

Dermot Nally Papers

UCDA P254/36

P254/36

Misc.
F. 2.

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17/9/93

To: Attorney General

From: Martin Mansergh

Questions on Articles 2 and 3

I enclose two papers on Articles 2 and 3, one (public) by the Knights of Columbanus, the other (confidential) by myself. There are a number of legal issues that need to be examined outlined in both papers, in particular:

1. Is there any truth in the statement that the Anglo-Irish Agreement is in some way dependent on Articles 2 and 3, and that it could be rendered void by their amendment?
2. To what extent are the provisions in the Irish Nationality and Citizenship Act covering persons born in the six counties of Northern Ireland dependent on the retention in their present form of Articles 2 and 3? Are there other (relevant) acceptable bases in international law for extending citizenship outside the border of a State? Can it be done by mutual agreement?
3. Article 2 is a statement about the extent of the national territory, not about the extent of the jurisdiction of the State? Is there not then a very good case for leaving it alone in any situation, on the grounds that it does not in any sense represent a claim of jurisdiction (taken on its own)? Is Article 2 (on its own) a claim of sovereignty? If not, could it be regarded nonetheless as a riposte on a different moral plane of legitimacy to the British claim?
4. Is there any intrinsic objection to inserting in Article 3 a clause that (self) imposes explicitly a condition of peaceful means/consent/agreement (while accepting of course, pace the Supreme Court judgement, such an addition is not strictly necessary?)
5. What is the legal effect (on sovereignty claims) of deleting the phrase "without prejudice to the right etc." in Article 3? Does our claim of sovereignty reside exclusively in that phrase, or is it also implicit in the phrase "pending reintegration of the national territory" taken together with Article 2?

Supplementary: If our claim of sovereignty does reside exclusively in the phrase "without prejudice to the right etc.", can it be so as to speak suspended as opposed to renounced, so that it comes into effect when and only when the conditions of agreement and consent are satisfied? (See suggestion in my accompanying paper).

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Uimhir.....

- 2 -

6. What would be the legal force of the 1967 Committee's reformulation of the first part of Article 3 (see attached paper)? To what extent does "firm intent" (very similar to German Constitution preamble) represent a constitutional claim?
7. In the 1921 Treaty, British sovereignty over the North was theoretically largely ceded (leaving aside caveats over crown/dominion status etc.), and then by vote of the Northern Ireland Parliament immediately recuperated? If Articles 2 and 3 were to be modified in some of the ways suggested, is there any way of making any consequent recognition of British sovereignty purely temporary from our point of view (until the condition of agreement/consent is satisfied), as suggested for example in question 6, and in such a way as to prevent them from ever being able to justifiably claim that Northern Ireland is an integral part of the UK? (i.e. a UK sovereignty independent of the wishes of a majority of the people of Northern Ireland).

[7 September, 1993.

Reflections on possible Constitutional Change

Background

1. Strictly speaking, no constitutional change is necessary on our side. The Supreme Court found that Articles 2 and 3 were fully consistent with the principle of consent contained in Article 1 of the Anglo-Irish Agreement (via Article 29 of the Constitution on Ireland's commitment to the peaceful resolution of international disputes). The use of the phrase 'constitutional imperative', while it has obviously been provocative, does not negate this. Article 3 emphatically limits the actual as opposed to the theoretical jurisdiction of the State to the 26 counties.
2. The Opsahl Commission and indeed many other voices have queried the wisdom of attempting to change Articles 2 and 3 on the grounds that it will stir up passions and increase political support for extremists. The matter was not pursued either in the New Ireland Forum or the Anglo-Irish Agreement for these reasons. Admittedly, the Supreme Court gave new life to the controversy.
3. The Unionists, with some degree of support from the British, have however made constitutional change a sine qua non of any new agreement. Apart from that, it could be argued that the claim in Article 3 by the Government and Parliament of the 26 counties to a right to exercise jurisdiction over the six counties, with or without their democratic representation, is difficult to reconcile with democratic principles. The political cost of attempting to resist all change indefinitely, while accepting that the constitutional position is on the table, could become increasingly high, although equally the dangers of embarking on an ill-considered Referendum are enormous.
4. Articles 2 and 3 represent a strong sense of historical legitimacy, a rejection of British sovereignty as of right, a reassurance to Northern Nationalists of a connection with them and of their Irish identity, and giving the Irish Government a status in regard to their position. Arguments against any change from many Northern Nationalists would claim that their Irish citizenship would be denied them, and that they were being abandoned.

However, some of the people putting forward this view would until recently have had very little time for the Irish Constitution. It would be difficult to see Sinn Féin as credible champions of the Irish Constitution. Article 1, which has never been in question, asserting the Irish people's right to national self-determination, would remain. Indeed, it should be our aim to get the British to accept it and endorse it (at least in so far as this right could be exercised jointly, North and South, and therefore also collectively). However, it is unlikely that any international court of arbitration would uphold the Irish claim to sovereignty.

The Nature and Reciprocity of change

5. There is no question of putting forward unilateral constitutional change (openly demanded only by the DUP at this stage). The Programme for Government speaks of a balanced constitutional accommodation, which implies movement by the British side also (they have taken our view on this on board), and there would obviously also have to be an acceptable and balanced outcome between the three strands (constitutional, North - South institutional and internal). It essentially amounts to whether the total package is sufficiently attractive to warrant constitutional change. It could be that limited agreements not involving constitutional change would be entered into.
6. The simplest solution would be to have a referendum North and South on any new agreement, which would, like the Single European Act and the Maastricht Treaty, be incorporated in an override clause in the Constitution (e.g. whatever the conditions were contained in the New Agreement about constitutional change would override any contrary interpretation that might emanate from Articles 2 and 3). While arguably this course of action would satisfy many of the requirements of the Programme for Government, it would clearly not be sufficient to satisfy Unionists.
7. There is a case to be made for keeping as far as possible to what is familiar and not completely swapping or recasting Articles 2 and 3. Few expect them to be changed entirely.
8. Article 2 which defines the territory that belongs to the Irish nation ought, if possible, to be left alone. It would be extremely divisive to define the Irish nation or the national territory in 26 county or in two nation terms. Michael

McGimpsey, while admitting he may not represent the Unionists' view on this, has told me personally he has no objection to Article 2. (The diplomatic habit of maintaining a stronger theoretical claim to the coastal waters of Antrim than to the land territory of the six counties themselves might, however, be gently dropped, as serving no earthly useful purpose).

9. In the event of a radical political solution, Article 3 might no longer be necessary at all, but we may be some way from that yet. Full-blooded joint authority, with its implications of (proportionate) joint financing and policing, would be fiercely resisted by Unionists, although there is everything **to be said for agreed joint North-South institutions.**
10. With regard to Article 3, it seems to me that there could be few objections to building in a consent clause, after 'pending reintegration of the national territory': **'which will only come about by peaceful means and through agreement and consent'**. This would not diminish the claim, but simply attach essential conditions for its exercise.
11. The most difficult phrase to grapple with is 'without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory'. One possibility would be to delete it altogether, though the legal consequences of this would have to be closely studied.
12. An alternative would be to add some qualifying clause. If the words on agreement and consent were added as suggested in paragraph 9, one could rephrase it as 'without prejudice to the right in those conditions of the Parliament and Government established by this Constitution or by a new Constitution freely adopted by the Irish people as a whole to exercise jurisdiction over the whole of that territory'.
13. A further alternative is to go for the type of firm statement of intent contained in the report of the 1967 Committee, which begins 'The Irish Nation hereby proclaims its firm will that its territory be united in harmony and brotherly affection between all Irishmen' (perhaps add 'and-women or alternatively' all the people of Ireland') and then goes on as in the existing article to limit the effective jurisdiction to the 26 counties. This is similar to the exhortation that was in the preamble of the German Constitution: 'the entire German people

are called upon to achieve in free self-determination the unity and freedom of Germany'.

Issues to be examined

14. At the broadest political level, it would be deeply divisive to recognize unconditionally any de jure or permanent and unconditional right to sovereignty of the British Government to any part of Ireland, because that will lead to charges of abandonment. The 1920-1 position was essentially a temporary continuation of British sovereignty, which had already been ceded in principle and then taken back, being purely conditional on the decision of the Parliament or people of Northern Ireland and on no other basis. A complete removal of the Irish claim is therefore undesirable. The modern Nationalist position is surely that the whole island belongs as of right to the Irish people as a whole, but that there is now a solemn obligation that that right will only be exercised, demanded or enforced with the consent of a majority of the people in Northern Ireland. There is obviously no difficulty in principle in recognizing de facto British Sovereignty, but how this factual limitation might continue to be expressed in legal terms is a different matter.
15. To what extent are or were the rights of the Irish Government as expressed in the Anglo-Irish Agreement dependent on the current wording of Articles 2 and 3, or is this just an academic question, given the Agreement is now a fact, and that we do not have to give it up, unless something at least equally satisfactory takes its place?
16. To what extent are the Irish Citizenship rights, as applied to the people in the North, dependent on Articles 2 and 3 as currently worded? Could the Northern aspects of the Irish Nationality and Citizenship Act be rendered unconstitutional, by a modification of the Articles? Or is there in fact the slightest difficulty in extending citizenship (as the Germans and Israelis have done) to nationals (who have always up till now) lived outside the borders of the State?
17. Any thoughts presented to the British Government should perhaps contain options, ranging from no change on the grounds it is not strictly necessary, to endorsement of a new Agreement North and South, and finally the possible

scope of change (concentrated on Article 3). We have already signalled in broad terms what we need from them.

HM

17 September, 1993