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ROYAL COURTS OF JUSTICE,
LONDON.

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CABINET OFFICE
R 2303
11 AUG 1966
FILING INSTRUCTIONS
FILE No. 11072

Dear Roy,

The Prime Minister has asked me to send you the enclosed copy of a letter which I sent him at his personal request on 5 April last year concerning Northern Irish representation in the United Kingdom Parliament.

It has been suggested that we should have a word about this subject before the weekend and I am asking Cartwright Sharp to fix an appointment at a time convenient to both of us.

*Yours,
Alan.*

The Rt. Hon. Roy Jenkins, M.P.
Home Secretary.

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5 April, 1965.

Northern Irish representation in
the United Kingdom Parliament

You have asked for my observations on the apparent constitutional anomaly whereby twelve Northern Irish Members are enabled to vote in the United Kingdom Parliament on matters relating exclusively to Great Britain, whereas domestic issues affecting that country, other than those reserved by Section 4 of the Government of Ireland Act 1920 for the United Kingdom Parliament, are decided by their own Parliament at Stormont. Should the Northern Irish Members of the House of Commons at Westminster be able to influence Divisions on purely British questions which do not affect Northern Ireland, or should their votes be counted only in respect of Northern Irish and reserved matters but disregarded for all other purposes?

History

2. Since the Act of Union of 1800 there has never been any limitation on the voting rights of Irish Members. During a whole generation, when the work of the House of Commons was seriously impeded by the obstruction of the Irish Nationalist Members, there was, so far as I can trace, only one occasion when a scheme of this kind was mooted publicly. This was in Gladstone's Second Home Rule Bill, introduced in 1893, which contained the following subsections:-

The Rt. Hon. Harold Wilson, O.B.E., M.P.,

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- "9(3) An Irish representative peer in the House of Lords and a member of the House of Commons for an Irish constituency shall not be entitled to deliberate or vote on -
- (a) any Bill or motion in relation thereto, the operation of which Bill or motion is confined to Great Britain or some part thereof; or
 - (b) any motion or resolution relating solely to some tax not raised or to be raised in Ireland; or
 - (c) any vote or appropriation of money made exclusively for some service not mentioned in the Third Schedule to this Act; or
 - (d) any motion or resolution exclusively affecting Great Britain or some part thereof, or some local authority or some person or thing therein; or
 - (e) any motion or resolution, incidental to any such motion or resolution as either is last mentioned, or relates solely to some tax not raised or to be raised in Ireland, or incidental to any such vote or appropriation of money as aforesaid.
- (4) Compliance with the provisions of this section shall not be questioned otherwise than in each House in manner provided by the House."

This was known as the "in and out scheme". It aroused considerable opposition and was dropped at the Committee stage. (Parliamentary Debates, 1893, Vol.14, cols. 1418-24 and 1485-1543.) Apart from this, although Irish obstruction produced the Guillotine and other devices calculated to assist the transaction of parliamentary business, no scheme as radical as that propounded in paragraph 1 herein was openly canvassed during the thirty or forty years when obstruction was at its height.

3. So far as I can ascertain, no scheme of this nature was considered during the passage of the Bill which became the Government of Ireland Act 1920, although Gladstone's

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in and out scheme was referred to in Committee by the First Lord of the Admiralty and described as unworkable (Parliamentary Debates, 1920, Vol. 130, col.2043). As you know, the 1920 Act set up the Parliament of Northern Ireland but excluded from the legislative authority of that Parliament a number of "excepted" matters relating to the Crown, defence, foreign relations, etc. There were also a number of other matters "reserved" to the United Kingdom Parliament, e.g., postal services and such taxation (including income tax and Customs and Excise) as the latter Parliament continued to levy. Section 75 reaffirms, perhaps unnecessarily, the fact that, notwithstanding the establishment of the Parliament of Northern Ireland or anything else contained in the Act, the supreme authority of the Parliament of the United Kingdom is to remain unaffected and undiminished over all persons, matters and things therein. The Act also provided that thirteen Northern Irish Members should continue to sit at Westminster. The number was reduced to twelve when University seats were abolished.

Mode of legislation

4. The scheme under consideration could certainly be brought into operation by parliamentary legislation, but because of the likelihood of successful opposition in the House of Lords, this course would presumably be impracticable. It is relevant, therefore, to consider whether the scheme could be brought into effect simply by Standing Orders pursuant to resolutions of the House, on the ground that this is a matter concerning the procedure of the House.

5. Whereas alterations in procedure which affect both Houses or affect rights exercisable outside the House (e.g., the rights of voters to elect a Member for a University seat) can only be effected by legislation, what is said or done within the walls of the House of Commons is governed by resolutions of that House and no court of law has the right to enquire into the propriety of such a resolution. Bradlaugh's case (Bradlaugh v. Gossett, 12 Q.B.D., p.271) went so far as to decide that the House of Commons is not subject to the control of the courts even when administering the statute law in relation to its internal procedure.

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6. Nevertheless the carrying out of such a radical change in the Constitution by a resolution of one House only would certainly be strongly criticised as improper. The Parliament at Stormont is a subordinate legislature and the ultimate authority on any matters still rests with Westminster. To debar a Northern Irish Member from voting on a wide range of issues (even if these are not issues of direct concern to the electorate) would mean their partial disenfranchisement. There is a further objection to proceeding by way of resolution procedure. The Northern Irish Members would inevitably object that the resolutions were ultra vires the House of Commons. It may well be that this matter could not be litigated in any court, although a possibility of a clash between the House and the courts cannot be ruled out with complete certainty. A more likely result is that the Members affected, or the official Opposition, would move that the Queen should be advised to refer the question of the propriety of the resolution (in accordance with Section 4 of the Privy Council Act 1833) to the Judicial Committee of the Privy Council. Such a proposal would be difficult to resist. If it were voted down, the Opposition would be able to attack the Government as flouting the rule of law. If it were not voted down and the reference to the Judicial Committee were made, there can be no certainty that the Judicial Committee would find in the Government's favour. On a reference of this kind the Judicial Committee would not be inhibited by the same self-imposed limitations as the courts but would feel free to examine the constitutional propriety of the proposal. Although I am inclined to think that they would still say that the resolution was intra vires the House of Commons, I could not make this forecast with confidence.

Machinery

7. For the scheme to operate it would be necessary to devise machinery to separate those matters on which the Northern Irish Members could vote from those on which they could not. In some cases the dividing line might not be entirely clear and in any event the question is one likely to arouse acute party controversy. A Select Committee of

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the House would not be a suitable body, therefore, to make these decisions; the Speaker, however, who is accustomed to considering questions of this kind with the advice of his officials, would be well qualified to perform this function, which would be somewhat similar to his function of certifying Money Bills under Section 1 of the Parliament Act 1911. It would be necessary for him to give his certificate in relation to Public Bills which did not extend to Northern Ireland in whole or in part, and similarly in relation to Private Bills and to motions which related exclusively to non-Irish matters.

8. The scheme under consideration would therefore appear to be feasible, and could perhaps be brought into operation by resolution of the House of Commons alone. The details of the Standing Orders that would be required in pursuance of the resolution would have to be worked out in a rather elaborate form with the House officials to ensure that the spirit of the resolution could not be flouted in practice by the ingenuity of experienced parliamentarians.

Objections

9. Clearly there are many objections that could be raised to a proposal of this kind, but a number are already apparent. First, if it were proposed to proceed by way of Standing Order it would be objected that this use of the powers of the House of Commons to regulate its own procedure is novel, extraordinary and unconstitutional. No Member has been excluded from the House or from voting in any Division in recent times save on account of some disqualification personal to him. In, for example, the case of Bradlaugh, this was no doubt because it was supposed that he as an unbeliever should not take his part in the deliberations of the House and, in any event, could not properly take the parliamentary oath in the spirit of the Statute. Similarly, Members who have a financial interest in the subject under consideration by the House do not vote. But the use of a resolution of the House to prevent a class of Members from voting on a large range of issues is a far

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graver matter and could open the door to much more far-reaching resolutions of the same character in times of crisis. Were it not for the political difficulties created by the present party strength in the House of Lords, it would seem to be a matter which should, as a matter of constitutional propriety, be dealt with by legislation in the ordinary way. As against this, it could be argued that to limit the voting powers and rights of participation in the proceedings of the House of Commons of the twelve Members would not, in view of their existing representation at Stormont as well as at Westminster, disfranchise the electors in Northern Ireland to any significant extent.

10. Another objection, which applies whether the scheme is implemented by legislation or by resolution, was raised by two Ulster Unionist Members, Messrs. Orr and Chichester-Clark, in a letter to "The Times" on Tuesday, 30 March. They argued that the scheme would be constitutionally improper because the Northern Irish would be taxed on matters on which they were unrepresented. I cannot be sure without consulting those who are expert in these matters - and without express authority I do not consider myself at liberty to do this at the present stage - how far this objection is a valid one. There can be no question of taxation without representation in relation to topics which are reserved for the United Kingdom Parliament, as the Northern Irish Members would still be able to record their votes on these matters at Westminster. It seems clear, therefore, that all proposals to tax the Northern Irish are matters on which their representatives would have the opportunity to vote either at Westminster or, in relation to Northern Ireland taxation, at Stormont. I frankly do not at present know, however, sufficient about the financial adjustments made between the constituent parts of the United Kingdom to be sure that Bills proposing expenditure from central funds for purely British purposes cannot necessitate an increase in the rates of taxation imposed on Northern Ireland. I imagine that in practice the Exchequer in Northern Ireland on balance does well out of these financial arrangements, but it may be that there

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is theoretically a possibility that additional taxation could be imposed on them without their representatives at Westminster having the opportunity to cast a vote on the proposals under which the original expenditure was incurred.

11. Further, it could well be argued that Bills which do not directly affect Irish interests (and therefore on which the Irish Members would have no right to vote) could have consequences which are important for Ireland. If the voting rights of Irish Members were limited in the manner suggested, they might be prevented on a number of occasions from discharging the essential function of sustaining or opposing the Government. One cannot overlook the fact that if a Conservative Government with a small majority were defeated on a purely British issue on which the twelve Members had been debarred from voting the result would be of great consequence to them. Must they then resign or go to the country even though with the addition of the Northern Irish Members they would have had an overall majority? Of course, they might find a way round the difficulty. At the present time, every Bill not intended to apply to Northern Ireland contains a specific exclusion. If the scheme were in force the excluding words could be omitted and the Northern Irish Members would, therefore, be entitled to vote. At a late stage (e.g., during the Report stage in the House of Lords) a clause excluding Northern Ireland could be adopted. When the Bill came back to the House of Commons the Northern Ireland Members, being affected, would presumably be able to vote to agree with the Lords amendment.

12. Again, it could be said that such measures as, for example, the Steel Bill could have repercussions in the Belfast steelyards, even though not applying directly to Northern Ireland.

13. An important result of the scheme might be the effect on the United Kingdom Parliament as a whole and the greater likelihood that some form of federalism or other fragmentation of it would be proposed. It would be said that the scheme in effect turns the twelve Members into "second class Members" because they would be debarred from voting on

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some issues. It could then be urged that the Scots, English and Welsh Members should in justice be subject to a corresponding limitation. There would also be the incidental danger that Scottish, and possibly even Welsh, Members, who are of a different political persuasion from Northern Irish Members, would be unable to vote on purely English matters. In effect, I fear that the introduction of a scheme of this nature could present - and would be thought to present - a real threat to our present parliamentary system of representation as it has been long accepted.

14. A further, if minor, inconvenience would be that suggested in Lord Rathcavan's letter in "The Times" of Wednesday, 31 March, that the Ulster electorates are larger than those in the rest of the United Kingdom and presumably pressure would grow to correct this position and increase their representation.

15. There is one further aspect of the proposed scheme which seems to me important. At the beginning of this note I referred to the "apparent constitutional anomaly" whereby Northern Irish Members can decide domestic Northern Irish issues at Stormont while other Northern Irish Members can vote on purely British issues at Westminster. Since this anomaly provides a large part of the moral justification for the scheme under consideration, it is important to see how far it is a real one.

16. The United Kingdom Parliament at Westminster legislates for the whole of the United Kingdom unless the Act in question specifically states that it does not extend to Northern Ireland or some other part of the United Kingdom, and, as I mentioned earlier, Section 75 of the 1920 Act reaffirms the supreme authority of the United Kingdom Parliament. Only the constitutional convention, therefore, - albeit not one to be lightly disregarded - prevents the Parliament at Westminster from legislating on all subjects for Northern Ireland without regard for the views of the Parliament at Stormont. The Stormont Parliament is in this respect a subordinate legislature, differing from county councils not in kind but only in the magnitude of the questions with which it is empowered to deal. In these

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circumstances, the anomaly may not be as substantial as it appears to be at first sight.

Conclusion

17. (1) The scheme described in paragraph 1 could be brought about by legislation.

(2) It could probably also be brought into operation by resolutions of the House of Commons alone, but -

(a) this method would be constitutionally inappropriate to a change which would partially disfranchise - even if only to a modest extent - a part of the population and would amend the Government of Ireland Act 1920; and

(b) there would be a real danger that the Opposition would press for a reference to the Judicial Committee of the Privy Council; if the reference were made, the results cannot be predicted with certainty.

(3) By whatever means the scheme were introduced, it would be open to a number of other difficulties mentioned above.

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