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**Reference Code:** 2021/48/177

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BÉAL FEIRSTE

BELFAST

3 March, 1994

Confidential

Mr Sean O hUiginn  
 Assistant Secretary  
 Anglo-Irish Division  
 Department of Foreign Affairs  
 Dublin 2

Dear Assistant Secretary

Identity IssuesJudicial Matters

Pursuant to discussion at the last Conference we had a further meeting to consider judicial aspects of Identity issues on 1 March. I enclose a note of the meeting prepared by Ms. O'Donoghue. We concentrated on those matters which have been raised since the Agreement and on which there has been no progress as yet. While we made it clear that change in the symbols of the system was not going to solve the serious problems of lack of confidence, we did emphasise that the change would be an indication of goodwill and a positive gesture towards parity of esteem.

In summary, none of the proposals we have made since 1985 have yet been put in place; and we established that both the Jurors' Oath and the Oath of Allegiance taken by the judicial and senior counsel retain homage to the Monarch which is no longer the case in simplified forms obtaining in England and Wales. There, the Jurors' Oath makes no reference to the Monarch; and senior counsel make a declaration only, with no Oath of Allegiance. We were informed, that the legislation, which will bring the situation in regard to the Jurors' Oath in line with the practice in England and Wales, will be published before the Summer. It is still the intention that the legislation will pass all stages in this session of Parliament, that is by October. There is no plan to change the situation in regard to the Oath of Allegiance and we urged that this should be considered for legislative action also, granted that, as with the Jurors' Oath, the authorities here are unwilling to make the change by practice directive.

Yours sincerely

*Aeresa Eneigh*

PP Declan O'Donovan  
 Joint Secretary

Dictated by Declan O'Donovan and signed in his absence

Identity Issues - Legal and Judicial Matters, 1 March 1994

Irish Side

Declan O'Donovan  
Pat Hennessy  
Sean Farrell  
Dermot Cole  
Aingeal O'Donoghue

British Side

Martin Williams  
Eddie Simpson  
Alan Whysall  
David Kyle  
Clive Barbour

1. Mr. O'Donovan began by recalling that this exercise was based on Article 5 of the Anglo-Irish Agreement and reflected a desire on the part of both Governments that communities in Northern Ireland develop a greater sense of identity and confidence in the administration of Justice. To the extent that certain symbols and oaths impede the Nationalist community from involvement in that process of identification with and participation in the administration of Justice we wished to raise those particular issues. We recognised, of course, that a reasonable and practical view had to be taken as to what measures it was feasible to address. He suggested that perhaps the best approach would be to look at those issues in the legal and judicial area which have come up since 1985/86. In particular we had raised a number of issues about the Court practice and conduct in a paper to the British side in 1986 to which they had replied at the time and we proposed examining that paper to see what developments had occurred.

Oaths by Judiciary and Queen's Counsel

2. The Irish side first raised the question of the Oath of Allegiance to the Monarch sworn by members of the Judiciary and Queen's Counsel in Northern Ireland. Mr. O'Donovan pointed out that this Oath was there for historical reasons and not for any modern practical purpose and he raised the question of whether the Judiciary and Queen's Counsel in the UK generally must take the Oath of Allegiance and make a declaration as was the case in Northern Ireland. Mr. Simpson replied that there was no requirement to take the Oath of Allegiance in England and Wales though there was a form of declaration which was very similar to that made in Northern Ireland. When the matter had been raised previously the view was taken that this was not a particularly controversial or divisive issue among members of the Judiciary or Queen's Counsel. The only significant development since then was that the Government had made a specific statement in the June 1991 paper on the "Legal Services in Northern Ireland" acknowledging the importance of the Bar Library as an institution and its contribution to the Administration of Justice in Northern Ireland. The British Government was anxious to foster the Bar Library

system because if it was to break up the Bar might well split on sectarian lines. Currently there were a lot of pressure of accommodation on the Bar Library and this was something that the Court Service was attempting to address urgently. In this context raising the issue of the removal of the Oath of Allegiance or making it optional was not likely to "go down well".

3. The requirement to take the Oath of Allegiance was a matter of custom and not of statute. In that context it was difficult for Mr. Simpson to see exactly who the matter should be raised with - the Lord Chief Justice or the Inn of Court. In response to a question he acknowledged that since it was a matter of custom it was very probably the case that refusal to take the Oath of Allegiance would not prevent somebody from becoming a QC. In addition he pointed out that he had never been the recipient of adverse comments or criticisms of the necessity to take the Oath. While it may well be that the suggestion to remove the Oath of Allegiance would meet with little or no opposition, he was of the opinion that there were dangers in raising the issue and in doing so at this point in time. His advice was that nothing should be done to disturb the present system.
4. Mr. O'Donovan made the point that where there was a variation in practice between England and Wales and Northern Ireland and where the former lent towards a simpler more neutral version it was difficult to see why there was a more "sturdy" form in Northern Ireland except for the purpose of preserving it as a badge of identity for one section of the population. Overall we thought it desirable to align Northern Ireland practice with that in England and Wales and could not see how this should offend anyone. While we had not received a great number of complaints on the question we had heard of more difficulties than Mr. Simpson had suggested.
5. The Irish side understood the reluctance there might be to take an initiative to change customary practice and suggested that it might better be done by legislation as part of a series of moves to simplify judicial forms in different areas. Mr. O'Donovan therefore raised the question of whether the issue of the Judicial and QC Oath of Allegiance could not be included in the legislation soon to be published on Jurors' Oaths and could therefore be represented as part of a process of consolidation and simplification of Court procedures. Mr. Simpson said he was not sure that that Order was an appropriate vehicle for such a change and made the point that adding a new provision at this point would require a process of consultation which might well substantially delay passage of the Order. There was also the question of whether indeed it was a matter for the Government or the Lord Chancellor to proscribe how a particular profession should order its own affairs.

6. Mr. O'Donovan and Mr. Hennessy pointed out that the Lord Chancellor has responsibility for the admission and the form of admission of Judges even if not for QCs in Northern Ireland. Mr. O'Donovan referred the meeting to the Northern Ireland Constitution Act 1973 Section 21.1 which prohibits the imposition of a requirement to make Oaths, Undertakings or Declarations as a condition to being appointed to or acting as a member of an authority or body. While it was not clear whether the section applied to the particular case of the legal profession, the provision did go to show the importance that is given to the issue.
7. Mr. Simpson said that he had no objection to raising the matter with the Lord Chief Justice and the Inn of Court but since he was in discussions with them on a range of major issue at the time, he was not anxious to press on this particular point. Mr. O'Donovan replied that while we understood these points, it was fair to ask why the provisions and practice here were not the same as that in England and Wales. He also made the point that even if the Oath of Allegiance were in existence in England and Wales we would argue against it here because of the special circumstances in Northern Ireland and the divisive impact it has.

#### Jurors' Oath

8. Unlike the position in England and Wales, Northern Ireland retains a form of Jurors' Oaths which involves an explicit reference to the monarch. The Irish side have been pressing since 1986 for a more neutral form of the Oath such as that used in England and Wales. Mr. Simpson confirmed that the NI Courts and Legal Service Order would be published before the Summer and in place before the end of the year. It will grant an enabling power to the Lord Chancellor to prescribe the form of Jurors' Oath and the Government's expectation is that the Lord Chancellor will use the power to bring the situation in regard to Jurors' Oaths in line with the practice in England and Wales.

#### Coroner's Declaration

9. The Irish side then expressed concern that the voluntary nature of the Coroner's Declaration was not widely known and suggested that steps should be taken to point this out. Mr. Simpson replied that the practice of swearing in Coroners had fallen largely into disuse. Mr. O'Donovan felt that if it had indeed fallen into disuse there was no need to pursue the matter further at this time but he suggested that it could be looked at, in the next review of Coroner rules.



### Flying of Union Flag

10. Mr. Simpson said that there was specific days laid down for the flying of flags in public buildings (including Courthouses) which provisions applied throughout the United Kingdom. Court Clerks were instructed to fly the flag on those specific days but he assured the meeting that they had no discretion to fly the flag more frequently.

### Court Dress

11. Mr. O'Donovan said that while the question of Court dress was less important to us than other issues, such as Oaths for example, we did feel that when a suitable opportunity arose it might be desirable to look at the whole issue of dress and simplify it so as to make it less representative of one identity as opposed to the other.
12. Mr. Simpson said that the Lord Chancellor and the Lord Chief Justice had been particularly active in pursuing the question of Court dress and had published a joint consultation paper on the matter. However, there was widespread opposition among the Bar to any changes in the dress code including the removal of wigs and gowns as part of Court dress and it would therefore be difficult to urge the Lord Chief Justice to open the question again. Mr. O'Donovan questioned whether the dress for Judges in Northern Ireland at the different Court levels was the same as that for England and Wales and Mr. Hennessy made the point that County Court Judges seem to have "gone up market" and changed from a black gown and wig to a red gown. Mr. Simpson replied that the dress of Judges was very much in line with the policy in England and Wales (as aside he informed us that High Court Judges were granted £7,600 to purchase their robes) and that the only difference between Northern Ireland and England and Wales was that Court staff and Clerks, other than Court criers and tipstuffs, do not wear uniforms or costumes here. He also made the point that the dress regime in commercial and family courts was much simpler.

### Coats of Arms

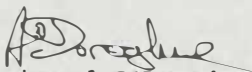
13. On the question of Coats of Arms Mr. Simpson said that many Courthouses in Northern Ireland had nothing in the exterior indicating what they were. Coats of Arms for mounting inside Courthouses were now of one standard, relatively small, size and were usually made of plastic. Of course where there was a pre-existing Court Coat of Arms this would be kept in place. Mr. Simpson added that he could see no difficulty with putting different, for example, County Coats of Arms, in the Civil Courts but that the Royal Coat of Arms would have to be maintained for Criminal Courts.

"God Save the Queen"

14. Mr. O'Donovan also raised the question of the ceremonial practice of the tipstaff crying "God Save the Queen" at the beginning and end of the Court day which would appear to us to be unnecessary. Mr. Simpson said that there was no reference to "God Save the Queen" at any stage in proceedings in the High Court or Magistrates' Court but it was used in the Crown and County Courts. The cry is used in the Crown Court because prosecutions are taken in the name of the Queen. It's use was carried over to the County Court since it is the same Judge that sits in both Courts. However, he intended to investigate the matter further since it was clearly an anomaly to have the cry used in the County Court and not in the High Court.

Conclusion

15. In conclusion Mr. O'Donovan again recalled that the basis of our concern in this area was to foster confidence in the administration of Justice and the Courts system in Northern Ireland among the Catholic/Nationalist community. To this end he quoted from results of Northern Ireland social attitudes surveys in 1990, 1991 and 1992 which found a low level of support for and confidence in the Courts and legal system among the Catholic/Nationalist community. While it was clear that merely changing the symbols of the system was not going to solve the serious problems of lack of confidence, it did have a role to play and might be seen as an indication of goodwill and a positive sign. Mr. Simpson made the point that a recent PPRU survey had shown that it was not so much a lack of confidence in the Administration of Justice as a lack of understanding of how the Courts and legal system worked that were causing problems and he handed over copies of information leaflets that had been prepared dealing with the role of Jurors and Witnesses. He also noted, on a general level, that the question of privatisation of the Court service was a very pressing one and under active consideration which would of course have grave implications for the conduct of Court business. Mr. Whysall said that the NI confidence figures compared favourably with those in England and Wales.
16. Mr. O'Donovan replied that while the data from the NISAS reports was interesting it was difficult to evaluate fully because different questions were posed in each successive survey. The Irish side were looking forward with interest to a PPRU proposal to supply "rolling statistics" which would provide much more reliable data on the subject.

  
Aingeal O'Donoghue  
2 March 1994