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**Reference Code:** 2021/50/19

**Creator(s):** Department of Foreign Affairs

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Draft 1

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## Issues Paper: Constitutional Matters

1. This paper sets out the commitments made by the two Governments in *A New Framework for Agreement*, summarises the previous progress made in informal preparatory work between the two Governments on possible constitutional amendments (Irish side) and new constitutional legislation (British side), and seeks to list, very briefly, the issues which might now arise for re-consideration.

### Framework Document

2. Paragraph 20 of the Framework Document sets out the commitment of the British Government to a new approach for Northern Ireland, based essentially on the three pillars of consent, impartiality as between the two aspirations, and the absence of a selfish strategic or economic interest. It goes on to state "*This new approach for Northern Ireland, based on the continuing willingness to accept the will of a majority of the people there, will be enshrined in British constitutional legislation embodying the principles and commitments in the Joint Declaration and this Framework Document, either by amendments of the Government of Ireland Act 1920 or by its replacement by appropriate new legislation, and appropriate new provisions entrenched by agreement.*"
3. The commitments made by the Irish Government are set out in paragraph 2, which states that "*As part of an agreement confirming the foregoing understanding between the two Governments on constitutional issues, the Irish Government will introduce and support proposals for change in the Irish Constitution to implement the commitments in the Joint Declaration. These changes in the Irish Constitution will fully reflect the principle of consent in Northern Ireland and demonstrably be such that no territorial claim of right to jurisdiction over Northern Ireland contrary to the will of a majority of its people is asserted, while maintaining the existing birthright of everyone born in either jurisdiction in Ireland to be part, as of right, of the Irish nation. They will enable a new Agreement to be ratified which will include, as part of a new and equitable dispensation for Northern Ireland embodying the principles and commitments in the Joint Declaration and this Framework Document, recognition by*

*both Governments of the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its constitutional status, whether they prefer to continue to support the Union or a sovereign united Ireland.*

Preparatory Work

4. In the summer of 1994 representatives of both sides, in their negotiation of the constitutional aspects of the Framework Document, did some work on the precise wording of constitutional changes, and informally exchanged material. However, subsequent discussion in this group then focussed on the text of the Framework Document itself. Consideration seems briefly to have been given to whether wordings might be published alongside the Framework Document, but this option was not pursued.
5. The last informal proposal from the Irish side read as follows:

Article 2

*The national territory consists of the whole island of Ireland, its islands and the territorial seas, and is the shared inheritance of all the people of Ireland, in their diverse identities and traditions.*

Article 3

1. *Accordingly, the reintegration of the national territory, which is a primary legitimate national objective, shall be pursued only by peaceful and constitutional means, and shall be achieved, in a spirit of concord and reconciliation, only with the consent freely given of a majority of the people in each of the jurisdictions which exist within that territory.*
2. *Pending the achievement of the objective above referred to, the laws enacted by the Parliament and the executive powers of the Government shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect.*

6. The Irish side also produced a possible re-draft, based substantially on the language of paragraph 4 of the Joint Declaration, of section 75 of the Government of Ireland Act 1920. This appears to have reflected the firm preference of the then Taoiseach, for political/symbolic reasons, that the Act be amended rather than wholly repealed. The British, for their part, indicated at official level a personal preference for repeal rather than amendment, arguing that substantial new constitutional legislation would in any event be required and that it would be neater to consolidate all relevant provisions. They prepared two non-papers on new constitutional legislation - the later, from November 1994, is annexed.
7. Following the change of Government in December 1994, but before the publication of the Framework Document, the Attorney General, in correspondence with the Department, expressed some concerns, from a legal perspective, about the clarity of the term "territorial claim of right to jurisdiction over Northern Ireland" as in paragraph 21, suggesting that territorial and jurisdictional claims were of a different order. He also said that, on the reasoning of Chief Justice Finlay in the McGimpsey case (which he evidently did not share), it was arguable that even the amended version of Article 2 suggested by the Irish side involved a territorial claim as a matter of legal right. (This view had not been taken by his predecessor, Eoghan Fitzsimons).
8. It is noteworthy in this regard that in his statement to the Dáil following the publication of the Framework Document the Taoiseach used a formulation somewhat different from that in the Document itself: he spoke of an immutable political commitment "to remove any jurisdictional or territorial claim of legal right over the territory of Northern Ireland contrary to the will of the people of Northern Ireland [sic: not "the will of a majority of its people"]." He repeated this in the Forum's debate on constitutional issues (May 1995).

Amendment of the Constitution: Issues for Consideration

9. Any amendment to the Constitution must therefore satisfy a number of requirements:
- (a) it must fully reflect the principle of consent
  - (b) it must demonstrably be such that no territorial claim of right to jurisdiction over Northern Ireland contrary to the will of a majority of its people is asserted
  - (c) it must maintain the existing birthright of everyone born in either jurisdiction to be part as of right of the Irish nation.
  - (d) it should allow for the ratification of a new Agreement recognising the legitimacy of whatever choice is exercised by a majority of the people of Northern Ireland with regard to its constitutional status.
  - (e) presumably - though this is not specified in para. 21 of the Framework Document - it should also ideally reiterate a commitment to exclusively peaceful and democratic means.
10. The 1994 draft clearly seems to meet criteria (a), (c) and (e) above. The Attorney General's initial view puts (b) - and consequently (d)? - in some doubt. Politically, any doubt would be highly damaging vis-a-vis both the British and the Unionists.
11. A softer formulation considered in 1994 - but kept in reserve - was

Article 2

*The whole island of Ireland, its islands and the territorial seas belong as a shared inheritance to the Irish nation in its diverse identities and traditions.*

The removal of any reference to the national territory would have necessitated a consequential change to the start of the new Article 3.1, as follows:

*“Accordingly, the achievement of a sovereign reunited Ireland...”*

12. This formulation might cause difficulties in relation to the “birthright” criterion, “c” above, with political consequences on the nationalist side of the equation. As a minimum it would require the amendment of the 1956 Irish Nationality and Citizenship Act, which relies on the definition of the national territory contained in Article 2.
  
13. While these are the central issues which arise for consideration, other amendments to the Constitution which could be considered are briefly listed - a fuller discussion could be essayed:
  - Preamble: there are terminological inconsistencies which could be sorted out: *“We the people of Eire..”* (compare *“The Irish nation”* in Article 1). The religious and historical references are perhaps anachronistic. No qualifications are placed on how the *“unity of our country”* is to be *“restored.”*
  
  - Article 1: Might the “Irish nation” be defined - *“the people of Ireland”*?
  
  - Article 4: *“The name of the state is [The Republic of] Ireland, or in the Irish language, Éire [Poblacht na hÉireann].”*?
  
  - Article 9: A persuasive case could be made, particularly in the event of a more substantial change in Article 2, for the incorporation of an explicit statement that any person born in Ireland shall be a citizen of Ireland. This would directly answer the nationalist fear that their birthright to citizenship could be compromised. It could be copper fastened by mutual recognition in a new Anglo-Irish Treaty of the two states’ complementary citizenship laws.
  
14. On the other hand, changes not strictly necessitated by our Framework Document commitments, no matter how objectively desirable, could provoke confusing and

diversionary debate.

15. As mentioned by then Secretary Dorr in 1994, and as suggested in our issues paper on North/South institutions, an EU type amendment to either Article 6 or Article 29 would also be required to allow for the ratification of an agreement establishing institutions with executive or judicial powers.

#### Possible Approach

16. The following language is tentatively suggested as a possible basis for discussion should the 1994 text be felt to be inadequate or incomplete:

#### *Article 2*

*The whole island of Ireland, its islands and the territorial seas belong to the people of Ireland in their diverse identities and traditions."*

"People of Ireland" seems to fit better with current usage than "Irish nation." It echoes "the people of Eire" in the Preamble.

#### *Article 3.1*

*Accordingly, the achievement of a sovereign united Ireland, which is a primary and legitimate objective of a majority of the people of Ireland, shall be pursued only by peaceful and constitutional means, and shall be achieved, in a spirit of concord and reconciliation, only with the consent freely given of a majority of the people in each of the jurisdictions which exist within Ireland.*

"United", in keeping with the Framework Document, replaces "Reunited." "National" is removed and replaced by "a majority of the people of Ireland".

#### *Article 3.2*

*Pending the achievement of the objective above referred to, the laws enacted by the Parliament and the executive powers of the Government shall have the like area and*

*extent of application as the laws of Saorstát Éireann and the like extra-territorial effect.*

Article 9.2

*Any person born in the whole island of Ireland or its islands, or on the territorial seas, shall hold Irish nationality and shall be a citizen of Ireland. The acquisition otherwise of Irish nationality and citizenship, and its loss, shall be determined by law.*

British Constitutional Legislation

17. No immediate further work seems to be required in the short term. We shall in due course need to decide whether to press for the amendment or the repeal of the 1920 Act: the latter might have a certain “clean break” logic. We shall need to consider carefully whether what is proposed by the British offers a true balance and whether it respects the substance and the spirit of their Framework Document commitments, in particular as regards the recognition of the unique absence of consensus which is the basic constitutional reality.

Further Work

18. At present the priority should be an early meeting with the Taoiseach’s Department and the Office of the Attorney General. The 1994 text as handed over to the British could form the initial basis for discussion.

Research Unit

16 May 1996