THE CONSTITUTION OF IRELAND

and

NORTHERN IRELAND

LEGAL SUBMISSION

Prepared by Cleaver Fulton & Rankin, Solicitors, Belfast, on behalf of the Ulster Unionist Party Stand 2 Negotiating Sub Committee

PART ONE

1. Introduction

1.1 The Constitution of Ireland contains the following claims over Northern Ireland:

The preamble to the Constitution provides as follows:-

> "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"
> (emphasis added)

1.2 Articles 2 and 3 provide as follows:-

> **"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 Saortstat Eireann and the like extra-territorial effect".

2. Summary of Legal Objections

2.1 These provisions have not proved acceptable to the majority of the people of Northern Ireland and there seems no cogent prospect of any such acceptance emerging at any future date. As will appear even 'watered down' versions remain unacceptable.

2.2 In summary the legal basis for objection is as follows:-

(i) The claims contained in the Constitution of Ireland are a denial of the right of such determination of the people of Northern Ireland - see the separate paper on the Rights of Self Determination in International Law.

(ii) The claims in the Constitution of Ireland constitute breaches of the international obligations of Ireland in regard to the principle of the peaceful and friendly relations between States epitomised in particular in the UN Declaration of Friendly Relations between States 1970 - this is dealt with in the paper on the Rights of Self Determination.

(iii) The claim puts Ireland in breach of the terms of the Agreement of 3 December 1925.

3. Scope of this Paper

3.1 As noted above, a separate paper has been prepared in regard to the fundamental principles of the right of self determination in International Law and the international principles regarding peaceful and friendly relations between States.

3.2 These are central to any examination of the legal and international validity of the claims contained in the Constitution of Ireland, and that paper should be studied and taken in close conjunction with this paper.

3.3 The next part of this paper deals with the separate question of the standing of the 1925 Agreement, and the breach thereof by Ireland in persisting with its claim in respect of Northern Ireland in breach of the terms of that Agreement.

3.4 The final part of this paper deals with the application of the claim under the domestic law of Ireland with some international comparison.

PART TWO

4. Introduction

4.1 On 3 December 1925 an Agreement was entered into entitled 'An Agreement Amending and Supplementing the Articles of Agreement for a Treaty Between Great Britain and Ireland'.

4.2 This Agreement was entered into between representatives of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Irish Free State in order to resolve differences which had arisen in regard to the 'Boundary Commission' which had been established under the terms of 'Articles of Agreement for a Treaty between Great Britain and Ireland' of 6 December 1921. Article 12 of those Articles had provided for a Boundary Commission to determine

> 'in accordance with the wishes of the inhabitants, so far as may be compatible with economic and geographic conditions, the boundaries between Northern Ireland and the rest of Ireland'

which were to be definitive for the purposes of the Government of Ireland Act 1920 and the Articles of Agreement.

4.3 Following failure on the Irish side to agree with the proposals of the Boundary Commission the parties came together in 1925 to resolve their differences.

4.4 Article 1 of the Agreement provides that the powers of the Boundary Commission should be revoked and that:-

> "The extent of Northern Ireland for the purposes of the Government of Ireland Act 1920 and of the Articles of Agreement shall be such as was fixed by sub section (2) of section 1 of that Act".

4.5 Subsequently the 1925 Agreement was confirmed by the United Kingdom by *The Ireland (Confirmation of Agreement) Act 1925* and in Ireland by the *Treaty (Confirmation of Amending Agreement) Act 1925*.

4.6 There has been much discussion of the legal status of the original 'Treaty' of 6 December 1921 but in any event it seems clear that the 1925 Agreement is at least an inter governmental agreement. At the time the Government of the United Kingdom was reluctant to concede that agreements between Governments of the Dominions of the British Commonwealth could be regarded as Treaties between separate States in international law, though the Government of the Irish Free State did not accept this and proceeded to register the Agreements at the League of Nations in pursuit of its claim to international recognition as a separate sovereign State.

4.7 The position accordingly in 1925 was that the Irish Government had entered into an Agreement which they regarded as binding in international law which recognised the boundaries and jurisdiction of Northern Ireland as set out in the Government of Ireland Act 1920. Both parties proceeded as noted above to confirm the status of the Agreement in their domestic legislation.

4.8 In any event the Agreement accorded with international perceptions in that the Government of Ireland has never been accorded recognition internationally for its claim of jurisdiction over Northern Ireland, and it is a matter in respect of which judicial notice may be taken that the United Kingdom of Great Britain and Northern Ireland is a State duly recognised in international law and practice and the stability and validity of its frontiers are recognised in international law and practice.

4.9 Despite the subsequent at least implied revocation of the terms of the 1925 Agreement by Ireland it is clear that the Irish Government at that time was entitled to deal with the United Kingdom and make as they did a legally binding Agreement. It follows that the Government of the United Kingdom is entitled to rely on the permanence of the territorial declaration embodied in that Agreement and that the Government of Ireland is estopped from denying the validity of that declaration once made and relied upon.

4.10 As noted in the next part of this paper, in Irish Law an attempt has been made to regard the 1925 legislation as being 'spent', but it must be doubted that this has any validity in international law and the parties should return to the basis of the Agreement entered into in 1925.

PART THREE

THE POSITION UNDER THE LAW OF IRELAND

5. Introduction

5.1 This part first considers the background to Articles 2 and 3. Then, the caselaw on the subject is explored. Finally, proposals for reform and revision of these provisions are examined.

5.2 The background to these Articles is well known. In effect, they constituted a repudiation by Mr de Valera of the legitimacy of the recognition of Northern Ireland by the Treaty (Confirmation of Amending Agreement) Act 1925.

5.3 Incidentally, while this law has never formally been repealed it is described in the *Official Index to Statutes* as 'spent'. This term is used to describe laws that cater for certain temporal events now long since past, e.g., fixing the retirement age for a particular civil servant who died many years ago or providing for special legislative arrangements for a particular election (e.g., the election of 1943 held under war time conditions). It seems a curious term to use in relation to an international agreement.

5.4 The thinking behind the provisions of the Preamble and Articles 2 and 3 of the Constitution of Ireland was explained by the Supreme Court in *Re Criminal Law (Jurisdiction) Bill*[1]

> "One to the theories held in 1937 by a substantial number of citizens was that a Nation, as distinct from a State, had rights; that the Irish people living in what is now called the Republic of Ireland and in Northern Ireland together formed the Irish nation; that a nation has a right to unity of territory in some form, be it as a unitary or federal state; and that the Government of Ireland Act 1920 though legally binding, was a violation of that national right to unity which was superior to positive law".

5.5 In other words Articles 2 and 3 asserted the right of the Irish Nation (i.e., all the people residing on the island of Ireland, as opposed to the citizens of the State (= the Republic) to unity, irrespective of what positive law (in this context, an Act of the British Parliament and international law) so provided. The distinction between the Nation and the State which was articulated here runs throughout the Constitution and assumes a high degree of significance in any discussion of Articles 2 and 3, as will be seen.

---

[1] [1977] Irish Reports 129:

6. Case Law

6.1 As it happens, largely because of their mixed political and legal content, Articles 2 and 3 have not figured prominently in litigation. Six cases are here identified in which they have figured in any meaningful sense and they are listed in chronological order:

People -v- Ruttledge[2]

Boland -v- An Taoiseach[3]

Re Criminal Law (Jurisdiction Bill)[4]

The State (Gilsensan) -v- McMorrow[5]

McGlinchey -v- Ireland (No 2)[6]

McGimpsey -v- Ireland[7]

6.2 In the first of these cases, *Ruttledge*, concerned the application and adaption of the phrase 'United Kingdom' in the Larceny Act 1916. By a process of statutory devolution and poor drafting, it was held to follow that the phrase 'United Kingdom' in a pre-1922 piece of legislation means 'Great Britain' and the 'the Republic' but does not include Northern Ireland. it must be

---

[2] (Supreme Court, 1947);

[3] [1974] I.R. 338;

[4] [1977] I.R. 129;

[5] [1978] I.R. 360;

[6] [1990] 2 I.R. 220;

[7] [1990] 2 I.R. 220;

stressed - as did the Supreme Court - that this has nothing to do with Articles 2 and 3 of the status of Northern Ireland, but is entirely the result of poor drafting in the Adapatation of Enactments Act 1922. In any event, O'Bryne J stated, en passant, that the effect of Articles 2 and 3 was as follows:-

> "The effect of these provisions is to proclaim that the whole of Ireland is included in the national territory of the State but that, for the time being, the law enacted by the national parliament (i.e., the Oireachtas) are to have the same area and extent of application as the laws of Saorstat Eireann. Accordingly, at present, the laws enacted by the Oireachtas do not purport and are not intended to bind the six counties of Northern Ireland".

6.3 A very similar approach was taken by the Supreme Court some 30 years later in *Gilsenan*, where again the question of the applicability of the Larceny Act 1916 to Northern Ireland was discussed. Here, however, the Court took the opportunity to discuss the status of Northern Ireland was a matter of Irish law (i.e., the law of the Republic). Henchy J said (at pp.370-1):

> "It is true that since 1937 there has been no general statutory interpretation of adaption of the expression 'Northern Ireland', but the frequency with which it occurs in our statutes, the unambiguous way in which it has been used to identify the six counties over which this State does not exercise jurisdiction [all] would make it impossible for our Courts to say that 'Northern Ireland' is other than an officially recognised and clear appellation for the part of this island which has remained within the United Kingdom of Great Britain and Northern Ireland .... In my opinion, the Courts are bound to take judicial notice of the expression 'Northern Ireland' as connoting the part of this island which is outside the functioning

jurisdiction of the State, which State has been given the statutory description of 'the Republic of Ireland'.

6.4 Kenny J in his separate assenting judgment (but one which was not expressly approved by the rest of the Court) went even further. He referred to the Treaty (Confirmation of Amending Agreement) Act 1925 and concluded (at 375):

> "Therefore the State has recognised the legal status of Northern Ireland and has fixed its boundaries of the purposes of our legislation".

6.5 But if the Oireachtas and the authorities in the Republic may validity recognise Northern Ireland as the level of working reality, so as to speak, difficulties arise where the Irish Government purports to recognise the official de jure status of Northern Ireland as part of the United Kingdom. This was first judicially articulated in *Boland -v- Taoiseach*[8], where the plaintiff challenged the compatibility of the Sunningdale Agreement (which, though the use of language approximating to what later used in Article 1 of the Anglo-Irish Agreement, was said to constitute an official recognition of the status of Northern Ireland) with Articles 2 and 3. Clause 5 of the Agreement had provided that:

> "The Irish Government fully accepted and solemnly declared that there could be no change in the status of Northern Ireland until a majority of the people of Northern Ireland desired a change in that status".

---

[8] [1974] I.R. 338

6.6 The Supreme Court dismissed this argument on the ground that the Agreement was no more than a statement of government policy and, hence, not legally cognisable in the same manner as a treaty. However, O'Keeffe P did state (at p363):

> "An acknowledgement by the Government that the State does not claim to be entitled as of right of jurisdiction over Northern Ireland would, in my opinion, be clearly not within the competence of the Government having regard to the terms of the Constitution. I cannot presume that the Government would consciously make an acknowledgement of that kind and, accordingly, I accept the view of the Chief Justice that Clause 5 represents no more than a reference to the de facto position of Northern Ireland coupled with a statement of policy in regard thereto".

6.7 This is the 'stronger' interpretation of Articles 2 and 3: an interpretation which, as will be seen, was later adopted by the Supreme Court in *McGimpsey*.

6.8. A differently constituted Supreme Court took a different view of Articles 2 and 3 in *Re Criminal Law (Jurisdiction) Bill*[9]. Here O'Higgins C J said (at p145):

> "[1] This national claim to unity exists not in the legal but in the political order and is one of the rights envisaged in Article 2; it is expressly saved by Article 3 which states the area to which the laws enacted by the parliament established by the Constitution apply.

---

[9] [1977] I.R. 129

[2] The effect of Article 3 is that, until the division of island of Ireland is ended, the laws enacted by the Parliament established by the Constitution are to apply to same area and have the same extent of application as the laws of Soarstat Eireann had".

6.9 Ruling [1] - which rather dismisses the significance of Articles 2 and 3 as aspirational - was formally overruled by the Supreme Court in *McGimpsey*. Ruling [2] - which makes it clear that the Oireachtas cannot legislate for Northern Ireland, save on the usual extra-territorial basis - was approved by the Supreme Court in *McGimpsey*.

6.10 Matters came to head with the decision in the Supreme Court in *McGimpsey*, where the constitutionality of the Anglo-Irish Agreement was similarly challenged. Article 1 of the Agreement is in the following terms:

"The two Governments:

(a) affirm that any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland;

(b) recognise that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland';

(c) declare that, if in the future, a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a United Ireland, they will introduce and support in the respective Parliaments to give effect to that wish".

6.11 In the High Court[10] Barrington J thought that the use of the word 'would' (rather than 'could' in Clause 5 of the Sunningdale declaration) had a certain significance. He continued (at p586-7):

> "It appears to me that in Article 1 of the Agreement that the two Governments merely recognise the situation on the ground in Northern Ireland (paragraph (b)), form a political judgment about the likely course of future events (paragraph (a)), and state what their policy will be should events evolve in a particular way (paragraph (c)). Even on the second interpretation [i.e., the more 'nationalist' interpretation] of Articles 2 and 3 of the Constitution, I cannot find anything offensive in this. While I myself would prefer the first interpretation of Articles 2 and 3. I do not think that the Anglo-Irish Agreement offends either Article of the Constitution on either interpretation.

6.12 On appeal[11] the Supreme Court accepted Barrington J's analysis of the effect on the Anglo-Irish Agreement, but Finlay C J stressed (at 120-1) that Article 1 merely constituted:

> "a recognition of the de facto situation in Northern Ireland, but does so expressly without abandoning the claim to the re-integration of the national territory. These are the essential ingredients of the constitutional provisions in Articles 2 and 3".

6.13 The Chief Justice had earlier overruled the statement in the *Criminal Law (Jurisdiction) Bill* case to the effect that Articles 2 and 3 is not a claim to legal right to the 'entire national territory'. He went on (at p129):

---

[10] [1988] I.R. 567

[11] [1990] 1 I.R. 110

"With Articles 2 and 3 should be read the preamble, and I am satisfied that the true interpretation of those constitutional provisions is as follows:

1. The re-integration of the national territory is a constitutional imperative.

2. Article 2 of the Constitution consists of a declaration of the extent of the national territory as a claim of legal right.

3. Article 3 of the Constitution prohibits, pending the re-integration of the national territory, the enactment of laws .... applicable in the counties of Northern Ireland".

4. The restriction imposed by Article 3 pending the re-integration of the national territory in no way derogates from the claim as a legal right to the entire national territory.

The provision in Article 3 .... is an express denial and disclaimer made to the community of nations of acquiescence of the national territory, the frontier at present existing between the State and Northern Ireland is of can be accepted as conclusive of the matter ....".

6.14 Quite apart from the emphatic statement that Articles 2 and 3 constitute a constitutional imperative and a claim, of legal right, *McGimpsey* is notable in that (i) the recognition afforded by the Irish Government to Northern Ireland is (and can only be) that of de facto acknowledgement and (ii) the reference to Article 3 means that none of the multi-lateral agreements to which the State is a party concerning international frontiers (such as Helsinki Final Act of CSCE) can, as a matter of domestic law, override the provisions of Articles 2 and 3. Accordingly, it appears that the correct view of the law of Ireland is that the Helsinki assurances given by the Irish Government are - as a matter of Irish

constitutional law - entirely worthless as far as legal status of Northern Ireland is concerned. This is notwithstanding the fact that in ratifying the Helsinki Final Act the Irish Government may well have been quite sincere in its desire to respect all international borders).

6.15 Finally, in *McGlinchey (No 2)*[12] it was said that the provisions of the Extradition Act 1965 were unconstitutional insamuch as they allowed for the extradition of an Irish national. This suggestion was rejected by Costello J on the ground that this was but one of many statutory provisions expressly recognising the activities of the authorities in Northern Ireland. As Costello J said (at p229-230):

> "There is therefore no constitutional restriction on the Oireachtas which would prohibit it from recognising (i) the legal efficacy of laws enacted in Northern Ireland either by the Parliament of Northern Ireland, the Parliament of the United Kingdom or by ministerial order pursuant to delegated powers, and (ii) the lawfulness of authorities established by such laws".

[12] [1990] I.R. 220

7. The 1967 Redraft

7.1 In 1967, an All-Party Committee on the Constitution, produced their *Report on the Constitution*[13]. The Committee consisted of representatives of all three parties then represented in the Dail (Fianna Fail, Fine Gael and Labour) and they produced a report on the understanding that none of them could bind any of their individual parties to any such changes as might be recommended. (The members of the Committee, incidentally, included the current Minister for Foreign Affairs David Andrews TD).

7.2 The Committee recommended the following charge to Article 3 (not, be it noted, Article 2):

> "The Irish Nation hereby proclaim its firm will that its territory be re-united in harmony and brotherly affection between all Irishmen.
>
> 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 are and extent of application as the laws of the Parliament which existed prior to the adoption of the Constitution. Provision may be made by law to give extra-territorial effect to such laws".

---

[13] Pr. 9817, 1967

7.3 It is of interest to note that, unlike other recommended changes, the Committee did not itself give any reasons for this suggested change beyond saying that "it would now be appropriate to adopt a new provision to replace Article 3".

8. Comments

8.1 By the standards of the mid-1960's, this proposal and re-draft was quite radical. Political thinking in the Republic was still deeply imbued with the 'legal right of unity' attitude and the proposal was quietly dropped as even these attributes hardened with the onset of violence in 1969-1970. Quite apart from the fact that even any change to Articles 2 and 3 would herald a significant change of heart on the part of the Republic, the proposal would also have the effect on reversing the *McGimpsey* decision: there is no longer a claim to unity in Article 3 and the constitutional claim is largely reduced to that of the mere aspiration (albeit a very strong aspiration). Moreover, the phrase 'without prejudice to the right of the Parliament and Government .... to exercise jurisdiction over the whole of the territory ...." was omitted: a significant step in diluting the irredentists nature of Articles 2 and 3.

8.2 At the same time, it would be wrong to over-emphasise the significance of the 1967 recommendations for the following reasons:

(i) Article 2 remains untouched. By defining the 'national territory' as including the whole island of Ireland, Article 2 represents an implied claim on the territory of Northern Ireland.

(ii) The phraseology used in re-draft ('the Irish nation proclaims its firm will that its territory ....) has been carefully chosen. As we have seen, by virtue of Article 1 of the Constitution, the inhabitants of the island are defined as embracing the 'Irish nation'. The phraseology of the re-draft therefore suggest that all inhabitants of the island strongly desire the re-unification of the national territory, i.e., conveying the innuendo that the 'national territory' would, in fact, be immediately re-united were it not for the presence of outsiders. This flies in the fact of fact, right and reason.

(iii) It is true that the re-drafted Article 3 would merely contain a strong aspiration to unity and not, as such, a constitutional claim on Northern Ireland (unless read together with the unamended Article 2). However, before *McGimpsey*, the present Articles 2 and 3 were understood to constitute only a 'political aspiration' and not a legal claim of right. But even on this 'political aspiration' understanding, Articles 2 and 3 were unacceptable in Northern Ireland

9. The 1988 Progressive Democrats Version

9.1 The re-draft of Articles 2 and 3 suggested by the Progressive Democrats in their draft revised Constitution was as follows:

> "The people of Ireland hereby proclaim their firm will that the national territory, which consists of the whole island of Ireland, its islands and territorial seas, be re-united in harmony and by consent". [Remainder as with 1967 Committee recommendation].

10. Comments

10.1 The 'Progressive Democrats' version was generally regarded as a further advance upon the wording of the 1967 Committee, It achieved this in the following manner:

(i) Article 2 was incorporated in Article 3, and, thus it was deliberately down-played.

(ii) **The reference was to the 'people of Ireland'** and not the 'Irish nation' as in 1967. The significance here was that, as explained by the Supreme Court in the *Criminal Law Jurisdiction Bill* case in 1977, traditional political and legal thinking had it that the Irish nation had the right to unity, quite irrespective, perhaps, of what the people of Ireland actually wanted or desired.

(iii) There was an important reference to 'consent', i.e., at once negativing the use of violence and implying that there were at least one significant section of the inhabitants of the island of Ireland who did not consent to unification.

11. The Worker's Party Proposals

11.1 The Worker's Party's Eleventh Amendment of the Constitution Bill 1990 was introduced in November 1990. All parties, save Fianna Fail, were agreed that these provisions should be amended, although they differed on the wording and timing of any such proposed amendment. The then Taoiseach, Mr Haughey, took the opportunity to defend these provisions with some vigour: see p403 Dail Debates, Col. 1407-1319 (December 5, 1990).

11.2 The Taoiseach first drew attention to the provisions of Article 1 of the Helsinki Final Act 1975 as evidence of the Republic's commitment to a peaceful solution of the Northern problem:

> "The participating states regard as inviolable all one another's frontiers as well as the frontiers of all states in Europe and therefore they will refrain now and in the future from assaulting these frontiers".

11.3 While the commitment to non-violence is sincere and (pace the Supreme Court in *McGimpsey*) constitutionally required, we have already seen that the Republic cannot regard the border with Northern Ireland as 'inviolable' in the sense understood by the Helsinki Final Act.

11.4 The Taoiseach then went on to provide a more 'modern' rationale for Articles 2 and 3:

"For over 50 years, Articles 2 and 3 have been of enormous importance to Northern Nationalists. I do not care whether anybody says that they were right or wrong in looking at Articles 2 and 3 in this way. I know, from my own experience and knowledge, that that is the position; they do and have looked on Articles 2 and 3 as something of great significance and importance to them. Our Constitution has reassured them that they have a place in the minds and hearts of those who live in the South, that their aspirations are shared and that their claim to be members of the Irish family is not just a hopeless, idle dream".

The revised Article 2 would have read:

"The national territory consists of the whole island of Ireland, its island and territorial seas. This shall not be held too mean that there will be any change in the status of Northern Ireland other than with the consent of a majority of the people of Northern Ireland".

Article 3

The people of the State hereby proclaim their firm will that the people of Ireland be re-united in peace, harmony and by consent". [Remainder as in 1967 Committee].

12. Comments

12.1 There are here two major advances over the 'Progressive Democrats' version. First, the revised Article 2 incorporates similar wording to that of Article 1 of the Anglo-Irish Agreement and gives constitutional recognition of the present status of Northern Ireland. Secondly - and this may be crucial - the reference is to 'The people of the State'. Articles 4 to 11 of the Constitution differentiate between the Nation (32

counties) and the State (26 counties). Through the use of the phrase 'the people of the State, there is here no suggestion or implication - such as exists through the use of the phrase 'the Irish Nation' - that, in fact, the entirety of the people of the island desire unity, but that 'outside forces' are somehow conspiring to prevent this occurring. This revised Article 3 is thus more clearly aspirational than the Progressive Democrats version, with the added point that the aspiration comes exclusively from the people of the Republic and not from the 'Irish Nation' as a whole.

12.2 Nevertheless, even this version has the following fundamental defects:

(i) The continuing claim that 'the national territory' consists of the whole island of Ireland, its islands and territorial seas. This is unacceptable having regard to the right of self determination of the people of Northern Ireland.

(ii) The failure to give explicit recognition to the legal status of Northern Ireland as part of the United Kingdom of Great Britain and Northern Ireland. This repeats one of the defects of the 'Anglo-Irish Agreement' dated 15 November 1986.

13. The German Example

13.1 At this point, it may be useful to make reference to the German Constitution. The Preamble to the Constitution contained the following passage:

> "The entire German people are called upon to achieve in free self-determination the unity and freedom of Germany".

13.2 To this there are two complimentary provisions. Article 23 allowed for the accession of the 'other parts' of Germany through the making of an accession declaration. (This was the procedure by which the Saarland acceded in 1957 and the former GDR in 1990). In addition, Article 146 envisaged that the 1949 Constitution would yield to a new Constitution 'freely adopted by the German people as a whole'. This latter provision contemplated the merging of the two German states on an equal footing, something, of course, which was impossible with the rush of unity throughout 1990.

13.3 Mr Charles Haughey when he was Taoiseach was fond of quoting these provisions as justification for Articles 2 and 3. In the Dail on December 5 1990, he described both sets of constitutional provisions as "being very similar in their intent". He continued:

> "This [preamble] never constituted a physical threat to the former East Germany or served as a basis for the use of force. This has led in the fullness of time to the peaceful unification of Germany, East and West, with the consent of the people of both parts of Germany and of all the other parties involved a general atmosphere of good will".

13.4 While it is true that the Preamble was never couched in such direct terms as Articles 2 and 3, nevertheless the relevant judgments of the German Constitutional Court make it clear (in language uncannily similar to that employed by the Irish Courts) that (i) the GDR constituted part of the German national territory; (ii) that there was a constitutional duty on the German Government to 'strive for unity' and (iii) that, pending unification, the GDR was that part of the national territory to which laws passed by the Bundestag did not apply.

13.5 Thus, in the *Bravarian State* case (1973) (where the legitimacy of the so-called 'Ost-Vertraege' (Eastern Treaties) was challenged on the ground that that they acknowledged the de jure status of the GDR), the Constitutional Court merely said that this simply afforded de facto recognition only. The Court added that the GDR was to be seen as that part of Germany:

> "whose population and territory were inseparable and the frontier between the two States were considered to have the same status as the frontiers between the Laender of the Federal Republic".

13.6 This view is emphatically confirmed by the Court in its latest judgment on this issue, that on April 23 1991 (see 'Law Report' section of Frankfurter Allegeimene Zeitung for April 24 1991). Here the Court was required to examine the constitutionality of the provisions of the Unity Treaty providing for limited compensation to the owners of property in the former GDR who had had their property expropriated in 1949-1950.

13.7 The Court said that although since the enactment of the Constitution 'the German Government was responsible in the manner understood from the Preamble for the whole of Germany', its sovereignty over that part of the German territory was 'factually and legally restricted to that part of Germany constituting the then Federal Republic'. Accordingly, the expropriations laws of 1949 could not be tested by reference to the Constitution, since that document did not then have force in Germany at the time of the enactment of those laws.

13.8 **These comparisons are germane, since the sentiments** contained in these judgments have strong parallels with cases such as *Gilsenan* and *McGimpsey*. In other words, even with a watered down version of Articles 2 and 3 (such as the Germans had) one may still find this sort of judicial commentary on their meaning and effect.

Dated 19 day of June 1992

Cleaver Fulton & Rankin
Solicitors
50 Bedford Street
BELFAST BT2 7FW

Tel: 0232 243141
Fax: 0232 249096

NCF/UUCART/A2 - 19.06.1992