

A REPORT
PREPARED FOR

The Alliance Party of Northern Ireland
Alliance

THE CONSTITUTION OF IRELAND
ARTICLES 2 & 3

19 SEPTEMBER 1992

Progressive Democrats "Constitution for a New Republic"

The Progressive Democrats Explanatory Memorandum published in January 1988 proposes altering the existing Constitution in both its form and content. Articles 1 to 3 of the Constitution are headed "The Nation". The Progressive Democrats have incorporated Article 1 into a new preamble to the Constitution. The existing preamble is essentially a religious and historic text with little legal significance. It makes reference to—

Article 2

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

Article 3

Pending the re-integration 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 Éireann and the like extra-territorial effect.

...in its relations with other nations, and declares that all powers of government, legislative, executive and judicial, derive under God from the people, whose right it is to designate the rulers of the State, and, in final appeal, to decide all questions of national policy, according to the requirements of the common good, and further declares that such powers of government are exercisable only by or in the authority of the organs of State lawfully established, and, seeking to unite in the pursuit of a just social order, the freedom and dignity of the individual and concord with other nations, do hereby adopt, enact and give to ourselves this Constitution.

The All Party Committee on the Constitution (1967) proposed leaving Article 2 as it was but replacing Article 3 with the following text—

1. The Irish Nation hereby proclaims to firm will that its territory be united in harmony and brotherly affection between all Irishmen.

Progressive Democrats “Constitution for a New Republic”

The Progressive Democrats Explanatory Memorandum published in January 1988 proposes altering the existing Constitution both in form and content. Articles 1 to 3 of the Constitution are contained within a section headed “*The Nation*”. The Progressive Democrats have incorporated Article 1 into a new preamble to the Constitution. The existing preamble is principally a religious and historic tract with little legal significance. It makes reference to—

“...seeking the common good, with due observance of Prudence, Justice and Charity so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored and concord established with other nations”.

The Progressive Democrats amend this omitting the reference to “*unity of our country*” and include the existing Article 1 in a new preamble which reads—

“We, the people of Ireland, hereby affirm the inalienable, indefeasible and sovereign right of the Irish Nation to choose its own form of Government, to determine its relations with other nations and declare that all powers of government, legislative, executive and judicial, derive under God from the people, whose right it is to designate the rulers of the State, and, in final appeal, to decide all questions of national policy, according to the requirements of the common good, and further declare that such powers of government are exercisable only by or on the authority of the organs of State hereby established, and, seeking to unite in the pursuit of a just social order, the freedom and dignity of the individual and concord with other nations, do hereby adopt, enact and give to ourselves this Constitution.”

The *All Party Committee on the Constitution (1967)* proposed leaving Article 2 as it was but replacing Article 3 with the following text—

- 1. The Irish Nation hereby proclaims its firm will that its territory be reunited in harmony and brotherly affection between all Irishmen.*

2. *The laws enacted by the Parliament established by this Constitution shall until the achievement of the nation's unity shall otherwise require 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 extra-territorial effect to such laws.*

The Progressive Democrats proposed new text reads as follows—

Article 1, Section 2

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 re-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 extra-territorial effect to such laws.

The Progressive Democrats proposed new text is different in that it omits the phrase “*brotherly affection between all Irishmen*” and substitutes the words “*by consent*”.

The effect of such a change would be to replace the territorial claim with a declaration of intention to seek unity, based on consent. This wording would also be in accordance with the terms of Article 1 of the Anglo-Irish Agreement.

It is suggested by the Progressive Democrats that it is a constitutional nonsense for a minority of the people of Ireland in 1937 to purport to establish a parliament with jurisdiction to rule the people of Northern Ireland in accordance with laws, principles and constitutional values and institutions on which they were not even consulted let alone permitted to vote. The argument is made that the effect of Articles 2 and 3 is to contest the legitimacy of partition. The proposed wording still disputes the legitimacy of partition by implication, since the right of Ireland to govern itself is asserted in the revised preamble to the Constitution and the national territory is expressed to be the whole island.

Instead of the territorial claim the Progressive Democrats propose a wording which expresses a determination to re-unite the country by consent, not conquest. The proposed wording also makes it clear that the achievement of Irish unity could take different forms and stages. Thus the suggestion that the Oireachtas must be the legislature for an all Ireland state is omitted. In a confederal or federal Ireland the question of an all Ireland government would arise but its nature and powers would

be very different from those of the Oireachtas which, in the 1937 text is assumed to be the post re-unification parliament. For this reason the word "*shall*" is removed from the text of the 1967 proposed amendment and the word "*may*" is substituted.

Reference to extra-territorial legislation is to give formal recognition to the series of judicial decisions that recognised the right of successive parliaments since 1922 to legislate with extra-territorial effect on criminal matters and as permitted by International Law.

The provision also copperfastens the validity of certain provisions of the Law of Extradition which established the State's right to choose between trial on the basis of extra-territorial jurisdiction as an alternative to extradition.

In view of the provisions of Article 1 of the Anglo-Irish Agreement it is desirable that the principle of unity by consent, being the only unity sought by the people of Ireland, be written into the Constitution.

The McGimpsey Case

The McGimpsey brothers' legal challenge to the Anglo-Irish Agreement raised an important constitutional issue. In the High Court in July 1988, Mr Justice Barrington ruled that the Agreement did not violate the Republic's Constitution. The McGimpseys had claimed that the guarantee to Unionists in Article 1 of the Anglo-Irish Agreement breached the Republic's territorial claim to Northern Ireland as expressed in Articles 2 and 3. Mr Justice Barrington said that Articles 2 and 3 should be interpreted as a statement of political theory rather than a legal claim and that Article 1 of the Agreement merely recognised the situation on the ground in Northern Ireland and so did not constitute an abandonment of the rights expressed in Articles 2 and 3. He said that because the aspiration to unity in Article 2 existed in the political as distinct from the legal order Article 3 was to be viewed as a political claim and not a legal right. At most he said that the Republic's right to legislate for Northern Ireland was an inchoate right which the Constitution did not permit it to exercise in advance of "*the re-integration of the national territory*".

Mary Robinsons View

In May 1990 in an article in **Fortnight** magazine Mary Robinson made a case for constitutional amendment.

The Supreme Court in the McGimpsey case interpreted the territorial claim in Article 2 of the Republic's Constitution as a "*constitutional imperative*". This judgement disturbed the perceived balance in this highly sensitive political area. Mary Robinson argues—

"...that it is the responsibility of the Government and ultimately of the people if it is sensed that there is a shortfall in the laws undermining peace and reconciliation on this small island."

The McGimpsey case was based on the ambiguity of Article 1 of the Anglo-Irish Agreement whereby the two Governments affirmed that any change in the status of Northern Ireland would only come about with the consent of the majority of the people of Northern Ireland.

Mary Robinson suggests that the territorial claim in Article 2 should be modified by writing into the Constitution the substance of the guarantee in Article 1 of the Anglo-Irish Agreement. Article 2 would then read—

"The national territory consists of the whole island of Ireland, its islands and the territorial seas. This shall not be held to mean that there will be any change in the status of Northern Ireland other than with the consent of the majority of the people of Northern Ireland."

and Article 3 would read—

"Pending such consent of the people of Northern Ireland to the re-integration 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 Éireann and the like extra-territorial effect."

This approach would achieve a certain balance in that, while the legal claim to the national territory would remain, it would be modified by the proviso that there would not be any change in the status of Northern Ireland without the consent of the majority of its people; but Mary Robinson warned of the consequences of a referendum in the political climate at that time "*which could highlight divisions, exacerbate fears and prove counter-productive*".

11th Amendment to the Constitution Bill

On 4 December 1990 this bill was presented to the Dail. Pronsias De Rossa (Workers Party) called it a historical occasion, as it was the first time for more than 50 years that the question of Articles 2 & 3 had been debated in the Dail. Realising that these articles provoke strong emotions, De Rossa said that De Valera's constitution had been debated in the Dail 53 years previously. He quoted the late Sean Lemass who said that the constitution should be changed every 25 years "*as our society develops into a modern state*".

De Rossa added—

"Even if there were peace in Northern Ireland and even if these articles did not cause offence to so many people in Northern Ireland, there would still be, after more than 50 years, a case for reviewing them anyway."

De Rossa said of the amendment—

*"We are not suggesting this as a way of placating Unionists and ignoring Nationalists. We believe that the claim is undemocratic and poisons relations between Unionists and Nationalists throughout Ireland. The Unionist case against these articles is a just one.....
The changes we recommend would represent an important step to political honesty about Northern Irelandand help to advance the incredibly complex and difficult process of political accommodation in Northern Ireland."*

The proposed amendment, in relation to Article 2, follows the same formula as that suggested by Mary Robinson. In relation to Article 3 the formula suggested by the *All Party Committee on the Constitution (1967)* drops the claim to exercise jurisdiction over the whole island. Unlike the Committee's recommendation which speaks about "*unity of the nation*"; the Bill proposed "*that the people of Ireland be united in peace, harmony and by consent.*"

In the same debate John Bruton TD, Leader of Fine Gael, told the Dail that there was a need to change the constitution. This should be done, "*for ourselves and for our own sake*". This should not be as a bargaining tactic with Unionists or anyone else. The "*content of our Constitution is not something to be bartered in the manner of a huxter.*"

He went on to say—

“The Provisionals have shown the ultimate reality of territorial nationalism, a nationalism which places higher value on natural physical boundaries, seas, islands, and rivers than it puts on the wishes of those people who live within those boundaries.

In the move towards greater European unity, given that Europe is moving away from nation states and embracing new concepts of federalism and devolution, why should the Irish Constitution continue to stick so rigidly to the concept of the unitary nation state standing alone before the whole world?

In 1976 the Supreme Court pointed out that political theories have evolved a lot since these articles were drafted. The Supreme Court in 1976 identified a particular political doctrine of the 1930's as lying behind it (Articles 2 & 3) namely the doctrine that 'a nation as distinct from the state land rights' and 'that a nation has a right to unity of territory and some forum' and that this 'national right to unity was superior to positive law'.

The Supreme Court recognised in 1976 that these doctrines were out of date. Surely it is not too early for the Dail to recognise it in 1990? Peace will only come when people feel secure. Changing Articles 2 & 3 can go a long way to making Unionists feel secure. The Anglo Irish Agreement (however much Unionists may complain about it) was absolutely necessary to give Northern Nationalists an equivalent sense of security.”

The Minister for Foreign Affairs, Mr Collins, speaking against the bill said that *“much had been made of the effect that amending Articles 2 and 3 could have on Unionist sensitivities.”* While the Government was *“not in the least lacking in the appreciation of the need to respect Unionist sensitivities”* they *“must also have regard to Nationalist sensitivities.”*

He added—

“We owe it to Northern Nationalists who have had to put up with so much over the past 70 years to leave no doubt of the value we place on what they have achieved and what they aspire to. They have pursued the Nationalist ideal by purely constitutional means and have rejected the

means of violence. They deserve better than to be told that we no longer want a Constitution that gives full expression to the Nationalist ideal.

..... Articles 2 and 3 do not imply any aggressive and territorial intent. On the contrary the Constitution makes it abundantly clear in Article 29, paragraphs 1 and 2, that Ireland is devoted to the ideal of peace and friendly co-operation and that it adheres to the principles of a specific settlement of disputes.

Our commitment to co-operation and the peaceable settlement of disputes is there for all to see. The same can certainly not be said for the men of violence. Do the supporters of this Bill imagine that the IRA who have not the least regard for our laws and our democratic process will be persuaded that it represents a fundamental change and that their cause is lost? Would it not be far more likely that they would see it as a justification for the use of force and for pursuing their own futile agenda? Articles 2 and 3 are central provisions of our Constitution which has been in existence for 50 years and there is a heavy onus on those who seek to alter them to demonstrate that the case for amendment is persuasive. I believe that the proposers and supporters of the Bill have failed to do this. Similarly I do not believe that there is anything in our present Constitution which could obstruct our working towards a peaceful solution with all sides in Northern Ireland. This Bill is a diversion and an irrelevancy at a time when serious efforts are being made to move the political process forward.”

In the same debate, David Andrews said—

“...the piecemeal tinkering with the Constitution is no answer to the problem. One of the answers to the problem is discussion of the totality of arrangements within and without this island. Then Articles 2 and 3 can be looked at within a new Agreement or a new Constitution. A legitimate aspiration to unity in Articles 2 and 3 of the Constitution is not unreasonable.”

He said that he did not see such aspiration as either aggressive or offensive and added that in the present atmosphere if Articles 2 and 3 of the Constitution were deleted that “we may as well be handing over the question of unity to the IRA” who consider themselves to be the only true upholders of the principle of unity.

One of the proposers of the eleventh amendment to the Constitution Bill (Mr McCartan) said that it was—

“...time that this country faced up to the reality that the territorial claims contained in Articles 2 and 3 of the Constitution are a legal and political nonsense and that they are furthermore an obstacle to peace and reconciliation on this island. It is time also for us as the elected representatives of the Irish people to be honest with ourselves and with our electorate and tell them that maintaining Articles 2 and 3 in their present form will not only fail to bring unity but are almost certainly delaying the unity of the Irish people.”

Mr McCartan went on to say that it was the wish of his Party to see unity in a single state on this island. That objective was set out in their Party's Constitution, but it was realised many years ago that this can only be achieved when there is first unity of the people. Articles 2 and 3 in their present form are an obstacle to the forging of that unity and must be changed. Whatever justification the author of the 1937 Act may have felt for including them 53 years ago they are now an anachronism and there is no justification for maintaining them in their present form.

A public opinion poll published in the **Sunday Independent** on the Sunday previous to the debating of this Bill showed that a clear majority of those polled were in favour of amending the Articles to include a consent clause along the lines proposed in the Bill and that only a little more than a quarter of those polled believed that Articles 2 and 3 should be maintained in their present form.

Mr McCartan said—

“This is a clear public endorsement of the principles contained in the Bill. It shows in fact that public opinion on this issue is progressive and it also indicates that an amendment along the lines proposed in the Bill could be carried quite comfortably in a referendum.”

In the debate on the Bill, on 12 December 1990, Mr Des O'Malley (Progressive Democrats) said—

“Articles 2 and 3 of the 1937 constitution are clearly unhelpful and incompatible from a political point of view, with the emergence of tolerance, peace and concord in Northern Ireland.”

Mr O'Malley said that the Progressive Democrats would not be supporting the Bill because amending Articles 2 and 3 *“should be a part of a comprehensive updating*

of the whole Constitution". Mr O'Malley added that "failure to deliver a change in Articles 2 & 3 in a referendum would be a disastrous setback for peace and a licence for violence and hatred."

The Bill was defeated. by 74 votes to 66.

Irish Times Editorial *suggestions*

An editorial in the Irish Times, at the end of 1987, said of Articles 2 & 3—

“...it is a claim which is expressed in a dangerously simplistic idiom, in terms which are suggestive of a desire for conquest, subjugation indeed, and which can have no place in the dialogue which must come about with the Unionist majority in the North. The concept of territorial occupation of the Gael flying to the sea before the conquering might; military, social or cultural - of the Gael, may well have had its place as a part of a necessary political or cultural mythology in 1937. It has none today. And it contradicts the declared desire of the great majority of people on this island for the achievement of unity by peaceful means alone.”

Various Alliance Suggestions

Seamus Close

Pending the re-unification of Ireland, to which this nation aspires, we recognise that Northern Ireland is part of the United Kingdom: We affirm that any change in the status of Northern Ireland will only come about with the consent of a majority of the people of Northern Ireland: We recognise that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland: We declare that if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a United Ireland, we will introduce and support in our Parliament legislation to give effect to that wish.

Revised Version

1. The name of the state shall be The Republic of Ireland, or in the Irish language Éire.
2. The Republic of Ireland is a sovereign, independent, democratic state.
3. Recognising that Northern Ireland is part of the United Kingdom by virtue of the choice of the majority of the people there, and that any change in the status of Northern Ireland can and should only come about with the consent of the people of Northern Ireland, the people of the Republic of Ireland hereby affirm and proclaim their firm desire that the island of Ireland be reunited in harmony.
4. Until the achievement of such unity shall otherwise require the laws enacted by the Parliament established under this constitution shall have the like area and extent of application as the laws of Parliament which existed prior to the adoption of this constitution. Provisions may be made by law to give extra-territorial effect to such laws.

Steve McBride

Minimalist version (*based on the Progressive Democrat proposal*).

1.2 The people of Ireland (the Republic of Ireland) hereby proclaim their firm will that the whole island of Ireland, its islands and territorial seas, be reunited in harmony and by consent. The laws enacted by the Parliament established by this constitution, until the achievement of 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 extra-territorial effect to such laws.

Radical Version

1. The name of the state shall be The Republic of Ireland, or in the Irish language Éire.

2. The Republic of Ireland is a sovereign, independent, democratic state.

3. Recognising that Northern Ireland is part of the United Kingdom by virtue of the choice of the majority of the people there, and that any change in the status of Northern Ireland can and should only come about with the consent of the people of Northern Ireland, the people of the Republic of Ireland hereby affirm and proclaim their firm desire that the island of Ireland be reunited in harmony.

4. Until the achievement of such unity shall otherwise require the laws enacted by the Parliament established under this constitution shall have the like area and extent of application as the laws of Parliament which existed prior to the adoption of this constitution. Provision may be made by law to give extra-territorial effect to such laws.

Notes

Article 1 is the old 4, with 'The Republic of Ireland' inserted for 'Eire', which no one uses, and with 'Ireland', which is unclear in this context, dropped.

Article 2 is the old Article 5, (which says much the same as the old Article 1 in rather fewer words), with 'Republic of Ireland' inserted for 'Ireland'.

Article 3 is wholly new, and replaces the old 2.

Article 4 is more or less the old 3, less the reference to 'the national territory'.

Old Article 1 is replaced by new Article 2.

Old Article 2 is out.

Old Article 3 is (slightly modified) new Article 4.

Old Article 4 is new Article 1.

Old Article 5 is (slightly modified) new Article 2.

Old Article 6 become new Article 5 etc.

The existing preamble is not very important and has not been dealt with here; it could readily be improved on.

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