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18 JUNE 1992

The general question of the Irish Constitution and the attitudes to the current Talks are considered in an issue which went to Ministers in Election. This paper examines any amendment of Articles 2 and which are likely to be explored.

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PREPARATION FOR STRANDS 2 AND 3 OF THE TALKS: ARTICLES 2 AND 3 OF THE IRISH CONSTITUTION

I attach a briefing paper for Ministers on Articles 2 and 3 of the Irish Constitution.

(SIGNED)

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ARTICLES 2 AND 3 OF THE IRISH CONSTITUTION

1. The general question of Articles 2 and 3 of the Irish Constitution and the attitudes to them of the parties to the current Talks are considered in the paper "The Constitutional Issue" which went to Ministers shortly after the General Election. This paper examines in greater detail the precise form any amendment of Articles 2 and 3 might take and the arguments which are likely to be deployed in Strands 2 and 3.

Background

2. The present Irish constitution was adopted in 1937. Article 2 states:

"The national territory consists of the whole island of Ireland, its islands and the territorial seas".

Article 3 states:

"Pending the reintegration of the national territory, and without prejudice to the right of the Parliament and Government established by this constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Eireann [the Irish Free State] and the like extraterritorial effect".

3. These articles encompass certain concepts of traditional Irish nationalism, namely:

(i) there is an Irish "nation" which consists of all the inhabitants of the island of Ireland;

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(ii) that "nation" has a right to the territory of the whole island;

(iii) as a result of partition, the Irish state is not at present coterminous with the Irish "nation".

4. Articles 2 and 3 are generally held to contain a claim to the territory of Northern Ireland. Northern Ireland Unionists have always regarded them as offensive and as an obstacle to the development of good relations between the two parts of Ireland. They argue that this position cannot change until the territorial claim is removed. Unionist concerns were reinforced by the Irish Supreme Court judgement in the McGimpsey case of 1 March 1990. This concluded that: "Article 2 of the Constitution consists of a declaration of the extent of the national territory as a claim of legal right" and that "the reintegration of the national territory is a constitutional imperative".

5. The identification of the "constitutional imperative" by the Irish Supreme Court has reinforced the determination of Unionists to secure the removal of the claim in the Strand 2 negotiations. They tend to speak of removal, rather than amendment, of Articles 2 and 3. They have not up to now addressed the question of whether any revised formulation of those articles might be acceptable to them. The UUP position paper presented during the previous round of Talks in 1991 called for the removal of both Articles 2 and 3 and the preamble. (The reference to the preamble is obscure. When questioned by the Alliance party and the SDLP, the UUP leader did not seem clear as to what was objectionable. It seems likely to be the reference to the restoration of "the unity of our country".) Those in the Republic who favour removal of the territorial claim, on the other hand, think in terms of amendment rather than removal of Articles 2 and 3, with an aspiration to unity by consent replacing the claim.

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Previous proposals for the amendment of Articles 2 and 3

6. Many in the Irish Republic have come to see Articles 2 and 3 as anachronistic and obstructive to the development of good relations between the two parts of Ireland. As a result, there have been several proposals to amend them in recent years. The first was contained in the report of the all party Dail Committee on constitutional reform which reported in December 1967. The report proposed no amendment of Article 2, but the replacement of the reference in Article 3 to the "right of jurisdiction" over the whole of the national territory by an aspiration that that territory be "reunited in harmony and brotherly affection between all Irishmen". This proposal would thus have retained the reference to the "national territory" and would not have enshrined the principle that the consent of a majority of the people of Northern Ireland was necessary before unity could be achieved. (No Irish Government had up to that time formally accepted that Northern Ireland was an appropriate unit for self determination).

7. In January 1988, the Progressive Democrats put forward a proposed new constitution, Article 1, sub-paragraph 2, of which would have replaced the present Articles 2 and 3 with the following formulation:

"The people of Ireland hereby proclaim their firm will that the national territory, which consists of the whole island of Ireland, its islands and territorial seas, be united in harmony and by consent. The laws enacted by the Parliament established by this constitution, until the achievement of the nation's unity may otherwise require, shall have the like area and extent of application as the laws of the Parliament which existed prior to the adoption of this constitution. Provision may be made by law to give extraterritorial effect to such laws."

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8. The PD's new constitution would thus have retained the existing definition of the national territory while removing the reference to the "right of jurisdiction" over the whole of that territory. It included a reference to reunification by "consent", but did not specify whose consent was needed.

9. Following the McGimpsey judgement, Mrs Mary Robinson (then an independent Senator) put forward a proposal in the Irish Times on 21 April 1990 for grafting on to Articles 2 and 3 the substance of Article 1(a) of the Anglo-Irish Agreement. This would have enshrined in the Constitution the principle that unity required the consent of the people of Northern Ireland, but would have left Articles 2 and 3 otherwise unaltered.

10. On 5/6 December 1990 the Dail debated a Private Member's Bill tabled by the Workers' Party to amend Articles 2 and 3. The Bill proposed adding the following sentence to Article 2:

"This shall not be taken to mean that there will be any change in the status of Northern Ireland other than with the consent of a majority of the people of Northern Ireland".

11. The Workers' Party also proposed the replacement of Article 3 by a provision proclaiming the firm will of the people of the state that the people of Ireland "be reunited in peace, harmony and by consent." While retaining the definition of the national territory, therefore, these amendments expressly provided that the consent of the people of Northern Ireland would be needed before reunification could be achieved and removed the "right of jurisdiction" from Article 3. (The positions adopted by the other parties in the debate are analysed in the paper on the "Constitutional Issue").

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Handling of Articles 2 and 3 during Strand 2

12. It is clear from what Unionists said during the previous round of Talks in 1991 that, as far as they are concerned, the first item to be addressed in Strand 2 will be removal of the territorial claim in Articles 2 and 3. (They have more recently, when it has suited them, argued that Articles 2 and 3 are a Strand 3 issue. But it is difficult to imagine that nothing will be said about them in Strand 2. Much depends on how the pre-Strand 2 and pre-Strand 3 meetings go.) It will be for the independent Chairman to decide how this question is handled, but it is necessary to consider how the Government should respond if asked to state our position directly on Articles 2 and 3. (We already envisage that in the pre-Strand 3 meeting we would signal our wish to see unambiguous recognition in any successor to the Agreement that Northern Ireland is at present part of the UK and would not cease to be so except with the consent of a majority in Northern Ireland. This would entail amendment of Articles 2 and 3 of the Irish Constitution.)

13. Unionists will certainly expect us to support their demand for removal of the territorial claim. Indeed, they may expect us to make the running in Strand 3. They are unlikely to be satisfied if we simply reiterate that we find Articles 2 and 3 "unhelpful". On the other hand, the Irish Government and the SDLP, while they accept that Articles 2 and 3 will be "on the table", are likely to be alienated if we appear to support the Unionist position too closely or assertively. They will expect us to assume that they will seek to avoid giving any definite commitment on Articles 2 and 3 until they see the shape of the rest of the Strand 2 package.

14. The best approach might be therefore to leave it to the Unionists to take the lead in Strand 2, but be ready to make clear when asked that we would regard amendment of Articles 2 and 3 as a

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positive development. We should, however, avoid ourselves proposing any specific wording and we should also avoid associating ourselves with some of the more strident arguments the Unionists are likely to use, such as that the claim is "aggressive", "illegal", or "immoral". We should also not appear to endorse likely Unionist arguments that the claim is contrary to international law, the EC Treaties, the UN Charter or the CSCE Final Act (since none of these is the case). If we have to take the lead - eg if the main discussion of Articles 2 and 3 is in Strand 3 rather than Strand 2, we could, as indicated above, use our desire for an unambiguous replacement for Article 1 of the Agreement as a natural lead in to Articles 2 and 3 without needing to purport to tell the Irish how to amend their own constitution.

15. As stated above, Unionists talk of removal, rather than amendment of Articles 2 and 3. It is doubtful whether any formulation similar to those which have previously been put forward in the Irish Republic would satisfy them. There appear to be two aspects to the territorial claim: first, the definition of the "national territory" in Article 2 (which the Irish Supreme Court has interpreted as "a claim of legal right"); and, secondly, the assertion of a "right of jurisdiction" over the whole of that territory in Article 3. The Unionists are therefore likely to demand the removal of both. An amendment which removed the latter, but not the former, might well not be acceptable to them. It is most unlikely, however, that the Irish Government would be prepared to agree to an amendment which removed the reference to the "national territory" or redefined it so as to exclude Northern Ireland. To do so would cause serious difficulty with the Fianna Fail grass-roots, who are instinctively opposed to amendment, and thus put at risk the prospect of securing approval for amendment at the subsequent referendum. The Irish Government is therefore unlikely to be willing to go beyond substituting an aspiration to unity by consent for the claim to a right of jurisdiction over the whole territory. Even if the Irish Government agrees in principle

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to amend Articles 2 and 3, therefore, there is likely to be protracted argument over the form amendment should take.

16. Between these two likely positions, the UK Government needs to have its own view of what would be an acceptable outcome. Our overall objective is to secure the replacement of the legal claim to the territory of Northern Ireland in a way which enables the two Governments both to acknowledge unambiguously the present status of Northern Ireland as part of the UK while a majority there wants that. (We also have a tactical objective of ensuring that protracted argument over Articles 2 and 3 does not prevent discussion of the rest of the Strand 2 agenda or result in early breakdown of the negotiations, but this is addressed in separate papers). Ideally, we should like to see a revised formulation which:

- (a) either removed the definition of the national territory or made clear in some way that it was a statement of political aspiration rather than a legal claim;
- (b) removed the reference to a right of jurisdiction over the territory of Northern Ireland;
- (c) included the principle that unity could only be achieved with the consent of a majority of the people of Northern Ireland.

17. It is likely, however, that we shall have to strike a balance between what is ideal and what is negotiable. As stated above, removal of the definition of the national territory would probably be a sticking point for the Irish Government. They may also resist a specific reference to unity requiring the consent of a majority of the people of Northern Ireland. We shall need to take a view, as the negotiations develop, as to how far we should insist on these points, or support the Unionists in doing so.

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Final decisions are likely to depend on (a) the likely shape of the rest of the Strand 2 package and (b) the risk of deadlock over this issue. Our "bottom line" might be that we could live with a retention of the definition of "the national territory", provided we secure removal of the claim to a right of jurisdiction over the whole of that territory and inclusion of the principle that unity requires the consent of a majority of the people of Northern Ireland.

18. As recommended in the "Constitutional Issue" paper, we should avoid ourselves putting forward any specific amendments to the Irish Constitution. We might, however, wish to have in mind a possible revised formulation to test against proposals which the Irish Government and the Unionists put forward. A possible formulation might be along the following lines:

"The people of Ireland proclaim their firm will that [the national territory] [the island of Ireland] [the territory of Ireland] be reunited in harmony and with the consent of a majority of the people of Northern Ireland. Until such unity shall be achieved, the laws enacted by the Parliament established by this constitution shall have the like area and extent of application as the laws of the Parliament which existed prior to the adoption of this constitution."

The 1972 Act provided for the establishment of separate Parliaments for Northern and Southern Ireland and a Council of Ireland, "with a view to the eventual establishment of a Parliament for the whole of Ireland, and to bringing about harmonious relations between the Parliaments and Governments of Southern Ireland and Northern Ireland". The Act also provided for the establishment of such a Parliament for the whole of Ireland as hereinafter described as

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