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The Northern Ireland Talks and Articles Two and Three of the
Constitution

A Discussion Paper

Introduction

1. This is a personal paper which is intended to help in clarifying the issues the Government face. It is written immediately before the Strand Three Meeting in Dublin on 28 July, 1992.
2. This paper is divided into three sections:
 - A. Articles Two and Three in the Negotiations.
 - B. What kind of settlement is emerging?
 - C. What kind of Constitutional amendment might we envisage?

Ultimately, of course, whether B justifies C (or if not how it would need to be added to) is a matter for political judgement by the Government and this paper does not seek to pre-empt that judgement.

A. Articles Two and Three in the Negotiations

3. It is now clear that Articles Two and Three are firmly on the table in the talks. Indeed, whether we like it or not, they appear to have become central to the outcome since the Unionists have 'talked up' their objections to those Articles to such an extent that they will not, and

probably cannot, enter into any new arrangements or structures until those Articles are changed.

4. The British Government position is not to press us directly on those Articles but to focus rather on the ambivalence of Article One of the Anglo-Irish Agreement on the question of the 'status' of Northern Ireland. They know well that this was carefully drafted as the maximum that could be said without falling foul of Articles Two and Three of the Constitution. They know that anything further would require a Constitutional change. They profess not to want to press us themselves on either point - they simply note that the Unionists will not join any new arrangement without a clear statement accepting the status of Northern Ireland within the UK. The net effect, of course, is to put us under pressure on the issue while themselves taking an apparently detached position in regard to it.

5. Initially, in public presentation, the Taoiseach's statement that the Government of Ireland Act 1920 (which partitioned Ireland) should also be on the table was a good counterbalance to the demand for change in Article Two and Three in the sense that it established the point that there are two agendas of equal standing historically: that of Nationalists for an ending of partition and that of Unionists for its definitive acceptance.

6. In the actual talks, however, this ploy, though it does highlight that fundamental issues are at stake, will not be enough to counter the pressure for change in Articles Two and Three. Apart from the fact that Paisley threatens that he will walk out if the Union is on the

table (a threat we might not care about and might want to face down) there is the more important point that the Government, in accepting the Anglo-Irish Agreement and otherwise, are committed to the principle that Irish Unity will come only with the consent of a majority in Northern Ireland. Since that patently does not exist at present, we are inhibited from pressing in a full-blooded way, even if we wanted to, for an end to the Union; while the Unionists and the Alliance Parties directly, and the British Government indirectly, have no similar inhibitions about pressing for a change in Articles Two and Three. Such a change is, therefore, now beginning to become accepted both inside and outside the talks as a necessary condition for a successful outcome.

7. We can, of course, resist this pressure. But in doing so we risk Articles Two and Three becoming the breaking point in the talks. If they were to break down on this issue, then the Government run the risk that they will be presented as having killed hopes of peace in Northern Ireland because of their 'intransigence' in holding on to 'the territorial claim' rather than accepting its re-phrasing as an aspiration.

8. A factor which tends to increase the pressure on the Government is that, looked at from a British or Unionist perspective, it may seem that the population of the South is not so strongly wedded to those Articles that they would object to their removal if that were to help in achieving a settlement. Indeed, it may seem to the British that many people in the South would acquiesce in the view that these Articles should be removed because it is right (as Paisley said in the talks) without even making their removal part of a settlement package.

9. To take this view is to overlook the concern which any Government here would rightly feel about going to the electorate to propose the removal of those Articles 'cold' rather than as part of a settlement package with a serious chance of resolving the problem definitively. In such a Referendum, whatever the polls might say at the outset, old passions could easily be aroused; and Sinn Fein and the Provos could gain a new life from the controversy. A crucial point would be the attitude of the minority in Northern Ireland and particularly of the SDLP. While the extent to which an Irish Government should be tied in detail to SDLP positions has sometimes been a matter of debate, it is hard to imagine any Irish Government going to a Referendum or achieving a successful outcome, if in doing so they had to face down opposition and criticism from John Hume, Seamus Mallon and their colleagues on this fundamental issue.

10. In retrospect, looking back over the past 25 years, there were probably only three occasions when it might have been a serious political possibility to change Articles Two and Three: (a) in 1967/68, following the report of the Committee on the Constitution in a relatively calm atmosphere before the troubles started; (b) as an immediate follow-up to Sunningdale in early 1974; and (c) at the time of the Anglo-Irish Agreement in 1985. Whether or not to move on Articles Two and Three on any of those occasions was, of course, a political judgement to be taken by Government in the circumstances of the time. But it seems clear in retrospect that those were the only three occasions in a quarter of a century when the issue could have been presented to the electorate in a context of movement and change which could be presented

as justifying such a major change in the Irish Nationalist position.

11. If the foregoing is correct then it seems, from our point of view, there are now three possible outcomes to the talks:

- (a) A breakdown (or a walkout such as Paisley has been threatening) on Articles Two and Three.
- (b) A breakdown on some other issue.
- (c) A settlement package of such substance that the Government here could seriously consider a proposal to change Articles Two and Three.

(b) above - that is a breakdown on some other issue - does not seem likely at present; and it would be very difficult to contrive, even if we should wish to do so.

(a) - that is a breakdown on Articles Two and Three - is not at all a favourable outcome from the Government's viewpoint since it will be simplistically presented as 'intransigence' without any real understanding of the genuine risks which an attempt to amend Articles Two and Three 'cold' and out of context would entail.

12. A breakdown on Articles Two and Three would also, psychologically, deprive us of the high moral ground which we have enjoyed since the signature of the Agreement in 1985. Since that time, we and the British Government have been seen to be working together in a reasonable way and the Unionists have been seen as having intransigently excluded themselves. If, at this stage, having embarked on talks involving all the parties, we get ourselves into a situation where the break seems to

come on our unwillingness to amend the 'claim' notwithstanding our acceptance of majority consent (in Article One of the Agreement), then it will seem that our "outdated claim" is the real obstacle to a settlement. We will still, of course, have the Anglo-Irish Agreement and can hold the British to its operation as an international obligation. It will not be enough, however, to cling to the letter of the Agreement if whatever spirit it had has gone out of it. More important perhaps - the united front which the two Governments maintained in 1985 on the basis of the careful ambiguities of Article One will be seen publicly to have dissolved in a way which puts the British firmly on the side of the Unionists in opposition to our position on the 'status' of Northern Ireland.

13. Apart from calculations of interest or advantage of this kind, there is, of course, also an even more fundamental point - that after seventy years an Irish Government is at last sitting down opposite the Unionist parties to negotiate the future of the island. Every other negotiation or discussion since 1920 - with the partial exceptions of 1925 and Sunningdale - has been with a British Government. The British Government are, of course, also present on this occasion but they profess to be ready to accept virtually any outcome that can be agreed between the other parties. This new approach, which is a development of Mr. Brooke's statement that Britain no longer has any strategic or other direct interest in remaining in Northern Ireland, means that the real negotiation is to a large extent between Unionism and Nationalism in Ireland. If, having reached the table with the Unionists at last, we give up or have to give up on the effort to reach agreement, then perhaps we may

have to draw certain more general conclusions as to our whole approach to the future of the island.

B. What kind of settlement may be emerging?

14. The argument in this paper so far suggests that, now that we have embarked substantially on these talks, the choice we face is between a breakdown which is very likely to turn on Articles Two and Three in a way which puts us in an unfavourable position; or negotiating to achieve a package substantial enough to warrant a decision by the Government to propose a change in those Articles. What form might such a package take?

15. While it may take some time and effort to get there, the shape of what seems to be emerging as a possible outcome at present looks broadly as follows:
 - (a) An Assembly elected by PR in Northern Ireland with approximately 85 members and a system of guarantees and protections (of a kind to be determined) for the interests of the minority.
 - (b) An Executive of some kind with some kind of minority representation which would be responsible for certain Departments in a Northern Ireland Government.
 - (c) Devolution of responsibility for certain Departments by the British Government to these structures.
 - (d) Possibly - in private British thinking - devolution of some functions in the security area on a 'rolling' basis, possibly beginning with responsibility for prisons.
 - (e) An institutionalised North/South link of some kind to deal with matters of practical cooperation.

- (f) Possibly some tripartite institution - for its own sake and because the British Government will retain responsibility for some Northern Ireland matters so that there will be a need for coordination in relation to transferred and non-transferred matters.
- (g) Possibly - a Bill of Rights in some form to entrench certain protections and guarantees.
- (h) An Ombudsman system in some form - perhaps that of a panel elected or appointed - to invigilate and monitor the fair operation of the system.
- (i) A residual role for the Anglo-Irish Conference - depending on how much was devolved.

The foregoing is, looked at very broadly [and with the exception of (i)] a variant of the Sunningdale structure which provided for internal power sharing institutions within Northern Ireland and North/South institutions of cooperation with a capacity for growth.

16. Structures based on this outline would clearly be - in one respect at least - a good deal less than was achieved in the Anglo-Irish Agreement of 1985. That Agreement, for the first time, admitted the Irish Government to a role in relation to the internal affairs of Northern Ireland as well as providing for cooperation between North and South. The outline set out above on the other hand could mean a virtual end to the 'intrusive' role of the Irish Government in relation to the internal affairs of Northern Ireland. The issue for the Government here would then be whether to settle for a position which was less 'advanced' than 1985 in terms of the traditional aims of Irish Nationalism in return for the fact that the outcome for the first time, would have the Unionists, including Ian Paisley, fully aboard. The question, in other words, would be whether widespread acceptance (including Unionists) is worth more than deeper

involvement.

17. The schema above could, however, be the skeleton for a number of different possible outcomes; and there are at least three or four ways in which it could be built up further so that it would take a 'strong' rather than a 'weak' form:
- (1) Even with some devolution to the institutions mentioned, there could still be a rather substantial residual role on other matters for the Conference established under the Anglo-Irish Agreement.
 - (2) The Ombudsman role could be developed so as to allow for Irish Government input at that point - either through appointments to a panel or through a direct monitoring role for the Anglo-Irish Conference.
 - (3) The North/South institutionalised cooperation could be so constructed that the institutions would have, to some extent at least, an executive role. That is to say the institution established could itself have responsibility devolved to it instead of being merely an instrument for cooperation and coordination between institutions North and South.
 - (4) The possibility touched on in private by some British officials of a 'rolling' devolution of security responsibilities offers some possibilities for an Irish Government role in an area of concern to Unionists which might be worth further examination.
18. The policing issue would obviously be of great importance and it is hard to see how any settlement could really work over time unless it gets that right. A whole range of possibilities were canvassed in private in the negotiations leading up to the Anglo-Irish Agreement. These included such possibilities as six separate County police forces; and a clear separation of the community policing and gendarmerie (or armed police) functions in the hope that the former at least could win widespread

acceptance if separated off from the latter. In the end, however, the British were not prepared to take head-on the Unionist sensitivities in regard to the RUC and its continued existence as a single force under that title - the Royal Ulster Constabulary.

19. Some of these ideas from that time could be looked at again with due regard to the improvement in the RUC since that date. One point worth looking at also may be the provision in the new CSCE document signed at Helsinki for help and assistance on policing to CSCE members in situations of internal conflict. It is possible that these could be built on or used in some way - either by drawing in some senior police officers from elsewhere or by some kind of arrangement for monitoring. But it has to be said that it would be very difficult to have such ideas accepted by the Unionists.

20. Whatever about the institutions which may be established, one very important - and difficult - area which would need to be got right in any settlement is that of symbols - flags, emblems, titles, marches etc. These are issues which mean a great deal psychologically to the Nationalist minority in their daily lives even if they seem somewhat intangible to outsiders and since the minority would probably have to settle into accepting Northern Ireland for the foreseeable future it would be important to ensure that their acceptance of any settlement was made easier as far as possible by getting the symbolic issues right. This will be a very difficult area on which to get agreement.

21. The question of whether the structures outlined above in para. 13 or any development of them on the lines of para. 15, are at all likely to be enough to justify the Government in going to a referendum on Articles Two and Three is, of course, one for political judgement. When we tell the British privately at official level that they are not, they tell us that there is still a lot of negotiating to be done (they imply it could be a long-haul), that there is a lot to play for still on our part and that they, for their part, would be willing to accept a very 'deep' settlement - if it can be agreed by other parties.

C. What kind of Constitutional change might we envisage?

22. If the Constitution is to be changed, it would seem better to do it by modifying Articles Two and Three in some way rather than by seeking to delete them. This would reduce somewhat the head-on nature of the clash with those who would flatly oppose their removal.
23. This approach would also fit with the view that it is necessary for international legal reasons to maintain, vis-a-vis the British Government, a position something like that set out in Articles Two and Three. Those who hold this view make a clear distinction between the position of Ireland vis-a-vis Britain and the position of Irish Nationalism vis-a-vis Unionists.
24. This distinction was maintained for example in the statement made by the late Mr. George Colley in the Dail on behalf of the Fianna Fail party at the time of

Sunningdale (13 March, 1974 column 10). On that occasion he said:

"As between the Irish Government and the British Government there are conflicting Constitutional claims. As between those who wish to maintain the Constitutional link with Britain and the rest of the Irish people the position is somewhat different. There is a full understanding and recognition of the political aspirations of Unionists but there is also a firm conviction that in the course of time most Unionists will come to see that their best interests lie in a United Ireland. In seeking to bring about a United Ireland, we in Dail Eireann have abjured violence and seek agreement".

25. Obviously, modification of the Constitution rather than simple deletion of Articles Two and Three would be less attractive to the Unionists. But even Ian Paisley has said (in the course of the current talks) that he has no difficulty with an aspiration to unity; and suitably drafted it should be possible to present a modification of the Constitution in that light.

26. There are a number of ways in which this might be done. As an illustration the following ideas are offered here. (It might also be possible to combine elements from the different approaches.) A key idea in all would be to ask the people to write into the Constitution by way of Referendum the concept that unity would come about only with the consent of a majority of the people of Northern Ireland. This idea was first given solemn expression in the Sunningdale Agreement of 1973 and subsequently in the Anglo-Irish Agreement of 1985, Article One.

27. The following are some approaches which may be worth considering:

a) Write a new Article or Articles in between Articles Two and Three

The new Article might take some form such as the following:

"The National Territory is at present divided. It is an aim and aspiration of the Nation that it be united, in peace and harmony and by agreement. Unification shall take place, however, only with the consent and agreement of a majority of the electorate in each of the two parts of the island, signified by a vote to that effect in each part".

b) Add a new Article after Article Three in regard to consent

This could be on the following lines:

"It is hereby declared that the reintegration of the National territory referred to in the preceding Article shall take place only with the consent of a majority of the electorate in Northern Ireland (or in each part of Ireland)".

c) Add a new Article between Article Six and Seven

The aim here would be to have the people declare in the Constitution a statement of 'National policy' in relation to Northern Ireland. (This would pick up on the statement in Article Six that it is for the people 'in final appeal to decide all questions of national policy'.) A possible formula might be the following:

"It is hereby declared as a statement of National policy that the reintegration of the National territory is an aspiration which is to be pursued only by peaceful means and through agreement. It is further declared that its achievement shall be subject to the consent of a majority of the electorate in both parts of Ireland".

d) Addition to the Preamble

It might also be possible to consider adding another paragraph to the Preamble in words which would explicitly acknowledge the division of the island and establish unification as an aim to be achieved by peaceful means, in harmony between Irish people, and with consent.

28. The best approach, however, to the whole problem of Articles Two and Three would probably be to work now for an agreement which could be endorsed explicitly into the Constitution by Referendum in something the same way as was done with the Single European Act or the Maastricht Treaty. (This approach might indeed be combined with one or other of the formulations for amendment mentioned above.)
29. The advantage of this approach is that it would ensure that amendment of the Constitution was situated in context as an integral part of the settlement and not something in some way detached from it. This would be so because it would be the settlement agreement itself which formed the amendment to the Constitution. It would mean, also, that any breakdown, if it came, would be seen as due to a failure to achieve an overall settlement which could be put into the Constitution rather than a failure to achieve an overall settlement because of our refusal to make a (separate) Constitutional amendment.

30. This approach could be taken further if we were to work for a settlement package which included a 'guarantee' about consent which would be legislated for in exactly the same terms by the Westminster Parliament and in our Constitutional amendment. This would have the important psychological effect of establishing that both Governments (and peoples) were guaranteeing the Unionists together against their fears of unity without consent and establishing together a 'platform' on which a settlement for the future of the island would be built. If properly phrased it could also be presented as a significant change in the terms of the present British guarantee. This might, with proper political handling, ultimately be made the basis for a cessation of violence by the Provos. It would, of course, be very difficult to combine all these objectives in one text but such an approach as an aim in our negotiation would be worth thinking about.
31. At worst an approach which envisages amending the Constitution by asking the electorate to endorse a Settlement Agreement explicitly into the Constitution would help to avert the danger that 'removal of Articles Two and Three' will be presented as a separate issues on which we are intransigent. At best a settlement document with a suitable preamble, subscribed to by all the parties and by both Governments, endorsed by referendum into our Constitution, by legislation in Britain and by popular vote in Northern Ireland could become a Charter for the future of Ireland which would meet Unionist fears and might even provide a basis, or at least an excuse, to get the Provos off the hook of violence.

N. Dorr
Secretary
27 July, 1992.