

PAPER SUBMITTED BY THE IRISH GOVERNMENT DELEGATION

CONSTITUTIONAL ISSUES

I All constitutional issues open for discussion

1 The statement of 26 March 1991, which sets out the agreed basis for these Talks, states that:

'In order to ensure a full airing of the issues, it will be open to each of the parties to raise any aspect of these relationships including constitutional issues, or any other matter which it considers relevant'.

This makes it clear that any constitutional or indeed other aspect which any delegation considers relevant may be raised in the Talks. There is no suggestion anywhere in the agreed basis for Talks that such constitutional issues must be confined to developments in one direction only, or to changes regarding only one of the two rival constitutional perspectives on the status of Northern Ireland.

2 Neither does the agreed basis for Talks set any prior limitation, save only the test of mutual agreement, on the outcome which may result from the Talks. The discussion of possible future options should not therefore be limited by reference to the present arrangements or the existing status quo. The reason for the present Talks is that all these elements, taken together, have not produced arrangements relating to Northern Ireland to which all can give their consent.

3 It is evident that the "achievement of a new beginning for relationships within Northern Ireland, within the island of Ireland and between the peoples of these islands" will therefore require change. Change in one direction only can have little prospect of attracting general assent or achieving this new beginning. It follows that the discussions must embrace all aspects of the constitutional position, those which create difficulties for the nationalist tradition no less than for the unionist tradition. The challenge all participants must address is to find a new and honourable accommodation between the needs, rights and aspirations of both.

II The Government of Ireland Act

4 The Government of Ireland Act is, in the unionist perspective, the legislative bedrock of Northern Ireland. It was also the first instrument of partition, creating the new entity of Northern Ireland and dividing it from the rest of the island. This new arrangement was

bitterly opposed by the great majority of nationalists in Ireland at the time and has never won their collective assent. There are several reasons for this, including:

- the belief in the nationalist community that the traditional entity of the island of Ireland should be the valid area of reference for the collective exercise of the right of self-determination by the Irish people;
- the belief that the division was imposed from outside as a result of the privileged access of a minority community in the island to the levers of power in Westminster at that time;
- the delimitation of Northern Ireland exclusively by reference to the interest and wishes of one community, with the clear intention of encompassing the maximum area consistent with a safe overall unionist majority, including two counties of the six with nationalist majorities;
- the failure, in creating an area dedicated to the majority rule of one community, to make any provision to give effective expression to the political wishes and aspirations of the new minority community of more than one third of the population involuntarily included in the new entity;
- the failure of the anti-discrimination provisions of the Government of Ireland Act to protect the nationalist community from severe discrimination;
- the failure of the Government of Ireland Act to fulfill its stated purpose as a link between both parts of Ireland, summarised in the words of the Explanatory Memorandum published with the Bill:

"Although at the beginning there are to be two Parliaments and two Governments in Ireland, the Act contemplates and affords every facility for Union between North and South, and empowers the two Parliaments by mutual agreement and joint action to terminate partition and to set up one Parliament and one Government for the whole of Ireland. With a view to the eventual establishment of a single Parliament, and to bringing about harmonious action between the two Parliaments and Government, there is created a bond of union in the meantime by means of a Council of Ireland".

5 It has plausibly been suggested by some historians that certain flaws of the Government of Ireland Act, including its disregard for the wishes and needs of the nationalist population which it enclosed in the new entity, arose from the fact that the division it established was seen by its architects as temporary and short-term. Those who urge that the division introduced by that Act should be endorsed by the nationalist community have a corresponding duty to say how the evident flaws of the original, purportedly temporary provisions, would be addressed in such a context.

III The Constitution of Ireland

6 The position of the Irish Government is governed by the provisions of the Irish Constitution, duly adopted by referendum in 1937 and authoritatively interpreted in various judgments of the Irish Supreme Court. This document is the supreme authority which guides the actions of the State. It can be amended only by popular referendum, as is specified in Article 46.2:

"Every proposal for an amendment of this Constitution shall be initiated in Dail Eireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum".

7 The Irish Constitution has been subject to severe and occasionally intemperate criticisms in the course of the Talks. It may help the process of future discussion on this topic to address these briefly.

8 The objection was advanced that the size of the majority which passed the Constitution in 1937 suggests it would not have been passed by a majority of the electorate of the whole island, making certain plausible assumptions about the likely attitudes of the communities in Northern Ireland. This hypothetical objection seems to accept the contention that the natural political unit for Ireland is the island as a whole. It does not however alter the fact that the Constitution was duly enacted. It has the actual force of supreme law in the Irish jurisdiction. Its authority within that jurisdiction is questioned only by a tiny minority of subversives who take the view that a constitution enacted by the people of the South alone cannot be valid.

9 This objection has more force if it is meant to argue that, in practice, the Constitution would not be satisfactorily applicable to the new situation which would be created by a coming together of both parts of Ireland under agreed new structures. This was indeed explicitly acknowledged by all the constitutional national parties in Ireland in para. 4.14 of the Forum Report:

"It is clear that a new Ireland will require a new constitution which will ensure that the needs of all traditions are fully met. Society in Ireland as a whole comprises a wider diversity of cultural and political traditions than exists in the South, and the constitution and laws of a new Ireland must accommodate these social and political realities".

10 The more sustained criticism of the Irish Constitution was however on the grounds that it contains, to quote the UUP opening submission, a "harsh, irredentist and uncompromising territorial claim", reflecting the doctrine of Lebensraum.

11 To interpret the Irish Constitution as enshrining an essentially territorial claim to Northern Ireland is to misunderstand the thinking behind it. It is also to misunderstand the view generally taken of it by the people within its jurisdiction who, incontrovertibly, will have to be persuaded of the value or need of change before an amendment can be enacted. The Constitution reflects the nationalist assumption that the traditional historic and political entity encompassing the island of Ireland should remain the valid frame of reference for the collective exercise of the right of the Irish people to self-determination.

12 Perhaps the clearest demonstration that the issue is not primarily a territorial dispute between the British and Irish States is furnished by the Anglo-Irish Agreement, which the Irish Supreme Court in the McGimpsey case found ~ was not in any way inconsistent with the Constitution. Article One of the Agreement, and indeed the Agreement as a whole, is not about land or territory, but about the wishes of the people. The Agreement sets the problem firmly in the context of reconciling the conflicting rights of two communities with divergent views of the status of Northern Ireland, based on different identities and aspirations. To cast the issue in primarily territorial terms is to devalue or miss the real focus of the problem. That is the failure to date to create political structures which can command broad consensus and general support, whether from within Northern Ireland or in the island as a whole. The Northern Ireland problem existed before the Irish Constitution. The provisions of the Constitution reflect, rather than cause, the basic divisions of opinion between nationalism and unionism. Taking issue with the provisions of the Constitution cannot and should not be a substitute for addressing and resolving these basic divisions of opinion themselves.

13 Articles Two and Three of the Constitution were also criticised as aggressive. This is to ignore the fact that the Constitution, as a whole, binds Ireland to the ideal of peace and friendly cooperation among nations and to the principle of the peaceful settlement of disputes. This is set out in explicit and unambiguous terms in Article 29 of the Constitution:

"a. Ireland affirms its devotion to the ideal of peace and friendly cooperation amongst nations founded on international justice and morality.

b. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination."

Far from invoking the supposedly aggressive potential of the Constitution, all Irish Governments since its enactment have made clear, and have acted on, their abhorrence of the use of force to achieve political ends. The full rigour of the law, under the Constitution, has been applied to those who violated this principle in relation to Northern Ireland and it continues to be upheld without question and at some very considerable cost. The reality is that those among nationalists who support violence reject the Irish Constitution and its dedication to the principles of peaceful settlement of disputes. They reject the peaceful, democratic approach reflected in that Constitution.

14 While rejecting unfounded criticism of the Irish Constitution the Irish Government has made clear that it does not rule out constitutional change ensuing from the present negotiations. Great damage would be done by proposing any amendment in this area which was rejected by the people. The electorate will wish above all to be reassured that any proposed amendment reflects the wish to reconcile and acknowledge the rights and aspirations of both communities on a basis of their equal legitimacy, and is not an attempt to resolve the conflict in favour of one side and at the expense of the other. They will be particularly sensitive to the impact of any proposed amendment on the position of the nationalist community within Northern Ireland who, unquestionably, were the victims of the Government of Ireland Act. The Government would feel justified in proposing constitutional

change only in a context where they considered the electorate could be offered reassurance on these and related aspects, and persuaded that the change being submitted to them was in the interest of both communities in Northern Ireland and would help achieve the truly historic conclusion of peace and stability in Ireland.