

**Dermot Nally
Papers**

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SECRET

NORTHERN IRELAND TALKS PROCESS

1. It is sometime now since I have been engaged in this work. Some of the comments may, therefore, be off the mark. However, they are given for what they are worth.

General

2. The British proposals for devolution in Scotland and Wales will provide them with the sort of Parliamentary cover for a fairly radical move on Northern Ireland, particularly if it can be negotiated with us as part of the current talks. In relation to Northern Ireland, the form of this movement will involve -

(1) relations between Britain and Northern Ireland (the constitutional guarantee, continuing subsidies, definition of functions to be retained in Westminster and to be devolved, elections, courts, security, human rights etc. Though we are not formally involved, the substance of these changes would be of concern to us);

(2) relations between the U.K. and Ireland (on an unofficial or informal level, these could hardly be better but if we are to get Unionists to unfreeze a bit something more public - and political - will be needed. Rejoin the Commonwealth? - which is no longer the "British Commonwealth" but a loose association of like-minded States. The EU implications would need to be gauged. Alternatively, and perhaps more realistically, beef up the Anglo-Irish Intergovernmental and Parliamentary Bodies, with again, inducements for Unionist participation. We would need to be particularly careful in all this to preserve our freedom of decision and action on EU matters, like the CAP, Structural Funds, taxation policy etc.);

(3) relations between North and South in Ireland. (There some really fundamental thinking needs to be done even if the eventuality we are looking to is far off. One proposal - that for 4 Regional Governments, including Ulster - could

weaken this country internationally and institutionalise rivalries internally to such an extent as to damage our interests fundamentally).

3. Of the possibilities mentioned in the Forum Report, the unitary State is by far the most advantageous for the people of the island as a whole and, if we are serious about it, we could work towards it far more constructively than we have in the past. For example, roads in the border areas - and elsewhere - in the South, would disgrace a Third World country. In the North, they are of a standard far higher than the traffic they are called on to bear. Taxes here on the individual offer no inducement to a Northerner to join the South. Our welfare system is probably better but people do not join a State to avail of its unemployment benefits (unless you are Eastern European and have none at all at home). Our record on personal rights and freedoms has improved a great deal in recent years. Our recent growth rates - as the Celtic Tiger - have probably done more than all the political blandishments ever to make Northerners think, even incidentally, of unity. In short, all our policies need to be framed with a view to making this country an attractive place to join - if we are serious.

4. A further point in this particular area is that the framework of cross border institutions with consultative or executive powers could produce a truly horrific bureaucracy, the net effect of which would be to drive up public expenditure and tangle every proposal in a web of talk. Once this sort of body is established, it is very hard to disestablish it or to prevent ~~X~~ from growing.

5. Some final general points. We must face the fact that as things are -

- (1) we could not afford "unity". The British pay the North about Estg 4 billion a year in various subsidies. Some of these would not be necessary in normal conditions but even after these adjustments the burden for this country - equivalent to about 30% of our own tax revenue - would be insupportable and the effect of unity tomorrow would well be economic chaos ~~byed~~. (I remember the assurances by even so well informed a man as Chancellor Kohl gave about German unity before it occurred. He said that Western Germany could easily

meet the costs through the dismantlement of border controls, some cuts in regional subsidies and perhaps a reduction in the size of the road building programme. The reality was starkly different. German taxes, already high, increased by substantial amounts. Economic growth stalled so that there is now a fair possibility that Germany will not meet the EMU criteria - largely of its own devising in better days. And its unemployment rate is amongst the highest in Europe. Very few here would thank an Irish government for this sort of mess in exchange for unity).

(2) The British have very clear advantages in a settlement acceptable to all - not least the possibility, at last, of getting rid of the £stg.4 billion yearly subvention over time: and could afford to be more generous than the Brooke/Mayhew statements about having no strategic etc. interest would imply. But this is a subject which would need to be handled with extreme sensitivity, when it emerges. Part of any final settlement in perhaps a distant future should be an undertaking by the British to continue these subsidies over say 25 years, on a reducing scale.

(3) The principle of "consent" needs to be very carefully considered. There would be grave dangers in moving along any path if the "majority" in the North, in favour, were, say, a mere 51%. The effect of doing this could well be to invite more violence, only this time, the violence would be coming from a well armed and motivated Unionist population, impossible to control or coerce, without unthinkable hardships throughout the whole island. The British army and the RUC, with all their resources, found it impossible to contain violence coming from a small proportion of the Northern population. What chance would we stand, in a Northern settlement with our far smaller resources, of containing violence from a far larger proportion of that population? If these comments have validity, then "consent" is almost the equivalent of consensus: and a policy of making this State attractive to Unionists (and Nationalists) becomes even more imperative.

6. These points are made here because they will undoubtedly be raised in debates on any referendum affecting the North. We could be secured and comforted by British assurances of continuing subsidies, on a diminishing scale, after unity and by firm arrangements in place for involvement by unionists (and nationalists) in government and legislature here.

7. All this is a preamble to some comments on Dr. Mansergh's excellent paper of 12 November on a Balanced Constitutional Accommodation: The Options.

Articles 2 and 3

8. I agree totally with Dr. Mansergh that strictly no change is required, in so far as the legal position is concerned, in the articles. We are members of the United Nations whose charter, in Article 1, states that one of the purposes of the organisation is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes". Articles 2 and 3 have been judged by the Supreme Court here to be fully compatible with the Anglo-Irish Agreement, 1985, which accepts the principle of consent to any change in the status of Northern Ireland (however that status is defined). And Ireland is a signatory of the CSCE Helsinki Agreement which binds the State to "the principle of the pacific settlement of international disputes by international arbitration or judicial determination" and allows that "frontiers can be changed in accordance with international law", ruling out any threat of force.

9. All of this is of no comfort to Unionists and, without their acquiescence - as without the acquiescence of nationalists - no lasting settlement will be possible. Therefore, as Dr. Mansergh indicates, constitutional change must be contemplated.

10. On the question of balance, it is important to remember also that in British and Northern eyes, Northern Ireland's constitutional status is set out now in section 1 of the Northern Ireland Constitution Act, 1973, - which, more or less, supersedes the Government of Ireland Act, 1920, in this respect.

McKenna Case

11. On this, the Supreme Court decision makes it impossible for a government to support or argue for a proposal it is putting forward in a referendum. Admittedly, political parties can but this is not the same thing - they have not got the resources, unless by sleight of hand they are given them, and quite frankly, they have not got the status of the Taoiseach arguing as head of the Executive of the Irish State (as distinct from Party Leader) for any particular course of action affecting the State and all its people, for whose well-being he is, as Head of Government, the person, chiefly responsible for exercising "the executive authority of the State" (Article 28).

12. The judgement places Governments in the invidious position of arguing for a certain position in, say, discussions leading to an international agreement - like that in contemplation on Northern Ireland or the Amsterdam Agreement - and then finding that it cannot tell the people why it wants them to vote in a referendum for the agreement it has negotiated. We could be international laughing stocks, if we seriously bring this sort of case to an international forum. I would suggest that thought needs to be given, involving the Attorney General's Office, and others, on how this incursion by the judiciary into how the Government is to govern can be remedied.

13. In his paper, Dr. Mansergh quotes 6 options. I take it that Option A - no change - and Option F - simple deletion of articles 2 and 3 - are not really to be considered seriously if the talks are to progress.

Option B - the change proposed by the 1968 All-Party Committee on the Constitution

14. This has admirable sentiments but the language, as Dr. Mansergh points out, has made it seriously dated.

Option C - the "Framework Document" Discussion Formula

15. This option contains perhaps the germ of a solution, but the description in plain language, (which sometimes is better avoided) of "the re-integration of the national territory", as a primary, legitimate, national objective" could perhaps be interpreted as being even stronger than the existing language in the constitution and would, therefore, provoke Unionism even more.

16. On Attorney Dermot Gleeson's point, at page 4, about "the people of Ireland" compared with "the Irish nation" and "the people of Eire", I do not profess to be a legal expert but it seems to me that a reference to the decision being made by "referendum" would bring article 47 into play - and that clearly says what is meant by "people" in this context. The 'people of Eire', not the people of Ireland, voted on the Constitution - at least that argument could be made, whatever about the subtleties. His point about "primary, legitimate national objective" in contrast with the pluralist tone of the proposed article 2 is well taken as is the need to avoid references to "constitutional" in the Constitution. Article 47 may deal with his point on the distinction between "the electorate" and "the people". The interpretation of the Preamble, in the light of specific provisions in the body of the Constitution is a point on which the lawmen might advise. My inclination would be to say that specific constitutional provisions certainly override or qualify what is in the preamble. (This is a big issue with certain people who believe the invocation of the Trinity in the preamble gives their views constitutional validity).

Option D - The Variation of the 1994 Proposal

17. The birthright issue is, as Dr. Mansergh points out, a very real one; and changes in more than Articles 2 and 3 would complicate a referendum perhaps fatally. Arguments about citizenship rights are going to be even more complicated than those on cabinet confidentiality. And what about people who happen to be here and have children (tourists, businesswomen, immigrants, foreign diplomats). Will the children all be Irish citizens by accident (or place simply) of birth?

Option E - A Possible New Formula

18. This option offers considerable promise, if the complications about citizenship can be avoided. The following are some comments:

(1) "the people of the island of Ireland" in article 2 contrasts with "the people living in Ireland" in article 3. Make whatever you say compatible with article 47 (the referendum):

(2) I would not refer to "origins", in article 2. It could include our Romanian and Zairean friends:

(3) article 3 seems to imply that Unionists would be included among those who have Irish unity as 'a primary legitimate objective'. I doubt very much if they would buy this:

(4) on the rule that only words that are necessary should be included in a Constitution, I would omit "recognising that they can only be brought about in a spirit of concord and reconciliation". They seem to repeat the sentiment in the preceding phraseology:

(5) the words "the jurisdictions which now exist" could cause problems. What happens if a jurisdiction changes. Is there a suggestion of *de jure* recognition, in the Constitution, of Northern Ireland's status? ✓

Possible Alternative

✓ 19. I wonder if a further option would be worth considering. This would be to change article 2 and 3 as little as possible, as follows (the changes are underlined):

Article 2

The national territory consists of the whole island of Ireland, its islands and the territorial seas (and is the shared inheritance of all the people of Ireland in all the diversity of their identities, beliefs, traditions and choice of political allegiance (1997 formula, with "origins" omitted).

Article 3

As in Constitution as^{is} present.

Article 3(2) (New)

The re-integration referred to in the preceding section shall take place only with the consent freely and concurrently given of a majority of the people of each part of Ireland voting in a referendum in each jurisdiction.

20. These minimal changes make a gesture towards Unionism, and other traditions, and makes the "territorial" claim constitutionally subject to consent. The retention of the territorial wording, I think, strengthen its chances in a referendum here and among Nationalists North of the border.

21. Alternatively, the version under, where the changes are marginally^{ly} more than minimal might suit.

Article 2

The national territory consists of the whole island of Ireland, its islands and the territorial seas and is the shared inheritance of the people of Ireland in all the diversity of their identities, beliefs, traditions and political allegiances.

Article 3

(1) The Irish nation hereby affirms its aspiration^{to} ~~for~~ the re-integration of the national territory in harmony and peace and recognises and accepts that such re-integration could take place only with the consent freely and concurrently given by a majority of the people of each part of Ireland voting in a referendum in each jurisdiction.

(2) As in present Article 3.

Conclusion

23. Whichever formula is settled on should I think be the subject of close prior consultation among the political parties here on the basis that

(1) very few referenda, if any, are carried where there is disagreement between the major parties and

(2) a defeat in this referendum could have the most serious consequences not only for the government of the day but for Anglo-Irish and North/South relations and the Irish people generally.

24. I would suggest that a [Green?] or White Paper setting out the background to the talks and any proposed settlement could be a most useful document, eventually, to assure people both North and South that their interests are not being sold down the river. After all "consent" is just as important in the South (which could lose a lot in the wrong sort of scenario) as it is in the North.



Dermot Nally,
17 November, 1997.