

# The Irish Constitutional Revolution: An Analysis of the Making of the Constitution

DERMOT KEOGH

In 1961, the Professor of Moral Theology at St Patrick's College, Maynooth, Enda McDonagh, described the Irish Constitution as 'by no means perfect — either in its democratic aspirations or in its adaptation of Catholic teaching'. Despite his reservations, he was convinced that it was "a fairly successful union of democracy and Catholic teaching'. By and large it "is a splendid achievement and its general solution of the Church-State problem has much to offer to modern politicians and theologians in their search for a satisfactory formula'.<sup>1</sup> That qualified praise of the Constitution came at the beginning of a decade that was to witness the most profound economic and social change.

By 1987, the Ireland of the 'age of de Valera' was little more than a yellowed photograph to a country with the youngest population in Western Europe. In the year of Bono, the Constitution appears dated, with provisions at variance with values held in sections of the community. Article 41, 3.2, which states that 'no law shall be enacted providing for the grant of a dissolution of marriage', has recently proved to be a source of bitter division. In the coming years, Article 43 on private property may be even more divisive. Bunreacht na hEireann, which served the country in the era of de Valera, is now showing signs of age. The moral and social cohesion of Ireland in the 1930s has been diffracted. The 'unsatisfactory' nature of the Constitution has precipitated the near launching of a 'constitutional crusade'. That in turn provoked a movement of restoration, which has demonstrated the power of traditional thinking in Ireland. Conflict and polarisation have resulted. The Constitution, flawed as it might appear to many, is here to stay for the foreseeable future.

However, the controversy and acrimony surrounding recent referenda have made it all the more difficult for the historian to evaluate the significance of de Valera's personal achievement in

crafting the Constitution and having it accepted in 1937. The extremism of European politics was not reflected in the document as presented to the Irish people in a plebiscite on 1 July 1937. In the Catholic political world of the 1930s, the Constitution was exceptional in its commitment to liberal democracy. The Portuguese Constitution of 1933 was strongly corporatist, reflecting the thinking of Salazar. The Austrian Constitution of 1934 was not exactly a model Catholic document. De Valera, although he was held in the deepest suspicion by the Vatican when he came to power in 1932, delivered a document which Pius XII was to call in 1957 'an instrument of "Prudence, Justice and Charity" at the service of a community, which has never, through its long Christian history, had any doubt about the eternal, as well as the temporal implications of that common good'. The Vatican had come to be pleased.

Reaction to the phenomenon of 'mass man' — central to the basic tenets of nazism, fascism and communism — was to influence de Valera in the framing of the Constitution. In the Ireland of the mid-1930s, corporatism, diluted by Catholic social thought and known as vocationalism, had a fashionable following among certain members of the clergy and laity. They were an irritating and persistent lobby. Fascism did not enjoy a mass following in Ireland in the 1930s, but fascist leaders like Mussolini commanded the respect of such newspapers as the *Irish Independent*. The Blueshirts were not fascist, although some of the leaders of the movement were believers. It was fortunate for the country that the Irish 'Duce', Eoin O'Duffy, was more spirited than charismatic. Irish-style fascism was transitory. However, support persisted for the anti-democratic ideas of the European right. Anti-Semitism had a place in popular Catholic literature of the 1930s while at least one Irish politician expressed, in public and private, prejudiced views about the Jews. Another feature of the ideology of the Irish right, as represented by the Irish Republican Army (IRA), was the mystique and cult of violence.

That authoritarianism was more than counter-balanced by the political performance of committed democrats like Eamon de Valera and William T. Cosgrave. Fianna Fail's entry into the Dail in 1927, their political performance in opposition and the manner in which de Valera in office provided leadership from

1932 onwards, strengthened an Irish democratic system built up by Cumann na nGaedheal (later Fine Gael) under the 1922 Constitution. However, no matter how strong the Free State Constitution was, objectively speaking, it was regarded as a Bivisive document enshrining the 'repugnant symbols' of Imperialism. Moreover, anti-Treatyites thought the Constitution had been dictated from London. Historical reality was much more complex than the simplistic views of an opposition that had emerged defeated from the civil war. Despite the many successes of Cumann na nGaedheal, achieved under the 1922 Constitution, Cosgrave's government had been denied what Jeffrey Prager has described as 'a supportive symbolic system'. The oath and the King were in the Constitution. No matter what Kevin O'Higgins or Paddy McGilligan achieved at Commonwealth conferences — and their successes were significant — it was difficult to translate that into political popularity. The Constitution denied Cumann na nGaedheal the 'supportive symbolic system' on which de Valera and Fianna Fail laid so much stress when in opposition.

In government, de Valera had the power to pursue his programme of constitutional reform. WittmiJfoiJLL^^ rid of the oath, appeals to the Judicial Committee of the Privy CouncilTancTtHe" Crown. It was an impressive record. However, the political appeal of introducing an entirely new Constitution was considerable<sup>7</sup>! De Valera would then have an opportunity to draw heavily on the 1919 Constitution and on the symbols of Irish nationalism. With the help of a 'supportive symbolic system' enshrined in a new Constitution, Fianna Fail would not have to labour under the same political disadvantages as Cumann na nGaedheal had had in post-civil war Ireland. De Valera's political metaphysics always retained an eye for the marginal constituencies.

Nevertheless, the drafting of a new Constitution carried heavy political risks. It created an opportunity for the opposition to find grounds for attack. It opened the possibility of exposing ideological and personal differences within Fianna Fail. There was the risk of creating friction between the state and the Catholic Church or between the state and the other churches. Finally, it was a strategy which might backfire politically if Fianna Fail lost a plebiscite and the new Constitution was rejected by the people.

De Valera never burdened his fellow ministers with the task of making a government decision on the matter until it was too late. What follows is a detailed analysis of how the Constitution was drafted and an assessment of the competing influences of ecclesiastical and political forces on de Valera. It should be noted that, unlike the 1922 Constitution, the first draft of the 1937 document was produced by a very small group.

### **The Labour Party drafts a Constitution**

The fate of another Constitution drafted and adopted by the Labour Party illustrates the importance of strong, decisive political leadership. The Labour leader, William Norton, did not have the confidence or the independent-mindedness of the leader of Fianna Fail. Proposals at the 1935 and 1936 annual conferences pledged the Labour Party to work for a workers' republic and declared the party's commitment to bring about 'the public ownership by the people of all the essential sources of wealth'.<sup>4</sup> There was opposition within the party to central sections of the draft Constitution. The matter was referred to the Catholic bishops, who set up a sub-committee to examine the orthodoxy of the Labour Party's Constitution. The Bishop of Waterford, Jeremiah Kinnane, the Bishop-elect of Calway, Michael Browne, Dr Patrick O'Neill and Dr Cornelius Lucey were appointed. The sub-committee reported in the autumn of 1938:

The Constitution contains a number of statements, of principle and of aim which, according to the natural and current sense of the terms used, are opposed to Catholic teaching. In particular, these statements involve a clear denial of the Catholic principles on private and individual ownership, as well as a denial of the essential liberty and natural rights of every individual in the State.'

William Norton had the Constitution amended at the annual conference of the Labour Party. It must have been the first time in the history of European socialism that a party of the left changed its Constitution at the behest of Catholic bishops.

De Valera was a strong believer in the virtues of 'closed' government and classical diplomacy and he made no concessions to either bipartisanship or populism in drafting the

Constitution. He worked with a very small number of people throughout the initial stages.

### **John Hearne and the origins of the drafting of a Constitution**

On 30 April and 2 May 1935, de Yalera instructed John Hearne, legal adviser in the Department of External Affairs, to prepare draft heads for a new Constitution.<sup>6</sup> That might appear to have been an unusual choice. He could have picked somebody inside his own Department of the President. But de Yalera was also Minister for External Affairs and in that capacity had discovered the value of Hearne. The latter had attended a number of sessions of the League of Nations with de Yalera. He may have been responsible for writing the President's notable speech at Geneva in 1932. Hearne had been heavily involved in drafting constitutional amendments early in de X'alera's first term of office.

Hearne was from Waterford and had been educated at Waterpark College and the National University of Ireland. He had studied for the priesthood for a while, a background which was to serve him well in the drafting of the Constitution. He had been called to the Irish Bar in 1919. Four years later he joined the parliamentary draftsman's office and moved to the Department of External Affairs in 1929 as legal adviser. With a background in ecclesiastical and civil law, experience as a parliamentary draftsman and his work as a diplomat, Hearne was a valuable asset. De Yalera rated highly his professionalism and judgment. Apart from de Yalera himself, no individual was so centrally involved in the drafting and shaping of the new Constitution.

On 18 May 1935 Hearne submitted draft heads of a Constitution that he had prepared on the President's verbal instructions. He attached a short explanatory memorandum, stating the scope of de Yalera's instructions and outlining the reasons for the preliminary method adopted in the preparation of the draft.

- A. to contain certain basic Articles guaranteeing fundamental human rights;
- B. to place the said Articles in a specially protected position, i.e., to render them unalterable save by the people themselves or by an elaborate constitutional process;

- C. to provide for the suspension of the said Articles during a state of public emergency only;
- D. to contain machinery for effectively preserving public order during any such emergency;
- E. to provide for the establishment of the office of President of Saorstát Éireann, the holder of which would fulfil all the functions now exercised by the King and the Governor General in internal affairs; and
- F. to contain provision for the retention of the King as a constitutional officer of Saorstát Éireann in the domain of international relations.

The draft heads prepared by Hearne were really an attempt to write down de Valera's instructions 'and insert them into the text of the Constitution rather than an effort to construct — at this stage — a completely new Constitution'. In Hearne's view, that had the advantage of carrying out the far-reaching constitutional reform within the framework as far as possible, of the existing State rather than to establish a new State with a constitutional system fundamentally different from that now obtaining'. The approach adopted had the advantage of showing the precise extent to which the changes contemplated 'will modify the Constitution of 1922'. There were two major questions raised by de Valera's proposals:

1. whether the new Constitution should or could be enacted by the existing Oireachtas, and, if not, whether a Constitutional Assembly should be called and, if so, how?
2. whether a new Constitution on the lines indicated in the President's instructions would be in accord with the constitutional provisions of the Treaty of 1921 or would involve a breach of that instrument.'

These were extremely difficult questions to answer. Nonetheless, the drafting of a new Constitution proceeded into 1936. Very few people were involved. According to the official record, 'the preparation of the original draft was done mainly by Mr John Hearne, B.L., Legal Adviser of the Department of External Affairs, in consultation with the Parliamentary Draftsman, Mr [Arthur] Matheson, B.L., under the personal direction of the President'.<sup>8</sup> The drafting of the Constitution was all the more

exhausting because of the fact that so few were involved in the initial stages. Professor John Kelly, in his authoritative study *The Irish Constitution*, explained the reason for choice of title thus:

This book is arranged around the text of the Constitution of Ireland of 1937. Its more informal, more general title *The Irish Constitution* is intended to reflect the fact that the general characteristics of the State were substantially formed before 1937; and that while all the branches of our law depend for their formal validity on the 1937 Constitution, this enactment was very largely a re-bottling of wine most of which was by then quite old and of familiar vintage.

Hearne was quite conscious of the fact that he was engaged in a 're-bottling' exercise. But de Valera was determined to make it much more than that.

The decision to have a new Constitution was formally advanced when the Executive Council agreed on 5 June 1936 to authorise the President to communicate with King Edward VIII in regard to the intention of the Irish government to introduce a Bill in the Dail, at the beginning of the autumn session, for the purpose of setting up a new Constitution. King Edward was to be informed that 'this Constitution would deal with the internal affairs of Saorstát Éireann'. The Executive Council further agreed that 'amongst the provisions of the new Constitution would be the creation of the office of a President elected by the people and the abolition of the office of Governor General'.<sup>10</sup> On 8 June, the Irish High Commissioner in London, John Dulanty, delivered a memorandum to King Edward outlining the intentions of the Irish government.

The abdication crisis later in the year enabled de Valera to proceed earlier with his plans. He did not have to wait for the finalising of a new Constitution to remove the King and governor general. He amended the existing Constitution with two Bills. The first removed all existing references to governor general and the second, the External Relations Bill, provided for the continuance of existing diplomatic relations. All foreign diplomats in Dublin would continue to be accredited to the King of England."

While the diplomatic manoeuvring in Anglo-Irish relations

continued during the latter half of the 1930s, the drafters of the new Constitution began to get offers of help from clerical quarters. Two persons in particular deserve mention: the Jesuit Edward Cahill and the Holy Ghost Father, John Charles McQuaid. The latter was the single most important clerical influence on de Valera. Cahill's influence has been exaggerated, even by de Valera, but not without good reason.

### **The Jesuits and the censoring of Edward Cahill**

The Jesuit, Edward Cahill, has been credited with exercising some influence over de Valera in the drafting of the Constitution. This view is largely mistaken. Cahill, like the Holy Ghost Father Denis Fahey, were men -apart within their respective religious orders. There were many reasons why that was so.

In the late 1920s and early 1930s, an Irish version of Catholic Action, An Ríoghacht (The League of the Kingship of Christ) was set up. Although it was never enormously popular, Cahill devoted much time to building up the organisation.<sup>14</sup> He was also a populariser and prolific publicist. He entertained a somewhat unhealthy obsession with the machinations of international freemasonry.<sup>15</sup> Cahill was a man of many enthusiasms. His major work, *The framework of a Christian state*, was quite unoriginal but de Valera seems to have appreciated the gift of a copy. He wrote to Cahill on 2 August 1932:

Taim an-bhuidheach diot i dtaobh coip den leabhar 'The Framework of a Christian State' a bhronnach orm. Is flu e'leigheamh agus a aith-leigheamh, agus is minic, dar Horn, a raghfarr chuige chun comhairle agus treorii 'fhaghail as ins na blianta ata le teacht.<sup>14</sup>

Perhaps de Valera was being polite. He did not govern Ireland from 1932 with *The framework of a Christian state* in one hand and Denis Fahey's *The kingship of Christ, according to the principles of St Thomas Aquinas* in the other. Although de Valera was known personally to both men, he did not have much in common with them intellectually. Moreover, because he knew ecclesiastical politics so well, there was little danger of his confusing mainstream Catholic thought with views from the periphery. Cahill was not an intimate of de Valera's. He wrote irregularly to the

President in the early 1930s and received some replies.<sup>15</sup> Cahill sent a submission on 4 August 1936. De Valera acknowledged receipt of the material and returned the manuscript on 19 September. He wrote:

[I] have read it over carefully. It is very useful as indicating the principles which should inspire all governmental activity so as to make it conform with Catholic teaching. The difficulty is to decide how much can be or should be embodied formally in the new Constitution.

I can see that some of the principles might be set forth in a preamble, but I fear there is not much that can be incorporated into the body of the Constitution, i.e., made Articles of it.

If you could find time to put into the form of draft Articles, with perhaps a draft preamble, what you think should be formally written into the Constitution, it will be very helpful. I could then arrange, when I had seen your draft, to have a chat with you about it.<sup>16</sup>

The content of the de Valera letter became known within the Jesuit community in Dublin. Senior members of the order were quite worried about the prospect of Cahill, alone among Irish society members, making submissions to the President. The standing of the society was in question. It was decided, therefore, to set up a committee to draft a formal submission which would be sent to de Valera as an official presentation from the Irish Province of the Jesuits. Cahill was appointed to the committee. Some of the "best heads" the order had<sup>1</sup> in matters of this kind<sup>1</sup> were selected to serve on the committee along with Cahill. P. Bartley was to act as president. J. McErlean was appointed secretary. J. Canavan and E. Coyne were also appointed.<sup>1</sup>

The committee met for the first time on 24 September 1936. Fr Bartley presided. The secretary, Fr McErlean, was absent on retreat. A decision was taken to draft a preamble on the model of the preamble in the Polish Constitution. Articles were to be prepared on the following subjects:

- (a) The rights of the family, particularly with regard to the education of children.

- (b) Religion to be taught in all schools, which were to be denominational whenever there was no 'insuperable obstacle'.
- (c) The state could not dissolve a valid marriage.
- (d) The relations between the Catholic Church and the State were to be defined by a Concordat.
- (e) Freedom of religious worship.
- (f) Ecclesiastical property.
- (g) Private property.
- (h) Freedom of speech and of the press, and the limitations of that freedom.
- (i) Any other matters that might be suggested by a study of concordats and existing constitutions.<sup>18</sup>

The next meeting of the committee, on 1 October, discussed three drafts of the preamble submitted by Cahill, Canavan and Coyne. They were discussed clause by clause, and certain changes were approved. It was to be considered in its new form at the next meeting.

At this meeting, it approved 'with slight modifications' an Article on Church and state drawn up by Bartley. But drafting the Article that declared the state could not dissolve a valid marriage was difficult. Various attempts were made to find a satisfactory wording that would embrace all possible cases, and further consideration was held over until the next meeting, when drafts on private property, and freedom of conscience, of the press and of association were to be discussed.

At the meeting of the committee on 8 October 1936, many drafts were considered and approved with slight modification. The Article on Church-state relations was passed with an addition proposed by Canavan. On Catholic marriage and the state, everyone except Canavan accepted Bartley's draft. It was decided to include Canavan's draft as an alternative. Bartley also drew up the Articles on freedom of worship and freedom of the press. Canavan suggested an Article on freedom of cinema, radio, theatre and suchlike, and it was decided to include it. The same control was to be exercised by law for these media as for the newspapers. A draft by Coyne on the family was approved. Coyne and Bartley drafted an Article on parents and education of children in schools. The Article on religion in school was to be

taken, with slight changes, from the Polish Constitution.

There was also progress on Articles on private property, religious property, family and a living wage. Coyne was entrusted with the task of working in that area. Canavan gave some help. The committee drew heavily on the Polish Constitution. Bartley wrote to the provincial on 11 October, reporting that he hoped the work of the committee would be concluded within a week. He proposed to hand over 'our suggestions to Fr Cahill, who will deliver them in the proper quarter. It is of the utmost importance that no time should be lost if our recommendations are to be in before the official draft is completed.' Bartley told his superior that the 'work has been very harmonious so far. Fr Cahill is in full agreement with it, and has shown no desire to veto anything.' If any such difficulties were to arise, he thought they would have to be 'met by diplomacy: and I think it can be so met'. But there was one problem which only the provincial could address:

Fr Cahill will almost certainly want to add recommendations of his own to those approved by the committee. Now these recommendations, partly by their sheer bulk and partly by their singular character, are likely to bring discredit on the very solid findings of the committee, especially if they are delivered at the same time as the committee's findings.

Bartley suggested that Cahill be issued with the following instructions. Firstly, that he was to add nothing when he delivered the committee's findings. He should be free later to send in additional recommendations, provided that these were approved by any two of those who had served on the committee with him. By that time, the committee would have ceased to exist. Bartley referred to what he was recommending as 'censorship', which he considered justified:

The source of Fr Cahill's recommendations will be quite well known to a small number of very important people. The reputation of the Society will be involved; and the Provincial has the right to watch over that reputation.

Bartley was a master of understatement. What he had said about Fr Cahill was not pure conjecture: 'I know for certain that

he is preparing voluminous recommendations and that some of them at least are rather singular'.<sup>19</sup>

Bartley had been entrusted with the job of controlling Cahill and preventing him from being too 'singular' in his ideas. Contrary to what might have been expected, Cahill appears to have played a rather passive role on the committee. He produced a draft preamble but did not make a substantial contribution to the drafting of any of the Articles. It may have been that Cahill was aware of the 'policeman' role of the committee and determined to save his ideas for an individual submission. He obviously did not keep secret from Bartley the fact that he was preparing 'voluminous recommendations' for de Valera.

Meeting again on 15 October, the committee proceeded steadily with the work. Bartley read the Articles as amended 'by previous decisions of the committee, together with a few additions and modifications handed in by Fr Cahill'. These changes were mostly verbal. In the Article on private property, 'the right to productive and non-productive property' was outlined. The state was to aim at a wide distribution of private productive property, especially in land. The committee approved an Article on private schools. Typed copies of the entire document were to be distributed to all members within a few days. They were at liberty to add any further comments they considered advisable, as well as references to existing foreign Constitutions tending to confirm important clauses.

After the meeting Bartley wrote to the provincial again, reporting that 'our committee finished its collective labours today'. The committee had 'maintained our harmony to the end though I was prepared for some dissension in the last session'. Bartley was preparing the final report and Cahill was going to type it. They intended to meet again on Sunday, 18 October to 'give this report a final look over'. Bartley explained how he had told Cahill that the committee was 'authorised by Your Reverence to deliver this report through him in the proper quarter'. Bartley told Cahill that the provincial had some instructions to give him regarding the report. 'I did not profess to know', Bartley wrote, 'the nature of these instructions'. However Bartley advised that the instructions should be sent at once: 'I am now more convinced than I was before that they are necessary. They should reach him on Saturday at latest.'

Two days before the committee met for the last time on 18 October, the provincial wrote to Cahill, giving him exactly the same instructions as Bartley had recommended:

Now as that document will be the product of the best heads we have in matters of this kind I think it would be well if it were presented as it stands by your Reverence to Mr de Valera.

The provincial picked up Bartley's suggestions exactly. Cahill was not to submit any of his own material with the main Jesuit draft. Neither was he to send anything to de Valera at a later stage without first submitting it for 'censorship to any two you may select of the committee members'.<sup>21</sup>

All members of the committee were present at its final meeting on 18 October 1936. The preamble was changed slightly so as to read:

In the Name of the Most Holy Trinity and of our Lord Jesus Christ, the Universal King, we the people of Ireland so full of gratitude to God who has so mercifully preserved us from innumerable dangers in the past; hereby, as an united independent Christian Nation, establish this Sovereign Society of the Irish people ... and so in accordance with the principles laid down we freely and deliberately to the glory of God and honour of Ireland, sanction this constitution and decree and enact as follows.<sup>22</sup>

The committee agreed that references to the Constitutions and concordats of Catholic states should be added to the various 'assertions' made in the document so 'that those who have the task of drawing up the constitution may come to know what the Catholics of other European States have already secured'. Cahill was to type the document and submit it without any additions of his own.

On 21 October 1936, Cahill wrote to de Valera enclosing the committee's preamble and articles. The letter accompanying the submission was an indication of just how much Cahill had bridled at the idea of turning his original initiative into a society one. Towards the end of the letter, he wrote:

I have, in drawing up the drafts which I am sending you,

availed myself of the advice and assistance of three or four others, some of whom have made a special study of these matters; others, although not specialists, are pretty well informed on them, and are men on whose judgment I have confidence.

In fact, there is no mention that the material he was giving to de Valera came from the society as a whole. Quite the contrary. He wrote:

I have, in drawing them up, confined myself to the minimum that I would consider necessary to realise a Christian Constitution, as I feared to outstep the limits of what you asked me to *doP*

From the records available, it is obvious that Cahill had contributed very little to the formulation of the submission.

The letter to de Valera provides some evidence of Cahill's own personal position, which he obviously did not express very strongly at committee meetings. He referred to the fact that there were a number of omissions in the articles. These were being left to be settled by concordat. He itemised civil observance of Sundays and holy days, and the juridical personality of religious congregations and communities in regard to property.

Influenced by the Portuguese Constitution, Cahill advanced the idea of forming parochial councils in rural areas. He wanted recognition of this in the Constitution. If the councils were elected by heads of families, this would 'serve to give a statutory recognition to the Christian family, such as is given in the Portuguese Constitution, making a definite departure from the Liberal, unchristian ideal and a return to the solid Christian tradition'.

In my book, *The Vatican, the bishops and Irish politics, 1919-1939*, I surmised that the official biographers of de Valera had confused the main Society of Jesus submission for the work of Cahill."<sup>4</sup> It is now easy to see why this was so. Cahill had presented the work of the committee as his own. Whether the document would have received greater attention had it been known that it carried the weight of the Irish Province of the Jesuits is difficult to say. But the submission was probably influential in a

number of respects. The idea of a preamble and some of the Jesuit wording in the submission may have been important. (Cahill later submitted his own version.)

The Jesuit preamble began in the same way as the final wording: 'In the Name of the Most Holy Trinity ...'. There is also another area where the official Jesuit draft Constitution may have been of direct importance. The religious Article read:

- (a) 'Freedom of Religious worship (in public and private) is guaranteed to all within the limits of *public order and morality*.'
- (b) 'The Catholic Faith, which is the faith of *the vast majority* of the nation, and which is inseparably bound up with the nation's history, traditions and culture, occupies among religions in our country a unique and preponderant position.'''

When de Valera was casting around later for the wording of Article 44, he may have remembered the content of what he would have regarded as Cahill's submission.

De Valera rejected a number of the specific ideas in the Jesuit draft. In particular, he did not warm to the suggestion of regulating Church-state relations through a concordat. However, the Catholic social principles underlying the submission did become part of his final document. The titles of the Articles and the structure of the Jesuit submission may also have influenced de Valera. There were places where de Valera might have been better advised to listen to the Jesuits, particularly in the area of private property.

When de Valera later admitted that Cahill may have been influential in specific areas, he was almost certainly referring to the Jesuit submission, which he had been deliberately misled into believing was the work of the author of *The framework of a Christian state*. Cahill wrote again to de Valera on 13 November 1936 with a submission of his own. He stated that he had been 'delayed unavoidably much longer than' he foresaw.<sup>21</sup> This may have been a reference to the fact that he had been obliged to submit his work to two censors of his choice from the disbanded committee. The material given to de Valera on that occasion was based, as Cahill had indicated, on the Portuguese Constitu-

tion. He was still pushing the idea of parish committees in the countryside, set up on the basis of the family. In the final analysis, Cahill was not particularly influential, but de Valera may have considered that he owed him more than was actually the case because of the deliberate confusion over the authorship of the Jesuit submission. However, neither Cahill as an individual, nor the Jesuits as an order, had nearly as much influence on de Valera as the Holy Ghost Fathers and John Charles McQuaid in particular.

### **John Charles McQuaid and the Constitution**

The official biographers of de Valera, Professor T.P. O'Neill and the Earl of Longford, have accurately pointed out that McQuaid was very influential in the drafting of certain Articles, particularly what were to become Articles 40 to 45. But recent archival material also demonstrates the degree to which de Valera differed both in philosophy and ecclesiology from his friend and neighbour. It was the difference between being a very conservative, traditional Catholic, as McQuaid most certainly was, and a liberal Catholic, as de Valera proved himself to be in the course of the drafting of the Constitution.

Since his schooldays at Blackrock College, de Valera had many close friends in the Holy Ghost Order. He retained his contact with the college while his children attended there. The President, John Charles McQuaid, was a friend of the family who had performed a very great service for de Valera when he had first come to office in 1932. During the Eucharistic Congress, McQuaid had hosted a garden party to welcome the papal nuncio, Cardinal Lauri. He had taken expert care of an awkward piece of protocol for de Valera. The governor general, James McNeill, and the government ministers were in a state of war.<sup>27</sup> De Valera was attempting to abolish the office. Neither side could afford to meet for fear of a public incident. McQuaid saw that both 'factions' were introduced independently to the papal nuncio at the garden party in Castle Dawson.<sup>28</sup>

McQuaid became a friend of the family and he was particularly attentive to the children at the time of the death of their brother, Brian, in a riding accident in February 1936. He was a frequent visitor to the de Valera home at Bellevue. His visits became much more frequent in late 1936 and the first four

months of 1937. McQuaid worked prodigiously hard. He supplied de Valera with learned notes on theories of authority, the family, marriage, Catholic social principles, private property and Church-state relations. In the initial stages much of the material submitted was in the form of typed quotations from papal encyclicals.<sup>29</sup> But as the drafting progressed, McQuaid was involved in the actual formulation of the Articles dealing with personal rights, the family, education, private property, religion and directive principles of social policy (Articles 40 to 45 in the final draft). On the day that the Constitution came into force, 29 December 1937, McQuaid wrote to de Valera:

This morning again I said Mass for you at dawn, on the eventful day. I am reminded all day of the text in the New Testament: 'Many have desired to see what we see and have not seen'.<sup>10</sup>

That was certainly the case in the early months of 1937. McQuaid was privy to much of what de Valera was doing. Proof of that came in a letter on 17 February 1937:

I beg to enclose a draft of the paragraphs on free-competition etc., which, after much thought, I feel to be more logical and compact. I hope the correction will not prove inconvenient. In the paragraph on 'share in the land', I have recast the third reason, making it more accurately represent the famous passages in *Quadragesimo Anno* and also *Rerum Novarum*. With CTRahilly's draft [CTRahilly was Registrar of UCC at the time] I feel very disappointed; but, I suppose it was hasty and was all that could be done at the time.<sup>51</sup>

On 8 March 1937, McQuaid wrote enclosing an amendment dealing with widows, orphans and the aged:

It will be noted that I have retained the word support, qualifying just claims, because it is unfair to expect, as so many do, that the State will be everything. It devolves on the family to support — where it can — its own aged members, in a spirit of charity. Further, we have, at no point, met the most

potent form of social agitation: the unsettled strike. A great deal of the venom of Communism could be neutralized, if, where strikes do occur, a mode of settlement, fair to both sides, could be found. I venture, therefore, to suggest a small paragraph — which is both correct in social doctrine and capable of averting immense evils.

When the proofs of the Constitution became available on 9 March 1937, de Valera sent McQuaid a copy. The future Archbishop of Dublin took particular pride in ensuring that the inverted commas were in the right place: McQuaid wrote to de Valera on 10 March: 'Having been through the text very carefully, I append a few points for your kind considerationV~

But perhaps the topic which had taken up most of McQuaid's time was the Article on 'Religion, Church and State'. His thinking in this area was very heavily influenced by his teacher and friend in religion, Fr Denis Fahey GSSP.<sup>34</sup> The latter was not noted for his pioneering work in the world of ecumenism. Neither did he champion the cause of Christian-Jewish dialogue.<sup>53</sup> Fahey represented a strand of theological thought which owed much to the besieged and beleaguered world of right-wing French Catholicism traumatised by the conflict between Church and state at the beginning of the twentieth century. McQuaid was not quite as 'singular' in his views, but he shared Fahey's hardline position on the relationship between Church and state. That rather triumphalist attitude found expression in the first draft Article 42, 'Religion, Church and State'.

*Religion, Church and State*<sup>TM</sup>

Article 42

1. The State acknowledges the right of Almighty God to public worship in that way which He has shown to be His Will.
2. Accordingly, the State shall hold in honour the Name of God and shall consider it a duty to favour and protect religion and shall not enact any measure that may impair its credit.
3. The State acknowledges that the true religion is that established by our Divine Lord, Jesus Christ Himself, which He committed to His Church to protect and pro-

pagate, as the guardian and interpreter of true morality. It acknowledges, moreover, that the Church of Christ is the Catholic Church.

4. The State recognised the Church of Christ as a perfect society, having within itself full competence and sovereign authority, in respect of the spiritual good of men.
5. (1) Whatever may be ranked under the civil and political order is rightly subject to the supreme authority of the perfect society, the State, whose function it is to procure the temporal well-being, moral and material, of Society.  
(2) The State pledges itself, therefore, in virtue of this sovereign authority conferred on it by God within its temporal sphere to enforce respect, by its just laws, for the inalienable rights of the citizen and the family, and to preserve, as best it can, conditions of right social and moral well-being.  
(3) In cases where the jurisdiction of Church and State requires to be harmoniously co-ordinated, the State may come to a special agreement with the Church and other Religious Bodies, upon particular matters, civil, political and religious.
6. The State guarantees to its citizens freedom of religious conviction and liberty to practice their religion, in private and in public, having due regard however to social order and right morality.
7. The State pledges itself not to impose any disabilities on the ground of religious conviction that would be contrary to natural rights and social justice.
8. Every religious association, recognised by the State shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious and charitable purposes.
9. The property of a religious denomination shall not be diverted save for necessary works of public utility and on payment of just compensation.
10. Legislation providing State aid for schools shall contain no discrimination against schools under the management of a particular religious denomination.

The similarity of the draft Article to the structure and content of the file submitted by McQuaid may lead one to speculate whether in fact the Holy Ghost priest himself was not the author. There is an earlier draft which has been worked on by de Valera. He changed the title of the Article, adding the words: Church and State. There were other minor amendments made by the President but no change in substance.<sup>17</sup> There is a striking contrast between the first draft Article and what ultimately evolved. The difference, as can be seen by comparing both texts, was quite radical:

**Religion<sup>18</sup>**

## Article 44

1. (1) The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.
- (2) The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.
- (3) The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.
2. (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
- (2) The State guarantees not to endow any religion.
- (3) The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.
- (4) Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to

affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

- (5) Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.
- (6) The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

De Valera was to tell the Church of Ireland Archbishop of Dublin, George Gregg, that he had neglected to pay much attention to that Article because he felt it was relatively easy to draft. However, de Valera circulated copies of the Constitution privately between 9 and 14 March. The printer's record show that there were twelve copies of proofs pulled on 9 March. Exactly who got copies to look at it is not possible to say. But there are people who would have had to receive the draft Constitution. John Hearne was certainly to have got one. Joseph Walshe, the Secretary of the Department of External Affairs, also got one. Presumably the parliamentary draftsman, Arthur Matheson, would also have got a copy. He was a member of the Church of Ireland and is unlikely to have liked draft Article 42. As has been already stated, McQuaid was sent a copy — or part of the document. De Valera also gave it to a number of other trusted friends. \_\_\_\_\_,

What emerged as a first/ draft |was the\_j2ejmlt^i^^ eiK^rgy~^an3~enort. The content was a blending of the old and the new. There werFsigihicant changes in both substance and form from the 1922 document. It TTacTnotoeeen just a question of 're-"Bottling^ The documentT" was self-consciously nationalist, strongly Catholic in tone and republican in aspiration. The influence of Catholic thinking was very evident. But there were liberal and conservative currents within that tradition. In the case of the Article on religion, de ValenThad allowed the more conservative trend to dominate. That was a serious difference from the corresponding Article 8 in the 1922 Constitution.

Somebody must have pointed out to de Valera the unsuit-

ability of the draft Article on religion because it was removed from the copy circulated on 16 March 1937. But McQuaid did not object to this, by letter anyway:

I am deeply grateful for the draft. It is such a joy to see it in print; now it remains to see it enacted. It reads very well. I think I note already the few changes made.<sup>39</sup>

### **Political and administrative reaction**

On 12 March 1937, the Executive Council met and discussed general procedure in regard to the enactment of the new Constitution. It was agreed that the draft should be submitted to Dail Eireann for approval, the procedure for its consideration by the Dail being that applicable to a Bill. If approved by the Dail, the draft would be submitted to a plebiscite to be held at the same time as a general election. It was agreed also that the Constitution would come into operation *either* on the day following the expiry of a six-month period *or* on an earlier day as might be fixed by a resolution of the chamber of deputies elected at the general election on the polling day, which was to be the same day as the plebiscite. Authority was given to prepare legislation for the plebiscite.

On 16 March, the printed text was distributed confidentially to members of the Executive Council and to other selected persons, including the President of the High Court, Conor Maguire, High Court judge, George Gavan Duffy, and Supreme Court judge, James Geoghegan. De Valera invited reaction from government departments and from his colleagues. As noted, the Article on religion had been removed. It was 'in blank' and was to stay that way until the last week in April. It is not known what happened at the Executive Council meeting when the text was discussed. De Valera may have been given a mandate to secure a formula that was to stop far short of establishing the Catholic Church. Sean MacEntee gave me that account of what had happened at an Executive Council meeting, where the document was warmly received.<sup>40</sup>

When ministerial, departmental and other comments had been received, de Valera set up a committee to 'examine and revise the draft in the light of these observations, and generally to advise him on both the scheme and the text of the constitu-

tion'. Four civil servants were appointed; Maurice Moynihan, Secretary to the Executive Council, acted as chairman. The others were: John Hearne, legal adviser, Department of External Affairs; Philip O'Donoghue, legal adviser, Attorney General's Department; and Michael McDunphy, Assistant Secretary in the Department of the President. According to a memorandum, drawn up on 30 December 1938 by Paddy Kennedy (Assistant Secretary to the government from 1938 to 1947), the committee 'were in constant touch with the President'. They met 'without a break, up to the end of April, some of sittings lasting until midnight or later'.<sup>41</sup>

The chosen method of proceeding enabled de Valera to keep the drafting process under his personal control. He had entrusted the work of completing the Constitution to a small group, made up of the best civil servants of their generation. At no stage did he plan to hand over the drafting to a constitutional committee on the 1922 model. He wanted to avoid any possibility of leaks or political divisions within his own party. The various government departments responded to the tasks of commenting with varying degrees of enthusiasm. The Department of Industry and Commerce, where Sean Lemass was Minister, submitted nothing, whereas the Department of Finance went to the other extreme. The Secretary of the department, J.J. McElligott, a veteran of the GPO garrison in 1916, commented extensively and was extremely critical of some draft Articles. McElligott was particularly critical of Articles 1 and 3 dealing with the nation and the national territory. He objected to the fact that these Articles dealt with the nation as distinct from the state, a distinction, he argued, that many political scientists would not accept. The claim would be described, he stated, with justification as a fiction and one that would give offence to neighbouring countries with whom 'we are constantly protesting our desire to live on terms of friendship'. He didn't think it was clear that the country was on safe ground from the point of view of international law in claiming sovereignty and jurisdiction over land 'recognised internationally, *de jure* and *de facto*, as belonging to another country'.<sup>42</sup>

In commenting on the 'second revise', McElligott was even harsher in his criticisms. He found the revised Articles (1 to 4) less emphatic and aggressive in tone. But the claim to territory

'which does not belong to us' gave 'a permanent place in the constitution to a claim to "*Hibernia Irredenta*".' McElligott found 'the parallel with Italy's historical attitude to the Adriatic seaboard beyond its recognised seaboard striking'. His comments were not heeded. As McDunphy minuted on reading the memorandum: 'This is a matter of policy'.<sup>4/i</sup>

McElligott was the only official to make any reference to the absence of the Article on religion. In his comments on the 'second revise' he had minuted, 'We are still without the article dealing with Religion, Church and State. It is most important that as much time as possible should be available for consideration of its terms'. When that was written, sometime after 10 April, de Valera was very much aware of the delicacy and difficulties presented by trying to find a wording that would satisfy everybody. He conducted his quest for an acceptable religious formula independent of the constitutional committee as a body. He may, however, have had help from individuals on that committee. The small committee had more than enough to contend with. They had sifted the comments from all quarters. On 1 April the first revise was in printed form and in the hands of the President. Copies were given to the members of the committee and other selected persons, and the process of re-examination commenced. This was done without further reference to departments, whose observations had already been exhaustively considered in connection with the original draft. The second revise was circulated to government ministers and others on 10 April and the returned submissions were reviewed.

While the constitutional committee was examining and revising, de Valera continued in the last week of March to get letters and submissions from McQuaid. On 21 March McQuaid sent a few emendations. His letter is of interest, although it is not clear which section of the Constitution he is referring to:

It occurs to me that for the interpretation of all this section one must presume as a cause of just interpretation:

- (a) that the natural sense of the words will be maintained.
- (b) that the mind of the legislator will be duly regarded.
- (c) that moral — not mathematical — possibility will be envisaged.

Otherwise, any private citizen — or indeed, jurist — could

drive any law or any interpretation of law to an impossible conclusion concerning the obligations of the State.<sup>44</sup>

On 22 March 1937, McQuaid wrote again about 'the case we discussed'. The statement that he was sending was 'a combination of two more Papal pronouncements! So we are in good company'. He asked de Valera to note that the had 'put in the rational and Christian concept of work'. He sent two letters on Holy Thursday, 25 March 1937. He apologised for being 'somewhat late' with his submission: 'I enclose the more useful excerpts connected with Religion. There are a few more valuable ones, but they can follow'. Later that day, he sent 'with great pleasure the remaining dossier, point by point, for the Family, Education and Private Property'. He added that 'by tonight I hope to have Church and State all typed'. On Good Friday, 26 March 1937, he sent 'the last of my dossier: with the sincere hope that it will prove of some avail. What of the Secret Societies clause? I hope you are not too tired after these nights of labour; and that all goes well'. On 27 March, McQuaid wrote: 'This letter is unusual from me: it is only one of good wishes for a peaceful Easter. I hope you will soon draw breath — whatever breath my friends, the jurists, will have left you'. On 31 March, McQuaid made another submission: 'I think the enclosed is safe and sure'. In a postscript, he asked: 'Perhaps you will have the sheet of suggestions on Art. 41, by this evening. I can work on them too'.

At this time, de Valera was casting around to find another draft Article on religion. McQuaid may have tried hard to dissuade him from jettisoning the original Article, which came so closely to the priest's ideal. The need to formulate an alternative to the draft Article on religion, Church and state may have induced de Valera to look more sympathetically at Article 8 of the 1922 Constitution. However, the matter was sufficiently serious for de Valera to risk showing the papal nuncio, Paschal Robinson, the results of his labours.

On Saturday, 3 April 1937, de Valera called to see the nuncio at his residence in the Phoenix Park. He brought with him three documents, marked A (original religious Article), B (modified religious Article draft formula) and C (preamble). The difference between draft A and B was that section 2 had been reduced to:

Accordingly, the state shall hold in honour the Name of God and shall consider it a duty to favour and protect religion.

Section 3 had also been changed:

The State acknowledges that the true religion is that established by our Divine Lord, Jesus Christ Himself, which He committed to his Church to protect and propagate as the spiritual guide of men and the guardian of right morals.

Sections 4 and 5 were deleted. The old section 6 became the new section 4, and the last line was changed to read: 'having due regard however to public order and morality'. There was an interesting change in the old section 7 (now 5):

The State guarantees not to impose any disabilities on the ground of religious conviction that would be contrary to natural rights and social justice, nor shall the State place any barrier to employment in the public service on such a ground.

The old section 10 became the new section 6 and remained unchanged. What is of particular interest about these changes is that they are made in Eamon de Valera's handwriting. The nuncio was shown both versions of the religious Article.<sup>41</sup> In his own minute of the meeting, the President explained his dilemma:

... explained that I was being urged to put in something like '1 of A, but it would be quite impossible; that I wished to go as far as it was at all practicable, but could only go that far. 1 and 2 would cause no difficulty in Document B(3) was a suggestion but would leave the matter still in the air but would inevitably be pushed either backwards or forwards. Was personally in favour of leaving it out. The nuncio agreed.<sup>46</sup>

That section quoted above is crossed out in the copy of draft Article on religion (B) which is on file. De Valera left a copy of the amended Article (B) with the nuncio.

When de Valera said that he was going to see Dr Edward Byrne, Archbishop of Dublin, the nuncio told him that Cardinal

MacRory was going to be in the city on Monday for a meeting, the following day, of the Episcopal Standing Committee. Robinson gave more than a piece of information. It was both protocol and prudent to see Armagh *before* Dublin. The nuncio saved de Valera from making a bad mistake. De Valera agreed to see MacRory. They met at six on Monday evening at the nunciature in the Phoenix Park. Very little is known about the content of the discussion. But de Valera has minuted:

He [the cardinal] felt that omission of any mention of the position of the Catholic Church would cause considerable difficulty and cause me to be attacked. He would himself not attack, as he understood the difficulties.<sup>47</sup>

The nuncio had been left with a copy of the revised Article on religion. Whether he showed it to the cardinal, or discussed its contents with him, is impossible to know. It is most likely that he did not do so. By Monday, 5 April, de Valera had a new version, which had dropped the section 3 that both the President and nuncio felt ought to be removed. That left no specific mention of the Catholic Church in the latest draft on religion. That was unlikely to suit MacRory, whom de Valera had known since their time on the staff together at Maynooth. They knew each other quite well but there had been differences of opinion, particularly in 1932 around the time of Patrician celebrations. The cardinal was much more opposed to de Valera's liberal attitude than he was prepared to admit. He had had sufficient time to sketch out an alternative formula on nunciature notepaper:

The state reflecting the religious convictions of 93 pc of its citizens acknowledges the Catholic religion to be the religion established by Our Divine Lord Jesus Christ; while guaranteeing at the same time to all its citizens the fullest liberty to practise their religion in public and in private, with due regard however for public order and morality.<sup>48</sup>

The meeting ended inconclusively. De Valera 'pointed out the difficulties of such a draft'. His worst suspicions had been confirmed. The Cardinal had indicated that there could be difficulties although 'he would himself not attack'. There was no

promise of his being positive and supportive. MacRory's refusal to lead, even in the event of an attack on the government from sections of the Catholic Church, had serious implications for de Valera. The same evening, de Valera took the preamble and the draft Article on religion to Drumcondra where he met Archbishop Edward Byrne. According to de Valera's own account, '[Byrne] liked the preamble immensely, and with the preamble was prepared to see, if I thought it necessary, omission of the Catholic Church as such'.<sup>49</sup> In final form the preamble read as follows:

BUNREACT NA HEIREANN

In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Eire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution.

An early draft differed significantly. (Italics show where changes were made.)

BUNREACT<sup>50</sup>

IN THE NAME OF THE MOST HOLY TRINITY, from Whom is all authority and to Whom, at our final end, all actions both of men and States must be referred.

WE, THE PEOPLE OF EIRE, *Motherland of the Irish Race.*

HUMBLY ACKNOWLEDGING all our obligations to our Divine Lord, Jesus Christ, *for Whose worship our fathers have endured so many centuries of pain.*

GRATEFULLY *RECALLING* the heroic and unremitting struggle, especially in these latter times, to regain the rightful independence of our Nation.

AND SEEKING to promote the common good by due observance of the *Christian principles of Prudence, Justice and Charity, whereby* the dignity and freedom of the citizens may be *rightfully secured* and true social order *adequately established and maintained.*

DO . VOI F CO. VFIRM, ENACT, and PROCLAIM this our CONSTITUTION.

De Valera took a personal interest in this section and minuted the changes through the various stages. He changed 'for whose true worship our fathers have endured so many centuries of pain' to 'who kept our fathers constant in their faith thro[ugh] centuries of trial'<sup>1</sup> after showing the preamble to the nuncio on 5 April. (The phrase is underlined in the copy taken by de Valera to the Phoenix Park.) In a further redraft, made on 7 April, de Valera settled on the formula 'who sustained our fathers thro[ugh] centuries of trial'.<sup>2</sup> In the final section, substantial changes were made. The phrase 'the Christian principles' was dropped and the line 'the unity of our country restored and concord reached with other nations' added.<sup>5</sup> Further amendments were made on 9 April. The phrase 'Motherland of the Irish race' was dropped. By 10 April, the preamble was in final form. It satisfied the most rigid Catholic criteria. The difficulty was to win support for it from the other Churches.

### **Building consensus: discussions with the Churches**

The preamble was not de Valera's major concern during the second week in April. He had to work out how to prevent a fundamental difference of principle between the cardinal and himself from developing into a public row that would inevitably involve the other Churches. He had problems with the cleric who had been most helpful to him in the drafting of the original article. On 5 April, McQuaid sent de Valera a letter outlining a modification to the by-now-rejected Article:

I beg to enclose herewith an amendment to Paragraph 6 — which seems to me better, for it more explicitly distinguishes between State-respect for *individual* choice in things religious and state-tolerance of differing forms of worship: two different aspects of religious tolerance. The original was quite correct: this form is less open to an accusation of being inaccurate. And on this particular question very acute writing has been done."

By that date, de Valera had diverged significantly from McQuaid and he was thinking of how best to change the formula.

De Valera had been buoyed up by his meeting with Archbishop Byrne, who took a much more helpful line on the Article on religion, leaving it up to the President as to whether he would include special mention of the Catholic Church or not. On Tuesday, 6 April, the day after he had been to Drumcondra, de Valera thought over the problem. It occurred to him 'that we might put in a clause recognising the fact that the Catholic Church was the guardian of the faith of the majority of the citizens'<sup>6</sup> On 7 April, a re-draft was made and the changes are in de Valera's own hand. In another working draft, probably made around 8 April, an amendment to section 2 can be found scribbled in the margin: 'the Spec. pos. of the Cath. Church'. Written in pen between sections 2 and 3 is the following: 'recognises the Cath. Church as the guardian of the faith professed by the great majority of the citizens but guaran. etc'. That was to read as part of section 3. When it emerged in final form later in the week, the above had become section 2, and section 3 had been replaced by guarantees to a list of named Churches.<sup>37</sup> By the following Sunday, 11 April, de Valera had finalised a new draft of the religious Article. It does not seem likely that the President submitted the problem to the constitutional committee. But people working on that committee, such as John Hearne and Maurice Moynihan, may have been consulted individually. De Valera was certainly centrally involved in the drafting process. He was to tell Cardinal MacRory that 'the lawyers have not seen the draft and may want some changes in the phrasing'.<sup>18</sup>

The new draft was considerably more liberal than either the

first or second versions. It was to remain substantially the same until about 20 April when further changes were made. As presented to various political actors on 10 April, this Article read:

Religion:<sup>9</sup>

1. The State recognises that public worship is due to Almighty God. It shall hold His name in reverence and shall respect and honour religion.
2. The State recognises the special position of the Catholic Church as the guardian of the Faith professed by the great majority of the citizens.
3. The State also recognises the Church of Ireland, the Presbyterian Church, the Methodist Church, the Hebrew Congregation, and the other religious denominations existing at the date of the coming into operation of this Constitution as the guardians of the Faith of their respective communities.
4. Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
5. The State guarantees not to endow any religion, and shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.
6. Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.
7. Every religious denomination shall have the right to manage its own affairs, own, acquire and maintain institutions for religious or charitable purposes.
8. The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

The drafting of this Article was carried on in great secrecy. It is unlikely that many of de Valera's fellow ministers knew of what was happening. When, for example, I showed a copy of the first draft Article on religion to Sean MacEntee, he told me that he

had never laid eyes on it before. However, on that occasion, I did detect a certain suppressed anger in the old politician. He may have suspected what was going on, but he never knew. MacEntee was Minister for Finance at the time.<sup>60</sup>

On 10 April, de Valera called on the nuncio, who promised to see the cardinal. The same day he went to see Archbishop Byrne in Drumcondra and later he saw Dr Irwin of the Presbyterians.

Sean T. O'Kelly, the Vice-President, took copies of the preamble, the Article on religion, and an explanatory note to the nuncio on Sunday, 11 April 1937. According to a minute in de Valera's hand, 'The nun. to meet cardinal at some pt. on our territory this Sunday afternoon'.<sup>61</sup> It is not clear whether Robinson went alone to see the Cardinal or whether he was accompanied by Sean T. It is possible that he might have been because one of the documents is minuted by de Valera 'further points given verbally to S.T.'.<sup>62</sup>

Robinson had in his possession the redrafted Article on religion and an explanatory note. Section 2 of the Article on religion was underlined in two places by de Valera, for the benefit of the cardinal:

2. The State recognises *the special position* of the Catholic Church as the guardian of the Faith professed by the *great majority* of the citizens.

De Valera explained in the prepared note that the lawyers had not yet seen the draft and would probably want some changes. The word 'denomination' might be regarded by them as unsuitable, but the 'substance would be unchanged'. He explained that the phrasing of Sections 3 to 8 were those of the 1922 Constitution. Section 7 was new. De Valera felt that the principal bodies mentioned in section 3 might refuse their consent unless the words underlined in section 2 (as above) were omitted. In that case, the question to be decided was whether sections 2 and 3 were to be retained as modified or were to go altogether:

There are very strong reasons for getting into the Constitution explicit mention of the Churches, with the Catholic Church in the premier position — the opportunity may not recur. The combined influence of the Churches will be united against

atheism; the Church of Ireland and the Presbyterian Church are, like the Catholic Church, all-Ireland bodies in their organisation, and are powerful aids to prevent partition from being made complete or permanent.

De Valera felt that the above reasons 'urge that we should be willing to make some sacrifice if they become the *sine qua non* of agreement'. He was sure that 'to insert sections two and three without agreement would stir up a whole sea of trouble: a religious controversy at this time would be most unfortunate'. Quite astutely, de Valera then went on to mention the sensitivity of the preamble:

As regards the Preamble, many are sensitive because of its religious character. The mention of our Divine Lord's name they think is more suited to a Church document than to a Constitution, and fear that it may give rise to charges of hypocrisy or pharisaism. This could all be met if it were generally known that the competent ecclesiastical authorities had approved of the religious part.<sup>6/1</sup>

However, the meeting did not go particularly well. MacRory, who had expressed his reservations on 5 April, had not undergone any *metanoia* in the meantime. De Valera met the nuncio later that same evening in the home of Sean T. O'Kelly. Robinson, according to de Valera, 'reported that Cardinal was quite pleased but disliked the last three lines of 3 and suggested they should be omitted'.

De Valera argued with the nuncio 'over the difficulties'. He made the point that 'we must have [*see is written above this word*] the other person's point of view', although, it appears from de Valera's earlier conversations with Robinson, the nuncio tended to agree with him. The fact that the Cardinal Archbishop of Armagh had difficulties with perhaps the most sensitive section of the religious clause dealing with the other Churches placed de Valera in a very awkward situation. No matter how much the nuncio tended to agree with de Valera, he could not appear to be partisan.

On Monday, 12 April 1937, de Valera was confronted by what is termed in more contemporary parlance a 'worst-case

scenario'. He had not yet begun to consult the other Churches and already there was the possibility of a confrontation with the Catholic Church — or, at least, with its leader. There was the further prospect of the other Church leaders not accepting the wording 'the special position of the Catholic Church'. De Valera called on the Church of Ireland Archbishop of Dublin, Dr G.A.F. Gregg. The latter wrote in his diary: 'Mr de V calls and speaks three quarters of an hr. in regard to religious clauses of the new constitution'.<sup>64</sup> The urbane Gregg proved very helpful to de Valera. The President emphasised that:

our Constitution should win the respect of all sections of the Community, and that the members of all Churches should, if possible, be satisfied. But here was my difficulty. I knew that some members of our Church objected to being called *Roman Catholics*, whilst many in your church objected to being called non-Catholics or Protestants.

When the President discussed his difficulties over finding the correct names for the Churches, Gregg suggested he adopt the simple device of using the term by which each Church describes itself. Consulting a volume of the Decrees of the Council of Trent in his study, Gregg read out: 'Holy Catholic Apostolic and Roman Church'. That was how the Catholic Church was described in the Constitution. Church of Ireland was to be used to describe Gregg's own Church. De Valera had made progress. The Church of Ireland view on the 'special position' phrase remained open. De Valera may not have laid too much emphasis on it at that time.

De Valera called on the nuncio at his residence, but there is no information about what transpired. Later that day, the President saw Dr Irwin of the Presbyterian Church, who was to report back to the Moderator designate in Belfast.

On 13 April, de Valera was in contact by phone with the nuncio. He saw W.H. Massey, President of the Methodist Church in Ireland, later that day. That meeting went particularly well. The wording of the preamble and the Article on religion were the same as those shown to the cardinal. On 15 April, Massey wrote to 'My dear President': he had consulted, in confidence,

two of 'our most prominent and influential men' on the subject matter of the interview with de Valera. Massey confirmed the positive views he had already expressed to de Valera: 'We find nothing either in the substance or wording of the sections submitted to which we could fairly take exception'. He pointed out that the official title of the Church of which he was the head was 'The Methodist Church in Ireland'. Massey stated that 'we are not sensitive' on the matter of the phrase 'the Catholic Church'. The Methodists were:

quite satisfied that it should be used as the official title of the Church of the great majority in this country, so long as it is not used in any deliberately exclusive sense. The succeeding paragraph in the draft copy in which the other 'Churches' in this country are 'recognised' as such removes any doubt on this point.

Massey then expressed his appreciation for 'the courtesy and fairmindedness' shown by de Valera 'in arranging for our interview, and seeking to understand our point of view, and where necessary to meet, if possible, our reasonable wishes'.<sup>65</sup>

On Wednesday, 14 April, de Valera met Dr Irwin again. Two days later, he met Dr Irwin, the Moderator of the Presbyterian Assembly, F.W.S. O'Neill, and the Moderator designate, John Waddell, who travelled from Belfast for the meeting. The three were shown the preamble and the Article on religion, which they were allowed to take away. The documents were later returned.<sup>66</sup> But how did this meeting turn out?

When F.W.S. O'Neill received his copy of the published Constitution, he wrote to de Valera, offering 'my best thanks for your very cordial reception of our unofficial delegation, and for your very sympathetic attitude to our observations. All three of us were impressed and pleased'. He informed de Valera that there would be an hour-long broadcast on 7 June of the opening of the Presbyterian General Assembly. In his address as outgoing Moderator, O'Neill proposed to 'make grateful reference to the Preamble of the Constitution and the section on Religion'.<sup>67</sup>

One of the most notable features of de Valera's consultations with the other Churches was his success in confining discussions

very largely to the preamble and the Article on religion. He appears to have been able to assuage any more general fears the Churches might have had. The wider discussion on the philosophical and religious ideas underpinning the rest of the document did not arise. At one level at least, this reflected a high degree of religious consensus in the country. It also reflected the hierarchical nature of Irish democracy and the marginalised existence of the religious minorities in a society that was overwhelmingly Catholic in culture and ethos. The fact that de Valera troubled himself to consult the heads of the various Churches was an unprecedented gesture in the history of the state. The unsolicited visits to the leaders of the minority Churches generated considerable goodwill. The Irish political culture of the 1930s is not noted for its tolerance and ecumenism. The explicit mention of the Jewish congregations in the Article on religion was a deliberate challenge to the anti-Semitism of the vociferous supporters of right-wing Catholic thought.<sup>118</sup> The framing of Article 44 on religion, in particular, helped de Valera face up to the latent sectarianism and basic intolerance in sections of Irish society.

If de Valera was making progress with the minority Churches, his difficulties with the leader of the Catholic Church remained acute. Nevertheless, the President had the controversial sections redrafted by 14 April to read:

2. The State recognises the special position of the *Holy Catholic Apostolic and Roman* Church as the guardian of the Faith professed by the great majority of the citizens.
3. The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Jewish Congregations, and the other religious denominations existing in *Eire* at the date of the coming into operation of this Constitution.<sup>69</sup>

These changes followed upon Gregg's recommendation.

The decision to change the Article on religion so radically from the first draft was a bitter disappointment to the man who had done most to shape its original content. John Charles McQuaid was angry and upset.<sup>10</sup> At the time, de Valera was under a considerable amount of pressure and may not have wel-

corned the generous daily attentions of McQuaid. However, psychological factors alone are not sufficient to explain the gulf between the two men in mid-April. There were profound ecclesiological and political differences separating de Valera and McQuaid. Although it may not have been known to either cleric, MacRory was in the same camp as the Holy Ghost Father. The sage remark of Dr Leon O Broin about Dr McQuaid applies equally to the cardinal: 'Dr McQuaid was a native of Cootehill in Co Cavan and carried to Dublin with him the antagonisms of the Border area'.<sup>71</sup> (In the case of Dr McQuaid, the influence of conservative French Catholicism ought also to be added.)

De Valera had received over fifty pages of notes from John Charles McQuaid, which have been referred to earlier, as background for the drafting of Articles 42 (this became 45) and 44 in the final document. It may have been the President who marked the following passage from Leo XIII's *Immortale Dei* in McQuaid's notes and wrote 'very important] beside it:

Nor is there any reason why any one should accuse the Church of being wanting in gentleness of action or largeness of view or of being opposed to real and lawful liberty. The Church indeed deems it unlawful as the true religion, but does not, on that account, condemn those rulers who for the sake of securing some great good or of hindering some great evil, tolerate in practice that these various forms of religion have a place in the State. And in fact the Church is wont to take earnest heed that no one shall be forced to embrace the Catholic faith against his will, for, as St. Augustine wisely reminds us, 'Man cannot believe otherwise than of his own free-will'.<sup>72</sup>

There is another passage from the same encyclical which de Valera would have found useful had he read it in full:

The Almighty, therefore, has appointed the charge of the human race between two powers, the ecclesiastical and civil, the one being set over divine and the other over human things. Each in its kind is supreme, each has fixed limits within which it is contained, limits which are defined by the nature and special object of the province of each, so that there

is, we may say, an orbit traced out within which the action of each is brought into play by its own native right'."

De Valera may have had occasion to dwell upon such 'let out' clauses as the two quoted above while he grappled to overcome McQuaid's rigid outlook. In an undated letter, which may have been sent around that time, the Holy Ghost father interpreted Leo XIII's thinking for de Valera in a not unhelpful way:

Hence the society and the Government ought per se to profess the true Faith and legislate in accord with it; per accidens it may not be prudentially possible to have that public admission. This seems to me the meaning of Leo XIII. Of course, once the State acknowledges God's right to public worship, it cannot be secular even if it be not Catholic. And when the State legislates according to natural law, of necessity, it legislates according to Catholicity, because the latter is the guardian of natural law.<sup>74</sup>

Although McQuaid was opposed *in principle* to the new approach which de Valera had adopted, there was one further change in Article 44, in section 1.3, that may have triggered friction between the two men. After de Valera had spoken to the leaders of the minority Churches, he may have felt obliged to insert 'The State also recognises *the other Christian Churches*, namely, ... etc'. In McQuaid's view, some of those Churches had denied the divinity of Christ and were heretical. That is, however, my interpretation of how he would have reacted. Fr Farragher states that 'one rather heated discussion on this matter' took place in de Valera's house at Bellevue on 14 April.<sup>75</sup> De Valera telephoned the next day. He may have been attempting to patch up differences, but his call only compounded the problem:

It was kind of you to phone and I am grateful. At the time, I was surrounded by people and could not say more than I did, in a bald way. I do not judge myself so indulgently as you have done. I was clearly at fault and I am sorry for it.<sup>76</sup>

McQuaid sent de Valera a second note later that day, apologising for the previous night:

I fear that my many notes and papers must have only bothered you these last ten days. But it occurred to me as I said Mass this morning that last night I may have so shown my disappointment as to seem wanting in courtesy. If I did in the least way, I am very sorry for it. Should I be able to serve, now or in the future, even to a small degree, I should like to think that you will not hesitate to ask me and to believe that I bow willingly to those who are placed above and who give their decisions.<sup>71</sup>

The last line could be a reference to de Valera acting in his capacity as President. But it may also refer to high ecclesiastics in the Catholic Church. At the time, that could only be Archbishop Edward Byrne. McQuaid may also have been referring to both spheres of power.

However it would be quite incorrect to conclude that this was a rift in friendship. The annoyance disappeared but the fundamental ecclesiological differences remained.

The fact that Byrne had sided with de Valera against MacRory was a substantial factor in favour of the government. But the opposition of both McQuaid and MacRory, on a matter of principle, signified the widespread support that could be summoned 'in defence' of the Catholic Church. It was against that background of uncertainty that de Valera decided upon the need to seek clarification from a higher authority.

The theory that the desire to include the phrase '*the other Christian Churches*' triggered the row with de Valera cannot be proved conclusively. I did not say that it was the *cause* of the 'confrontation' but it may have been the point beyond which McQuaid was not prepared to go. The timing also supports this view. The draft Article, dated 14 April, does not contain that phrase. When Joseph Walshe, the Secretary of the Department of External Affairs, was sent to Rome on Friday, 16 April, he took a copy of the 14 April draft. However, his final instruction read:

To get permission to phrase ARTICLE 3 so as to include the phrase 'The State also recognises the other Christian Churches, namely, etc.'

In other words, de Valera had taken the drafting process a stage

further late on 14 April. He had a difference of opinion that night with McQuaid, which led the clergyman to send two letters of apology. De Valera, therefore, anticipated that MacRory would also have strong objections to the latest change in the Article. The Vatican had already been made aware of the cardinal's position. The basic dilemma was how to pre-empt a Church-state crisis on the matter. At very short notice, probably on 15 April, it was decided to send Walshe to Rome. There was not the time to retype the full draft Article on religion so as to include the phrase so repugnant to McQuaid.

### **Joseph Walshe and high diplomacy at the Vatican**

The decision to send the Secretary of the Department of External Affairs, Joseph Walshe, to the Vatican on Friday, 16 April, could only have been taken very reluctantly by Eamon de Valera and his advisers. The historical experience of the Fianna Fail leadership with Rome had cautioned minimal contact as far as domestic Irish politics were concerned. Pius XI had not shown himself to be particularly friendly towards Irish nationalism. The memory of the would-be peace-maker, Monsignor Salvatore Luzio, sent by the Pope in 1923 to try and end the civil war, still rankled with certain members of Fianna Fail.<sup>18</sup> There were residual suspicions that the Vatican was pro-British. Therefore, de Valera had no reason to feel confident about the Vatican's political judgment as far as Ireland was concerned. Since coming to power in 1932, the Fianna Fail government had realised the necessity to dispel as far as that was possible the known doubt that the 'republican' de Valera's name evoked at the Vatican. The Eucharistic Congress, which was held in Dublin in 1932, helped change de Valera's international profile in a positive way.<sup>79</sup> This was followed by an official visit to the Vatican during Holy Year in 1933 when it was evident that the Irish President had not yet won fully the confidence of senior officials of the papacy. Further efforts were made to counteract a negative outlook by a succession of ministerial pilgrimages. The Vice-President, Sean T. (O) Kelly, was generally entrusted by de Valera with the task of establishing better relations in that area. His visit in 1933 with the Irish national pilgrimage proved to be a diplomatic success. When P.J. Little, parliamentary secretary to the President, visited Rome in December 1933, with a party

of Brancardiers, Walshe wrote to the Irish charge d'affaires, Leo T. McCauley, pointing out the importance of securing a private audience:

It is important to bring to the Holy Father's notice that more members of the Irish Free State Government have gone to Rome for the Holy Year than of any other Government in the world. The private audience is therefore essential.<sup>80</sup>

In retrospect, Walshe's admonition to McCauley sounds rather *gauche*. That was his diplomatic style. But the extreme nature of the claim reflected de Valera's policy concern to engage in confidence-building exercises with the Vatican. The danger of allowing unfounded suspicion to linger might have damaged Irish interests at a future date. Between 1933 and 1937 Irish interests were protected in Rome and government policy helped slowly reassure the doubters at the Vatican regarding Fianna Fail's religious orthodoxy. Between 1934 and 1940, Irish diplomacy at the Vatican was in the able hands of W.J.B. Macaulay (not to be confused with the other Irish diplomat, Leo T. McCauley).

Against this historical background, it could only have been with the greatest reluctance that de Valera decided to send Walshe to Rome on 16 April 1937. But the conflicting positions within the Catholic Church, in that small circle taken into de Valera's confidence, had potentially dangerous political consequences. Were the substantial differences over the wording of the religious Article to become public, the chances of having the Constitution passed in a plebiscite appeared remote. The fear of a public controversy over the religious clause of the Constitution, led by an influential sector of the Catholic hierarchy and supported by the *Church Militant*, outweighed the risk of having the Walshe mission end in disaster. It was a calculated risk. Undoubtedly, de Valera was advised by the nuncio on possible options facing the Vatican. Joseph Walshe does not appear to have played a central role in the drafting of the Constitution and he may have been anxious to go to the Vatican anyway. The Irish envoy could have handled the matter, but the sending of the Secretary of the Department of External Affairs emphasised the delicacy and importance of the undertaking."<sup>1</sup>

Walshe took four documents to Rome: a draft of the proposed preamble, the revised article on religion, a set of instructions and a *pro memoria*. The instructions were clear and unambiguous:

1. General approval for religious part.
2. To get the official name of the Catholic Church.
3. To get permission to phrase ARTICLE 3 so as to include the phrase 'The State also recognises the other Christian Churches, namely, Church of Ireland, etc., as well as the Jewish Congregations and the other religious bodies existing in Eire at the time of the coming into operation of this Constitution.'<sup>82</sup>

The *pro memoria* outlined de Valera's dilemma and provided an insight into the mind of the President as a working politician. The document was not a philosophical tract stating objectively the tenets of de Valera's world view. It was a diplomatic document designed to furnish Walshe with the arguments necessary for the Vatican to understand the particular political difficulties of a state with diverse religious groups in its jurisdiction. It was to serve Walshe as a 'remainder'. Therefore, it was not to be presented to the Cardinal Secretary of State, Eugenio Pacelli. The objective was to publish the Constitution on 24 April 1937.<sup>85</sup> Walshe was instructed to argue that 'the Articles concerning religion are not the Catholic ideal as regards the relationship between Church and State'<sup>1</sup>. However, it was 'not deemed possible to go further than is provided' because of the actual conditions in the country:

About one-fourth of the population of Ireland is Protestant. Until recently, in all State relations the Protestant Churches were the dominating influence.

The 'Church of Ireland' was until 1869 the State Church here, and the Protestant religion the State religion.

The Protestant Churches in this country are closely associated with the corresponding churches in Great Britain, in which there are over 40,000,000 Protestants. With this strength so close to hand, and with the recollections of their past supremacy, the Protestant members of our population find it hard to accept a second and subordinate place. If the

attempt were to be made to embody in the new Constitution the full Catholic ideal there would be an immediate outcry from the Protestant section of the population, and a bitter religious controversy might easily ensue.

In the present circumstances, such a controversy would in every way be disastrous. The Government would be charged by a large section even on its own supporters with having needlessly caused this controversy and with having wilfully disturbed the present religious calm in this part of Ireland. The Government would likewise be charged with having provided the occasion for a renewal of the bitter attacks on our fellow-countryman in Belfast and in the rest of that part of Ireland in which Catholics are a minority.

The Government would further be charged with having raised a new barrier to the reunion of our country, and with having recklessly caused offence to a section of our countrymen whose ancestors produced many patriots whose names are revered in many a Catholic home. Wolfe Tone, Robert (Emmet, Parnell, etc.).<sup>84</sup>

On the other hand the recognition of the Protestant Churches, even though they are put in a subordinate place, will produce considerable appeasement, will lead to better feeling and understanding between the different religious bodies here and may also lead to the desired political reunion of our country.

The effect of the recognition given will, I am convinced, secure the united influence of all the Christian bodies against Atheism which present world conditions seem to indicate to be the enemy now most dangerous.

But Walshe was to stress that that would not detract from the position of the Catholic Church:

The premier and special position accorded to the Catholic Church as 'guardian of the Faith of the great majority of the citizens' will mean in practice that the Catholic Church will be the Church associated with the State on all public occasions.

Under our democratic Constitution the vast majority of the Ministers of State are certain to be Catholic, who will profess

their religion openly and will attend religious functions in a Catholic Church on all occasions in which a manifestation of religious belief is called for.

In the past Ministers in a body have annually attended Mass on St. Patrick's Day at the Catholic Pro Cathedral; the Government and Members of Parliament have attended a special Mass on each occasion in which a new Parliament meets after the dissolution. At the Eucharistic Congress the State was officially represented by all the Ministers.

De Valera awaited anxiously for the outcome of the Walshe mission. Both men were in daily contact between 19 and 23 April 1937. Aply assisted by Macaulay, Walshe, who had arrived on 17 April, began a round of protracted discussions with officials of the Secretariat of State. A series of coded telegrams kept de Valera informed. For example, on 19 April Walshe sent a coded message:

Saw Assistant Secretary of State [Monsignore Pizzardo] yesterday. Gave him message. Secretary of State sees us tomorrow having informed Pope. Hope send telegram announcing complete approval tomorrow afternoon. Do not foresee any difficulty.

On 20 April, Walshe reported further that he had had a long interview with Pacelli, the Secretary of State and was meeting him again the following day after Pacelli had reported to the Pope:

Cardinal's attitude towards general question is that Vatican could only approve completely if Church recognition by State because it is Church founded by Our Lord. Explained all reasons why this absolutely impossible. They will approve setting up — difficult circumstances of such Catholic constitution and will give blessing thereto. Pacelli gratified by title as set out by you with word 'and' before Roman. He also endorses use 'Christian Bodies'. Have requested audience. Shall telegraph tomorrow.

Dublin sent Walshe a coded telegram on 21 April stating that de

Vaiera was 'awaiting full report'<sup>1</sup>. This reflected the President's anxiety to get a conclusive and immediate answer from the Vatican. But YValshe had caused anxiety in Dublin:

You state Pacelli endorses use 'Christian Bodies'. President desires to know whether words 'Christian Churches' and not merely 'Christian Bodies' are endorsed.

However, Walshe was not in a position to answer that query when he reported the same day:

Another long interview today. Secretary of State had seen Pope this morning. Latter's attitude was one of complete neutrality. Says he is not to be taken as approving 'or as not disapproving'. He will ... maintain ... [telegram is not deciphered here]. Seeing Secretary of State again tomorrow about the audience and the question your telegram of today's date but I have no hope of change in the present position. Have used every argument but neutrality is the maximum concession without making Constitution exclusively and formally Catholic. Cardinal extremely kind, full of consideration for the Government, realises all the difficulties.<sup>8</sup>

On 22 April, Walshe sent a coded telegram to Dublin claiming success for the mission:

Christian Churches acquiesced in, but without responsibility. Cardinal says strictly there is only one Church, and Catholics should not formally recognize existence of any other. Pope's expression taceremo [We shall maintain silence] sums up whole attitude towards Constitution and having spent so many hours with Secretary of State these days I am convinced that with their rigid tradition they could not go further. It is a great deal that they should take the position of friendly and sympathetic silence. Seeing His Holiness Saturday but not privately.<sup>86</sup>

But de Vaiera was still anxious to know on 22 April whether 'official title of Church approved by the Pope'. He referred in his telegram to an earlier communication of Walshe which had

stated that 'Pacelli gratified by title<sup>1</sup>. The following day Walshe, who had been given permission to spend a few more days in Italy, confirmed that 'official title approved by Pope. It is "the Holy Catholic Apostolic and Roman Church"'.<sup>87</sup>

With the exception of possible telephone calls, de Valera learned of developments in Rome by means of telegram. However, Walshe produced a long handwritten report on 22 April after the completion of his round of discussions with senior Vatican officials. It is worth looking at the content of this document because it throws light on the subtleties of high diplomacy. The contrast in diplomatic styles between Pacelli and Walshe is quite striking. The exchanges demonstrate the determination of the Vatican not to allow itself to become involved in the internal politics of a Catholic state. Pacelli had no desire to allow the Vatican to become co-opted by any group in Ireland.

Walshe, who ought to have known better because of his experience during the nuncio negotiations in 1929, had been told by Pizzardo that he 'saw no difficulty in getting the desired approval'. It was on that basis that Walshe had sent a telegram to Dublin promising an announcement of 'complete approval'. However, as things happened, that 'proved to be excessive optimism'.

The first three sections of Article 45 (which became Article 44 in the final draft) were left with Pizzardo for Pacelli. Walshe and Macaulay saw the Secretary of State the following day, 20 April. According to the Walshe report, 'the cardinal was most amicable'. He kept them for over an hour which was well into lunchtime, as he did also on the two following days. Walshe explained de Valera's policy, emphasising 'particularly the aspect of the "apeasement" [sic] which you desire to bring about not only amongst our own people of all religions and political beliefs but also between our people and the British people'. Pacelli appeared very interested and asked endless questions:

I thought it well to say at a very early stage that you fully realised that the sections of the Constitution under discussion did not correspond with the complete Catholic ideal. You would like to have the approval of the Vatican in so far as it could be given. At any rate you wished to have the satisfaction of having let the Card. Secy, and the Holy Father see the sec-

lions relating to the Church before putting them before parliament.

Pacelli expressed his great joy that de Valera had done so and suggested that the President should understand that whatever he and the Holy Father might say they were in the fullest sympathy with de Valera and his government in his difficulties. They appreciated how great a task it was to achieve anything like the Catholic ideal in the special circumstances.

But Pacelli was determined to speak with complete frankness. He had discussed the matter briefly with the Pope and would do so again the following day:

He felt however that the 'special position' given to the Catholic Church had no real value so long as there was not a formal acknowledgement of the R.C. Church as the Church founded by Christ. Moreover its importance was based on numbers only (as far as the test was concerned) and the recognition given to the other Churches nullified any advantage which might have been derived from exclusive recognition. He thought we should use the word 'tolerates' in regard to them. He could see no juridical consequences flowing from the text used which could confer advantages on the Catholic Church not equally conferred on the other bodies. Ireland was *the* Catholic country of the world, and he thought we should have made a very special effort to give to the world a completely Catholic constitution.

Walshe made a passionate defence of the official position, trying to keep to the 'realities' of Irish politics. Pacelli, who was very friendly throughout, said that he was talking as a churchman must talk. Walshe ascertained very early on in the conversation that he would never succeed in getting approval of the text from the Vatican: 'From the nature of things they have to stake their full claim, and formal or indeed informal approval was not to be given to a text which did not come down completely on the side of strict Catholic doctrine'. Pacelli told Walshe with a smile 'but quite truthfully that according to the strict teaching of the church we were heretics to recognize any church but the one true church of Christ'. Walshe immediately countered, only to

be told by Pacelli that 'the church would not take our heresy too seriously'.

In fact, Pacelli was engaging in gentle 'leg-pulling' with Walshe. He was telling the Irishman politely that the Vatican had no intention of becoming involved in domestic Irish politics. The Secretary of State had pointed out that if the Vatican were to do so it would have to seek the 'one, true church' formula. In his report, Walshe expressed the view that he was disappointed when the Cardinal returned the following day, having seen the Pope, with the words *'Ni approvo ni non disapprovo; taceremo'*. Pacelli did not leave Walshe in any doubt as to the meaning. The answer: 'I do not approve, neither do I not disapprove; we shall maintain silence'. Walshe tried to translate the 'evil out of this double negative but the Cardinal held me to the sense'. Pacelli went on to say that the Pope was doing 'quite a lot in saying that he would maintain silence'.

Pacelli, according to Walshe, saw the Pope's position in a positive light from the Irish standpoint:

It was an attitude of complete neutrality. He might have taken the text without bearing in mind all the implications of the explanations I had given, because the test after all was what counted, but he refrained from disapproving. He would not say 'I approve' and while he would not say 'I do not disapprove' he took the middle position of keeping silence. So argued the Cardinal and while he clearly wanted to give us a crumb of consolation he had to maintain that the Pope went to the extreme limit to which his position allowed him to go.

Walshe also had an exchange with Pacelli on the question of marriage. He claimed that there the Irish state was 'also heretical'. He argued in favour of giving legal recognition to a specifically Catholic position. Walshe countered by saying how difficult it was to adopt such a position in a country of mixed religions where divorce was forbidden to all. Pacelli pushed the point and Walshe

... insisted again and again that we regarded the fundamentally sound position of the church in the hearts of the people as an infinitely greater safeguard for Catholic doctrine than

forms in any document whether Constitutions or Concordats — and that that conviction was never absent from your mind when drawing up the Constitution. The Holy Father and he, the Cardinal, would realize — as our state evolved — that we had acted in the best interests of the Church as well as of the people.

There was further discussion of a somewhat lighthearted nature about attendance at the coronation ceremony of George VI in London.

On his final meeting with Pacelli, Walshe learned how pleased the Cardinal was to know that de Valera intended to use the full official title of the Church in the constitution. He compared the wording carefully with the text of the Lateran Treaty. Pacelli was not prepared to approve formally the phrase 'other Christian Churches'. He preferred 'bodies' but 'let it go without taking any responsibility for it'. Walshe concluded his long report, which does not appear to have been put on file in the Department of External Affairs, thus:

... I want to express my great regret at not having been able to do what I was sent out to do. But I have learned a great deal about the attitude of the Holy See to such matters — and I can assure you, most confidently, that at the back of their adherence to rigid forms and dogmas there is very sincere respect, and even gratitude for the extent to which you have been able to go in making our const. Catholic; notwithstanding the very great difficulties which they understood better than they pretend to understand them. I will of course amplify this report viva voce on my return.<sup>88</sup>

Walshe came very close to the truth of the situation in that final paragraph. Pacelli had been kept informed about the internal political and ecclesiastical difficulties which had arisen over the framing of a new Constitution. The Secretary of State counselled the Vatican to adopt a policy of neutrality. He knew about the divisions with the Irish hierarchy and the Irish Church on this matter. MacRory and Byrne had taken different points of view and the Cardinal Archbishop of Armagh let it be known in Rome that he had his reservations about certain

aspects of the Article on religion. One oral source has suggested that MacRory went to Rome to lobby. But that does not seem likely. The Irish envoy Macaulay claimed that he helped enlist the Irish cardinal's support for the Constitution during an evening in Rome when good whiskey played a role. However, there is one historical fragment which supports the view that MacRory was opposed and only withdrew his objections after the outcome of the Walshe visit was known. On a piece of headed nunciature notepaper, MacRory had minuted: 'de Valera would not accept this [his draft referred to earlier] and the question went on to Rome. The Holy Father at first agreed with me but eventually in view of the Six Counties etc., allowed the form that stands in the F.S. [Free State] constitution'.<sup>89</sup> The question is whether MacRory actually went to Rome himself to press his case or whether he had it done on his behalf. There is no reference in the de Valera papers, or in the state archives, to prove that he did the former. But the Irish envoy, Macaulay, was to recall many years later to a relative how he had softened up the cardinal with whiskey and got him to intervene with the Vatican to drop its insistence on giving canon law some express recognition in the Constitution.<sup>90</sup> MacRory's opposition, which had been euphemistically described in the *pro memoria* as 'seeing no cause to disapprove', was a major factor in determining that Walshe should be sent to Rome. The outcome for de Valera was more than satisfactory. The Vatican determined not to offer an opinion. Silence was a vote in favour of de Valera's position. It removed the ground from under a potentially awkward confessional lobby likely to have caused maximum damage to de Valera and his government.

### **De Valera and the quest for political consensus**

The slow progress of Walshe in Rome worried de Valera sufficiently that he decided to work again on the wording of the first part of the Article on religion. By 21 April 1937, the first section of this Article had been redrafted and sub-section 2 read:

2. The State, on behalf of the great majority of its citizens, recognises the Holy Catholic Apostolic and Roman Church as that established by our Divine Lord to be the spiritual guide of man and the guardian of right morality.<sup>91</sup>

The next sub-section now had the phrase 'The State also recognises *the other Christian Churches*' etc. This was both an advance and a step backwards to the original and controversial first draft. It was an advance because de Valera was referring to 'other Christian Churches'. But sub-section 2 was a retreat. De Valera must have felt that if he was going to make a concession to the other Churches, he would have to compensate the Catholic Church by reverting to the sentiments of the first draft.

McQuaid was still trying to get de Valera to revert to the position adopted in the original Article on religion. In one undated communication, McQuaid appears to have been familiar with the wording of the new draft. He asked de Valera whether he had 'fixed yet the term "other Christian"' in Article 45 (religion: later to become Article 43, and finally, in the published version, Article 44). This was most likely a reference to section 1.3. He argued:

I have been thinking much about it. Of course, they claim the title, but as so very many in all these Churches deny the divinity of Christ, unlike their ancestors, they have truly ceased to be Christian. Very often they are only ethical. But you may have already settled the question.

However, Walshe's trip to Rome had made it clear that Pacelli had preferred 'Christian bodies' but would not object to the use of 'Christian Churches'. De Valera had also got confirmation of the official title of the Catholic Church: it was as stated in the Article. (A telegram from Walshe on 23 April had made that perfectly clear.) On 22 April, de Valera met Paschal Robinson at the nunciature since he was still unsure about the final wording of the Article on religion.<sup>91</sup> They discussed the draft, based on the previous day's work (with only minor changes). On 23 April, the nuncio phoned de Valera to say that the 'Cardinal approved Christian Churches'.<sup>94</sup> However, de Valera may have already decided what he was going to do before the telephone call: a draft, dated that same day, 23 April, had restored the original section 1.2, and the phrase 'the other Christian Churches, including ... etc' in section 1.3 had been removed.

On 24 April, de Valera met the cardinal and the nuncio. Presumably, the President had undertaken to brief MacRory on the outcome of Walshe's visit. Whether the cardinal was in full

agreement or not, de Valera had decided to proceed with the formula as drafted on 14 April 1937. While there was no mention of 'the other Christian Churches', neither was there anything left of the 'one true church formula'. If de Valera had suffered a temporary loss of nerve, he had completely regained his political composure by 24 April. The decision to drop the phrase 'other Christian Churches' was not a capitulation to bigotry. It was superfluous to the meaning of the section and could have been dropped with justification on stylistic grounds. It was much more important for de Valera to hold his ground against the lobby to include a 'one true church' formula in section 1.2. He succeeded in doing so.

The nuncio has to be given due credit for the role that he played in mediating between de Valera and MacRory. Robinson was much more than a mere intermediary. He shared de Valera's liberal Catholic outlook and worked to convince MacRory not to make a public stance against the Constitution. He succeeded. By 23 April, matters appeared to have been resolved with Armagh. But that was not the case.

MacRory could hardly have rejected the substance of what Walshe had been told by Pacelli in Rome. While the cardinal may have given the impression he had 'no cause to disapprove', at least one phrase in this Article continued to rankle after 24 April 1937<sup>5</sup>

The use of the term 'Church of Ireland' as it emerged ultimately in Article 44.1.3 had not been readily accepted by the Cardinal or by a number of clerics, among them P.J. Gannon and Edward Cahill. The latter had written to de Valera on 23 May and in a postscript to his letter said:

I presume you know that the term '*Church of Ireland*' which occurs in Art. 44, 1.3 has aroused no end of criticism and surprise; for it really seems to be an authoritative approval of a piece of lying propaganda. I hope it will be changed.<sup>96</sup>

His confrere, P.J. Gannon, had also chosen to write to de Valera. Since he had received no reply, he wrote to Cardinal MacRory on 9 June 1937. He explained that he did not want to provoke controversy by writing to the papers urging a change in the wording of the Article. It would appear as 'dictation from

our side to involve the C. of I. in some *diminutio capitis*'. Instead, Gannon had written 'a careful and diplomatic note to Dev. explaining all that the title logically involved'. He suggested a re-drafting of the 'opening paragraph' so as 'to grant toleration in general terms refraining from explicit reference to Jews or the sects (this would be everyway the best procedure)'. Gannon also suggested another change: 'the state acknowledges as religious bodies within the law the institutions known as etc' De Valera had not answered when Gannon had written to the cardinal: 'from his character I hardly expect him to be moved by anything I write especially as he seems unmoved by your Eminence's immense authority'.<sup>97</sup> MacRory had written to de Valera in May, as was known by Gannon, requesting a change in the wording of the Article. But de Valera replied politely on 29 May 1937 that 'at this stage I am afraid it will be very difficult, if not impossible, to make any change regarding the matter to which you refer. I will, however, give the whole question further careful consideration'.<sup>98</sup> He did not change his mind.

On 26 April de Valera sent Maurice Moynihan to see Dr Gregg, the Church of Ireland Archbishop of Dublin. It may have been on that occasion that Mr Moynihan was asked the searching question by the prelate: What was the legal weight of the phrase 'The State *recognises* the special position of the Holy Catholic Apostolic and Roman Church?' The Secretary of the Department of the President referred the matter back to de Valera, who subsequently clarified the situation with Gregg by phone.<sup>99</sup> 'G[regg] satisfied' read a minute in de Valera's hand.<sup>100</sup> As a result, a D. Robinson 'got letter from Gregg to D'Arcy'. The latter was Charles F. D'Arcy, the Church of Ireland Archbishop of Armagh. Robinson went to see him on 27 April<sup>101</sup> and presumably delivered the letter from Gregg that contained a favourable recommendation on the draft Constitution.

When de Valera felt he had achieved consensus with all the Churches, he rushed the draft Constitution through the final stages of preparation. On 23 April, ministers received a circular, including draft Articles 42, 43 and 44, on private property, religion and directive principles of social policy.<sup>102</sup> The first section of Article 43 on religion was still not included.

On 24 April, Michael McDunphy sent a 'further revise' of

sections of the Constitution to the government departments for quick comment. De Valera wanted to send the final document to the printers that evening. As yet, neither the preamble nor the first section of the Article on religion were included. The preamble had been proofed on 23 April and twelve sets reproofed on the following day. The draft Constitution, including the preamble and Article on religion, was printed on 26 April. The Executive Council had had an opportunity to discuss the Constitution. There is evidence that quite a number of protracted discussions took place on the contents. There is only circumstantial evidence to indicate that the Article on religion had been a cause of friction. But, as has been emphasised earlier, de Valera had been mandated to provide a formula which did not result in the establishment of the Catholic Church. He had stayed within his brief. A major discussion took place in the Executive Council on 27 April when the complete text was available.

The Executive Council faced a debate on the draft Constitution at two levels, the theoretical and the pragmatic. At the ideological level, the document combined the ambiguities in the Fianna Fail political tradition, but it may not have suited Cerry Boland, the Minister for Lands and Fisheries. Boland said later in 1968 that he had told de Valera in relation to certain aspects of the draft that acceptance 'would be the equivalent to the expulsion from our history of great Irishmen like Tone, Emmet, Russell, McCracken and even Parnell, Childers and many more. None of these men would live in Ireland under such a sectarian Constitution, and I would not live under it either'.• But whether there were any other upholders of secular republicanism in the Executive Council is difficult to state. De Valera is much more likely to have had greater difficulty from the opposite wing — those who would have preferred a confessional document. The Vice-President and Minister for Local Government and Public Health, Sean T. O'Kelly, was noted for his orthodox Catholic views, but de Valera had involved him in discussion with the nuncio. The Minister for Education, Tom Derrig, was in the same camp.

There were others, however, who occupied a middle position and they were the most numerous and influential. Frank Aiken may have been closer to Boland at the ideological level and de

Valera closer to Sean T. O'Kelly. But pragmatism was the touchstone of Fianna Fail's success. The Minister for Justice, P.J. Ruttledge, the Minister for Industry and Commerce, Sean Lemass, the Minister for Agriculture, James Ryan and the Minister for Posts and Telegraphs, Oscar Traynor, all accepted the necessity for the compromises which de Valera had to make in order to win consensus among the Churches.<sup>104</sup> Lemass appeared to be quite detached from the proceedings surrounding the drafting process,<sup>105</sup> but he was concerned about the political consequences of the draft Constitution for the government. De Valera was in a position to win the support of his colleagues by stressing the dangers of conceding to either the right or the left of the party. Sean MacEntee summed up very well for me the feeling of the Fianna Fail frontbench:

Now, look, here is what has to be remembered in relation to the Constitution. The purpose of the Constitution was to get rid of the Oath, and the Irish Free State Constitution. And we had to go a long way ... I mean, how many people, including Dev, had to subordinate whatever private views they may have had in relation to these questions, particularly the question of the Church, to the fact that we had got to get a majority of the people. And we felt, and it was true, that we wouldn't get it if we gave the bishops any chance to attack us.<sup>106</sup>

It is certainly true that de Valera had great difficulty reconciling religious principle with the wider community, political and national interests. He had advanced his own thinking considerably through the long round of discussions in which he had engaged with all the Churches during the first three weeks in April. But those consultations had a definite political purpose.

De Valera gave Cahills the order to print late on 27 April. The 1,200 copies were returned on 29 April and distributed to each member of the hierarchy, judiciary, Dail and Irish clergy and prominent figures abroad, reaching them on 1 May 1937, the day of publication.

The draft Constitution received a strongly favourable reaction at home and abroad. Scores of de Valera's friends and admirers wrote offering their congratulations. Given the

anxious time he had had in the month of April, de Valera must have been particularly pleased with the letters from Edward Byrne and MacRory. De Valera had sent Joseph Walshe to the Archbishop of Dublin with a copy of the document, part of which the prelate had helped so much to put into final form. In writing to thank him, Byrne allowed himself one mischievous comment: 'I have noticed that the Holy Catholic Apostolic and Roman Church still retains its special position'.<sup>107</sup> De Valera was perfectly well aware of the agonising that had gone over the insertion of that phrase. He was also aware of how understanding Byrne had been.

MacRory did not write until 9 May. He had been away for the past week on a confirmation tour and he had only 'this moment noticed that a copy of the new constitution has come to me "with the compliments of the president" '. He regretted that he had not acknowledged it sooner: "On various occasions I heard it discussed by the priests and in every instance the comments were favourable'. The cardinal ended: 'It must be a great relief to you to have got it launched, and I congratulate you sincerely'.<sup>1</sup> It is very interesting to note that MacRory reserved his opinion on the content. He was to object to the use of the phrase 'Church of Ireland' (this episode has been referred to earlier) and tried unsuccessfully to get it changed. Later, however, MacRory was to describe the Constitution as 'a great Christian document... a splendid charter — a broad and solid foundation on which to build up a nation that will be, at once, reverent and dutiful to God and just to all men'. Nothing succeeds like success.

On 17 May, *The Irish Press* carried a report that the *Osservatore Romano* had devoted a front-page piece to the draft Constitution and given it high praise. While that was not an *official* Vatican response, it was at least tacit approval."<sup>19</sup> There was no possibility of serious Catholic opposition to the document. Informed insiders, like Alfred O'Rahilly, knew of the difficulties in framing Article 44 and wrote perceptively on its meaning. His critical views reflected the thinking of the Cardinal, McQuaid, Edward Cahill, Denis Fahey and many others.<sup>110</sup> But they were not in a position to do or say anything. The Vatican had given its tacit approval to the document.

De Valera also received congratulations from the leaders of the other Churches. The Presbyterians, the Methodists, the

Jewish Congregations and the Church of Ireland all expressed satisfaction with the new Constitution. That had not come automatically. De Valera had prepared the way by bringing them into the decision-making process. Their agreement further reflected the uniformity of views on moral issues between the Churches which existed in the country in 1937. Divorce, for example, was not the contentious and divisive issue it had become by the 1980s.

The adverse reaction to some aspects of the draft Constitution was predictable and not too worrying for de Valera. He could deal with the opposition parties. He could also deal with most of the theoretical objections raised to the draft. One of the most supportive people during May and June was John Charles McQuaid. He wrote to de Valera on 10 May 1937:

It is a great pleasure to send the enclosed ammunition. Even though I had before me the actual texts, yet for complete safety, I submitted my statement to Dr Leen for criticism. His answer was: 'it is impeccable'. As he is an expert, I think we are safe, on this very knotty question.

I have been at the 'capacity and social function' passages. The Ennis speech reads very well indeed. Any time you want me, I am available.<sup>1"</sup>

Precisely what the 'knotty problem' was is quite difficult to say. But it may have had to do with the content of de Valera's major speech, which he delivered in the Dail on 11 May at the beginning of the debate on the Second Reading.<sup>112</sup>

In another undated letter, McQuaid advised de Valera. It concerned trade union reaction and the reaction of women's groups to the Constitution:

I enclose a note on 'moral' person or body — which I trust will be helpful. The feminists are getting angry and are moving into action. They seem stung by the suggestion that the normal place for a woman is the home. I shall shortly have another note to meet these persons. Their thoughts are very confused. Both 'Casti Connubii' and 'Quadragesimo Anno' answer them.<sup>m</sup>

The cooperation between the two men in May 1937 refutes any suggestion that de Valera and McQuaid had fallen out over the difference of opinion in the middle of April. The future archbishop of Dublin provided de Valera with, to use his own word, ammunition to refute his critics.<sup>114</sup> It is little wonder that when McQuaid's name for the see of Dublin did not meet with enthusiasm in Rome, de Valera felt called upon in 1940 to try and remove the obstacles.

Once the document was published, there was little that could be done to change the content. That did not prevent some clerics from trying. I have already referred to MacRory's effort to have 'Church of Ireland' removed from the text. Edward Gahill also wanted this but he was much more concerned with Article 43 on private property. He wrote to de Valera on 23 May:

In other words I believe that the individual aspect of private ownership is unduly stressed to the detriment of the counterbalancing or *social* aspect; and that this fact, especially when taken in conjunction with the individualism, which is so deeply embedded in our current jurisprudence, may (contrary to the manifest aim intended in the Constitution) render very difficult, if not impossible, the long-desired reorganisation of our economic and social regime in harmony with the Papal Encyclicals.<sup>115</sup>

That view has come to have a particular relevance in more recent times. In the Dail, however, Article 43 on private property did not attract much attention. An amendment proposed by John A. Costello and Patrick McGilligan calling for the insertion of 'and on payment of compensation' was rejected; it would have strengthened individual rights. The leader of the Labour Party, William Norton, wanted to include a clause protecting community rights:

Laws shall be enacted to provide that increase in the value of land arising through community effort without expenditure by the owner of labour or capital shall accrue to the community.<sup>111</sup>

That amendment was also rejected.

Article 41 on the family and Article 42 on education did not attract much attention. In the Article on education, William Norton wanted to include a sentence in section 4 to read 'including school books, requisites and a free meal during school hours for each child attending school'. This was rejected.

Article 44 was not the subject of much attention from the main opposition party. The Independent TD, Frank MacDermot and the deputy for Dublin University, Robert Rowlette were the most vocal. The former sought the deletion of Article 44, section 1.2, 1.3 and 2.5. MacDermot felt that the 'special position' clause 'really means nothing' and is 'entirely useless'. It did not 'establish the Catholic Church in a privileged position'. Neither did it, according to MacDermot, 'offend in any way against the principle of equal treatment of people of different religions'. It seemed to serve no purpose except make for misunderstanding. However, de Valera stoutly defended the Article:

The recognition of an obvious fact is there, and that fact must have considerable influence in the life of the State. It is bound to have. There are 93 per cent of the people in this part of Ireland and 75 per cent of the people of Ireland as a whole who belong to the Catholic Church, who believe in its teachings, and whose philosophy of life is the philosophy that comes from its teachings. Consequently it is very important that in our Constitution that fact should be recognised.

He also defended section 2.3. It was important that, 'notwithstanding that the vast majority of our people belong to one faith, nevertheless the state recognises the liberty of every citizen to practise his religion and to adore the Almighty in public and private'. He indicated that the remainder of the Article was largely a rewriting of Article 8 in the 1922 Constitution." Rowlette made similar points to MacDermot, but de Valera reassured him that the two sections of Article 44 had been put down 'after careful consideration and, I might add, testing, as to whether there was anything that was going to cause reasonable objection in any quarter'. De Valera got off relatively lightly in the third reading. The main opposition party did not table any amendments to Article 44.

One hundred and fifty amendments were tabled to the draft. The main opposition party focussed on Articles 12 and 13 dealing with the President and his/her function. John A. Costello and Patrick McGilligan cross-examined de Valera ably. They tabled over 40 amendments. It is likely both men were influenced by the drift of politics in the Europe of the mid-1930s. Nazism in Germany, where the Fuhrer-principle had been so much in evidence, undoubtedly exercised the minds of such distinguished lawyers. The Duce in Italy was yet another example of the cult of the individual leader. Salazar in Portugal had none of the flamboyance of Mussolini or Hitler but was nonetheless a dictator. The chequered political past of Eamon de Valera may also have given Costello and McGilligan cause for concern. But Fine Gael undoubtedly had an eye on a coming general election. De Valera had exhibited no signs of revolutionary behaviour since coming to power in 1932. He had, however, initiated a *constitutional* revolution. Moreover, de Valera could have afforded to smile ruefully across the floor of the Dail at a party which was striving to avoid a 'presidential dictatorship' in Ireland and at the same time had as official policy the recognition of General Franco in Spain — a *caudillo* not noted for his commitment to liberal democracy.

It is, however, quite obvious that Fine Gael and Labour Party attitudes towards the Constitution were conditioned by both ideological and pragmatic considerations. There was strong *normative* agreement between all three political parties. Moreover, and this factor may have been of even greater importance, the prospect of a general election conditioned the freedom of TDs to speak in the Dail. Many deputies would not have wanted to face the embarrassment of having Fianna Fail repeat at the hustings unpopular sentiments expressed by Fine Gael in Leinster House. The expectation of a general election may have stilled opposition eloquence: Fine Gael did not challenge Articles 40 to 45.

But Frank MacDermot was not in any way inhibited; he was a one-member opposition in the Dail, putting down over 30 amendments. (William Norton tabled about ten.) Frank MacDermot and Robert Rowlette were among the few Dail TDs to articulate a concern that the draft Constitution was likely to drive a deeper wedge between North and South. If, as

the President stated, the Constitution was for the whole nation, then MacDermot felt that it was necessary to insert references to the excluded dimensions of Irish history in the preamble. He proposed the inclusion of the following:

Remembering, too, that merely one-quarter of our people are united by ties of blood, tradition and sentiment with Great Britain; remembering the part played by our forefathers in founding and developing the British Commonwealth, and by our kith and kin today in guiding its destinies; remembering the security given by membership of that Commonwealth against attack upon our independence from any quarter; remembering the long agony of Irish history due not solely to foreign oppression, but also to conflict of ideals and loyalties among Irishmen ..."<sup>8</sup>

De Valera was not prepared to accept that amendment despite the fact that it made sense in terms of North-South relations. But de Valera did not share MacDermot's broad view of Irish history.

The closed governmental style adopted by de Valera in the writing of the 1937 Constitution had both advantages and lasting disadvantages. In the political climate of the 1930s, it would have been impossible to approach the writing of a new Constitution on a bipartisan basis. Mistrust between the two major political traditions ruled that out. Had de Valera set up a constituent assembly, the document that might have emerged is likely to have been much more flawed and ephemeral than the present Constitution. Irish society was not noted at the time for its tolerance and liberalism.

On the other hand, in setting himself up as the major architect of the 1937 Constitution, de Valera was limited in the range and scope of his contacts. He was further limited by the shortness of the time he had given himself to complete the work. The urgency of the task precluded protracted consultation with friends abroad. These circumstances increased the possibility of de Valera being influenced by a small number of individuals. However, de Valera's independence of mind, coupled with able advice from a handful of senior civil servants, enabled him to avoid most of the unevenness and lopsidedness of contemporary

Catholic social teaching that was influenced by radically different historical circumstances in continental Europe.

It was fortunate that de Valera could draw upon such expert advice. Maurice Moynihan and John Hearne, in particular, were men who transcended the limitations of their own times. Both helped to infuse the document with a balance and basic-humanism which stood in marked contrast to the legal positivism of the decade in continental Europe. In an age when the principle of civil service anonymity might not have been so strictly observed, de Valera would have been the first to admit their influence on the framing of the Constitution. The broad-based culture of these men prevented the triumph of extremism.

Table 1: **Chronology of Events, 1937**

<i>Introduced in Dad</i> .....	10 March
Provisional draft (limited circulation by de Valera).....	10-15 March
First draft circulated.....	16 March
First Revise circulated.....	1 April
Second Revise circulated.....	10 April
Third Revise.....	23 April
<i>Published and circulated</i> .....	1 May
<i>Second Reading</i> .....	11-13 May (69 to 43)
<i>Third Reading</i> (committee stage).....	25 May-3 June
<i>Fourth Reading</i> (report stage).....	9-14 June
<i>Approved by Ddil, and recommended for adoption</i> .....	14 June (62 to 48)
<i>Enacted by the people</i> .....	1 July
	For 686,105
	Against <u>526,945</u>
	Majority 158,160
<i>Date of coming into operation</i> .....	29 December
<b>1938</b>	
<i>Senate met</i> .....	27 April
<i>President elected</i> .....	4 May
<i>President entered office</i> .....	25 June

De Valera acknowledged the central role of Hearne when he autographed a copy of the Constitution for the legal advisor of the Department of External Affairs on 29 December 1937.

Hearne was described as 'architect in chief and draftsman of this constitution'. De Valera made the presentation to him as 'a souvenir of the successful issue of his work and in testimony of the fundamental part he took in framing this the first free constitution of the Irish People'.<sup>119</sup> De Valera could equally have written the same tribute to Maurice Moynihan and may have done so.

Both must be numbered among the figures who have most influenced the political and administrative culture of the state. They helped to shape the Constitution in a way which neither McQuaid nor Cahill could have done. In writing the administrative history of the period, the framing of the 1937 Constitution will prove to be an important example of how a political leader interacted successfully with a small team of civil servants to produce the most important single document in the history of the state. It was an interesting example of de Valera's placing of talent before seniority. He identified Hearne as his main craftsman and worked closely with him. De Valera did not involve the Secretary of External Affairs, Joseph Walshe, until much later. He placed Maurice Moynihan at the head of the small committee which worked from the first draft through to the final document. The limitations of 'closed government' were mitigated considerably by the calibre of the people working with de Valera. O'Donoghue, McDunphy, Matheson and Leon O Broin were also of major importance. But Hearne and Moynihan were centre-stage. However influential both Hearne and Moynihan proved to be, the draft Constitution remained very much a personal statement of the philosophy of Eamon de Valera.

What emerged in April 1937 was a document which had deliberately 're-bottled', to use John Kelly's term, sections of the 1922 Constitution. But it was still de Valera's document. It was a Constitution, in his view, made by Irishmen. De Valera and Fianna Fáil regarded the 1922 Constitution (wrongly, to be historically accurate) as "a document whose contents had been dictated by Condon and which had institutionalised the most repressive

Table 2: Population 1926\*

Denominations	Saorstata Eireann (26 cos.)	Northern Ireland (6 cos.)	Totals
Catholics	2,751,269	420,428	3,171,697
Episp.	164,215	338,724	502,939
Presb.	32,429	393,274	425,703
Method.	10,663	49,554	60,217
Jews	3,686		
Baptists	717		
Others	9,013	54,841	63,854
	220,723	220,723	836,133
Totals	2,971,992	1,256,561	4,228,553

\* Dated 3 April 1937 in de Valera Papers, 1995/1A; another sheet dated 3 June 1937, contained the following information:

'Including 9,031 'others' with 3,686 Jews, making a total of 12,717 non-Christians, the Christian population of the Free State is over 99.5 per cent. Jews are not recorded for Northern Ireland, but if 'others' are regarded as non-Christian the total population of Northern Ireland includes over 95.6 per cent Christians.'

provisions of the Treaty. Cumann na nGaedheal (known as Fine Gael from the 1930s onwards) had expanded the independence of the Irish state by helping to bring about a series of constitutional reforms within the Commonwealth. McGilligan and Kevin O'Higgins had used the Treaty and the 1922 Constitution as a 'stepping stone'. Their achievements were considerable in, for example, building up an independent Irish foreign policy and foreign service. However, as Jeffrey Prager has pointed out, the 1922 Constitution was perceived as a "partisan political tradition". In 1937, de Valera was engaged in a politico-psychological exercise. He was claiming to provide the Irish people with their own Constitution free of imperial symbols and accretions.<sup>1-0</sup> O'Higgins had said in the Dail on 30 September 1922: 'It [the Constitution] contains the trappings, the insignia, the fiction and the symbols of a monarchical institution, but the real power is in the hands of the people'.<sup>1-0</sup> O'Higgins, insignia and symbols were very important in Irish politics. Cumann na nGaedheal learned that to their political cost. De Valera sought

to introduce his own 'supportive symbolic system'<sup>121</sup> in the guise of a new Constitution.

A plebiscite was held on 1 July 1937. De Valera called a general election for the same day. Needless to say Fianna Fail attempted to turn the event into a single-issue campaign on acceptance or rejection of his 'symbolic system'. It was quite futile of the opposition to try and turn the campaign into a debate on the record of Fianna Fail in office. De Valera had skillfully shifted the ground of political discourse.

He had opted for a short campaign and gambled on Fianna Fail winning support, helped by the favourable international publicity that the Constitution had attracted. It was a clever ploy. The plebiscite was won by 685,105 votes to 526,945, a majority of 158,160. Fianna Fail won the election with 45.2 per cent of the vote. Hopes of a Fine Gael return to office were dashed. De Valera was back in power. He had won popular acceptance for *his* Constitution. A plebiscite had given the document popular legitimacy. The Constitution came into operation on 29 December 1937. The new Senate met on 27 April 1938. Two days earlier, de Valera had signed an Anglo-Irish agreement which had, among other things, unreservedly revoked Articles 6 and 7 of the 1921 Treaty. The British government relinquished its control over naval bases at Cobh, Lough Swilly and Berehaven. A second agreement ended the 'economic war'. This pact was the culmination of de Valera's constitutional revolution.

The handing over of the ports provided the Taoiseach with what would be termed today a good photo-opportunity. On 4 May the Gaelic scholar and member of the Church of Ireland, Douglas Hyde, was elected unopposed to the presidency. He took office on 25 June 1938. Conscious of the favourable political climate generated by the Anglo-Irish agreement, de Valera dissolved the Dail on 27 May 1938. He returned to power on 30 June with 52 per cent of the vote and an overall majority of 19 seats. Constitutional revolutions paid handsome political dividends.

Table 3: **De Valera's Negotiations with the Churches, 1937**

April	3	Called on the Nuncio ( <i>Saturday</i> )
April	5	Saw the Cardinal at the Nunciature ( <i>Monday</i> )
April	5	Called on Archbishop Byrne ( <i>Monday</i> )
April	10	Saw the Nuncio, who promised to see Cardinal ( <i>Saturday</i> )
April	10	Saw Archbishop Byrne ( <i>Saturday</i> )
April	10	Saw Dr Irwin ( <i>Saturday</i> )
April	11	Saw the Nuncio at Sean T's ( <i>Sunday</i> )
April	12	Called on Archbishop Gregg [Church of Ireland] ( <i>Monday</i> )
April	12	Called on the Nuncio ( <i>Monday</i> )
April	12	Saw Dr Irwin ( <i>Monday</i> )
April	13	Phoned the Nuncio ( <i>Tuesday</i> )
April	13	Saw the Rev. W.H. Massey, head of the Methodist Church in Ireland ( <i>Tuesday</i> )
April	14	Saw Dr Irwin ( <i>Wednesday</i> )
April	16	Saw Dr Irwin, the Moderator, and the Moderator Designate, who travelled from Belfast ( <i>Friday</i> )
April	16	Saw the Nuncio at Sean T's. ( <i>Friday</i> )
April	16	J.P.W. [Walshe] went to Rome ( <i>Friday</i> evening)
April	22	Called on the Nuncio ( <i>Thursday</i> )
April	23	Nuncio phoned to say Cardinal approved Christian Churches ( <i>Friday</i> )
April	24	Saw Nuncio and Cardinal ( <i>Saturday</i> )
April	26	M. Moynihan saw Arch. Gregg and D. Robinson got letter from Gregg to D'Arcy ( <i>Monday</i> )
April	27	Robinson goes to see D'Arcy ( <i>Tuesday</i> )

[From tie Valera's account of his contact with the Churches: de Valera papers]

**Afterword**

The strength of the 1937 Constitution rested upon the cohesion of Irish society, a cohesion which lasted into the late 1950s. Between the modernisation of the economy and society in the 1960s and the recession of the 1980s, much has happened to destroy that cohesion. The political skills of de Valera would not now prevent conflict and confrontation in a country with radically different moral and social standpoints. The paradigm of Catholicism in the age of de Valera has been replaced by what is not yet certain.

The political culture in Ireland from the 1930s to the 1950s was strongly hierarchical and it was relatively easy to operate the politics of informal consensus between Church and state. This was helped by the strong nexus existing between civil and religious society; the political and religious elites were on familiar terms. De Valera could ascertain or anticipate the needs of the Catholic Church with relative ease. In a hierarchical society, it was relatively easy for a political elite to bring about consensus through brokerage. De Valera's handling of the discussions surrounding the framing of the Constitution is a classic example of the politics of informal consensus.

The Catholicism of the 1930s was characterised by a Church which had contributed to the development of Irish independence and to the building of new Irish state. The strong links forged in days of military struggle gave many politicians and churchmen an intimacy of contact that no longer exists. The Catholic Church of the 1930s felt threatened and beleaguered by the forces of communism and depended upon the state for protection. It was a traditional Catholicism, handed down from generation to generation 'in spite of dungeon, fire and sword'<sup>1</sup>. It fostered popular piety, devotion to the saints, pilgrimages and penitential exercises. It was a sacramental Church with a static view of society. De Valera was quite at home in that Church paradigm. The Irish Church kept de Valera in touch with his cultural roots. He applauded the side of Irish Catholicism represented by an order like the Franciscans. However, de Valera was far from being a traditionalist and he avoided the narrowness of many of his contemporaries. He was not in harmony with the traditional Church paradigm in two respects. De Valera was far more egalitarian and ecumenical than a man like McQuaid,

possibly because his theology was more devotional and sacramental than doctrinal. Secondly, he did not possess the static image of society of many of his ecclesiastical contemporaries.

What has replaced the old paradigm of Church and society is not yet clear. If anything, there are now competing paradigms. Post-Vatican II Catholicism helped inject a new dynamism into the Irish Catholic Church. Replacing the dominant image of Church as 'Mystical Body' with the concept 'People of God' ought to have been more than a mere rhetorical flourish. Post-conciliar Catholicism provided the laity with a far less individualistic and defensive view of this religion. That had radical implications for inter-Church relations and for intra-Church relations. The relationship between Church and state was also redefined. De Valera anticipated something of that openness in the 1930s. When Joseph Walshe visited Rome in 1937 he made the point that the Irish government 'regarded the fundamentally sound position of the church in the hearts of the people as an infinitely greater safeguard for Catholic doctrine than forms in any document whether constitutions or concordats — and that conviction was never absent from your [de Valera's] mind when drawing up the constitution'. That was a rather modern statement for 1937. It was very much at variance with the main current of Catholic thought of the time, which emphasised the centrality of the law for the protection of morality.

Sean Lemass, who succeeded de Valera as Taoiseach in 1959, was much more pragmatic in his approach to constitutional reform. He had been one of the least enthusiastic about the drafting of a new Constitution in the 1930s. On one occasion, a senior civil servant passed an open door in Merrion Street where de Valera and Lemass were in discussion about the Constitution: 'But you can't put the Papal Encyclicals into the Constitution', Lemass was saying. In the post-conciliar world of the 1960s, the new Taoiseach saw the need for constitutional review. An all-party committee was set up in August 1966. It reported in December 1967. The committee did not propose the writing of a new Constitution:

As a general proposition, therefore, it might be said that our inclination was to adhere to the constitutional provisions

which have worked well in practice, and to consider changes only in the case of those provisions which, from experience, might be regarded as not adequately fulfilling their purpose.<sup>122</sup>

Nevertheless, the review was wide-ranging and the recommendations interesting. Article 3 was to be replaced by a new provision:

1. The Irish nation hereby proclaims its firm will that its territory be re-united in harmony and brotherly affection between all Irishmen.
2. 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 the Parliament which existed prior to the adoption of this Constitution. Provision may be made by law to give extra-territorial effect to such laws.<sup>125</sup>

The committee recommended changes in a number of other Articles. However, in view of recent events, it is worth drawing attention to the fact that proposals were also made to amend Articles 40, 41, 42, 44 and 45. The committee recommended the deletion of Article 44.1, 2 and 3. They were motivated by the view that 'these provisions give offence to non-Catholics and are also a useful weapon in the hands of those who are anxious to emphasise the differences between North and South'.<sup>124</sup> The committee also took into account the impact of decisions taken at Vatican II on Catholics in that area. On examination of the *Declaration of religious freedom* and the *Pastoral constitution of the Church in the modern world*, the committee concluded 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.

On the question of marriage, the committee recommended an alternative wording in Article 41.3.2 to replace 'no law shall be enacted providing for the grant of a dissolution of marriage'. It

could be argued, the committee reported, that 'the existing constitutional provision is coercive in relation to all persons, Catholic and non-Catholic, whose religious rules do not absolutely prohibit divorce in all circumstances'. The committee found that it was 'unnecessarily harsh and rigid and could, in our view, be regarded as being at variance with the accepted principles of religious liberty as declared at the Vatican Council and elsewhere'.<sup>126</sup> The committee unanimously recommended as an example the following alternative wording:

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.<sup>127</sup>

In the spirit of the committee's recommendations, a referendum was held in 1972 which deleted sections 2 and 3 from Article 44.1 of the Constitution. John Charles McQuaid retired as Archbishop of Dublin in January that year. The two events appeared to mark a new era in Irish Church-state relations. But the 1970s, despite the progress made in ecumenism, was a decade of growing tension. Legislators faced many sensitive problems such as contraception and adoption. A change of government in 1973 brought Liam Cosgrave to power with Dr Garret FitzGerald as Minister for Foreign Affairs. Against the backdrop of growing violence in Northern Ireland, the emphasis on constitutional reform was given a much lower priority. Liam Cosgrave was less adventurous than Sean Lemass. Not surprisingly, John Whyte has called the 1970s a 'decade not of conflict but of consensus'.<sup>128</sup> But it was a decade of fragile, perhaps superficial consensus. Changes were made in social policy, education, adoption and contraception. The initiative for change in the latter area followed the Supreme Court judgment in the case of *Mrs Mary McGee versus the Attorney General*. In 1973, the court decided by a majority of four to one that section 17.3 of the 1935 Criminal Law Amendment Act was unconstitutional. (This section empowered the customs to confiscate contraceptives.) It fell to Charles Haughey, Minister for Health in the Jack Lynch government which came into office in 1977, to pilot through

amending legislation. The Health (Family Planning) Bill became law in July 1979.<sup>129</sup>

The success of the McGee case ought to have pointed the way to further challenges to the Constitution. However, the cost of litigation in Ireland is such that a Supreme Court case is beyond the financial reach of most citizens. Access to justice is denied to many. That, in itself, might become the subject of a constitutional challenge. However, the McGee case in particular pointed to a process of judicial dynamism. The Constitution was not static; it had to be interpreted in the light of contemporary events.

In 1982 the new Taoiseach, Dr Garret FitzGerald, favoured the writing of an entirely new Constitution. The New Ireland Forum reported in May 1984 and was perhaps the most comprehensive review of Irish identity since de Valera wrote the 1937 Constitution. It appeared that the Irish Catholic Church had come to terms with the phenomenon of pluralism. The delegation of bishops to the forum was at pains to point out that they did not represent a lobby demanding a Catholic state. The Bishop of Down and Connor, Cahal Daly said:

... that the Catholic Church in Ireland totally rejects the concept of a confessional state. We have not sought and we do not seek a Catholic State for a Catholic people. We believe that the alliance of Church and State is harmful for the Church and harmful for the state. We rejoiced when that ambiguous formula regarding the special position of the Catholic Church was struck out of the Constitution by the electorate of the Republic. The Catholic Church in Ireland has no power and seeks no power except the power of the Gospel it preaches and the consciences and convictions of those who freely accept that teaching. The Catholic Church seeks only the freedom to proclaim the gospel.<sup>150</sup>

The acceptance of that position has very radical implications for the Catholic Church and for the state. The deletion of the controversial sections 2 and 3 of Article 44.1 by the electorate in 1972 is far less significant than the need to think through the implications of a Church that 'has no power and seeks no power except the power of the Gospel'.

The Minister for Foreign Affairs, Peter Barry, responded to the episcopal submission in a speech delivered at a luncheon to welcome Cardinal Secretary of State, Agostino Casaroli, on 16 September 1985. He argued that it could not 'seriously be denied that during the fifty years which followed the establishment of an independent Irish State, there was a considerable intimacy between the State and the Catholic Church'<sup>1</sup>. Mr Barry said the extent of that intimacy had been greatly exaggerated. In many ways, the close relationship that marked the period was quite understandable given the prevailing historical factors and the proportion of Catholics in the population. He argued:

Nevertheless, in retrospect, it has been argued — most notably by the Catholic Bishops at the Public Session of the New Ireland Forum on 9 February 1984 — that the alliance of Church and State was harmful for both parties. That is why the Catholic Bishops, to quote one member of the Hierarchy, 'rejoiced'<sup>1</sup> when the provision concerning the special position of the Catholic Church was removed from the Constitution, following the Referendum of 1972.<sup>m</sup>

The then Foreign Minister saw the relationship between Church and state being governed by two principles, principles that appeared to have been 'publicly accepted by the representatives of the Catholic Church at the New Ireland Forum'. Firstly, every Church and religious denomination had the right, subject to the provisions of the Constitution, to speak out on any issue they wish. Particular recognition was given to the duty of Church leaders to alert the consciences of their followers to what they perceived to be the moral consequences of any proposed legislation or its effects on the moral quality of life in society. Secondly, the members of the Houses of the Oireachtas had the right, based on the democratic principles reflected in the Constitution, to legislate in accordance with their conscience in what they considered the best interests of the Irish people.

However, the 1980s have proved to be the most acrimonious in terms of conflict between Church (or rather, important elements of it) and state over proposed constitutional reform. The all-party unanimous recommendations of the 1967 committee on the Constitution are a piece of nostalgia in the late 1980s.

Two bruising referenda, in 1983 and 1986, have shattered hopes of political agreement on the drafting of a new Constitution. That is now not practicable. Let there be no mistake about it, the two referenda manifested poor political judgment. The 1983 referendum should never have taken place. The 1986 poll on divorce was a tilt at a windmill which even Don Quixote would not have tried. The government gave every appearance of being totally unprepared. Had the referendum on the Single European Act in 1987 been handled in the same inept manner, it would not have been passed. The bittersweet political experience of the 1980s has closed the door on the option to replace the Constitution in the near future.

The future of constitutional change in Ireland will depend very heavily on which Church paradigm replaces that of the age of de Valera. If the paradigm of the Church of the poor is predominant, it will change the axis of Church-state relations and introduce a new set of issues and tensions. But that may not be without considerable long-term benefit to Irish society. If the paradigm of the Church of power predominates, associated with what is referred to as the 'new restoration', then the future for the Catholic Church, for inter-Church dialogue and for Church-state relations is gloomy.

### Notes to article

This paper is based on primary source material found in the State Paper Office, Dublin Castle; the de Valera Archive,<sup>1</sup> Dun Mhuire, Killiney; Armagh Archdiocesan Archive; Dublin Archdiocesan Archive; Edward Cahill Papers and Papers of Jesuit Constitutional Committee, and interviews with Sean MacEntee, Frank Aiken, Frederick Boland and Dan Bryan. I am very grateful to Mr Maurice Moynihan, who identified the handwriting on one document in the de Valera Archive for me and gave me a copy of an important memorandum which traced the writing of the Constitution. Mr and Mrs Brendan MacCiolla Choille, the Franciscans, and the stall of the de

Valera Archive at Killiney were very helpful and courteous. I would also like to thank Fr McGrath of the Jesuit Archives, Lower Leeson Street, Dublin, for giving me access to the Edward Cahill papers and other Jesuit papers. I would also like to thank Sean Faughnan, who drew my attention to some documents. On the basis of available sources, I wrote a critique of the drafting process, particularly in relation to Article 44, in my book, *The Papacy, the bishops and Irish politics 1919-1939* Cambridge University Press, Cambridge, 1986. Chapter VII. A new edition of the book will contain some of the more recently released papers.

In preparing this article I have

used 'Church' as shorthand for 'the Holy Catholic Apostolic and Roman Church'. I am very conscious of the sensitivity in this area in an age of ecumenism. But 'Church' is simply used for editorial convenience.

<sup>1</sup> Enda McDonagh, 'Church and state in the Constitution of Ireland', *Irish Theological Quarterly*, Vol. 28, No. 2, 1961, p. 131. See L. Kohn, *The Constitution of the Irish Free State* London, 1932; Nicholas Mansergh, *The Irish Tree Slate: its government and politics* London, 1934; J.G. Swift MacNeill, *Studies in the Constitution of the Irish Free State* Dublin, 1925; Darrell Figgis, *The Irish Constitution* Dublin; and Basil Chubb, *The Irish Constitution* Institute of Public Administration, Dublin, 1966, pp. 7-14.

<sup>f</sup> Jeffrey Prager, *Building democracy in Ireland - political order and cultural integration in a newly independent nation* Cambridge University Press, Cambridge, 1986, pp. 90-91.

<sup>4</sup> The Constitution, in section 11 — Principles, stated<sup>1</sup>: 'Pledged to the declaration of Democratic Principles and Sovereign Nationhood proclaimed at Easter. 1916, the Labour Party asserts that the purpose for which the people of Ireland have struggled so long can be fulfilled only through the establishment in Ireland of a Workers' Republic founded on equal justice and equal opportunities for all citizens who render service to the Nation and fealty to its institutions'.

<sup>1</sup> Copy of 'Statement on the Constitution of the Irish Labour Party' presented to the National Conference of Bishops, autumn

1938. A former general secretary of the Labour Party, Brendan Halligan, told John Bowman on his R IE programme, 'Any other business' (1 August 1981): '... but it was also true to say — and historically so — that the Labour Party had got to take out of its constitution a commitment to the Workers' Republic which Norton had written in to the new Constitution after it split from the Irish Congress of Trade Unions. And he wasn't behind the door in giving the reason for it: he said the reasons for having to take it out were the bishops'.

The implied logical response for Irish politicians when confronted by episcopal opposition evident in this answer would certainly have amused de Valera. Norton did not *have to agree* to the removal of certain clauses in the Labour Party Constitution.

<sup>5</sup> Earl of Longford and Thomas P. O'Neill, *Tuition de Valera* Arrow Books, London, 1970, p. 290.

The first two volumes of the Irish version of the biography are very important. They provide a much fuller account of events. See Tomas O'Neill agus Padraig O'Fiannachta, *De Valera* C16 Morainn, An Charraig Dhubh, 1968 and 1970.

<sup>7</sup> Memorandum prepared by John Hearne, 17 May 1936, de Valera papers 1029/6.

<sup>k</sup> Memorandum prepared by Patrick Kennedy, Assistant Secretary to the government, 30 December 1938. I am grateful to Maurice Moynihan, who supplied me with a copy of this document. See also S 9748 S P O.

<sup>11</sup> John M. Kelly, *The Irish Constitu-*

- lion Leinster Leader, Naas, 1980, Preface xxviii.
- <sup>10</sup> S9748 S P C).
- <sup>11</sup> Longford and O'Neill, op. tit.. pp. 291-92..
- <sup>12</sup> An Rioghacht was formed on 31 October 1926 in Dublin. It was modelled on the *Volkverein* and other Catholic Action associations in Germany and Italy. Its objects were to make Catholic social principles better known among the Irish; to strive to make those principles effective in Irish public life and, finally, to promote Catholic social action. The organisation never won mass support in Ireland.
- <sup>13</sup> Sec E. Cahill. *Ireland's Petit* (An Rioghacht pamphlet, Dublin, 1930) and *Freemasonry and the anti-Christian movement* (An Rioghacht pamphlet, Dublin, 1929).'
- <sup>14</sup> Cahill papers, Jesuit Archives, 35 Lower Leeson Street. Dublin.
- <sup>15</sup> See file of letters from de Valera (and one from his wife) in Cahill papers, Jesuit Archives.
- <sup>16</sup> De Valera to Cahill. 19 September 1936 (Cahill papers).
- <sup>17</sup> The minutes of the committee have been located and are available in the Jesuit Archives. My thanks to Fr McGrath and Sean Farragher.
- <sup>18</sup> Minutes of Jesuit committee (Jesuit Archives).
- <sup>19</sup> Bartley to Provincial, Lawrence Kit-ran, 11 October 1936, Jesuit Archives.
- <sup>20</sup> Bartley to Provincial, 15 October 1936, Jesuit Archives.
- <sup>21</sup> Provincial to Edward Cahill, 16 October 1936, Jesuit Archives.
- <sup>22</sup> The submission, as it was finally made to de Valera by Cahill, was changed somewhat from the

wording agreed to by the committee. Cahill had included a phrase like: 'We, the people of Ireland, being the parent nation of the Irish race'. That phrase was — in amended form — to remain in the early draft of the preamble. The phrase which ultimately appeared in the preamble-, 'who sustained our fathers through centuries of trial', is not in meaning unlike the draft quoted above.

The first line of the Jesuit preamble was based on the Austrian Constitution of 1934, and the preamble and Article 54 in the Polish Constitution of 1921. For full version, see de Valera Papers, 1095 2B.

Cahill to de Valera, 21 October 1936; de Valera papers, 1095 2B.

- <sup>23</sup> Dermot Keogh, *The Galican, the bishops and Irish politics, 1919-1939* Cambridge University Press, Cambridge, 1986, pp. 213 and 279. There is another reference in what was an early draft in Cahill's personal papers which read:

The Holy Roman Catholic Church, which is now and has been for centuries the Church of the vast majority *oi'(our)* the Irish people and in whose defence generation after generation has suffered and endured so that it might hand down unimpaired its treasures of Faith and Morals, occupies in the social life and organisation of the Irish Nation an unique and (*altogether special and*) preponderant position, which is recognised as a fact by this Constitution and shall be as such duly recognised by the state'.

The underlined words were dropped from this draft, which may have been the original wording submitted to the committee on 1 October 1936 by Bartley. It is ironic that the 'special position' of the Catholic Church in the final wording was approved by de Yalera. He would not have known about Bartley's rejected phrase. There is an addition in E. Coyne's writing on the page. There is, however, a section in this draft which reads suspiciously like Cahill. It is a reference to the outlawing of oath-bound societies.

<sup>s</sup> Jesuit submission.

Cahill to de Yalera, 13 November 1936, de Yalera papers, 1095/2C.

<sup>7</sup> Deirdre McMahon, *Republicians and imperialists - Anglo-Irish relations in the 1930s* Yale University Press, New Haven, 1984. pp. 63-64.

<sup>8</sup> Sean P. Farragher, *Dev and his alma mater - Eamon de Valera's lifelong association with Blackrock College, 1898-1975* Paraclete Press, Dublin, 1984, pp. 164-66.

<sup>mm</sup> For submissions and background on these Articles, see de Yalera papers, 1079 1; 1079 2, 1079 3; 1078/1A; 1078/1D; 1078/2; 1078/3; 1078/4; 1078/5; 1995 2B; 1995/2C; 1040; 1051/2; 1051/7; 1052; 1053.

<sup><</sup> De Yalera papers, 1091.

<sup>u</sup> De Yalera papers, 1091.

<sup>v</sup> Twelve sets of page proofs in English were pulled. McQuaid got one set. Whether he got the full set is not very clear. His comments concern only Articles 11, 12, 13, 14, 16, 18 and 21.

<sup>1</sup> There is a substantial file of over fifty pages in the de Yalera

papers, 1055, which shows the amount of work that McQuaid put into this Article on religion. Leo XIII's encyclical, *Immortale Dei*, is quoted very frequently. If these extracts were sent very early in the process, then they formed the basis of the Article on religion, church and state. There is another possibility: McQuaid drafted the Article and later provided the sources on which his work was based.

<sup>14</sup> Fahey taught a few generations of Holy Ghost priests. He also found time to write but had difficulty in later years getting ecclesiastical approval for some of his work. Quite ironically, Fahey could not get permission to publish one of his books in the Dublin Archdiocese when John Charles McQuaid was the prelate. The latter had written a preface to one of his earlier works. See Denis Fahey, *The Church and farming* Cork, 1953; *The kingship of Christ; according to the principles of St Thomas Aquinas* Dublin, 1931; *The kingship of Christ and the conversion of the Jewish nation* 1953; *Money manipulation and the social order* 1944; *The mystical body of Christ in the modern world* 1935; *The rulers of Russia* 1938 and *The social rights of our divine Lord Jesus Christ, the lung* 1932.

Bartley to Provincial, 11 October 1936, Jesuit Archives.

<sup>M</sup> See Preliminary Draft, with name of [Joseph] Walshe [no. 6] written on it in the hand of John Hearne, privately circulated by de Yalera, S9715A.

<sup>n</sup> De Yalera papers, 1078 4; it is possible to speculate whether other articles in that cluster 40 to 45 were not also written by McQuaid.

- <sup>8</sup> Bunreacht na hEireann, Article 44; sub-sections 1.2 and 1.3 were deleted following a referendum in 1972.
- <sup>m</sup> McQuaid to de Valera, 16 March 1967, de Valera papers, 1091.
- <sup>4.1</sup> Interview with Sean MacEntee.
- <sup>41</sup> S 9748 S P O.
- <sup>1J</sup> Finance memorandum, 22 March 1937, S 9715A.
- <sup>1</sup> Finance memorandum. April 1937, S 10159.
- <sup>44</sup> Is it possible that the material on religion in the de Valera papers, 1055, was supplied in an effort to stop the President moving in another direction?
- <sup>n</sup> De Valera papers, 1995 2A. On the original draft Article on religion (A), heavily annotated by de Valera and marked twice 'free exercise', is written: 'Copy shown nuncio — apr. 3rd. Did not leave copy'. It is not clear from the source whether de Valera let Robinson see the actual copy that he had so heavily minuted and changed or whether he had given him a clean copy to look at.
- <sup>h</sup> De Valera papers, 1034.
- <sup>1</sup> De Valera memorandum on his 'negotiations with the Churches', undated, de Valera papers, 1034.
- <sup>4H</sup> MacRory draft on nunciature notepaper (MacRory papers).
- <sup>9</sup> De Valera papers, 1034.
- <sup>mm</sup> De Valera papers, 1080 1.
- <sup>51</sup> De Valera papers, 1080 1. In the last line, de Valera settled upon the final wording 'Do now confirm and give to ourselves this constitution'.
- <sup>52</sup> Ibid.
- <sup>53</sup> Ibid, 1080 2. This line had 'established\*' substituted for 'reached' in a further draft on 9 April. The phrase 'motherland of the Irish Race' was also dropped. De Valera papers, 1080/3.
- <sup>4</sup> Recondite discussions had taken place — and were to continue to take place — between de Valera and McQuaid on the divine source of authority in the context of post-Enlightenment theories of popular sovereignty. De Valera papers, 1091.
- <sup>"</sup> De Valera papers, 1091.
- <sup>h</sup> De Valera papers, 1034.
- <sup>37</sup> De Valera papers, 1079/4. I sought a second opinion on the handwriting in this draft and have had it confirmed that it is that of de Valera. There is a possibility that section 3 might be written by a different hand.
- <sup>H</sup> Notes prepared for Cardinal MacRory, 11 April 1937, de Valera papers, 1995/2D.
- <sup>9</sup> De Valera papers, 1079/4, 11 April 1937.
- <sup>60</sup> Interview with Sean MacEntee; Maurice Moynihan, who was chairman of the constitutional committee, did not remember seeing the original draft Article on religion before.
- <sup>1.1</sup> De Valera papers, 1995/2C.
- <sup>"-</sup> De Valera papers, 1995/20. The 'further points' may only have been for Robinson.
- <sup>.vi</sup> De Valera papers, 1995/2C.
- <sup>1.4</sup> George Seaver, *George Allen Fitzgerald Gregg, Archbishop* (The Faith Press, London, 1963), pp. 127-28. This books gives some valuable additional information. It quotes de Valera as saying to Gregg that 'when framing the text of the Irish Constitution, he dealt first with all the other articles, and had left to the last the articles on religion, as likely to present no special difficulty.

He soon found that he was mistaken<sup>1</sup>. *Ibid.*, p. 127.

<sup>65</sup> W.H. Massey, President of the Methodist Church in Ireland, to de Valera, 15 April 1937, de Valera papers, 1080.

<sup>hb</sup> De Valera papers, 1995/2E. In the copy, which was returned by the Presbyterians to de Valera, the word 'denominations' in the controversial section 3 is circled, but it is not possible to verify whether this was done by the Presbyterians or by de Valera.

<sup>n7</sup> F.VV.S. O'Neill, Moderator of the Presbyterian Assembly, to de Valera, 1 May 1937, de Valera papers, 1080.

<sup>ms</sup> De Valera enjoyed very good relations with the Jewish Community in Dublin. He had been friendly with Dr Herlog who had left Ireland in 1936 to become Chief Rabbi in Palestine. There is no record of de Valera consulting with leaders of the Jewish congregations in Dublin. But it is certain that he would have done so either directly or indirectly, possibly through the Jewish Fianna Fail TD, Ben Briscoe. After the Constitution was published, de Valera received a letter from the Irish Rabbinate Committee, which 'noted with the greatest satisfaction and due appreciation that the Jewish congregations are included in the clause giving equal recognition to the religious bodies in Eire, and they respectfully tender congratulations on the production of such a fair and just document'. S9852.

<sup>'''</sup> De Valera papers 1995/2F (emphasis added to show changes from previous draft); section 1 was also changed. It read: 4(1) The state acknowledges that the

homage of public worship is due to Almighty God. It shall hold His name in reverence, and shall respect and honour religion'. There was also one major change in the structure. The Article was now divided into two parts. Section 1 had three sub-sections. The new section 2, with five sub-sections, began at the section 4 of the old draft.

There is a reference to a difference of opinion in the excellent book by Fr Sean Farragher, *Dev and his Alma Mater & Eamon de Valera's lifelong association with Blackrock 1898-1970* Paraclete Press, Dublin, 1984, p. 174; I am not sure whether the first draft of the religious Article was all translated into Irish. But there is a minute on the text which suggests that de Valera retrieved it from the translators on 15 April 1937 — the day after he had had his difference of opinion with McQuaid. 'Returned by Mr O Criobhtha 15/4/37' is written on a copy of the draft, possibly in de Valera's hand. De Valera papers, ^ 1079/4.

<sup>71</sup> Leon O Broin, *Just like yesterday an autobiography* Gill and Macmillan, Dublin, 1986, p. 184.

<sup>11</sup> De Valera papers, 1055 (p. 30); see also Sidney Z. Ehler and John B. Morrall, *Church and state through the centuries - a collection of illustrative documents* Burns and Oates, London, 1954, p. 315. *Immortale Dei*, quoted in Enda McDonagh, 'Church and state in the Constitution of Ireland', *Irish Theological Quarterly*, Vol. 28, No. 2, 1961, p. B9.

<sup>''</sup> De Valera papers, 1091.

<sup>''</sup> Farragher, op. cit., p. 174.

<sup>7.1</sup> De Valera papers, 1091. The

letter had begun: 'I beg to enclose some suggestions on the work of last night, which I trust may prove useful in some way'.

" De Valera papers, 1091: McQuaid added in a postscript: 'I shall work at the Property section to-day and if anything occurs to me, I shall send it across'.

<sup>78</sup> Keogh, *op. cit.*; see Chapter IV.

<sup>79</sup> *Ibid!*

<sup>80</sup> J. P. Walshe to McCauley, 1 December 1933 (Irish Embassy to the Holy See, Villa Spada).

<sup>81</sup> Walshe was no stranger to Rome. In 1923, he had visited the city with the then Minister of External Affairs, Desmond Fitzgerald. He was there again in 1929 in an official capacity, negotiating the establishment of diplomatic relations for the Free State. He visited the city in 1933 with de Valera. It is probably that Walshe, who became the first Irish diplomat to be given the rank of Ambassador when he went to the Vatican in 1946, was a frequent private visitor to Italy over the years.

<sup>82</sup> De Valera papers, 1995 2F.

<sup>1</sup> There were two drafts of this document. One was taken by Walshe to Rome on 16 April. Written on the corner in de Valera's hand is 'Copy given J.W. as a reminder. 16.IV.37.' — De Valera papers, 1995/2F. But there is a second version of the document with 'Re-draft from that given J.P.W. in de Valera's hand' — de Valera papers, 1995 ID. It is unclear whether the re-draft was sent to Rome to Walshe, but as it did not differ in substance from the first document it is probably that it was not. There is no reference on file

as to who drafted the document. It is probable that it was either John Hearne or Maurice Moynihan — or possibly both. De Valera almost certainly took an active part in the drafting of the document.

<sup>84</sup> Words in brackets in de Valera's handwriting.

<sup>85</sup> D/FA, S49. This telegram was 'completely garbled' in transmission and it had to be sent again. There is a missing word in the text cited above, which I have added in brackets.

<sup>86</sup> D/FA, S49.

<sup>87</sup> D/FA, S49. Walshe arrived back in Dublin on a K.L.M flight on 27 April.

<sup>8</sup> De Valera papers, 1995 ID.

<sup>9</sup> MacRory papers.

" Professor Geoffrey Hand to author, February 1978; there is no date for this meeting between Macaulay and MacRory. It has not been possible to locate any reference to such a meeting in diplomatic reports from the Irish envoy to the Vatican. However, sensitive high diplomacy of that nature may not have been committed to paper either in the form of a report or a telegram. It seems unlikely that there was any need for the cardinal to intervene to soften the Vatican's position after the Walshe visit, which implies that MacRory visited Rome before 16 April 1937.

<sup>91</sup> De Valera papers, 1079/4. In de Valera's hand, there is a minute to include 'The Society of Friends'. This is now Article 45.

<sup>92</sup> De Valera papers, 1091.

<sup>93</sup> De Valera papers, 1995 IB and 1034/2.

<sup>94</sup> De Valera papers, 1995 IB.

<sup>9</sup> MacRory was in a very weak position. Byrne of Dublin had

voiced his approval for the draft Article on religion. Being archbishop in the most important metropolitan see in the country, in whose diocese the capital was located, Byrne had to be listened to. MacRory was only following custom when he took a subordinate role to Byrne on this matter. Edward Cahill to de Valera, 23 May 1937, de Valera papers, 1095/2D.

P.J. Cannon to Cardinal MacRory, 9 June 1937, MacRory papers.

De Valera to Cardinal MacRory, 23 May 1937, MacRory Papers. An extreme example of inter-church disharmony can be found in the statement by Cardinal MacRory when both the Church of Ireland and the Catholic Church celebrated the fifteenth centenary in 1932 of the coming of St Patrick to Ireland. Cardinal MacRory said, as quoted in an article by David Kennedy, that Irish Protestants did not belong to the Church founded by St Patrick and that the Protestant Churches were 'not even a part of the Church of Christ' (*Irish Catholic Directory*, 1933, p. 570). He said in mitigation some time later: 'I have no ill-feeling towards non-Catholics. I never said a word against non-Catholics. What I did say and what gave offence to many was against their Churches and creeds and not against themselves' [*Belfast Newsletter*, 21 April 1937; emoted in David Kennedy, 'Aspects of the Northern situation' in Michael Hurley (ed), *Irish Anglicanism 1869-1969* Allen Figgis, Dublin, 1970, p. 164.

Interview with Maurice Moynihan. The Secretary of the Department of the President had an envelope containing the final draft of the religious Article and preamble.

<sup>100</sup> De Valera gave Gregg an assurance that the phrase about which he was concerned did not bestow any legal privileges on the Catholic Church.

<sup>1.11</sup> De Valera papers, 1995/IB.  
<sup>102</sup> S 9830, S P O.

<sup>105</sup> *The Irish Times*, 11 October 1968.

<sup>104</sup> The evidence for advancing this hypothesis is circumstantial. But I have pieced it together through a series of interviews with Frank Aiken, Sean MacEntee, and other leading politicians, civil servants and academics. The Executive Council minutes for March and April are no particular help in trying to determine what went on around the table at Executive Council meetings. The Department for Industry and Commerce did not make any comments on the Constitution. Lemass made one personal intervention at the last minute.

Interview with Sean MacEntee, 22 March 1979.

<sup>107</sup> Byrne to de Valera, 4 May 1937, S 9852, SPO.

<sup>1015</sup> MacRory to de Valera, 9 May 1937, S 9852, SPO.

<sup>109</sup> When de Valera visited Pius XII in 1957, the Pope praised the Constitution.

<sup>110</sup> Alfred O'Rahilly, who was later President of University College Cork, wrote articles, in a series in the *Irish Independent* (11, 14 and 15 May) on the Constitution, in which he attacked de Valera for the way Article 44 had been phrased. It was nothing more, in

his view, than 'a piece of neutral scientific statistics expressed in fervent phraseology'. He was strongly of the opinion that 'it should be expunged'. De Valera had, to some extent, satisfied MacRory by including such a formula. He had taken up the cardinal's idea, put forward in their meeting at the nunciature on 5 May. See Alfred O'Rahilly, *Thoughts on the Constitution* Dublin, 1938.

<sup>111</sup> De Valera papers, 1091.

<sup>\*\*</sup> *Dai I Debates*, Vols. 67-68, 11 May 1937, cols. 29 and following.

<sup>1,3</sup> De Valera papers, 1091.

<sup>114</sup> McQuaid was particularly active in helping to neutralise O'Rahilly, whom, incidentally, the Holy Ghost father had invited to make a submission at one point during the drafting of the Constitution. On 25 May, McQuaid wrote:

I think that with the previous sheet, dealing with donation and designation theories of power, this one should answer O'Rahilly. Leo XIII is very explicit in not calling the designation theory by the strange names that Professor O'Rahilly found to fit it. (De Valera papers, 1091).

<sup>11</sup> Edward Cahill to de Valera, 23 May 1937, de Valera papers, 1095/2D.

<sup>116</sup> List of amendments, de Valera papers, 1038/4. I am grateful to Sean Faughnan for providing me with this reference.

<sup>117</sup> *Dai I Debates*, Vols. 67-68, 4 June 1937, cols. 1888-95.

<sup>1,8</sup> *Deal Debates*, Vols. 67-68, June 1937, cols. 1922-1925.

<sup>9</sup> Autographed copy of Constitution dedicated to John Hearne, MS 23, 508, Dublin. National Library; Professor Brian Farrell kindly pointed this important reference out to me.

<sup>11</sup> Jeffrey Prager, *Building democracy in Ireland - political order and cultural integration in a newly independent nation* Cambridge University Press, Cambridge, 1986, pp. 90-91.

<sup>1</sup> *Ibid.*, p. 92.

<sup>11</sup> *Report of the Committee on the Constitution*, December 1967 Stationery Office, Dublin, 1967, p. 2.

<sup>123</sup> *Ibid.*, pp. 5-6.

<sup>1</sup> <sup>4</sup> *Ibid.*, p. 47.

<sup>125</sup> *Ibid.*, p. 48.

<sup>126</sup> *Ibid.*, p. 44.

<sup>1</sup> <sup>7</sup> *Ibid.*

<sup>11,8</sup> John Whyte, *Church and State in modern Ireland* Gill and Macmillan, 2nd ed, Dublin, 1980, p. 388.

<sup>129</sup> *Ibid.*, pp. 413-16.

<sup>130</sup> Report of the proceedings of the New Ireland Forum, Irish Episcopal Conference Delegation, 9 February 1984, p.2.

<sup>131</sup> Peter Barry, the then Minister for Foreign Affairs, speaking at a lunch in Iveagh House during the visit of the Secretary of State of the Holy See, Agostino Casaroli, 16 September 1985.