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STORMONT HOUSE ANNEX

CONSTITUTIONAL CHALLENGE IN THE IRISH COURTS TO AN ANGLO-IRISH AGREEMENT

Your note of 16 September sought advice on the likelihood of:

(a) the constitutionality of an Anglo-Irish Agreement's being challenged in the Irish Courts;

(b) the chances of such a challenge succeeding; and

(c) the implications for the implementation of an Agreement.

Likelihood of a Challenge

2. While we cannot be certain, a legal challenge must be regarded as likely. Since the mid-60s, the Supreme Court has developed a broad and creative approach to the interpretation of the Constitution and the Irish Republic most now be ranked amongst those countries, such as the USA or the Federal Republic of Germany, where the judicial resolution of controversies has become an integral part of the political process. It would accordingly be both natural - and tempting - for hardline Republicans, with probably some tacit sympathy from parts of Fianna Fáil, to challenge the Agreement which they would represent as a betrayal of the national aspiration to unity.

There is already a precedent in the challenge mounted against the Sunningdale Agreement by Mr Kevin Boland, a former Fianna Fáil Minister, in 1974. The Supreme Court held that the Declaration and other acts of the Irish Government at the Sunningdale Conference owed their existence to an exercise of the executive power of Government and that, in the circumstances, the Courts had no power under the Constitution to review the conduct or policy of the Government. But although Mr Boland was not granted the injunction he sought restraining the Irish Government from implementing its Agreement with the United Kingdom, two judges also indicated that if it had amounted to an Agreement on fact or principle (as opposed to amounting at most to de facto rather than a de jure recognition of Northern Ireland as part of the UK) it might have infringed Articles 2 and 3. This was quite enought to give ammunition to Dr Paisley and other opponents in Northern Ireland of the power sharing Executive that owed its existence to this Sunningdale accord.

Likelihood of Success

3. Only Irish lawyers could offer authoritative advice on the likelihood of an action succeeding. We have, however, sought the views of the Irish Government and Mr Nally has told our negotiators that the best legal advice available to them was clear that the proposed Agreement was constitutional. However, he did volunteer the constitutionality was a matter of careful wording: a change from "would" to "could" in Article 1(a) of the Draft Agreement might make the Agreement unconstitutional. (The Irish Government used "could" in the comparable section of the Sunningdale Declaration.)

4. Mr Nally has also, however, said that while the legal advice was clear, it would be wrong to claim that there was absolutely no risk of difficulty in the Courts - even though this risk, in the view of the Irish Government was very small.

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Should the Courts rule that the Agreement was unconstitutional, there would be a major political crisis in the Republic, and a high risk that the Taoiseach or the Government would be brought down. For this reason, he added that we could take it that the constitutional dangers had been very carefully thought through.

The Implications for the Implementation of the Agreement

5. The Irish have also told us that, if a Court action were brought against the Agreement, they expected a very quick ruling. The High Court, where the first application will be made, would give a judgement in a matter of hours and the Supreme Court, to which there would undoubtedly be an appeal, would follow within a few hours more. The Irish mentioned that they wished to get the Dail debate under way as soon as possible to avoid any delay being caused by a Court action. They say that they are "80-90 per cent" certain that the Speaker will allow a debate to proceed even if an action had already begun in the Courts. This expectation seems to be based both on the fact that the Court ruled against Boland in 1974 and, perhaps more important, because the Speaker now is a loyal friend of the Taoiseach. If a case was introduced or was pending after the vote in the Dail, the Irish Government would apparently still go ahead with the exchange of notifications of acceptance, and proceed to implement it.

6. We must expect that any Court action in the south will be exploited to the full by Unionists as evidence of Irish insincerity in their acceptance of the present constitutional status of Northern Ireland. They will also examine minutely how the Irish Attorney General argues his case that the Agreement is not unconstitutional.

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Another Possibility

7. The FCO Legal Adviser has pointed out that it is theoretically possible that the Irish Courts might generally be prepared to accept the rest of the Agreement as constitutional, while ruling that Article 1 was repugnant to the Constitution. Since, however, the whole point of that Article is to extract from the Irish Government a clear and unequivocal recognition of the current constitutional position of Northern Ireland as part of the UK, and the Irish Government could not ignore a judgement of its own Supreme Court, the Agreement would be useless to us and could not be allowed. The tactical handling of the process of bringing it to an end would need to be discussed in detail should the problem arise. We would probably want to rely on Irish breach or repudiation of an essential element rather than simply denouncing it ourselves.

Conclusions

8. If the Irish are right about the speed with which their Courts can deal with a case, an unsuccessful challenge is unlikely to be too damaging (though not without harmful potential). However, there is still the risk of the action succeeding, although small - and this would be ruinous for the Agreement and its implementation. We are not in a position to seek independent advice from Irish constitutional lawyers and have, therefore, to rely on the judgement of the Irish Government. The risks to them are high, and the best reassurance available to us is that it seems unlikely that they would be prepared to go ahead were the risks substantial. The FCO concur with this assessment.

9. We shall be submitting advice separately to you on the likelihood of a Unionist challenge in Northern Ireland or English Courts succeeding (including on the relevance, if any, of the Act of Union 1801 to the issue).

P N BELL

10 October 1985

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