be dismissing the possibility of consensus on the crusade. Was that your intention?

No, it was not my intention. I tried to set out my position in a considered speech in the Senate in which I pointed out that the proposals to reform the constitution were in line with successive Fianna Fail leaders, and with their commitment.

What I was doing was carrying forward what they had said. The actual initiation of the idea was on radio because it seemed to be the best way to get across to people what the issues were, how important it was to address ourselves to them and my own very strong commitment to constitutional reform.

I felt that in a broadcast I had much more chance of communicating by own degree of commitment and sense of urgency and concern than in an interview, article or speech appearing in cold print. Inevitably, in doing it spontaneously and in ad libbing one does not choose one's words with such care as, for example, I did in my subsequent Senate speech.

But I had to take such a risk in order, I felt, to make sufficient impact on public opinion as to how serious I was about the subject.

I certainly did not intend, or wish, it to be divisive. HOW do you interpret reaction North and South to date to that crusade?

The reaction here has been more favourable and in the North very much more favourable than I had anticipated. The impact has been much greater, and I think it vindicates my judgment in doing it on radio in the first instance, even if that led me to use words I would not have used in a considered speech.

The reaction down here—apart from certain predictable political reaction—has been good. There are many indications within the Fianna Fail party that there are many people who agree with me, though they do not feel it opportune to say so.

And certainly there are many who are very embarrassed by the manner in which the leader of the Opposition has rejected it out of hand. Particularly, as what I am doing is within the tradition of the previous leadership of Fianna Fail right back. As for public opinion itself, one poll carried out showed that where previously 65 p.c. had been against any changes in Articles 2 and 3, this had diminished to 40 p.c.

Some at least of this reduction must be attributed to the fact that by raising this issue and by challenging people to think about it, they did so and did begin to face up to the fact that changes were needed.

To get such a shift in the first instance, I feel, is quite an achievement.

In Northern Ireland the reaction has been extraordinarily favourable—even amongst Unionist politicians like Bill Craig, John Taylor and, more recently, Harold McCusker. And at a non-political level I have had an overwhelming political response.

People have written to me, rung me up, passed on messages to me. And on the minority side also the indications are of very strong support. In another opinion poll that was leaked, but not yet published, and which tested opinions on Southern leadership amongst Catholics and Protestants, that showed an overwhelming majority supportive of me, following that initiative.

WITHIN Northern Ireland do you see any sign that the middle ground essential to any political advance shows any sign of emerging, and are both your constitutional crusade and the Anglo-Irish talks advancing that possibility.

I think the middle ground exists but it lacks political leadership. Every survey of public opinion from 1973 onwards has shown support, or acceptance, of power-sharing by an overwhelming majority on both the Protestant and Catholic side. This has never translated itself into votes at elections.

In Northern Ireland the leadership has been to the extremes and the whole atmosphere there of tension and violence encourages that, so the people in the middle who just want a solution, who want peace, find their voice isn't heard.

When it comes to an election there are not people offering leadership to whom they can turn and who will turn this inchoate force of moderation into something concrete and dynamic.

And that's the great tragedy of Northern Ireland.

I would hope that what we have been doing here on the constitutional initiative would help and encourage that leadership to emerge. And there are some signs of that.

Certainly there are many people in Northern Ireland—mostly outside politics but some inside—who are now much more committed to trying to create a moderate leadership, and that could respond when they see that down here there's a willingness to take initiatives that would be helpful to them.

As far as the Anglo-Irish talks are concerned, although originally intended to reassure Unionists and create a context in which they could more happily talk to us, their presentation after December 1980 had the effect of making the people of Northern Ireland, and the Unionists in particular, believe that they were designed to reach a solution to the problem over their heads.

That presentation turned the talks on their heads and had the effect of making them a negative rather than a positive element in the situation. I've tried to turn them back into a positive element, for example, by insisting that the Joint Studies be published. But it will take some time before the damage done by the wrong presentation of the idea can be put right.

WHAT kind of time scale, then, do you see for the implementation of the Joint Studies? Do you see a slowing down of this process or do you have a time scale for their implementation?

There's no question of a slowing down on either side, and the process of getting the institutional mechanism working will begin in January and the meetings of Ministers will take place from time to time after that in the new forum with the new administrative infrastructure for it. SO what can the general public expect to see in 1982 as a manifestation of this Anglo-Irish relationship?

I think by the end of the year you will have had a fair number of ministerial meetings within the framework of the Anglo-Irish Council. And I would hope for some progress in a number of concrete areas, both economic and also as regards the problems that arise with fugitive offenders. Here perhaps some progress will be made with regard to an All-Ireland court as a solution.

We may also have made some progress with some of the other institutions to be established—such as the advisory council. And, perhaps, though I wouldn't count on this next year, but perhaps as a target to try and get it off the ground next year, the parliamentary council.

Extract from Official Report of Debates

DATE: Tuesday 20 October 1981

Vol. 330 No. 1 Cols. 3-9

Amendment of Constitution

2. Mr. Haughey asked the Taoiseach if he will outline all the proposals for the amendment of the Constitution which will be brought before the Dáil in this session.

The Taoiseach: The Government have requested the Attorney General to undertake a review of the Constitution. It is envisaged that this review will involve consideration, Article by Article, of the provisions of the Constitution as it stands. It will indicate areas where inadequacies in the Constitution are perceived. In such areas options will be presented to the Government as to the approach which might be most desirable. Such options might include necessary amendments to the existing Constitution or indeed the need for an entirely new Constitution. The Attorney General has not been fettered in advance of the commencement of the review as to the approach which he might take to it, but he will be inspired by the concept that our Constitution should as far as possible contain the kind of provisions that the Constitution of a United Ireland might at this stage have contained, had the political division of Ireland not been made, rather than reflecting the impact on our island, and specifically on this part of it, of this division.

In connection with this review, I would like to draw the attention of this House in particular to that part of my speech in the other House in which I drew attention to the position of previous leaders of the

Fianna Fáil Party on this matter. As I pointed out in that speech, both Mr. de Valera and his colleague, Mr. MacEntee, subsequently explained why Mr. de Valera, clearly against his own instincts, had felt constrained for tactical reasons to introduce into the Constitution provisions reflecting the majority ethos in the State at that time. His successor, Mr. Seán Lemass, later described the Constitution as "a strait jacket" adding that changes were necessary in it and that it should be changed every 25 years. In turn, Mr. Lemass's successor, Mr. Jack Lynch, referring to the existing context rather than to any hypothetical bargaining table, said in 1970 and repeated at the Fianna Fáil Ard-Fheis in 1971:

In so far as there are constitutional difficulties which are legitimately seen by people to be infringements of their civil rights, then their views are worthy of intensive examination and we should try to accommodate them in our Constitution and in our laws.

It is in the spirit of the approach and attitude of these previous leaders of the Fianna Fáil Party, a spirit which I and those of us in this side of the House share, that I propose this review and I appeal to the present leader of that party and his colleagues in the national interest to adhere to the open approach of his predecessors to this matter.

Mr. Haughey: Would the Taoiseach reply specifically to my question, which is whether or not there will be any amendments to the Constitution brought before the Dáil in this session?

The Taoiseach: The time scale of this review is something which has not been determined and, in fact, perhaps cannot be precisely determined. In view of the magnitude and importance of the task, it would certainly take a period of six months or thereabouts, at a minimum. That is, I believe, the view of the Attorney General. It will be then a matter for the Government to consider the report of the Attorney General and consider what action should be taken on it. On that time scale, it would seem difficult to

bring provisions for amendment before the Dáil during this session. I am simply speculating as best I can in advance of something about which the time scale is necessarily somewhat in doubt.

Mr. Haughey: The Taoiseach is indulging in a great deal of speculation these days. However, does he recall very specific assurances he gave to members of the Pro-Life Amendment Campaign to introduce, as soon as possible, an amendment to the Constitution, or rather legislation which would enable the Constitution to be amended, to prevent the legalisation of abortion? Does he intend to honour the commitment made by him before and since the election?

The Taoiseach: That matter is under consideration by the Attorney General at present.

Mr. Haughey: I take it that the Taoiseach does not intend that there will be any such legislation in this session.

The Taoiseach: The Attorney General is considering the matter. We will not take any decision on this until we hear from him.

Mr. Haughey: The Taoiseach gave a specific assurance to these people before and subsequent to the election that there would be no delay whatever in the introduction of such an amendment. Is he now renegeing on that assurance?

The Taoiseach: I am not renegeing on any assurance. The question of how such a provision should be formulated is of some complexity and the question of whether it and any other changes in legislation should be undertaken separately or together is something which the Government will have to consider.

Mr. Haughey: The Taoiseach will recall that there was no question in the assurance which he gave to the members of the Pro-Life Amendment Campaign about any other matter. The assurance was specific in regards to this particular change in the Constitution. In view of

that, am I to take it that he will not proceed, as he promised these people, with legislation in this session?

The Taoiseach: We will be proceeding on that matter. As to when and in what terms the amendment will be formulated, that is something the Government will have to decide in the light of what will be submitted to them by the Attorney General.

Mr. Haughey: The Taoiseach will recall that, among other things, he told members of the pro-life campaign that he did not even have to consult his party about this. In view of the reply he has now given that in the general context there will not be any proposals coming before the Dáil in this session for constitutional amendment, will he now bring the divisive party political campaign on which he embarked to an end and so enable both the Dáil and the Seanad, and all of us engaged in the political process, to concentrate on the very real economic and social problems which confront us and to which the policies of this Government are contributing in no uncertain measure?

(Interruptions.)

The Taoiseach: I am convinced that a public debate on these issues at the present time is not only helpful but essential if all of us, politicians and electorate alike, are to face up to the challenge and the possibilities that now exist in the context of the higher plane to which my predecessor raised the whole issue of Northern Ireland by the initiation of Anglo-Irish talks. It would be unforgivable if we were not to prepare ourselves to play our part in whatever constructive moves may emerge from these discussions.

Mr. Haughey: Will the Taoiseach clear up, for the benefit of the House and the general public the particular purpose to which this party political divisive campaign is directed because on separate occasions he has given three different reasons for indulging in this campaign?

[Mr. Haughey.]

On the day he first mentioned it — in the famous or infamous Radio Telefis Éireann interview — he indicated that we should make these changes to make ourselves more pleasing to Northern Unionists. Subsequently he indicated that these changes should be made because of their inherent merits. On another occasion he indicated that these changes should be made as something we could throw into a bargaining situation with the British Government. On which of these reasons does he now base his campaign?

The Taoiseach: I have made clear in my initial statement my deep commitment to the whole question of relations between North and South. The fundamental consideration in raising this issue was because of the conviction I have held for a very long time that unless we, in this part of Ireland, are prepared to play our part and show some generosity and imagination in respect of the preoccupations and concerns of the majority in Northern Ireland, we shall never get anybody from Northern Ireland to any serious negotiating table. It was because of that motivation that I raised the matter. I should have thought that would have been clear to Deputies opposite and to anybody else who heard me speak on that occasion or who heard or read my speech in the Seanad.

Mr. Haughey: Would the Taoiseach not be prepared to admit at this stage that this campaign was launched by him purely as a device to divert the attention of the general public from the disastrous economic situation —

(Interruptions.)

An Ceann Comhairle: Deputy Haughey, please.

Mr. Haughey: When I hear the clack coming into operation I know I am succeeding in my questioning.

(Interruptions.)

The Taoiseach: In the first place, I would like to reject that suggestion flatly

and to stress the hope that no one on the benches opposite or in the country would be in any doubt as to the depth of my personal commitment on this matter or the determination of our Government to make all possible preparations for this State to play its part in any future developments in North/South relations that may become possible in the period ahead. I have already paid tribute to my predecessor's work in preparing the way and I propose to follow in the path he set.

No action of mine in this or any other area could throw a smokescreen over the economic situation which now faces us after four years of Government by the party at present in Opposition. The gravity of the situation left to us has been emphasised recently by the preliminary conclusions of the IMF team which commented on the failure of our economy to adjust to a steep fall in the terms of trade which took place in 1979 and which threatens to undermine seriously the prospects for expansion in output and employment over the medium-term. The House may recall that they went on to say that foreign borrowing of the present magnitude — the levels the previous Government set — cannot in their view be sustained for long and if the present build up of foreign debt as undertaken by the previous Government was continued unabated, Ireland's credit rating overseas might be downgraded and we might then have to restrain domestic activity abruptly in a way which would have important repercussions on employment. As Deputies will be aware, and in answer to Deputy Haughey's question —

Mr. Lenihan: Sabotaging the economy.

(Interruptions.)

The Taoiseach: The House will also be aware of the EEC Commission's draft annual economic report which states that a reversal of the trend to increase deficits, especially those on account of current items, is overdue and that the corrective package introduced in July by the incoming Government after only one month in

office, to prevent a further deterioration in the 1981 situation is an important step in this direction which should be reinforced in 1982. I trust that answers fully the Deputy's question.

An Ceann Comhairle: This cannot develop into a debate. I am calling Question No. 3.

Mr. N. Andrews: I wish to ask a supplementary question.

An Ceann Comhairle: I am sorry, Deputy Andrews, I am calling Question No. 3.

(Interruptions.)

An Ceann Comhairle: Deputy Andrews, you are being disorderly. I am calling Question No. 3.

CONFIDENTIALADVISORY LEGAL COMMITTEE ON CONSTITUTIONAL REVIEW.

The first meeting of the Advisory Legal Committee on Constitutional Review was held in the Attorney General's Office on 1st December, 19

The members of the Committee present were the Attorney General, Mr. N. St. J. McCarthy, S.C., Prof. R.F.V. Heuston, Prof. J. P. Case, Mr. James O'Reilly B.L., and Mr. Declan Quigley. Apologies were received from Prof. Geoffrey Hand.

The Attorney General said that the meeting was an initial one to consider terms of reference and to decide on a method for continuing deliberations. He said that the Government's terms of reference allowed the Committee to consider all issues but that he felt that the essentially political issue of divorce should be left out because it was being considered by an all-party committee of the Oireachtas. He thought that Articles 2 and 3 of the Constitution should be considered at a later stage. He suggested that the Committee should proceed by taking areas of the Constitution and asking a member or group of members to prepare a paper for circulation a week in advance of meetings which should not take place more often than once a month. He said that while no time limit had been fixed for the Committee's deliberations it was hoped that the review would be completed within twelve months.

Prof. Heuston said that the review involved an enormous programme and wondered whether it would be possible to exclude certain provisions such as the article on the Comptroller and Auditor

General or the articles dealing with the workings of the electoral system where essentially non-legal questions were involved.

Mr. McCarthy questioned whether it was possible to avoid considering the divorce question and referred to the problem of foreign divorces and persons who might have more than one wife.

Mr. O'Reilly asked whether the Committee was excluded from consideration of matters involving political questions such as freedom of association and trade union rights.

Prof. Heuston suggested beginning the review with a discussion of the amending power in the Constitution and the reference of Bills under Article 26. He asked whether the Committee was intended to start from scratch as if there were no existing Constitution or whether it was intended merely to review the existing document.

The Attorney General replied that the terms of reference were as wide as to include consideration of a new Constitution but he thought the practical method of approach was to review the existing Constitution in the first instance and only to reject it if suggestions for change were unworkable in the context of the existing document.

It was agreed that a copy of the final draft of the report of the Attorney General's Committee on the Constitution should be circulated to all members.

It was agreed that the next meeting would be held on or about the 20th January, 1982.

Prof. Heuston agreed to prepare a working paper for the 12th January on the topic of amendment of the Constitution and the Article 26 reference procedure, possibly in association with Prof. Hand.

Prof. Casey undertook to prepare a paper on Articles 34-39 and said he hoped to have it available for 12th January.

Mr. McCarthy and Mr. O'Reilly undertook to prepare a paper on the question of citizenship rights and the extent to which constitutional rights were or ought to be available to citizens and non-citizens.

The Attorney General and Mr. Quigley agreed to prepare a paper on the preamble to the Constitution.

The meeting adjourned.

James Hamilton
Acting Secretary