

ARTICLES 2 AND 3 - BRIEFING NOTE

Text

1. Text attached (Annex A). In essence:

5. – 'national territory' defined as whole island of Ireland;

– claim of right 'to exercise jurisdiction over the whole of that territory';

– 'pending reintegration', Irish Parliament cannot pass laws applying to Northern Ireland;

6. – 1989 McGimpsey case (brought by unionists) led Irish Supreme Court to interpret Articles 2 and 3 as 'constitutional imperative' to achieve united Ireland - though only by peaceful means.

Significance

2. Until recent years, an irritant rather than an issue of substance. (Irish versions of treaties etc refer only to the United Kingdom, never to the United Kingdom of Great Britain and Northern Ireland.)

3. But for unionists an issue of rising significance, particularly since the McGimpsey case. In unionist eyes, the claim is 'illegal, immoral and invalid'; it has given comfort to IRA terrorism in pursuit of a united Ireland; it must be removed before normal relations can be restored; all Irish actions must be interpreted in the light of it (so even benign North/South co-operation has behind it the constitutional imperative of a united Ireland).

4. For nationalists, the Articles remain of potent symbolic value but increasingly regarded as outdated. Of particular importance for the Fianna Fail Government because

the Articles were drafted and pushed through by de Valera, their founding father. The key to Irish opinion, however, is Northern nationalism - traditionally they have regarded the Articles as a guarantee they will not be abandoned to their fate by the Irish nation. Irish popular opinion would not countenance change if Northern nationalists were opposed (so the Irish Government must secure the support at least of the SDLP).

5. FCO legal advice is that the Irish claim has no standing in international law. But it is not contrary to international law to maintain the claim if pursued only by peaceful methods. The Irish have never asserted their claim internationally nor challenged HMG's right to represent Northern Ireland internationally.

6. Change to the Irish Constitution requires a Bill through the Dail plus approval by a simple majority in a referendum. Recent opinion polls show popular support for change to Articles 2 and 3 falling below 50%.

Irish movement since 1992

7. In the 1992 talks, the then Fianna Fail Government infuriated unionists by saying only there "could" (not 'would') be change in the event of an overall settlement.

8. But in the 1993 Joint Declaration and 1995 Joint Framework Document, the Irish Government advanced its position to accept fully the principle of consent and promise constitutional change in the context of an overall settlement. The Irish feel unionists have never given them credit for this - unionists resent the implication that change must be achieved by negotiation rather than as of right.

Framework document

9. Paragraph 21 (attached - with paragraph 20 which sets out the parallel British commitments) is the high water mark so far of Irish commitment, as agreed with HMG. Changes will:

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- fully reflect the principle of consent;
- 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;
- maintain the birthright of everyone born in the island to be part, as of right, of the Irish nation;
- enable the Irish Government to recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland.

10. But these changes are subject to important provisos:

- (i) change will only be in the context of an overall settlement (not least because the Irish fear losing a referendum put in isolation);
- (ii) change must be part of a "balanced accommodation" on constitutional issues, reflected in balancing changes to the British Government of Ireland Act 1920 (itself of virtually no legal significance any longer). Paragraph 20 of the Framework Document promises HMG will come forward with such changes.

11. Unionists view the Irish commitments as unsatisfactory along with the rest of the Framework Document. Some claim that 'no territorial claim of right to jurisdiction' leaves open a residual territorial claim (ie of something other than a right to jurisdiction, though it is hard to define what).

Text of changes

12. The attached 3-column note (Annex C) records the state of play reached between officials in 1994 on the text of revised Articles 2 and 3 (before this was overtaken by

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work on the text of the Framework Document). Contrary to the Sunday Business Post, there was never agreement on the text of actual changes, even less has anything (other than the Framework Document) been endorsed by this Government.

13. The Irish are likely to be prepared to go at least as far as the right-hand column of Annex C, though this was never formally tabled. Interestingly (in the light of Trimble's comments) this drops references to 'territory', begins to develop a distinction between the Irish nation and state, and makes significant change to Article 2.

Bottom line

14. The Irish will not:

- make unilateral changes outside the negotiations;

- change their constitution without balancing symbolic change to United Kingdom constitutional legislation.

15. The Irish Government are unlikely to put realistic text in play in the negotiations without parallel signals from the UUP that they accept the need for a significant North/South body. But the Irish may be open to argument, if they knew HMG would come forward with text of changes to its own constitutional legislation.

16. In terms of text, the Irish bottom line is likely to include:

- maintenance of the 'birthright' of everyone born on the island to be part, as of right, of the Irish nation;
- some association between the island of Ireland and the Irish nation (so that nationalists in Armagh, for example, are not treated as simply exiles in a foreign land);

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- a strong aspiration to a united Ireland, but achieved peacefully and with the consent of the people of Northern Ireland.

17. The UUP's bottom line is likely to include:

- removal, with no room for doubt, of the territorial claim over Northern Ireland;
- acceptance of the need for the consent of the people of Northern Ireland as a fundamental principle, not just a political reality;
- acceptance that Northern Ireland is part of the United Kingdom *de jure* as well as *de facto*.

18. So far in the talks, the UUP have said they will not discuss North/South structures until the Irish Government come forward with the text of changes.

19. These respective bottom lines demonstrate that this is an issue between the UUP and the Irish Government (watched keenly by the SDLP). It is best resolved face to face between them: HMG should not seek to broker text on Articles 2 and 3.

Way forward

20. In the end, only the Irish Government can put forward changes to Articles 2 and 3. But a way in would be to suggest both Governments should privately work up together a text of what they agree upon on constitutional issues, to inform the changes each side have promised.

21. So we might:

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- (i) press Irish to discuss issue (in Liaison Group or in successor to 1994 Chilcot/Mansergh group) and focus on what we agree upon;
- (ii) work up changes to United Kingdom constitutional legislation to offer Irish as enticement to come forward with their own text;
- (iii) put this in context of other key issues, so pressing Trimble to be more positive on a North/South body as the key to Irish movement.

Political Directorate

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