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17 OCT 1985
STORMONT HOUSE ANNEX

c.c. PS/Mr. Scott
PS/PUS (L&B) - M-5
Mr. Bloomfield - M-6
Mr. Brennan
Mr. A.W. Stephens - M-8
Mr. Bell

POSSIBLE UUP LEGAL CHALLENGE TO AN
ANGLO-IRISH AGREEMENT

HEAD OF THE N.I.
17 OCT 1985
CIVIL SERVICE

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1. Mr. Cleasby's minute to Mr. Brennan of 1 October referred to the Secretary of State's interest in the possibility of a legal challenge to an Anglo-Irish agreement interfering with parliamentary debate through the application of the sub judice rule. In fact a number of points have been raised in respect of the possibility of a legal challenge to an agreement; and this note seeks to cover them all.

Prospects for a Legal Challenge

2. The Unionists have announced that they have retained counsel with a view to mounting a challenge in the courts (though there are indications that the DUP at least are sceptical of the chances of success). The Law Officers have been consulted and believe that the most likely form of legal challenge (if one does indeed emerge) would be an application for judicial review, seeking a declaration that existing statute law on the constitutional status of Northern Ireland makes it unlawful to conclude an agreement with the Irish without the authority of a fresh Act of Parliament.

3. The view of the Law Officers is that such a challenge would be unlikely to succeed. They believe that the agreement in its present form is consistent with all relevant statutes, that it does not require to be approved by an Act of Parliament, and that adequate arguments exist to defend the Government if an application for judicial review is made and accepted by the Courts. In fact, the Law Officers believe that the most likely outcome would be for the courts to refuse leave to apply, because the conduct of foreign affairs is not susceptible to judicial control.

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Act of Union

4. One particular argument being run by certain Unionists is that an agreement reached without the people of Northern Ireland being consulted would be in breach of the Act of Union 1801. Our legal advisers see no force in that argument. The Act of Union is not immutable, as evidenced by the constitutional changes in the 1920's. In any event the agreement contains nothing that alters the existing constitutional arrangements. The furthest it goes is to bind the UK Government to introduce legislation to change Northern Ireland's constitutional status if a majority so wish. But such legislation would not be precluded by the Act of Union, any more than was the Government of Ireland Act 1920.

Discrimination in Appointments

5. Article 6 of the agreement sets up a framework within which the Irish may put forward proposals on the composition of appointed bodies such as the FEA and Police Authority. We have considered this Article in the light of S.19 of the Northern Ireland Constitution Act 1973 which makes unlawful any public appointment which discriminates against any person or class of person on the ground of religious belief or political opinion.

6. Our legal advisers are clear that Article 6 is not inconsistent with S.19. That section does not prohibit whatever consultation is thought to be desirable before making an appointment. What matters is whether or not the person appointed was selected (or an unsuccessful candidate was rejected) on the ground of religious belief or political opinion. At present, in the absence of an Anglo-Irish agreement, extreme care has to be exercised not to contravene S.19, particularly when making appointments to bodies on which an overall political or religious balance is necessary. After an Anglo-Irish agreement, equal, if not greater, care will be called for. But that is not to say that there is any legal inconsistency between Article 6 and S.19. There is not.

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Sub judice Rule

7. The Solicitor General (in the absence of the Attorney General) has been consulted over whether application of the sub judice rule might preclude parliamentary debate of the agreement if a legal challenge to it were before the courts. In making any decision the Speaker will of course take his own legal advice. But the Solicitor General thinks that the Speaker ought to decide that it would be proper for the debate to proceed. The purpose of the sub judice rule is to avoid prejudice to a trial; no such prejudice would occur in this case. Moreover where issues of national importance are due for debate, a rather more relaxed view of the sub judice rule may be possible.

8. However, the Solicitor General has suggested that it might be prudent to take two steps to avoid any criticism of disrespect to the courts: first, if a case is pending at the time of the debate, the Government should be ready to give an assurance that, in the event of that case succeeding, it would not proceed with the agreement; secondly, if a case is pending when the Intergovernmental Committee first meets, the agenda for that meeting might be restricted to preparatory and procedural matters.

Conclusion

9. As part of their general sabre-rattling against an Anglo-Irish agreement, the Unionists have made various claims that it will be subjected to legal challenge (even though they do not yet know the substance of the agreement). Whether, when they see the agreement, they put their threats to the legal test remains to be seen. But if they do, our legal advice on all the points that have been raised is that we can be reasonably confident that there are either no grounds for, or that we can readily withstand, any legal challenge to the agreement in whole or in part. It is also thought that the Speaker would not interpret the sub judice rule in such a way as to interfere with parliamentary debate of the agreement if a case were pending.

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10. Finally, it may be worth recalling the convention that in public pronouncements the Government never reveals that it has taken legal advice or the substance of that advice. Any claims for the legal propriety of the agreement should be based simply on personal (or collective) confidence.

DZ

D. CHESTERTON
17 October 1985

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