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NORTHERN IRELAND: CHANGES TO BRITISH CONSTITUTIONAL LEGISLATION AS PART OF A SETTLEMENT

Summary

1. This note (requested in Mr Holmes' letter of 13 December) outlines the British side of the 'balanced constitutional accommodation' envisaged as part of a settlement in Northern Ireland.
2. The Prime Minister is invited to note it.

The Joint Framework Document

3. Paragraphs 14 to 21 of the JFD set out an understanding between the two Governments on a '**balanced constitutional accommodation**' as part of a settlement. The text (much argued-over, as is apparent) is attached. We have **confirmed that we stand by it** in our paper to the talks on constitutional issues.
4. It builds on the declarations about **consent and self-determination** in the Downing Street Declaration, affirming that it would be **wrong to change the constitutional status of Northern Ireland without consent**; but also to the converse, that **if there were consent, change would be supported** (as in Article 1(c) of the Anglo-Irish Agreement). And it points up the importance of arrangements guaranteeing equal respect for the two traditions, and their effective participation in political life.
5. As part of a settlement, the principles in paragraphs 14-21 would be reflected in an **international agreement**, and in **constitutional legislation on both sides**. On the Irish side, this involves chiefly the amendment of Articles 2 and 3: paragraph 21.
6. **Paragraph 20 is the key text on British obligations**. It reiterates commitments to the principle of **consent**, to be exercised without external influence; and to the **impartial administration** of Northern Ireland in the absence of a change in status. This 'new approach' is to be 'enshrined in **British constitutional legislation** embodying the principles and commitments in the Joint Declaration and the JFD, either by **amendment of the Government of Ireland Act 1920** or by its **replacement**'; and by 'new provisions entrenched by **agreement**.'

Government of Ireland Act 1920

7. **The 1920 Act is a red herring of great symbolic significance for nationalists**. It originally provided for Parliaments and Governments within the UK for Northern and Southern Ireland, for a Council of Ireland as a framework for cooperation between them, and for their possible eventual unification (still within the UK). In the South it was overtaken, and disapplied on the creation of the Irish Free State. In the North it was the basis of government until 1972. Most of it was repealed in 1973. One provision which survived, however, was **section 75**, which now reads:

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Notwithstanding... anything contained in this Act, the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things in Ireland and every part thereof.

8. Even after it was explained that it had not applied to the South after 1922, this section was (privately and publicly) **accorded great importance by Mr Albert Reynolds** as Taoiseach: he took it as a imperialist assertion of authority over Northern Ireland (and at times, the Act as a whole as a commitment to all-Ireland bodies, and eventual unification). **Other nationalists, especially Sinn Féin, followed his analysis.** Mr Reynolds was anxious that the principle of consent as the foundation of Northern Ireland's constitutional status should be set out by amendment to it.
9. In fact section 75 is no more than a saving clause, if cast in extravagant terms, for an authority previously established (in the Act of Union 1800); and now of **minimal legal significance**. Amendment would be legally dubious, but we believe the Irish no longer seek it: they would be content that the principle of consent was reflected some other way, **section 75 being repealed**, as could probably be done without difficulty (Mr Trimble has said as much). There are, however, sensitivities: some Unionists took Mr Reynolds seriously in his assessment of the Act's importance – hence Dr Paisley told the Prime Minister of his outrage that the Act, as the 'title-deeds for Northern Ireland', was on the table in the talks. Repealing section 75 may buy us a great deal for no real cost, but it is dangerous to play up its significance publicly.

Way forward

10. We have had an initial exchange with Irish officials (including Mansergh) about constitutional change on both sides, and floated the idea that the **principal outcome of the talks on constitutional issues might be text embodied in an international agreement**. It would then be for the two Governments to bring their constitutional law into line. This will probably not avoid the need to discuss statutory text on both sides in the talks: the UUP will want to see what the Irish propose to do with Articles 2 and 3, and how we legislate for the consent principle will matter greatly to nationalists. But **unionists ought to find it more satisfactory** that the key principles are set out in a binding agreement subject in principle to international adjudication – they have a fear (understandable, in the light of experience) of what Irish courts might make of any constitutional amendments. We have undertaken to talk in more detail to the Irish in the New Year, when we hope their thinking on Articles 2 and 3 will also have developed. We shall hope then also to talk to the unionists.
11. We are reflecting on the **statutory provision** required with legal advisers. It is likely to involve **some embodiment of the 'positive' aspect of the consent principle**, to stand alongside the guarantee now in section 1 of the Constitution Act that Northern Ireland will not cease to be part of the United Kingdom without consent. There may also be a wish in the talks for other key principles from paras 14 to 21 to be set out in statute, though the Agreement is arguably a better home. Other elements of them would be reflected in provisions for devolved institutions, and perhaps rights protection.

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Importance for nationalists

12. There are **few real difficulties of substance for us** in the commitments in the JFD. But they are **extremely important to nationalists symbolically**. The Irish (and SDLP) spin will be that the **constitutional status of Northern Ireland is established on an entirely new basis, dependent exclusively on consent**. Many nationalists, especially Sinn Féin-leaning ones, could never bring themselves to recognise Northern Ireland as part of the UK absolutely; but in the right context they might recognise the legitimacy of a constitutional status that is the product of the consent principle. The text of an **agreement and of statutory provision will be very important in persuading nationalists that there is something worthwhile for them in a settlement**.
13. Equally, it is important to be able to show nationalists that (while its constitutional status is unchanged) **arrangements in Northern Ireland are part of a fundamentally 'new approach'**, with respect for the full ~~and equal~~ legitimacy of both traditions – not merely a variation on the status quo, or on the theme of devolution as practised in Great Britain, or previously proposed in Northern Ireland.

Unionists

14. There may be **few difficulties of substance for unionists** either, but there is much **scope for suspicion and misrepresentation**. Mr Trimble is likely to accept repeal of section 75 without difficulty. He is committed in general terms to the principle of consent, though may have views about the formulation of it, especially the 'positive' aspect. But he is **deeply suspicious of us**, as was clear in interrogations he has subjected us to on the text of the JFD, and allegations in Parliament that there are **secret constitutional 'understandings'** with the Irish Government (Dr Mowlam has written to him to make clear there are not).

Northern Ireland Office
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