SDLP Submission

Strands 1 & 2

Constitutional Issues

20th October 1997

CONSTITUTIONAL ISSUES AFFECTING STRANDS 1 AND 2

1. It is the objective of the multi-party talks to arrive at an agreed settlement which will obtain the consent of all the people of Ireland, North and South, and which will address all of the issues which have led to instability and conflict since the partition of Ireland, and especially to the destructive conflict of the last thirty years. This objective, and the possibility open to the parties in the current climate, goes far beyond the mere underpinning of the cease-fires or the restoration of normality or devolved government. The possibility lies before us of establishing, **for the first time ever**, political structures and arrangements which the great majority of the people of both traditions can identify with, feel ownership of, and be willing to defend.

For the nationalist people, this would end their feeling of exclusion both from the institutions and governance of the political space within which they find themselves, and from the wider Irish nation of which they are a part. For unionists, it offers an end to the state and mentality of siege under which they have lived, a free and open partnership with all their neighbours, North, South and in Britain, and political structures which rest not on the support of a Government in which they express little confidence, but on the free acceptance of the overwhelming majority of the people of Ireland.

2. The agreed basis for these negotiations therefore provides for any and all issues, including constitutional issues, to be on the table.

Ground Rules (16.4.97)

3. "Any participant in the strand in question will be free to raise any aspect of the three relationships, including constitutional issues..."

14. "The agenda for negotiations...will include all the significant items which the various negotiating teams consider relevant and which will, therefore, have to be addressed in the search for agreement."

Rules of Procedure (29.7.96)

18. "Any participant in the format in question will be free to raise any aspect of the three relationships, including constitutional issues."

Draft Agenda for Substantive All-Party Negotiations (6.06.96)
(Strand One Issues)
3. "...Topics likely to arise include: - The constitutional position of Northern Ireland;"

3. In the Joint Framework Document (A New Framework for Agreement 1995) para. 18, the two Governments accept that: "...nor does the existing status of Northern Ireland command the consent of the nationalist tradition."

On this basis, the two governments concluded (para. 15):

> "Given the absence of consensus and depth of divisions between the two main traditions in Northern Ireland, the two Governments agree that such an accommodation will involve a new approach to the traditional constitutional doctrines on both sides. This would be aimed at enhancing...the fullest attainable measure of consent across both traditions."

4. This conclusion of the two governments is consistent with the consensus which has developed in recent years that there are two main legitimate perspectives on the Northern Ireland question - the nationalist and the unionist. Central to the nationalist political tradition is a distinct perspective on the constitutional question, and it is one which has at least as much historical and legal validity as the British and unionist perspective.

The nationalist identity defines itself as Irish and not British. Nationalists are, and feel themselves to be, part of the broader Irish nation. Until the border artificially divided them, northern nationalists were indistinguishable from the rest of the nation. This sense of Irishness is just as strong and just as important to them as the sense of Britishness which is central to the unionist identity. Nationalists aspire to participate in a wider Irish political system no less strongly than unionists assert their right to have their British identity expressed in a British system.

5. This identity was not acknowledged in any way in the political structures or symbolism of the Northern Ireland state, and nationalists and their political representatives have consistently refused their consent since 1922, to the arrangements imposed without any reference to them. It has always been the core position of the SDLP, and it is the known view of other nationalist parties. It is the stated or inferred position of almost 40% of the population of Northern Ireland. No state can ever hope for stability when this proportion of the population is disengaged from it.

6. The original foundation of the present constitutional position is the Act of Union (1800) by which Ireland was united with Britain, and the Irish Parliament, which had developed independently since the Middle Ages, was abolished. The Act was described by one of the Unionist leaders in the Brooke-Mayhew talks of 1992/93 as the 'bedrock of the union'. The Irish Parliament which passed the Act was, even by the standards of its time, wholly unrepresentative of the Irish people. It excluded entirely the Catholic and Presbyterian populations and was unrepresentative even of Protestant Ireland. Even so, the Act could only be passed through the Irish Parliament by means of bribery and patronage on a massive and quite unprecedented scale. It is probably the most corrupt

piece of legislation ever enacted in these islands, and was opposed by the vast majority of Catholics, Protestants and Dissenters in Ireland at the time of its passing.

- Contrary to the situation of today, where the British Government has stated in the Downing Street Declaration that "they have no selfish, strategic or economic interest in Northern Ireland", the Act if Union was passed solely in response to British strategic concerns at the time of the French Revolutionary Wars. It took no account of Irish wishes or interests, and no significant section of the Irish population had sought union.

Efforts to reverse the Act of Union began almost as soon as it was passed. As the franchise was extended, in the course of the nineteenth century, successive elections showed an overwhelming majority of people opposed to the Union, and in favour of self-rule. This legitimate democratic pursuit was repeatedly thwarted by the British Parliament until 1914.

7. The Government of Ireland Act (1920) is the foundation stone of Northern Ireland, and the chief instrument of the partition of Ireland. It was passed at a time when the vast majority of elected Irish representatives had repudiated the right of the British Parliament to make laws for Ireland, and had established a separate Irish legislature. It was bitterly opposed by the overwhelming majority of people in nationalist Ireland, and has never won their collective approval.

8. In particular, the partition of Ireland was bitterly opposed by Northern nationalists, who were trapped in the new entity of Northern Ireland against their will, and without their consent being given, or even sought. The British Government was entirely conscious of this injustice at the time. The Cabinet's Ireland Committee, which drafted the Bill, considered a number of options to allow Ulster unionists to avoid coming under the jurisdiction of a re-established Irish Parliament:

(i) exclusion of the nine-county Province of Ulster
(ii) exclusion of individual counties on the basis of a plebiscite
(iii) exclusion of parliamentary constituencies/ poor law unions on the basis of a plebiscite
(iv) exclusion of the six counties now comprising Northern Ireland

Of these alternatives, the nine-county area was at least based on the historical Province of Ulster, where unionists were in a very narrow majority. It was rejected only because the narrowness of the margin would make unionist control of the entire area difficult. County or other local option exercised by plebiscite would have been provided for areas of majority unionist tradition to opt out, leaving areas of majority nationalist tradition aligned to Dublin. It was clearly recognised at the time as the most just solution (or perhaps least unjust) in terms of the wishes of the inhabitants, and accorded strongly with the prevailing view of minority questions, which saw numerous plebiscites being held across Europe at this time to resolve frontier issues arising from the war. This option was rejected as it would have resulted, in accordance with the wishes of the inhabitants, in

Counties Fermanagh and Tyrone at the least, remaining with the south, and perhaps also parts of Derry, Armagh and Down. This was openly admitted at the time, amongst others by the Prime Minister in the House of Commons.

9. The solution imposed, the partition of Ireland and establishment of a separate Parliament for Northern Ireland, had no logical basis in history, tradition, administration or the wishes of the people. The area chosen was adopted as the largest area which the unionist population, concentrated in the east of it, could control. This came about because the British Government lacked the political will to resist the open threats of recourse to armed violence made by Unionist leaders. From the very beginning, therefore, from (at least) the foundation in 1913 of the Ulster Volunteer Force, political discussions on the fate of Northern Ireland and its people, were conducted with the gun outside the door.

10. The structure of the talks process in which we are now engaged requires that we reach an agreement commanding sufficient consensus among the representatives of both main communities in Northern Ireland, followed by the concurrence of the British Parliament and Dáil Éireann and the consent of the people, North and South, in a referendum. By contrast, the partition of Ireland in 1922 was the result of the expressed will of the British Parliament in 1914 being overcome by the threat of armed violence, while the consent of the nationalist people of Ireland, or even of Northern Ireland, was not even sought, and the referenda which might have demonstrated their withholding of consent were, for this reason, never held. This is the context in which the consistent withholding of consent by the nationalist people since 1922 should be viewed.

11. The vast majority of Irish nationalists, north and south, have continued to regard the partition of Ireland as illegal and unjust, and have never given formal assent to it. That view has been strongly reinforced by the experience of partition. Partition was quite obviously effected by reference to the interests of one section of the community only, with the clear intention of encompassing the maximum area consistent with a safe overall unionist majority. Whole areas with large nationalist majorities (Derry City, South Armagh, South Down) were incorporated in to Northern Ireland, including two whole counties (Tyrone and Fermanagh) with distinct overall nationalist majorities.

12. The experience of the nationalist community in the North has been one of political, social, economic and cultural disadvantage. In a state explicitly conceived and designed as "a Protestant state for a Protestant people", the 40% of the population left out of this description were also left without any meaningful participation in the political structures that ruled their lives. Even the provision in the Government of Ireland Act for elections by proportional representation, a radical departure from the British tradition for 1920, and one clearly designed to provide for adequate minority representation, was abolished as soon as the power to do so was given to the Stormont Parliament.

13. Representative democracy rests almost entirely on the willing consent, or at least acquiescence, of the overwhelming number of the governed. Supporters of opposition parties accept the rule of their opponents and the validity of laws which they might not

agree with, because the political process allows them an input, and especially because they can, in the normal course of events, expect that their party might be in government in the future. The powers available to a democratic government are very considerable. In most countries, they are kept in balance by the provision of a written Constitution and a Constitutionally protected Bill of Rights, defended from the Government by a strongly independent judiciary. In the United Kingdom, which has a constitutional doctrine of parliamentary supremacy, the long tradition of political consensus and cohesion, and the expectation that the roles of Government an Opposition will be reversed in the future, form the principal check on the almost unfettered power which a parliamentary majority conveys. Even in a community with a centuries old tradition of political cohesion as strong as in Britain, the system comes under considerable strain in a period of prolonged rule by one party.

14. In Northern Ireland these normal political roles and expectations never obtained. For the entire duration of the Stormont Parliament - over fifty years - the Governments was formed solely by the Ulster Unionist Party. Moreover, such was the nature of the state and its politics that both unionist Government and nationalist Opposition knew that there was no prospect whatever, in the foreseeable future, of these roles being reversed. This was not an accident: the state and its boundaries were designed specifically to produce this result. The report of the Royal Commission on the Constitution, which sat from 1969 to 1973, said:

"the [Government of Ireland]Act applied to Northern Ireland the system of Parliamentary democracy in use at Westminster, which depends for its smooth working on an alternation between Government and Opposition. The rule that the "winner takes all" - that the Government is formed exclusively from the Party that has a majority...and that the opposition is totally excluded - is far easier to accept when electoral victory passes from party to party. Balance and equity are achieved by alternation. But in Northern Ireland the winner was always the Unionist Party...such a result, so often repeated, and apparently so likely to continue, inevitably produced great dissatisfaction in the minority and raised the question of the suitability of that particular form of government in the special circumstances of Northern Ireland".

15. The Government of Ireland Act was clearly intended by the legislators who enacted it to be a temporary, and short-term arrangement, and was intended as an interim solution, pending the establishment of a single devolved parliament in Ireland. The Explanatory Memorandum published with the Bill stated:

"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 set up one parliament and one Government for the whole of Ireland. With a view to the eventual establishment of a single Parliament...there is created a bond of union in the meantime, by means of a Council of Ireland."

The proposed Council of Ireland was probably most unlikely, in the climate then prevailing, to have led to the end of partition, but it could have provided a measure of

recognition of the Irish identity of northern nationalists. However, this possibility was frustrated by hostility of the unionist party, and the failure in Dublin to realise the opportunity which represented. Consequently the Council was stillborn.

16. In 1949, in response to the adoption of the status of a republic in the South, the British Government introduced a new element into the situation by enacting into law, in the Ireland Act 1949, a guarantee of the Union:
"...in no event will Northern Ireland, or any part thereof, cease to be part of...the United Kingdom without the consent of the Parliament of Northern Ireland."
Once again the legal framework created by this Act recognised the validity of only one of the two main political traditions in Northern Ireland, and wholly ignored the perspective of nationalists. In according a right of veto over political developments to one community which had, as a result of the carefully calculated demographics of partition, a permanent majority in the Stormont Parliament, the British Government reversed its attitude from that exhibited in 1920-22, when the right of veto over the wishes of the overwhelming majority of the Irish people was vested in a minority (considerably smaller than the minority which nationalists constitute in Northern Ireland). The favoured group in both cases was the unionist community in north east Ulster.

17. It is incumbent upon the British Parliament and Government, and all those who uphold the Government of Ireland Act, to demonstrate how the rights and interests of Irish nationalists could be met in the context of that Act, given that its implementation since 1920 has been at variance with the context of the legislation, and contrary to the intent of the legislators who enacted it.

It is the view of the SDLP, and the people whom it represents, that the Government of Ireland Act, and the consequent partitioning of this country, was a wholly unjust violation, extorted by the threat of violence, of the right of the people of Ireland to be consulted about major constitutional changes which were to affect them and to give their consent, or at least acquiescence, to the political structures under which they were to live.

18. Nonetheless, the SDLP has always recognised that the historical fact of 75 years of partition has created new realities with which we have to deal. The SDLP has always accepted that, starting from where we are, the only way in which nationalists can bring about a united Ireland is with the consent of the majority of the people of Northern Ireland. In view of the nationalist perspective of the historical violence and injustice of partition as detailed above, in which all the political costs were paid by nationalists, this acceptance should be seen as substantive effort to accommodate the unionist perspective, and not just as an expected and unremarkable acceptance of democratic rules. Furthermore, this does not mean that the SDLP, or nationalists, will ever consent to the status quo which has obtained in Northern Ireland since its foundation.

19. We are here to devise political structures in the Three Strands of relationships which will represent not the victory of one tradition over the other, but an accommodation which will express the identities and aspirations of both. Such a

settlement cannot be devised within an exclusively Northern Ireland context. The essential expression of the British identity of unionists is a political arrangement external to Northern Ireland - the link with Britain. Nationalists are entitled to expect parity of esteem for their sense of identity and allegiance, expressed in meaningful institutional and other interaction with the rest of the Irish nation.

It is disingenuous for unionists to regard the maintenance of the *status quo* as an accepted starting point and then characterise any balancing recognition of nationalist identities as a one way street of concessions to nationalists. The SDLP accepts that unionists cannot be expected to give up their aspirations and identity to accommodate nationalists. We have never espoused a solution based on victory for one tradition over the other. But nor can nationalists be expected to forego an expression of their deepest aspirations because unionists do not see the need for it, or feel uncomfortable with it.

20. The aspiration of all Irish nationalists to a united Ireland, in which all the people of Ireland can live together and participate equally in all aspects of national life, is expressed most publicly in Articles 2 and 3 of the Constitution of Ireland. This expression has long been characterised by unionists as an aggressive, irredentist claim on their territory, and a denial of the unionist identity. Nationalists do not read these Articles in this way. Indeed, the Articles properly construed, assert the sole right of the people who live in Ireland to determine the future of Ireland. This is a principle which the SDLP has always held to and continues to hold dear. Moreover, it is a principle now accepted by the British Government in the Joint Declaration of 1995. In the context of the time they were written, and of the nationalist perspective on the legality of British jurisdiction in Ireland over the centuries, the sentiments expressed in the Articles is hardly surprising. It should also be pointed out that the Northern Ireland problem, of course, existed long before the enactment of the 1937 Constitution.

It has been accepted, however, by successive Irish Governments, that in the event of a comprehensive agreed settlement in Northern Ireland, the Government would propose to the people, and support, changes in the Constitution to reflect the commitments in the Joint Declaration, including the requirement of consent of a majority of the people in Northern Ireland.

This is primarily a matter for the Irish Government to consider, but it is clearly a matter of the greatest interest to northern nationalists, not least as Irish citizens. Irish people of the nationalist tradition have long accepted the principle of consent, and have given their overwhelming support to political parties who do likewise. The electorate will, however, wish to be sure that any amendment to the Constitution is part of an overall settlement which does not ignore the nationalist identity and which commands nationalist consent. Nationalists in the North have always looked upon the Irish state as embodying their sense of nationality, and have always looked to Irish Governments for support in pursuit of their right to their national identity, and to fair treatment. The Constitution of Ireland is the fundamental political statement of the Irish people. Nationalists would not object to changes to it designed to remove any perceived threats to the identity of the unionists

community, but would expect that their right to be part of the Irish nation would be unimpaired and fully expressed.