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Reference Code:	2017/10/75
Creation Dates:	16 November 1987
Extent and medium:	5 pages
Creator(s):	Department of the Taoiseach
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Roinn an Taoisigh
Department of the Taoiseach

Handwritten notes:
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19.11.87
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16 November 1987.

Mr Matthew Russell
Senior Legal Assistant
Office of the Attorney General.

Dear Matt

In referring to your letter of 3rd November about McGimpsey and McGimpsey v Ireland and Others, I enclose some preliminary thoughts on the plaintiff's statement of claim which you sent me.

In a lot of what I have said, I have telescoped things. If you would like any elaboration please get in touch.

I think that it is highly important that the defence should be cleared at political level before it is entered.

Yours sincerely

Dermot Nally

Dermot Nally
Secretary to the Government.

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Revised

ROINN AN TAOISIGH

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F. 2.

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McGimpsey and McGimpsey v Ireland and Others

1. The core of the arguments against the Agreement seems to be as stated in paragraphs 6, 7 and 8 of the statement of claim viz.

- (1) it establishes a framework through which the foreign relations power of the State must be exercised in respect of the United Kingdom - and is therefore contrary to Article 29 of the Constitution in that it restricts the State's freedom of action in foreign relations;
- (2) it purports to acknowledge the sovereignty of the Government by the United Kingdom over a portion of the national territory and is therefore contrary to Articles 2 and 3 of the Constitution. This is developed in the further argument that "it purports to leave the determination of the issue of the re-integration of the national territory to the majority of the people in Northern Ireland rather than to the people of the national territory as a whole"; and
- (3) insofar as it confirms the present legislative and executive structures in Northern Ireland it is repugnant to Articles 3 and 5 of the Constitution.

On the question of whether the Agreement establishes a framework through which the foreign relations power of the State must be exercised, there is nothing in the Agreement to support this argument. Article 2 says that an Anglo-Irish Inter-governmental Conference is established and that it is "concerned with Northern Ireland and with relations between the two parts of the island of Ireland, to deal, as set out in the Agreement, on a regular basis with "the matters listed in the Article".

This is a very far cry from saying that the only way in which matters concerned with Northern Ireland or with relations between the two parts of the island can be dealt with is through the Conference. All the Article is doing is to register an agreement between the two Governments to establish a body to deal with certain matters. This is not to say that these or any other matters must be dealt with in this way. In fact, the same Article says explicitly that the Agreement does not derogate from the sovereignty of either the Irish Government or the United Kingdom Government, and that each retains responsibility for the decisions and administration of government within its own jurisdiction. These include decisions relating to foreign relations.

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To argue otherwise would be to argue that the Conference has executive powers. Clearly, it has not. What it does is to provide a vehicle through which the Irish Government may put forward "views and proposals" - and through which "determined efforts" will be made to resolve "any differences". This is not in any sense the exercise of an executive power of Government. N <

The view that the Conference is not a framework through which foreign relations must be exercised is borne out by what happens in practice. The Prime Minister and the Taoiseach meet at least twice a year, and often more frequently, and deal extensively "with relations between the two parts of the island" and with the other matters listed in the Article. These meetings cannot be described as meetings of the Inter-governmental Conference. Yet they deal precisely with the matters listed as being within the purview of the Conference and many other matters.

Similarly, other Ministers and Ministers of State meet from time to time, outside the framework of the Conference, to discuss items of mutual concern, including cross-border co-operation and the administration of justice.

This is not to take away from the importance of the Conference, which is a mechanism established, formally, under the Agreement, for the orderly conduct of business, in a way agreed between the two Governments as being most likely to conduce to good relations and to progress in one of the most intractable problems facing them. It is not an inhibition or a qualification of either Government's freedom of action. It is a use - and an enhancement - of that freedom.

Examples of meetings at Prime Ministerial, Ministerial and official level outside the framework of the Anglo-Irish Conference can be produced, to illustrate the point that, though the Conference is important and conducts a great deal of business, its existence does not inhibit, qualify, or restrict the State's freedom of action in this area: and that the Conference is not an executive organisation.

On the question of whether the Agreement acknowledges the sovereignty of the Government by the United Kingdom over a portion of the national territory, the statement of claim refers to Articles 1 and 2(b) of the Agreement.

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Article 1 says that the two Governments affirm that any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland. Nowhere in the Agreement is there a definition of the status referred to in this Article. There is, however, the clear statement, in Article 2, that the Agreement contemplates no derogation from the sovereignty of either the Irish Government or the United Kingdom Government. Therefore, the Agreement can only be taken to mean that whatever the status referred to in Article 1 is, the Agreement does not purport to change it in any way, insofar as the sovereignty of either Government is concerned.

Both Governments approach the question of status from differing historical perceptions and within different constitutional frameworks. The Agreement does not change that. What it does is to start from the existing de facto position, however defined, and say that certain mechanisms and concerns may, by agreement between the two Governments, be dealt with in a certain way so as to diminish divisions, achieve lasting peace and harmony and attain the other objectives set out in the text. The Agreement is also simply stating what the Government's recognise to be the factual position that change in status, however defined, would - not "shall" or "may", which would have an entirely different meaning - only come about with the consent of a majority of the people of Northern Ireland. The Agreement is concerned with the future and how two Governments agree that in their common interest they might conduct dialogue. It is a statement of policy, principle, and intention as to future behaviour, which each accepts, to guide them in their relationship with each other.

Articles 4(b) and 5(c) which deal with devolution, are statements of fact, that it is the declared policy of the United Kingdom to intend to secure devolution on a basis which would secure widespread acceptance throughout the community. The acceptance of the Irish Government of this policy, or declaration of policy, is an executive act of government of a sovereign, independent, and democratic state - differing in no way from any other act of government here.

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If the above arguments are accepted, then I would suggest that paragraph 12 of the draft defence might be changed to read to read:-

- "12. The Government have not, in Article 1 and 2(b) of the Agreement or in Article thereof, purported to bring sovereignty into question. In fact, Article 2 says

"There is no derogation from the sovereignty of either the Irish Government or the United Kingdom Government, and each retains responsibility for the decisions and administration of Government within its own jurisdiction."

13. Article 1 of the said Agreement does not have the effect attributed to it by the final sentence of paragraph 7 of the Statement of Claim. It is rather a ~~statement of policy and~~ an assessment of the Government's position that change in status, however, defined, would - not "shall" or "may" which would have an entirely different meaning - only come about with the consent of a majority of the people of Northern Ireland."



Dermot Nally

16 November 1987.

Copy to:

Mr. Noel Dorr, Secretary, Department of Foreign Affairs

If you like, we could have a word on this.

16 November 1987.