

Dermot Nally Papers

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A BALANCED CONSTITUTIONAL ACCOMMODATION : THE OPTIONS

A Consultation Paper

I. The Commitments in the Downing Street Declaration and the Framework Document

In the Downing Street Declaration, the Taoiseach confirms that 'in the event of an overall settlement, the Irish Government will, as part of a balanced constitutional accommodation, put forward proposals for change in the Irish Constitution which would fully reflect the principle of consent in Northern Ireland'. In other words, there are two criteria for change. The constitutional accommodation must be balanced, and it must take place in the context of an overall settlement.

'Balance' was a reference to the need for British constitutional change as well, notably Section 75 of the Government of Ireland Act, 1920, which posits absolute sovereignty of the UK Parliament without reference to the will of the people of Northern Ireland. British constitutional law at present, while it says that the status of Northern Ireland will not change without the consent of a majority, does not close the logical gap by definitely or unequivocally affirming that it will change with such consent, in line with the Anglo-Irish

Agreement, the Downing Street Declaration and the Framework Document.

The 'triple lock' language implies a separate Parliamentary decision, which may not be just a rubber stamp.

The Framework Document elaborates the commitment of both Governments.

The British Government states, in para. 20 :

'This new approach for Northern Ireland, based on the continuing willingness to accept the will of a majority of the people there, will be enshrined in British constitutional legislation embodying the principles and commitments in the Joint Declaration and this Framework Document, either by amendment of the Government of Ireland Act, 1920, or by its replacement by appropriate new legislation, and appropriate new provisions entrenched by agreement'.

The Irish Government states :

'As part of an agreement confirming the foregoing understanding between the two Governments on constitutional issues, the Irish Government will introduce and support proposals for change in the Irish Constitution to implement the commitments in the Joint Declaration. These changes in the Irish Constitution will fully reflect

the principle of consent in Northern Ireland and demonstrably be such that no territorial claim of right to jurisdiction over Northern Ireland contrary to the will of a majority of its people is asserted, while maintaining the existing birthright of everyone born in either jurisdiction in Ireland to be part, as of right, of the Irish nation'.

The commitment pledges to remove in the context of an agreement any territorial claim of right to jurisdiction, rather than any territorial claim simpliciter, for reasons explained in more detail below. The Framework Document goes on to explain the net effect of a balanced change which is 'recognition by both Governments of the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its constitutional status'. In other words, the Irish Government committed itself in the context 'of a new and equitable dispensation', to recognise the legitimacy of choice of a majority of the people of Northern Ireland, rather than committing itself baldly to recognise Northern Ireland as part of the UK.

2. The Nature of Articles 2 and 3

Articles 2 and 3 state :

Article 2:

'The national territory consists of the whole island of Ireland, its islands and the territorial seas.

Article 3 :

'Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Eireann and the like extra-territorial effect.

The Supreme Court in 1990 decided controversially that they constituted 'a legal claim of right' over Northern Ireland, as well as asserting a constitutional imperative to pursue unity, but stated that they were fully compatible with Art. 29 of the Constitution to pursue the aim by peaceful means. The Government was entitled as a matter of policy consistent with this to accept the principle of consent, as embodied in the Anglo-Irish Agreement and the Downing Street Declaration, which are thus fully compatible with Articles 2 and 3 of the Constitution. When stated in that way, this comes as a surprise to many of the critics. Strictly speaking, there is no legal necessity to amend the Articles to accommodate the principle of consent, as they are capable of accommodating it

as things stands. The case for change is more a question of making the position explicit and less open to misrepresentation.

It is argued by Unionists and no doubt by the British that the Boundary Agreement of 1925 constituted de jure recognition of Northern Ireland and of partition. An examination of the files of the Agreement and the Dáil debate on it provides no strong or obvious counter-argument to this. This lends credence to the suggestion of most expert opinion that the State could have difficulty in upholding 'the legal claim of right' in an international court. This might have little sway with public opinion, however. Unionists are of course well aware of our potential vulnerability on this.

Politically, however, Articles 2 and 3 constituted an emphatic repudiation of any such concession de jure of recognition, whilst recognising in Article 3 the de facto position. Politically, Articles 2 and 3 were a reassertion of the 'essential unity' of Ireland, the principle that underlay both the Government of Ireland Act, 1920 and the 1921 Treaty, and a protest against partition and the apparent acceptance of it by the Free State Government in 1925.

In a practical political sense, as opposed to certain formal diplomatic positions, no one takes too seriously (least of all Northern Nationalists) the notion that the North is in some sense part of the 'Free State' or the 'Republic'. (From time to time, demands are made by Northern Nationalists to have the right to join Southern parties, to participate in elections and in the Oireachtas in accordance with Article 2, but many of them might not be compatible with the letter or spirit of Article 3 - hence the establishment of Forums, which do not have these potential complications). Republicans have generally preferred to speak of the 'Dublin Government' rather than the Irish Government. However, a much stronger consideration today would be the negative one of wishing to deny the British Government any uncontested de jure claim to sovereignty over Northern Ireland or recognition of its legitimacy. Even today, under new circumstances and an equitable agreement, in line with the strong language of para. 20 of the Framework Document, which would be a sine qua non, claims, even if somewhat of a distortion, that Northern Ireland was being fully recognised for the first time as part of the UK, or that Ulster was being accepted as British, remain highly emotive.

The other consideration, which is even more strongly felt, is a determination that no one will contest the right of Northern Nationalists to belong to the Irish

nation (this concern is explicitly recognised and taken account of the Framework Document, as quoted above). In addition, the Irish Nationality and Citizenship Act of 1956 in its preambular definitions says :

' "Ireland" means the national territory as defined in Article 2 of the Constitution'.

Constitutional change might well require a corresponding change in the 1956 Act ('Ireland means the nation as defined in Article 2 of the Constitution'? See option E below).

With a President from the North, the closest attention will be paid to the implications for citizenship entitlement of any proposed Constitutional change.

Ireland as a partitioned country has the right under international law to have reunification as an objective, provided it is brought about by peaceful means and by agreement. The West German Constitution of 1949 imposed an obligation to pursue German unification (Preamble : 'The whole German people remains under an obligation, to complete the unity and freedom of Germany in free self-determination'). Unification was brought about by entirely peaceful means and by concurrent agreement between its two parts, the model also envisaged in the Downing Street Declaration. Citizenship, subject to further

determination by law, belonged to those of German nationality or descent on the territory of the German Reich as of 31 December 1997 (equivalent to national territory in some respects). Cases in Eastern Europe involving ethnic minorities living across borders are not strictly comparable, since they were not pre-existing countries that were then partitioned. The CSCE Helsinki Agreement allows that 'frontiers can be changed in accordance with international law', but rules out any use or threat of force. There is nothing contrary to international law in the peaceful pursuit of Irish unity.

3. Constitutional Options

Six options are considered, with the arguments for and against.

- A. - No change.
- B. The change proposed in the 1968 All-Party Committee on the Constitution.
- C. The informally negotiated change in 1994, on which there was no final agreement between the British and Irish Governments, except on the more general principles set out in the Framework Document.
- D. A variation considered internally under the Rainbow Coalition prior to completion of the Framework Document.

- E. A new formulation to meet some likely objections to the 1994 formula.
- F. Simple deletion of Articles 2 and 3, as proposed by the UUP.

A. **The No Change Option**

From a domestic political viewpoint, this would in many ways be the most comfortable option. It was also the option exercised at the time of the Anglo-Irish Agreement. It could be argued that there is no real problem to be addressed. Post-1985, Arts 2 & 3 will only be exercised with consent.

Our agreement to engage in change is not a unilateral one, and depends on a substantive and balanced agreement. It would be very dangerous to put forward a proposal for change that was likely to be defeated. On the other hand, if we were to take up the position that we rejected all change in advance, it would be a pulling back from obligations we have entered into in good faith in the Downing Street Declaration and Framework Document, and would give the Ulster Unionists the excuse to break off negotiations.

The no change option is an entirely realistic one in the absence of any Agreement, but it would have the capacity to wreck negotiations, if it were to be our position in the context of substantive progress being available in other respects.

B. The 1968 All-Party Committee on the Constitution

The Report recommended no change in Article 2 (broadly the basis of the 1994 proposal also).

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'.

*Concentration
should be on
people not
territory
this justification
is presented out of
date thinking.*

The Report, on which Fianna Fáil were represented amongst others by David Andrews, Seán Lemass and Michael O'Kennedy, was not acted upon. The language, consciously or otherwise, is somewhat similar in construction to the Preamble of the German Constitution. Looked at from the standpoint of today's political debate, three observations can be made:

1. Words like harmony and affection are vague in comparison with more precise words like agreement, consent, peacefully, democratically.
2. 'Its territory' in conjunction with Art. 2 would continue to repeat the territorial claim.
3. The adjective 'brotherly', which appears to ignore women, would obviously have to be replaced by a word such as 'friendly', and Irishmen would have to be replaced by 'Irish men and women', if it were to be politically correct by today's standards.

C. The 1994 'Framework Document' Discussion Formula

The following formula, approved by two Attorneys General (Whelehan and Fitzsimons) but which Dermot Gleeson had reservations about, was elaborated in discussion in a Special Constitutional Committee under the co-chairmanship of John Chilcot and the undersigned between July 1994 and November 1995. (The other members of the Irish side were Seán O hUiginn and Fergus Finlay). The formula was approved by the Fianna Fáil Front Bench, and its thrust (without entering into full detail) accepted by the Fianna Fáil Parliamentary Party in Opposition in February 1995.

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 their diverse
identities and traditions'.

Article 3.1

Accordingly, the re-integration of the
national territory, which is a primary

legitimate national objective, shall be pursued only by peaceful and [constitutional/democratic] means, and shall be achieved, in a spirit of concord and reconciliation, only with the consent freely and concurrently given of a majority of the people [voting] in each of the jurisdictions which now exist within that territory.

Article 3.2

Pending the achievement of the objective above referred to, the laws enacted by the Parliament and the executive powers of the Government shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect.

The main effect of the proposed change is to retain Article 2 (with its vital perceived implications for citizenship rights in the North) but to add to it a pluralist definition of the nation. The proposed addition, which was made public, has aroused no controversy, and appears to be generally approved.

Article 3 retained as much as possible of the existing language, retained the notion of unity being 'a primary legitimate national objective', though the constitutional imperative was that it be pursued only by peaceful and constitutional means. The principle of consent, as set out in the Downing Street Declaration, was explicitly stated. There was recognition of two jurisdictions on the island, on a one nation - two jurisdictions theory, similar to one nation - two States, or one nation - two systems in other partitioned countries (notably China in pre-1990 Germany).

Former AG's Queries / Objections

Dermot Gleeson, AG to the Rainbow Coalition, made the following queries / objections to the 1994 formula :

- 1) He had some concern about the consistency of different terms in the Constitution and in the proposal, 'the people of Ireland', compared with 'the Irish nation' in Article 1 and, 'the people of Eire' in the preamble.
- 2) How consistent was the phrase 'primary legitimate national objective' with the new pluralist definition of the nation in Article 2 ?
- 3) He suggested 'peaceful and constitutional means' should read 'peaceful

and democratic means'. The adjective 'constitutional' should not appear in the Constitution !

4) 'Majority of the people' should be simply majority or majority of the electorate, as it is strictly speaking electors, not all the people who decide.

5) He felt that the preamble to the Constitution contained a possible territorial claim in addition to Articles 2 and 3, which might need to be addressed. ('Restore the unity of our country' ?). This seems far-fetched.

British / Unionist Objections

The main objection to the formula, and from another point of view its virtue, is that it leaves a territorial claim, albeit on behalf of the nation rather than the State, intact, even if it is not a claim to jurisdiction. But the distinction is not one that it will be very easy to get across to the public.

D. The Variation on the 1994 Proposal

In the first weeks of the Rainbow Government a softer formulation of Article 2 was worked on, which read :

'The whole island of Ireland, its islands and the territorial

seas belong as a shared inheritance to the Irish nation in its diverse identities and traditions'.

Article 3.1 began

'Accordingly, the achievement of a sovereign re-united Ireland (continues as per 1994 proposal).....

It is accepted that this formulation might cause problems in relation to the birthright criterion in the Framework Document. The Department of Foreign Affairs have also proposed that in the event of any further change in Article 2 it would be advisable to change Article 9, which at present reads (Section 2) :

'The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law'.

The change would include a statement that 'any person born in Ireland shall be a citizen of Ireland' (though it might be desired to exclude families of foreign diplomats).

E. A Possible New Formula

A possible new formula to silence Unionist objections would be for a new Article 2 to define the Irish nation, rather than the national territory, in a way that would nonetheless have a clear territorial reference, as well as be an expansion of the pluralist definition of the Irish Nation in the 1994 formula.

The new Article 3.1 borrows heavily from the 1994 formula, with the addition of a self-determination clause from the Downing Street Declaration, which gives constitutional sanction to the pursuit of an agreed Ireland. (The UN definition of self-determination in 1960 is that 'the establishment of a sovereign and independent State, the free association or interaction with an independent State, or the emergence into any other political status freely determined by a people constitute modes of implementing the right self-determination by that people'.)

Article 2

'The Irish nation consists of the people of the island of Ireland and its surrounding islands, in all the diversity of their origins, identities, beliefs, traditions and choice of political allegiance'.

Article 3.1

'The unity of Ireland and its people, and pending that, any other measure of agreement on future relationships in Ireland which the people living in Ireland may themselves freely so determine without external impediment, shall be a primary legitimate objective pursued exclusively by peaceful and democratic means, recognising that they can only be brought about in a spirit of concord and reconciliation, with the consent freely and concurrently given of a majority of the people voting in each of the jurisdictions which now exist in the island of Ireland'.

Article 3.2

'Pending such an outcome, the laws enacted by the Parliament and the executive powers of the Government shall have the like area and extent

of application as the Laws of Saorstad Eireann and the like extra territorial effect'.

The text of this formula would have to be further checked with and refined by the Attorney General's Office.

Possible Unionist Objections

They might object to a definition, which makes them part of the Irish Nation (though there are differing views on this). The obvious riposte is that the present constitutional position makes Nationalists unwilling British subjects.

The term 'choice of political allegiance' allows of course for the choice of a British political identity by some. It could be agreed also that for many purposes (churches, trade unions, sporting and some professional organisations) Unionists accept Irishness for certain purposes at least and they certainly cannot easily deny Nationalists the right to call themselves Irish.

They may object to the reiteration of Irish unity as a primary objective, but the alternative 'an agreed Ireland' is also specified. They cannot

Should not
include a
sub-article
reassigning
up front, the
rights to
British
citizenship
- a part of
the
clause.
[This would
require British
agreement]

reasonably object to a political ideal or aspiration peacefully and democratically pursued.

Possible Nationalist Objections

There is bound to be dislike of any suggestion of dropping the phrase 'national territory', and the dropping of the overt challenge to the British claim, which of course would have to be transformed in parallel. If combined with a reinforcement of Art. 9, it is difficult to see how the birthright could be sold out. The main judgement to be made is whether a formula as at Option E could in the right circumstances be carried.

F. **Deletion**

This would satisfy Unionist demands in full, and be welcomed by the British. It would be presented as a great Unionist victory against an illegal claim over Northern Ireland for which no concessions should be expected.

It would still leave Article 1 on national self-determination intact. It would be seen by many Nationalists as abandonment of their nationality and citizenship rights, and as a decisive rebuff to them. It is very unlikely that a referendum simply to delete Arts. 2 or 3 without putting

anything in their place could be carried.

Mark Marzugh

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