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RBS 1514

Mr Chesterton

PS/PUS (L&B)
PS/Mr Bloomfield
Mr Brennan
Mr A Stephens
Mr Elliott
Mr Gilliland
Mr Spence
Mr S Hewitt
Mr McCConnell
Miss Elliott

ARTICLES 2 AND 3 OF THE IRISH CONSTITUTION - SECTION 1 OF THE
NI CONSTITUTION ACT 1973

Introduction

Ministers are now openly hinting that the Irish should drop (or amend) Articles 2 and 3 of their Constitution: see, most recently, what the Secretary of State said in his St Patrick's Day speech. They are likely also to press the Irish in private. Even the Foreign Secretary, who has observed in the past that amendment is not in the gift of the Irish Government since it would require a referendum, has suggested that we might encourage Dr FitzGerald to start helping to create the necessary public climate.

2. The implications of this strategy do not, however, appear to have received detailed consideration within the Office and it may be that we should provide Ministers with considered advice on the quite complex issues involved. As a first step, by way of opening out the discussion, I offer preliminary thoughts*on:

- (a) the significance of Articles 2 and 3;
- (b) the obstacles to their amendment;
- (c) /^{the}price the Irish might try to exact in return; and
- (d) our possible tactics over the next year and beyond.

Assumptions

3. What follows rests on the following assumptions:

* and I have not consulted outside SIL

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- (a) our policies will remain directed to achieving peace and political stability based on mutual recognition and acceptance of the two traditions in Northern Ireland (and with the Anglo-Irish Agreement continuing a dynamic element in Anglo-Irish relations); and
- (b) we shall eventually (eg by next year) move into calmer waters.

4. The inherent logic of this approach, I suggest, would be to reach a common, and publicly avowed understanding with the Republic, embodied in constitutional law, that Northern Ireland is, in law and in fact, part of the United Kingdom, although HMG would not seek to oppose a united ^{Ireland} if and only if, that was the wish of the majority.

The Significance of Articles 2 and 3

... 5. The precise legal affect of these Articles (attached at Annex A) is debatable (and debated). Some authorities argue that they do not represent a territorial claim for sovereignty over the entire island (which, in any case, the Republic has been less than zealous in pursuing) but that they amount to no more than an aspiration - of the kind we ourselves accept now as legitimate - on the part of Nationalists to a united Ireland. But while it may only be, as Dr O'Brien has described it, a "low intensity" aspiration, it does not thereby follow that it is an aspiration which a majority in the Republic would be easily prepared to water down or formally abandon.

6. On the other hand, there is no doubt whatsoever that these Articles are offensive and not just to ^{Ulster} Unionists: public perception is that they continue to deny legitimacy to Northern Ireland. This point features not simply in the rhetoric of Unionist leaders but also extensively in the correspondence my

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Division receives. They are also a nuisance in practice: the test case Boland v An Taoiseach mounted against the Sunningdale Agreement was based on them, while we are familiar with the difficulties these Articles caused in/ ^{negotiating} the Agreement and which explain, at least in part, why Article 1 talks delphicly about the "status" of Northern Ireland and not about the "constitutional status" of the Province, or of Northern Ireland's belonging to the UK. (These ambiguities have not passed unnoticed.) Their existence also is exploited to legitimise the IRA who, while they exist unamended, can - and do (eg in the McFarlane and Kelly extradition case) - argue that they are doing no more than to give effect to the national aspiration and following, moreover, in the hallowed traditions of the dead generations who gave their lives for just such an ideal.

7. Given the resentment and suspicion stimulated by these Articles, it is not surprising that some members even of the Irish Government should be unhappy about their continuance - nor are they the first in Dublin to recognise the problem: in 1967 an all-party committee on the Constitution agreed upon the re-formulation of Article 3 to make clear that a united Ireland was an aspiration to be achieved through agreement and in peace. (The text of the proposed revision ... is at Annex B.) No revision was, however, proposed of the claim in Article 2, that the national territory should extend over the whole island of Ireland - although it is this Article, with its insistence that the 'national territory' is the whole island of Ireland that is the really objectionable one.

8. It is clearly right to keep up pressure on the Republic to adapt their constitutional rhetoric to reality* in a way that does not feed Unionist suspicions and to argue that the best way of doing this is for the Irish to give Northern Ireland de jure recognition as part of the United Kingdom. But one must also acknowledge that HMG is thereby asking the Irish to do something that strikes at the fundamental ideology of the Republic and, if our persuasion were successful, would face any Irish Government

* the absence of factual substance or even theoretical plausibility in the territorial claim is ably demonstrated by Bowman (De Valera and the Ulster Question, Oxford 1982)

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with launching a referendum which they could lose. Unless Fianna Fail were prepared to promote the amendment also - and there is nothing in that party or Mr Haughey's record which leads us to think he would - the chances of losing a referendum remain high, while the consequences of losing a referendum on this subject would probably be far greater than the benefits of winning. It would be particularly difficult, domestically, for the present Irish Government to launch such a referendum in the run-up to a general election when they could count on vociferous Fianna Fail opposition and, as HM Ambassador has pointed out (Dublin Telno 177) actions by HMG which led to Dr FitzGerald's downfall would not be in our interests.

9. This is a pessimistic analysis, and there are reasons for believing that things could change. They include: the welcome which the Agreement has received in the Republic and the signs of a developing less nationalistic cast to Irish politics with the rise most obviously of the Progressive Democrats. Nor must one forget that other emotive items of the Constitution have already been amended (the special position of the Roman Catholic Church) and the slow moves towards a more generally tolerant and pluralist society in the south (eg over contraception and now divorce). But amendment is still likely to be an uphill struggle so that if we, and progressive elements in Dublin, are likely to get anywhere, there must be a strong possibility that we may have to offer something substantial in return. The obvious candidate is the (so-called) 'Constitutional Guarantee'.

The Constitutional Guarantee

10. The "Constitutional Guarantee" (which we argue that Article 1 of the Agreement reinforces) first surfaced in the Ireland Act 1949, to be modified to its present form in S.1 of the NI Constitution Act 1973. The original intention was to reassure Unionists of position in the United Kingdom following the departure of the Republic of Ireland from the Commonwealth in 1948.

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11. Like Articles 2 and 3, it appears to have primarily a symbolic and declaratory, rather than a strictly legal effect. All it does is to keep Northern Ireland within the United Kingdom (unless the majority consents otherwise and it contains provision for a Border Poll) and to rule out future repartition. But it does not preclude any other form of constitutional change that would satisfy these conditions. Conversely, the legal - as opposed to the symbolic - effect of repeal would be slight: Northern Ireland remains part of the United Kingdom because of the simple fact that the majority of the people there wish it to remain so (a reality which even the Irish Government accepts) and it would be unparalleled for a modern democratic regime to cut adrift a large proportion of its fellow citizens against their wishes. In any case, the section is not worth much as a guarantee: given the absence of entrenched legislation in our constitution, section 1 of the 1973 Act could be repealed just like any other provision on the Statute Book.

12. We are not, however, ^{repealing} faced with a choice between/section 1 in toto (as urged by some nationalists in the past) or retaining it in its present form, while the case for a third option, amendment, rests ^{on the} following grounds:

- (a) the desire to remove from the Statute Book a provision which in its present form appears at times to be as much of a bugbear to nationalists as Articles 2 and 3 are to Unionists;
- (b) modifying our constitutional law to reflect a shared understanding with the Republic of the status of Northern Ireland (including, as at present, that it is de jure part of the UK, but that the Government's commitment to the Union was not absolute in the sense that it was only based on majority consent.)

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13. Given the Unionist attachment to the "guarantee", it is almost certain that any moves for its amendment would be misinterpreted and misrepresented. A good price from nationalists in return would be essential. This could not be less than a satisfactory revision of Articles 2 and 3 of the Irish Constitution.

Towards a Recognition of Reality

14. It seems desirable in principle that, so far as possible, the constitutional documents of both the UK and the Republic not only reflect reality, but are not offensive to either of the two traditions. This is an important part of what "reconciliation" means. Reality, however, in this context means: accepting that Northern Ireland is part of the United Kingdom lawfully and in fact; and that the majority of its inhabitants, for the time being, wish it so to remain. This may appear to favour the Unionists' position, but that is simply because that is the way things are, for the time being, in Northern Ireland. But another reality is, or should be, that the constitutional future of Northern Ireland will depend on the freely given consent of the people, and recognition for the aspirations and identities of both communities. This implies* that it is as legitimate for HMG openly, and without embarrassment, to advocate the continuance of the Union (eg on the grounds that it is in the United Kingdom that the interests of the people of Northern Ireland will be best served) as it is for the Irish Republic to urge the counter-claim of a united Ireland.

But at least if a relatively non-controversial form of words could be agreed between the Republic and the UK, embodying these realities and even these aspirations, there would be one less (at present only too fruitful) cause for misunderstanding, misrepresentation and even mutual execration in Northern Ireland. It would also help to refound the relations between the United Kingdom and the Republic of Ireland as a whole on a sounder basis.

* or certainly does not exclude

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15. That a shared form of words might be possible is shown by Article 1 of the Anglo-Irish Agreement - which, for reasons similar to my own, Professor Boyle and Mr Hadden recommend should serve as an "agreed" definition. In fact, the formulation in Article 1 can and indeed must be improved on, if the benefits to be obtained by a shared formulation is to justify the perturbations the process of amendment would entail. If Articles 2 and 3 were amended, then it would be possible to improve Article 1a by referring to the constitutional status of Northern Ireland as de jure part of the United Kingdom. However, the precise formulation matters less than that it reflects the realities sketched above, and is agreed. It would also, like section 1, have to include provision for some form of border poll (which is more reassuringly concrete than the references in Article 1 to formal consent etc) and make clear that there would be no automatic transfer of Northern Ireland to the Republic, but that this would have to be for Parliamentary approval. The Irish cannot be expected to warm to the latter two propositions, while Unionists might be equally unenthusiastic about the Article 1c-type provision.

16. That such a statutory provision for us (and for the Irish) would be at least in part declaratory does not seem an overwhelming objection, nor harking back to the Victorian convention of the Preamble. After all, neither Articles 2 and 3 nor section 1 is at the moment of much more than (undesirable) symbolic significance. We should be replacing an undesirable formulation with an agreed and, hopefully, salutary one.

A Way Forward

17. It is clearly sensible for Ministers to continue to bring home to the Irish the harm to our common objectives of peace, stability and reconciliation done by the very existence of Articles 2 and 3 of their Constitution (just as they are also right to press for a more pluralist society in the south). As the reaction

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to the Secretary of State's St Patrick Day speech showed, wiser heads in Dublin accept the justice of what we are saying and we should not be deterred by arguments that the Irish Constitution is an internal ROI/^{matter} (or that/^{urging} repeal of its Articles goes beyond the Agreement): so it is, except when it lays claim (somehow) to the territory of an allegedly friendly neighbour. It /^{remains} in our longer interest to keep the possibility of repeal on the Irish political agenda, and to pave the way for such repeal by talking tactfully in public, and more forcibly in private, /^{at} every convenient opportunity for explaining why such repeal would be in our joint interest.

18. But if we are seriously to try and enlist the support of the Irish Government for the amendment of the offending Articles - not just as an "aspiration" but as a specific political target, Ministers should be under no illusions about the difficulty of securing our objectives (and, I believe, its impossibility this side of the Irish general elections) and of the price that could be exacted in return - though a price which it was suggested above would be to our own benefit to pay. However, our chances of success would be materially increased if, by the time it came to a referendum, the Irish knew that we were prepared to amend section 1 of the Constitution Act if they were to amend Articles 2 and 3. If the Anglo-Irish process does not turn sour over the next 18 months, and particularly if there is no Fianna Fail Government, it does not seem hopelessly unrealistic, given the support the Agreement has obtained in the Republic, for the Irish to respond positively. The Taoiseach of the day could well win considerable kudos from the exercise (and not the ruin foreseen by Sir A. Goodison).

19. However, any public suggestion that HMG was even contemplating modification of section 1 would be extremely damaging at present and destroy any hopes that we may have of winning even grudging acquiescence from Unionists to the Agreement. Even if such acquiescence is secured over, say, the next 18 months, any proposal to

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amend section 1 is likely to inflame ancient discontent and, like the Agreement itself, our intentions are likely to be travestied. Hence, in reminding the Irish of the need to repeal Articles 2 and 3, it would be quite wrong at this stage to offer anything in return - the offending Articles are quite objectionable enough to make this a plausible stance. However, in circumstances where Northern opinion could see that the skids were Articles 2 and 3, the situation could be easier. Even were it not the case that Articles 2 and 3 were more offensive than anything in the constitutional guarantee (which certainly cannot be construed as laying claim to the territory of an allegedly friendly neighbour), this suggests that prior movement on the Irish side is a precondition of movement on ours towards a common constitutional definition. Because on both sides there would be major legislative implications, the whole exercise, if it were decided to embark on it in the first place, would require the most careful joint planning and coordination through the Secretariat, and a generally more relaxed political climate than at present. But this is by no means to say either that the game may not become worth the candle, or that the political situation in Northern Ireland is incapable of improvement. Encouraging the Irish, as the Foreign Secretary has suggested, to create the right climate for constitutional change etc remains desirable: we should also seek to get across to the Irish not that they are wrong to seek a united Ireland, if that is what they still wish, but that they should employ seduction rather than rape, and that Articles 2 and 3 are not the instruments of decorous courtship.

Conclusions

20. The objective of this paper was to set out, more fully than in the past, some of the, to quote Mr DeValera's expression, "rocks in the road" to a more realistic, irenic and agreed definition of Northern Ireland's constitutional position. You may think the issues worth further exploration at some meeting of PUS' Steering Group.



P N BELL

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