

CONSTITUTIONAL BACKGROUND TO AND ASPECTS OF THE GOOD FRIDAY AGREEMENT - A REPUBLIC OF IRELAND PERSPECTIVE¹

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As is well known, the proposal contained in the 19th Amendment to the Constitution Bill was approved by the people on the 22 May 1998 by a margin of 1,442,583 votes to 85,748. It was promulgated by the President as a Law pursuant to Article 46.5 of the Constitution on the 3 June 1998. Since that date, we are in a unique constitutional position where the original Articles 2 and 3 remain in the Constitution but Article 29 has been amended. That amendment contains within it new Articles 2 and 3 which on the happening of a certain event - the declaration by the Government that the State has become obliged pursuant to the Agreement to give effect to the amendment of the Constitution, then those new Articles 2 and 3 which are contained in the capsule of Article 29 sub-section 7 will slip into place displacing the old Articles 2 and 3. If the declaration is not made within 12 months of the 3 June 1998, or such longer period as may be provided for by law, the new Article 29 will itself fall out of the Constitution. Whichever is the outcome, we find ourselves now in a constitutional position where the perspective is unique and which provides a particularly interesting vantage point to consider the constitutional changes which have occurred and are due to occur. There are, I think, three different aspects of the amendment which I would like to address briefly under the following headings:-

- (i) Mechanics;
- (ii) Institutional provisions;
- (iii) Substantive amendments of Articles 2 and 3.

MECHANICS

The amendment is a conditional one, which by its terms, provides that when the Government makes the requisite declaration then *“notwithstanding Article 46 hereof, this Constitution shall be amended as follows”*.

In other words, the amendments to Articles 2 and 3, if and when they take place, will occur not by the mechanism created by Article 46 but rather under a mechanism approved by the people in an amendment which itself complied with Article 46.

This raises an interesting point. Is there any limit to the amending power of the Constitution? Are there provisions of the Constitution beyond the amending power, and if so, is Article 46 one of those provisions? Given the constitutional history, this is not an unstatable argument. The Irish Free State Constitution was originally intended to be capable of amendment by ordinary legislation for a limited time. However, that provision was used to amend the amending power itself and extend indefinitely the power to make amendments by ordinary legislation. This

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is widely regarded as one of the weaknesses of the 1922 Constitution. *The State (Ryan) v Lennon* [1935] IR 170 is a well known case concerning the drastic amendment of the 1922 Constitution by the insertion of a new Article 2A. It is also well known for the passionate dissent by Chief Justice Hugh Kennedy, one of the foremost drafters of the 1922 Constitution. In its tone and approach, the dissent is much closer to the more modern approach to constitutional interpretation and, indeed, it has been argued that in many ways, the Chief Justice's dissent is now the law. Because of the concentration on the natural law flavour of his dissent, it is often forgotten that one of the central points of his judgment was the contention that the amending power was not capable of amendment. It is noteworthy that the transitory provisions of the 1937 Constitution provide by Article 51 that power to amend the Constitution by ordinary legislation during the three years of its life does *not* apply to Article 46.

This argument was available but never really explored in the litigation commenced by Mr Denis Riordan and decided by the High Court on the 20 May 1998 and substantially by the Supreme Court on the 19 November 1998 (in the judgment of Barrington J). It might have been argued that the correct theoretical response was that while there was nothing to prevent the 19th Amendment to the Constitution, nevertheless, there may be some limitation on the amending power in that certain fundamental provisions or the fundamental structure of the Constitution could not validly be altered under guise of an amendment. This is an argument which has succeeded in India.² I must say, I do not agree, but in any event, I think the High and Supreme Courts were absolutely correct not to explore the theory and instead to give such a clear unambiguous and peremptory response which will presumably discourage further attempts to challenge or interfere with referenda. There is something unnerving when the court proceedings themselves become an actor in the political drama, such as for example, when the *McKenna* judgment emerged shortly before the Divorce Referendum and itself became part of the debate and its effect measured by opinion polls. It is too tempting for participants or would be participants in Referendum campaigns to seek some advantage and/or publicity by court challenge. In reality, such challenges are, I think, inconsistent with the primacy of the role of the people in a Referendum and such forays should, I think, be firmly discouraged.

INSTITUTIONAL PROVISIONS

There are two provisions in the amendment dealing with institutional matters. Article 29.7.2 contains the following provision:

“Any institution established by or under the Agreement, may exercise the powers and functions thereby conferred on it in respect of all or any part of the Island of Ireland notwithstanding any other provision of this Constitution conferring a like power or function on any person or any organ of state appointed under or created or established by or under this Constitution. Any power or function conferred on such an institution in relation to the settlement or resolution of disputes or controversies may be in addition to or in substitution for any like power or function conferred by this Constitution on any such person as aforesaid”.

² (See Whelan - Constitutional Amendments in Ireland: *The Competing Claims of Democracy in Justice and Legal Theory in Ireland* (ed Quinn, Ingram and Livingstone); and see also Kelly, *The Irish Constitution*, (3rd Edition), 683 and *Kesavananda's Case* (1973) ASC 1461.

Sub-section 2 of the proposed Article 3 contains the following provision:-

“Institutions with executive powers and functions that are shared between those jurisdictions may be established by their respective responsible authorities for stated purposes and may exercise powers and functions in respect of all or any part of the Island”.

There is clearly an element of duplication here. This may be attributable simply to a process of drafting by incorporating suggestions and text from different sources. However, a number of observations might be made. First, it is clear that Article 29.7.2 relates to institutions “established by or under the Agreement” i.e. the British/Irish Agreement to which the State may consent to be bound by virtue of Article 29.7.1. On the other hand, there is no such qualification in the proposed Article 3.2 which permits at any stage and pursuant to any agreement the establishment of “institutions with executive powers and functions that are shared between those jurisdictions”. The reference to “those jurisdictions” refers back to the provision of the new Article 3(1), which refers to the majority of people “... in both jurisdictions in the Island”. This is as close as the Constitution comes to referring to Northern Ireland. There is one further thing to be noted in respect of Article 29.7.2. The cumbersome language is designed to ensure that powers and functions conferred by the Constitution on certain persons or organs may, pursuant to the Agreement, be conferred on other persons or organs. If this interpretation is correct, then it seems to permit the exercise of legislative/executive and judicial powers by institutions created “by or under the Agreement”. The most significant matter to be observed, however, from these provisions is, I think, somewhat different. As was observed by Barrington J at paragraph 7 of his judgment in the *Riordan* case:-³

“Cross Border Bodies contemplated by the Belfast Agreement would exercise some of the powers formerly exercised by institutions established by the Constitution and that therefore, an amendment to the Constitution to authorise the Government to become bound by and to implement the Belfast Agreement was necessary”.

It was, I think, popularly assumed that the only constitutional amendment necessary was the amendments of Articles 2 and 3. However, the working of the Good Friday Agreement requires something more. While cross border bodies were widely referred to as exercising powers within Northern Ireland (and criticised or welcomed, according to the perspective of the speaker), what this amendment makes clear is that any such exercise of power and consequent subtraction from the administrative independence of Northern Ireland, only occurs in the context of an equal and opposite interference with or subtraction from the administrative independence of the Republic. This is, I think, from a Northern Nationalist perspective, both impressive and somewhat humbling. In her book, *In search of a State: Catholics in Northern Ireland*⁴ Fionnuala O'Connor records the mutual disenchantment between Northern Nationalists and the South, but these provisions of the Constitution show that when it came to a decision, the Administration in the Republic overwhelmingly endorsed by its people, was prepared, not only to shoulder the burden of becoming involved in the affairs of Northern Ireland, but to permit participation from the North in the affairs of the Republic.

³ Unreported 19 November 1998.

⁴ Blackstaff Press 1993.

SUBSTANTIVE AMENDMENTS OF ARTICLES 2 AND 3.

As I have already observed, we are now in a unique constitutional position where Articles 2 and 3 remain in the Constitution but their successors are also in the Constitution. Barrington J put it, "in the form of an escrow".⁵ As the title of this talk suggests, to understand the constitutional changes, it is necessary, I think, also to understand the constitutional background.

Articles 2 and 3 are, I suspect, reasonably unique in that they were probably more discussed outside the jurisdiction than within it. When I came to read Articles 2 and 3 and then subsequently to study them, they were something of a disappointment to me. They could never live up to the advance billing provided for them by their Unionist critics. If they are looked at solely as law calling for legal interpretation, then I think they make dispiriting reading for lawyers, because of the difficulty of coming to grips with them. In this respect, I do not think that I am alone. In fact, I would suggest that of all the articles of the Constitution which have been subjected to sustained judicial analysis, the cases on Articles 2 and 3 have the dubious distinction of being the least satisfactory.

It is well known that unlike the 1922 Constitution, the 1937 Constitution was not drafted by lawyers. Its principal architect was Eamon de Valera himself, and it is a work of impressive subtlety. De Valera was, I think, fully aware that this was a document which would have legal consequences and would be subjected to subsequent legal analysis and application, something he regarded as an undesirable though unavoidable consequence of the enactment of the Constitution.

Its origins show that the Constitution is a document which is political in the sense that it expresses political philosophy but is also intended to have legal effect. In my view, however, that does not mean that it is a legal document like any other and that we should apply the same principles to it as we do to the interpretations of say, contracts or leases. To properly and sensitively interpret the Constitution, I think that we must be alive to its political origins - by that I mean origins in political philosophy - and that it is something quite different from an ordinary legal document. Despite the common criticism of lawyers and legalese, I think that in most cases, lawyers want to draft documents to achieve supremely practical results: to seek to lay out as clearly as possible the intention of the parties and the practical consequences which are designed to follow a series of foreseeable events and to do so by reference to a prediction of how a court will apply the provisions in fact. The Constitution is, I think, significantly different. It certainly seeks to express common intention which must be discerned by the technique of the constitutional interpretation, but it is not particularly or primarily intended to predict or determine in advance, how certain events will be dealt with. In some sense, a Constitution is therefore less and at the same time, much more than another legal document. It is an unremarkable insight to suggest that Constitutions are different but I would suggest that sometimes lawyers and judges do not always approach the Irish Constitution with a consciousness of this difference. In many cases, we readily see the law and do not always see or appreciate the political philosophy or the social science. There are, I think, a number of reasons for this. Apart from the predisposition of lawyers to apply familiar techniques to the task of interpretation, there are also historical considerations. For the early years of its life, the Constitution was virtually ignored as an instrument capable of having legal effect. It was regarded as all political philosophy and no law. That

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⁵ *Riordan v An Taoiseach Bertie Ahern*, unreported 18 November 1998.

misapprehension has been comprehensively dispelled, but there is, I think, a danger, discernible in the cases of Articles 2 and 3, of overcorrection, and a implicit assumption that the Constitution is *only* law.

First, I would suggest that Articles 2 and 3 are not addressed primarily, or at all, to the people in the North. Instead, I suggest that they were principally directed towards a Southern audience, although undoubtedly heard and having some quite considerable effect in the North. Professor Tom Garvin's book, *1922 The Birth of Irish Democracy*⁶, studies different aspects of a momentous year when somewhat like today, there was a sense of fluidity, possibility and unpredictability. He suggests at one point⁷ that the differences between the sides which ultimately became the civil war protagonists, can be described as a difference between "republican moralism" on the one hand and "nationalist pragmatism" on the other. In a very real sense, the different sides spoke mutually incomprehensible languages leading to a contemptuous dismissal of the views of the other side. Significantly, as Professor Garvin observes - "de Valera could speak both of these political languages". I would tentatively suggest that Mr de Valera was doing just this when he came to draft Articles 2 and 3. Articles 2 and 3 sound like pure republican moralism but when one looks at the business end of the articles, the aspect which is intended to have some legal effect, they are pure nationalist pragmatism: the laws enacted by the Dail are to have the same area and extent of application as the laws of Saorstát Eireann. To the mathematician's mind to say thirty two minus six is to say precisely the same as twenty six, but Mr De Valera may not have cared, or more possibly quite liked, the fact that people when confronting that calculation, focused on and heard the reference to thirty two. I would also suggest that De Valera did not see the rhetorical aspects of Articles 2 and 3, the republican moralist parts, as intended to have future *legal* consequences. They were not the first word, but rather the final word. From his point of view, I think, they were happy and subtle reconciliation of his constituency of republican moralists with the demands he was facing of nationalist pragmatism.

In fact, Articles 2 and 3 were, in one sense, the last word for some considerable time and were not subjected to any significant legal analysis until the 1970s and 80s when three cases made their way to the Supreme Court arising out of the Sunningdale and Anglo Irish Agreements respectively. The first was *Boland v An Taoiseach*.⁸ In those proceedings, the plaintiff sought a declaration that the signing of any formal or informal agreement in the terms of the Sunningdale communiqué would be repugnant to the Constitution of Ireland and sought an injunction restraining the Government from implementing any part of the communiqué or entering into any agreement which would limit the exercise of sovereignty over any portion of the national territory or which would prejudice the right of the Parliament and Government of Ireland to exercise jurisdiction over the whole of the national territory. This focused attention directly on the second clause of Article 3: "without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory". The answer the Supreme Court gave to this challenge was not entirely satisfactory, that is, that the Sunningdale Declaration was an exercise of executive power and could not be reviewed. The Chief Justice, Fitzgerald J observed:-

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⁶ Gill & McMillan 1996.

⁷ p 145.

⁸ [1974] IR 338.

“Consequently in my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise of the Government of its executive functions unless the circumstances are such to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution”.

This of course, as the late Professor Kelly observed, really avoided the question, since the plaintiff’s claim was that the exercise by the Government of its powers was precisely a “clear disregard by it of its powers and duties conferred upon it by the Constitution”. However, I sympathise with the instinct of the Court in that case to avoid, if at all possible, becoming involved in a political controversy and I think that instinct is itself noteworthy.

More significant, for our current purposes, is the judgment of the then President of the High Court, O’Keeffe J. Just as the Chief Justice has been critical of Counsel for the plaintiff, O’Keeffe J’s judgment expresses some impatience with Counsel for the State, saying:

“During the course of the argument, I sought to obtain from Counsel for the Defendant, some expression of view as to what it [i.e. the *communiqué*] meant, but Counsel gave the Court no assistance as to how the Court should construe it”.

I think that on rereading this judgment, it struck me how differently one reads judgments as a practitioner than as a law student. Counsel for the State, was the late T.K. Liston SC and the cat and mouse exercise described here would, I think, have made fascinating viewing. Mr Liston’s position was not simply obtuse; it was instead, I think, a careful and intelligent tactic. This was a matter of enormous political sensitivity. Faced with an unpredictable court, anything said could have had unforeseen consequences. The only sensible course was to circle the wagons and wait for the storm to blow itself out. There is, I think, a hint of judicial frustration in the next sentence where O’Keeffe J expresses his own view:-

“An acknowledgement that the Government of the State does not claim to be entitled as of right to jurisdiction over Northern Ireland would, in my opinion, be clearly not within the competence of the Government having regard to the terms of the Constitution”.

It is not so much the content of this sentence but rather the fact that it was delivered at all, with its hint that the Government might be about to make such acknowledgements that contains, I think, an element of republican moralism revisited.

However, a significantly different view was expressed by the Supreme Court in an Article 26 reference on the terms of The Criminal Law (Jurisdiction) Bill, 1975⁹ which was enacted in order to give effect to part of the Sunningdale Agreement. The argument of Counsel assigned by the Court (Colm Condon SC, Donal Barrington SC and Hugh O’Flaherty BL), was ingenious. The State could not legislate for offences occurring in Northern Ireland because, although it had asserted a general right under Article 3, it had expressly withdrawn from that right by the terms of Article 3 “*pending the reintegration of the national territory*”. Counsel for the Bill, the then Attorney General, Declan Costello SC, Rory

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⁹ *In Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] IR 129.

O'Hanlon SC and John Cooke BL (as they all then were), implicitly accepted this argument, but contended that the right to legislate came, not from the second Clause of Article 3 but from the final clause, that the laws enacted by the Parliament would have the like extra-territorial effect as the laws of Saorstát Éireann. If it was possible for Saorstát Éireann to legislate with extra-territorial effect, then it was also possible for the Dail. This argument was accepted but the Supreme Court¹⁰ also took the opportunity of advancing a subtle interpretation of Articles 2 and 3 in a passage commencing with the words:-

“Articles 2 and 3 can only be understood if their background of law and political theory is appreciated”

The court went on:-

“One of the theories held in 1937 by a substantial number of citizens was that a nation, as distinct from a state, had rights: that the Irish people living in, what is now called the Republic of Ireland and in Northern Ireland, together form the Irish Nation; that a nation has the right to unity of territory in some form, be that as a unitary or federal state; and that the Government of Ireland Act, 1920, though legally binding, was a violation of that national unity which was superior to positive law”.

Significantly, in my view, the Supreme Court went on then to state:-

“The National claim to unity exists not in the legal but in the political order and is one of the rights which are envisaged in Article 2; it is expressly saved by Article 3 which states the area to which the laws enacted by the Parliament established by the Constitution apply. The effect of Article 3 is that, until the division of the Island of Ireland has ended, the laws enacted by the Parliament established by the Constitution are to apply to the same area and have the same effect of application as the laws of Saorstát Éireann had. The area to which the laws of Saorstát Éireann applied was, having regard to the Articles of Agreement of 1921 and the Act of 1925 is unquestionably the area now known as the Republic of Ireland”.

The significant sentence there was the one which identified the national claim to unity as existing “*not in the legal but in the political order*”. This was a theme taken up by a member of that Court, speaking extra judicially, when delivering the MacDermott Lecture in Queen's University, Belfast on the 9 November 1978¹¹. Mr Justice Kenny's topic was the advantages of a written Constitution incorporating a bill of rights, but he also took the opportunity of expressing his views on what he described as a controversial matter. He stated that to understand Articles 2 and 3, it was necessary to deal with the “*political (but not legal) concept of a nation and the political doctrines of Irish Nationalism*”. He described nationalism as:-

“Essentially a doctrine of the heart and not of the intellect. Those who hold it, brush aside all intellectual arguments against it. Because it is a doctrine of the heart and is therefore passionately held, adherents do not think it is important that they find considerable difficulty in answering questions as to how one becomes a member of the nation and how and when one ceases to do so”.

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¹⁰ O'Higgins CJ, Finlay P, Griffin, Kenny and Parke JJ.

¹¹ 1979 (30) NILQ, 189.

Mr Justice Kenny set out what he described as four of the fundamental doctrines of Irish Nationalism, repeating the analysis of the Criminal Law Jurisdiction Bill judgment and went on:-

“I want to emphasise that these beliefs are in the political and not in the legal order. Article 3 was intended to be and is a statement of political belief and not of law: the right of the Parliament established by the Constitution to exercise jurisdiction over the whole of the island which is referred to in article 3, is not a claim to a legal right to do this. It is the expression of a right which has its sole origin in the political doctrine of Irish nationalism. When the people enacted the Constitution, they did not make a legal claim that the Parliament and Government established by the Constitution had any legal powers under international or national law to exercise any power over Northern Ireland”.

This theme was taken up in a speech of great subtlety and interest, given by the (by then) Mr Justice Donal Barrington in 1988 as part of the Thomas Davis Lectures on RTE¹². He referred to *the Criminal Law Jurisdiction Bill* case (although perhaps significantly, not to *Boland v An Taoiseach*) and to Mr Justice Kenny’s paper. He stated:-

“the point is that while these doctrines of political nationalism are reflected in article 2 of the Constitution, the Constitution is primarily concerned with the establishment of a parliament and system of Government, and that that parliament, whatever the creeds of Irish nationalism, is expressly prohibited from attempting to legislate for Northern Ireland until such time as the partition problem has been resolved”.

He also made the important point that the Constitution does not purport to be a treaty or a document of international law. He identified as particularly significant the terms of Article 29 of the Constitution which had hitherto been ignored in the context of Articles 2 and 3. It was, as he said, of some significance that in 1936 when the Constitution was being drafted, Mr de Valera was President of the League of Nations and the language of Article 29 is clearly derived from the covenant of the League of Nations, in particular, Article 29.2 which reads:-

“Ireland affirms its adherence to the principle of the Pacific settlement of international disputes by international arbitration or judicial determination”.

Under this analysis, it is entirely appropriate, therefore, that Article 29 is the vehicle chosen to hold the proposed new Article 29.

As Barrington J pointed out, the 1925 Boundary Agreement was a treaty registered with the League of Nations. Accordingly, if the Constitution was to be viewed as a claim to be settled by international arbitration, it would not be difficult to predict the outcome of such an international arbitration, he went on to observe:-

“It is for these reasons that I suggest that the national claim made in article 2 is, for all purposes, of domestic and international law, withdrawn in article 3 until such time as the unity of our country is restored. The formula contained in Articles 2 and 3 is, I suggest, a subtle one in which

¹² Barrington, *The North and the Constitution in de Valera’s Constitution and Ours*. Ed Brian Farrell - Gill & MacMillan.

Mr De Valera has combined nationalist ideals with common sense and political caution in a manner not untypical of the man”.

Barrington J suggested that in fact, the Constitution committed the State to seek a peaceful method of reunification of the country. He concluded his lecture by suggesting that the formulation of policy in relation to any possible solution to the Northern Ireland problem, is “*under our Constitution a matter for the Government*”. There is nothing in Articles 2 or 3 he suggested:-

“To inhibit the Government in its quest for an interim solution, provided that the aim of ultimate national unity is preserved. If at any time the question of setting up any form of All Ireland Body exercising executive, legislative or judicial powers should arise, a Constitutional Referendum would be necessary, but if that were to happen, we would be on the road to an ultimate solution”.

There the matter lay, until the Anglo Irish Agreement of the 15 November 1985. The Agreement was challenged in the Irish Courts by Christopher and Michael McGimpsey. One of the arguments they made (although not the best argument) was that the Government’s recognition that the status of Northern Ireland could only be changed with the consent of the majority of the population of Northern Ireland, was contrary to the provisions of the Constitution of Ireland, 1937. They contended that to recognise the present status of Northern Ireland violated Articles 2 and 3 of the Constitution. This was, I think, their political argument. Their better legal argument was that the Secretariat established restricted the Government’s exercise of the external relation powers of the State and required a constitutional amendment.¹³

As luck would have it, the matter was heard in the High Court by none other than Barrington J. As bad luck would have it, both sides contended that Articles 2 and 3 amounted to a claim as of legal right, to jurisdiction to legislate with effect for Northern Ireland. Barrington J, however, took the opportunity of advancing the analysis developed in his lecture and that of Kenny J and derived ultimately from the decision in the *Criminal Law Jurisdiction Bill, 1977*, and which after all, was the then authoritative view of the Supreme Court. He rejected the plaintiff’s claim and the matter was appealed to the Supreme Court. Before the Supreme Court appeal was heard, Mr Justice Costello decided *McGlinchey v Ireland and the A.G. (No. 2)*¹⁴ and repeated and endorsed the construction of the Articles first advanced in the *Criminal Law Jurisdiction Bill* case observing - “*this claim to unity exists in the political and not in the legal order*”. There was thus an impressive, line of authority on this point by the time the Supreme Court decided the appeal in *McGimpsey*.

The Supreme Court¹⁵ upheld the decision of the High Court but adopted a significantly different analysis. The judgment of Finlay J was joined by Walsh, Griffin and Hederman JJ. In one sense, the simple answer to this aspect of the case was that given by both Barrington J and Finlay J in their respective judgments, that is, that an agreement recognising that the change in the status of Northern Ireland was something that requires the consent of the majority of the people of Northern Ireland, was not only not inconsistent with the Constitution but was compatible with the obligations

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¹³ Relying on *Crotty v An Taoiseach* [1987] IR 713.

¹⁴ [1990] IR 220.

¹⁵ Finlay CJ, Walsh, Griffin, Hederman and McCarthy JJ.

undertaken by the State in Article 29 Sections 1 and 2, whereby Ireland affirmed its adherence to the principles of pacific settlement of international disputes.

However, Finlay J went on to deal with the theoretical argument as to the status of the claim to unity. He stated:-

“I am not satisfied that the statement that this national claim to unity exists not in the legal but political order and is one of the rights which are envisaged in Article 2, necessarily means that the claim to the entire national territory is not a claim of legal right”

He declined to follow the decision in the *Criminal Law Jurisdiction Bill* case and set out that the true interpretation of the Constitutional provisions was as follows:-

- (i) The reintegration of the national territory is a constitutional imperative quoting Hederman J's (dissenting) judgment in *Russell v Fanning*;¹⁶
- (ii) Article 2 of the Constitution consists of a Declaration of the extent of the national territory as a claim of legal right;
- (iii) Article 3 of the Constitution prohibits, pending the reintegration of the national territory, the enactment of laws of any greater extent than that of the laws of Saorstát Eireann;
- (iv) The restriction imposed by Article 3 in no way derogates from the claim as a legal right to the entire national territory.

The arguments so carefully elaborated from the decision of the Supreme Court in the *Criminal Law Jurisdiction Bill* is here dismantled quite peremptorily. It is possible, I think, to suggest that the *McGimpsey* judgment in this regard, is an example of the weakness that I have referred to earlier. The Constitution is treated as a purely legal document. I understand, I think, the argument that since Article 3 refers to the “right” of Parliament to exercise jurisdiction, that that right must be a “legal right” since the Constitution is a “law”. Equally, I think it can be said that it does not really matter whether it is a claim of “legal” or “political” right, since it is probably as offensive to those who wish to be offended however it is characterised. Nevertheless, it is, I think, important to look closely at the question raised and apparently determined in *McGimpsey*, as to the nature of the claim made in Articles 2 and 3.

The phrases “constitutional imperative” and “claim of legal right” are impressive rhetorical soundbites, but it is not entirely clear what they mean, particularly as a matter of law. What is a “claim of legal right” and to what court or tribunal is that claim directed? The Constitution is not a pleading, nor is it indeed a document of international law. There is, in the phrase, a sense that the claim to national unity is something that some hypothetical court might grant.

The Chief Justice's reasoning, I think, reflects the difficulty lawyers have with Articles 2 and 3 and particularly when the matter is treated as one of pure legal interpretation. The Chief Justice went on to say that the phrase in Article 3 “without prejudice to the right of the Parliament etc ...” was:-

“an express denial and disclaimer made to the community of nations of acquiescence to any claim that, pending the reintegration of the national

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¹⁶ [1988] IR 505.

territory, the frontier at present existing between the State of Northern Ireland, is or can be accepted as conclusive of the matter or that there can be any prescriptive title thereby created and an assertion that there be no estoppel created by the restriction in Article 3 on the application of the laws of the State in Northern Ireland”.

This reasoning and language is familiar to a lawyer, but it is the very struggle to make sense of the text which is significant. There is something unconvincing about an analysis which treats Articles 2 and 3 as a pleading in some sort of large scale constitutional boundary and right of way dispute. In what circumstances and in what tribunal could it be that the claim to national reunification could be defeated by a counterclaim relying on acquiescence, prescription and estoppel ?

I suggest that a close reading of the clause as a “claim of legal right” means nothing more substantial than a claim of “political right”, although of course, it sounds and was understood to be much more significant. The whole progression is, I think, a demonstration of the difficulty lawyers have with these aspects of the constitutional text, particularly when they are viewed solely as matters of law to be compared with other provisions and analysed by reference to the concepts such as estoppel or prescription.

The assertion that the Articles amount to a claim of legal right has a certain attractive robust simplicity to it. The argument is, I think, that there is a claim of a “right” which must be a legal right, since the Constitution is a law. By the same token, the contrary argument, that the claim is one which lies essentially in the political realm, is easily dismissed as an attempt to depart from the plain words of the text. But as I have attempted to show, in my view, the true legal interpretation of the Constitution is that it is not just a legal but also a political document in the sense that it expresses not just a matter of legal right, but also political philosophy.

That view, which holds that most of Article 2 and 3 is in essence, a matter of political philosophy, would I think, gain important support from the law in the United States which of course, was significantly influential in the development of constitutional law here. The United States Supreme Court has developed a *political question doctrine* which holds that there are certain limited provisions of the Constitution which are simply not susceptible to judicial decision making. The doctrine is associated, in part, with Judge Felix Frankfurter and to some extent suffered when his reputation temporarily declined. However, it remains part of the constitutional jurisprudence of the United States. A classic example of this doctrine is the guarantee clause in Article IV paragraph 4 which provides that:-

“The United States shall guarantee to every State in this Union a Republican Form of Government and shall protect each of them against Invasion ...”

This has been held not to be a:-

“Repository of judicially manageable standards which a court could utilise independently in order to identify a States lawful Government”¹⁷

This language could, I think, be applied with benefit to some of the more unmanageable provisions of Articles 2 and 3. Professor Alexander Bickel

¹⁷ *Baker v Carr* (1962) 369 US 186223.

in his famous book, *“The Least Dangerous Branch”* 1962, advanced a rationale for the political question doctrine. He argued:-

“Such is the foundation, in both intellect and instinct, of the political question doctrine: the Court’s sense of lack of capacity compounded in unequal parts of:-

- (a) the strangeness of the issue and its intractability to principled resolution;
- (b) the sheer momentousness of it, which tends to unbalance judicial judgment;
- (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be;
- (d) finally, the inner vulnerability, the self doubt of an institution which is electorally irresponsible and has no earth to draw strength from”.

Not all of this is directly applicable in Ireland¹⁸ but these are ideas that could, I think, profitably be reflected on in the light of the Irish cases on Articles 2 and 3. These Articles present to the lawyer strange issues which are intractable to principled resolution. They are, nevertheless, momentous issues which can unbalance judicial judgment. The judicial judgment on such issues, is after all, the judgment of persons whose undoubted expertise lies in matters of law and not political philosophy, but nevertheless, produce judgments which are given much more importance in the general political world that they perhaps deserve on their own merits. One modest suggestion I would make, therefore, is that there may still be a place for a political question doctrine as a principled tool in constitutional analysis in this jurisdiction.

It is useful, given that background, I think, to look now to the proposed changes in Articles 2 and 3. Like the clauses they are intended to replace, it appears that they were not drafted principally by lawyers and are not thought of primarily as a legal text. Instead, they operate, successfully, in my view, at the level of political philosophy. However, the Constitution is law, will be sought to be invoked in court and, therefore, these phrases, having performed their task at the level of political rhetoric, will remain to be scrutinised by the more pedestrian and pragmatic turn of mind that lawyers adopt when approaching any text which requires interpretation.

Approached in this way, then just like the original Articles 2 and 3, I suspect that they would be off-putting to any lawyer seeking a clear answer to a client’s problem. The solution the Articles propose to the political problem posed by the current Article 2 and 3 is, I think, both

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¹⁸ The fact that judicial review is not explicitly provided for by the US Constitution and the fact that the bulk of Supreme Court cases are by way of petition for certiorari where the Court has a discretion to hear or refuse to hear the case, have contributed to an approach emphasising judicial restraint. see e.g. Hand, *“The Bill of Rights”*: “Since this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer”. See, however, the opposite view put by Herbert Wechsler: *“Towards Neutral Principles of Constitutional Law”*, 73 Harv.L.Rev.1:

clearly discernible and clever. The definition of nation by reference to territory is abandoned and instead the focus is on the people. It is then possible to express the aspiration of the people to unity by peaceful means and only with the consent of the majority in Northern Ireland democratically expressed.

If we apply a more mechanical legal analysis, some interesting aspects emerge. The new Articles 2 and 3 will slot into an existing document and use terminology which is used elsewhere in the text. The new Article 2 asserts in ringing terms:-

“The entitlement and birthright of every person born in the Island of Ireland which includes its islands and seas, to be part of the Irish Nation”.

Article 3 goes on to speak for and express the firm will of the Irish Nation. The concept of “Nation” and “national” are concepts which appear elsewhere in the Constitution. For example, Article 6 identifies the right of the people to designate the rulers of the State and “in final appeal, to decide all questions of National policy”. Articles 7 and 8 refer to the national flag and language. Article 13.7.1 refers to the President’s right to address the people on “matters of national importance”. Articles 16 to 27 refer to and identify the powers of the “National Parliament”. However, the most significant provision in relation to the Nation is Article 1 which reads:-

“The Irish Nation hereby affirms its inalienable, indefeasible and sovereign right to choose its own form of Government, to determine its relations with other nations and to develop its life, political, economic and cultural in accordance with its own genius and traditions”.

This is the nation to which the new Article 2 asserts it is the right and birthright of every person in Ireland to belong.

In Fionnuala O’Connor’s book referred to above (*In search of a State: Catholics in Northern Ireland*), two incidents are described which still have the capacity to raise the blood pressure. In 1925, as the Boundary Commission was being debated, a deputation of Northern Nationalists requested permission to address the assembled Dail. The matter was left to the Dail to decide. Both Messrs McGilligan and Cosgrave objected even to the question of procedure being debated. Mr Cosgrave said:-

“An occasion may arise in future in which some of our own citizens for whom we have a direct responsibility may have a case if a precedent has been made in respect of those for whom we only act as trustees”.

The deputation was sent away unheard.

In 1951, four Northern anti-partition league MPs and two nationalist Senators at Stormont sought admission to the Dail as elected representatives of part of the national territory. In the terms of the new Articles 2 and 3, here were members and representatives of the nation seeking the entitlement to participate in the national parliament. Again, they were sent away.

In recent days, this issue has arisen again in the political sphere, but I do not think that the claim has been advanced as a constitutional entitlement. I do not know how any such claim, if made, would have been resolved under the Constitution before the recent amendment. The strong terms of the new Article 2 may make some difference. It becomes, at a minimum, difficult, I think, to explain in a satisfactory and constitutional way, why someone in Northern Ireland who has accepted their birthright as part of the Irish nation can or should be excluded from, for example, referenda where the Irish nation chooses its form of government, develops its political life and resolves in final appeal, questions of national importance. It is not inconceivable that the Supreme Court may yet have reason to

revisit the political question doctrine and find new merit in the idea that these guarantees operate at a political rather than legal level: because after all, one thing the Good Friday Agreement triumphantly demonstrates is that these matters are most satisfactorily dealt with by the People.