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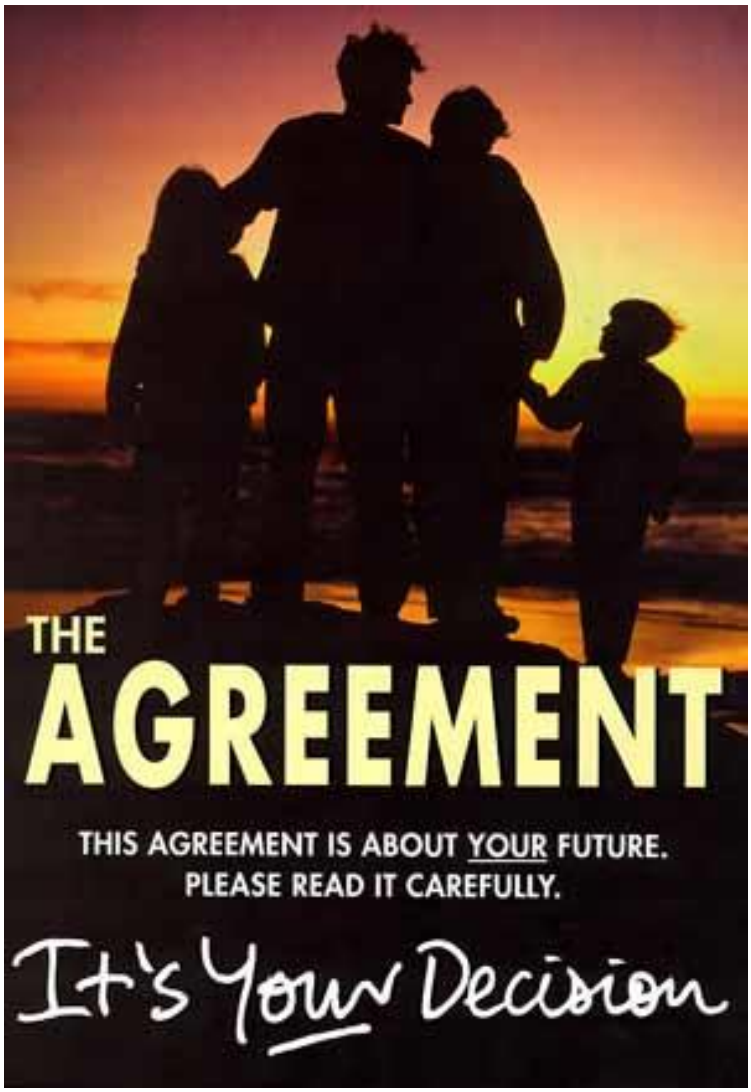
NORTHERN IRELAND AND THE IRISH CONSTITUTION: PRAGMATISM OR PRINCIPLE?-THE*MCGIMPSEY* CASE

M.A in Law-DLT567/1

By R.W. McGimpsey B.A, M.A, P.G. Dip. Student No: D09118099

Supervisor: Dr. Fergus Ryan

Date of Submission: 10/05/2010



Front cover illustration courtesy of Google Images.
www.google.com/GoodFridayAgreement

CONTENTS:

STATEMENT:

This thesis is submitted in part-fulfilment of the requirements of the M.A. in Law of the Dublin Institute of Technology.

I submit that this thesis is solely my work and has not been published or submitted in fulfilment or part-fulfilment of the requirements of another academic programme. All external sources have been cited and are fully referenced in the footnotes and Bibliography.

ABSTRACT:

The central theme of my thesis concerns the case of *McGimpsey v. Ireland* [1990] I.R. 110 and its wider significance. All discussion in the thesis can be traced back to this seminal case. On a wider level, the thesis discusses Articles 2 and 3 of the Constitution, tracing their history from their ideologically irredentist origins through to their amendment following the Good Friday Agreement, with its pluralist, inclusive re-definition of nationality. In essence, the thesis attempts to analyse the relationship between the two jurisdictions in Ireland, and how it evolved over time. I have endeavoured to explain how the 1937 Constitution re-defined these relationships, creating problems for the 26 County State and its courts.

The thesis discusses how the State reconciled the existence of a legal claim over Northern Ireland with the reality provided by a partitioned island. I argue that the State has adopted an essentially pragmatic position in its attempts to reconcile Articles 2 and 3 with the *de facto* political reality on the ground. I discuss how this fundamentally pragmatic position has co-existed alongside rigid Republican dogma and ideology. In charting the political journey of Articles 2 and 3, I discuss how pragmatic considerations have tended to weigh more heavily than idealistic rhetoric. While acknowledging the radical re-definition of Irish nationality prescribed by the Good Friday Agreement, I argue that conciliation and accommodation has always characterised the Irish State's relationship with Northern Ireland. It was through such pragmatism that the State was able to reconcile the existence of the legal claim with the reality of partition. The *McGimpsey* case forms the foundation of my argument, serving to illustrate the plethora of problems created by the former Articles 2 and 3. My interview with Chris McGimpsey (a plaintiff in *McGimpsey v. Ireland*) permits a deeper analysis of the subject, revealing his personal perspective on the wider constitutional issue. The case demonstrates how, (on a political level) the main traditions on this island were able to find a way to compromise, enabling the realisation of a workable accommodation. I explain my belief that the amendment of Articles 2 and 3 contributed in a small, but significant way to the delivery of this new dispensation. The essential theme of my thesis, however, is that such spirit of accommodation has always been inherent in Irish political thought.

LIST OF CASES:

Boland v. An Taoiseach [1974] I.R. 338.

State (Devine) v. Larkin [1977] I.R. 24.

Re Article 26 and the Criminal Law (Jurisdiction) Bill 1975 [1977] I.R. 129.

State (Gilsenan) v. McMorrow [1978] I.R. 360.

Crotty v. An Taoiseach [1987] I.R. 713.

Russell v. Fanning [1988] I.R. 505.

Finucane v. McMahon [1988] I.R. 165.

McGimpsey v. Ireland [1988] I.R. 567.

McGlinchey v. Ireland [1990] I.R 220.

McGimpsey v. Ireland [1990] 1 I.R 110

ACKNOWLEDGEMENTS:

The composition of a thesis on such a substantial topic has been an arduous and in-depth exercise. Articles 2 and 3 are not easy material to tackle, given the magnitude of their effect and the relative lack of writing on the subject. Even deciding on how best to approach the thesis became fraught with difficulty. As a History graduate, my dilemma concerned how best to write an informed and relevant thesis in Law. Should I attempt to focus primarily on the legal significance, or explain the wider context of the issue by incorporating historical and political elements? My answer was to attempt to write a comprehensive thesis, discussing the historical and political significance of Articles 2 and 3, whilst still firmly grounded in the legal context. This approach has been extremely rewarding, helping me attain a detailed appreciation of my subject matter. It has, however, been quite a demanding and taxing experience. The writing of this thesis has constituted a considerable commitment, but has proved especially time consuming alongside my full-time work obligations. As such, it would be remiss of me not to acknowledge my employer, Creation Finance, who has been extremely helpful in providing time off to study.

The final thesis owes much to the distinguished history of jurisprudence and writing on the Irish Constitution. Without such authority, I would have been unable to tackle such a complex and detailed topic. I am, though, particularly indebted to several individuals. In particular, I would like to thank Dr. Christopher McGimpsey for his time. Chris has been extremely helpful, providing me with a voluminous collection of documents which would have taken me years to read in full! As an authority on Articles 2 and 3, Dr. McGimpsey is prodigious and my thesis owes much to his advice. I also express sincere gratitude to my supervisor, Dr. Fergus Ryan. Dr. Ryan has been very generous with his time, providing essential advice and encouragement. Dr. Ryan's legal expertise has been invaluable, and I am especially thankful for his scholarly and academic influence. The thesis owes much to this authoritative knowledge. Needless to say, any errors are my own. In addition, I would like to thank my parents, Peter and Alison McGimpsey whose generosity has made this enterprise possible. Finally, I want to thank my fiancée, Siobhán, without whose patience and support this thesis would not have been concluded.

R.W. McGimpsey 28/04/2010

NORTHERN IRELAND AND THE IRISH CONSTITUTION: PRAGMATISM OR PRINCIPLE?-THE *MCGIMPSEY* CASE

CHAPTER 1: PREFACE-HISTORICAL PERSPECTIVE ON ARTICLES 2 AND 3 AND THE POSITION RELATING TO NORTHERN IRELAND

INTRODUCTION:

Article 2: "The national territory consists of the whole island of Ireland, its islands and its 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."[1]

"Ireland cannot shift her frontiers. The Almighty traced them beyond the cunning of man to modify" (Arthur Griffith).[2]

Both the original text of the old Articles and the views expressed by the founder of Sinn Féin, reflect the manner in which Irish nationalism traditionally interpreted the national territory. The nation was defined almost entirely in terms of geography and territory, comprising the island, its islands and territorial seas. The definition is problematic, being at once exclusive and restrictive. The clear emphasis is to apply the concept of the Irish nation exclusively to those inhabiting the island and its locality, with little scope being given for a wider, more inclusive form of Irishness. For example, in the founding fathers' limited definition of the Irish nation there appears to be little room for those of Irish

[1] *Bunreacht na hÉireann* (1937): The original Articles, prior to Nineteenth Amendment. For the purposes of simplicity, all references to "Articles 2 and 3" in this thesis are acknowledging the former Articles 2 and 3, unless otherwise stated.
[2] Quoted from a speech delivered by Dr C.D. McGimpsey to the Philosophical Society, University College, Cork: 15 December 1990, p.1.

origin living abroad. It should be remembered that the State was created at a time when the island had experienced extensive emigration due to the economic hardship experienced in the latter half of the 19th and early 20th centuries. The traditionally nationalist conceit of the Irish nation is derived from the idea that the island was bequeathed to the people by God, that the territory is held by divine benefaction. Griffith is referencing this political theory in his definition of the nation. As the Preamble testifies:

"In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and states must be referred".[3]

In reading the 1937 Constitution it is clear that a theological and territorial definition of nationality is very much reflected. Whilst the clear intention of the nationalist thinkers who expounded this ideology was to define the extent of the nation and promote their territorial interpretation of Irishness, it can be argued that a purely geographical interpretation of the Irish nation creates problems for those Irishmen of unionist background who would seek to define the nation in broader terms.[4] The Constitution was written at a time when such geographical notions of nationality were prevalent. The great nation-states of the world had arisen from the political theories which had dominated western thought since the late 18th century.[5] Nationality (as an idea) was defined in terms of territory. Linked to this concept was the idea that the nation possessed its own rights, one of which was the right to self-determination and unity.[6]

Hence the 1937 Constitution is characteristic of a territorial interpretation of nationality. Doyle has highlighted, however, that the document is rather vague and unclear in its use of the term "nation".[7] He argues that, in reading the document, it is advisable to approach the description of the nation with caution. He cites Desmond Clarke as reasoning:

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[3] *Bunreacht na hÉireann*: The Preamble. See McGimpsey (1990): p. 2.
[4] *Ibid*: p.1.
[5] See McGimpsey (1990): pp.2-4.
[6] See later discussion: *McGimpsey v .Ireland* [1990] I.R. 110. See below.
[7] Oran Doyle: *Constitutional Law: Texts, Cases and Materials* (Dublin, 2008) p.3.

"The concept of a nation (or nationality) should be used with due caution in constitutional discussions".[8]

Thus the Constitution is "inconsistent" in its use of the term nation, although keen to distinguish the concept from that of the State.[9] Despite the problem of definition, it is clear that the nation is defined in broadly geographical terms.

In assessing the constitutional position of the State in relation to Northern Ireland, it is necessary to consider the effect that this idea of territoriality had on relationships within the island. It is clear that the Constitution created in 1937 created considerable tension for relationships both within the island, and with the United Kingdom. It is my contention that one of the over-riding concerns of the State and its courts post-1937 was the resolution of this tension.[10] If the 1937 document can be characterised as an explicitly Republican charter, and Articles 2 and 3 as a political vehicle for re-unification, it follows that the interpretation of that document was destined to have implications for the State's interaction with the United Kingdom. More importantly, the 1937 Constitution provoked a negative reaction from the unionist population in Northern Ireland. In highlighting the way in which the State has defined its concept of the nation, it is beneficial to understand the political and social conditions which led to the adoption of the legal claim over Northern Ireland. In order to assess the State's attitude to Northern Ireland, we must first analyse the political background to the constitutional position. Before considering contemporary attitudes to these issues, it is expedient to return to the formation of the State in order to grasp the background to the 1937 Constitution.

[8] Desmond Clarke: "*Nation, State and Nationality in the Irish Constitution*"; Irish Law Times (1998) p.258, as cited in Doyle (2008): p.3.
[9] Doyle (2008): p.3.
[10] See below: the reconciling of the *de facto* political reality with the legal claim over Northern Ireland was a key feature of both the jurisprudence of the courts and the policy of the State post- 1937.

THE ANGLO IRISH TREATY, 1922 CONSTITUTION AND SAORSTÁT ÉIREANN

"The only policy for abolishing partition that I can see is for us, in this part of Ireland, to use such freedom as we can secure to get for the people in this part of Ireland such conditions as will make the people in the other part of Ireland wish to belong to this part".[11]

In these terms the newly installed leader of Irish nationalism expressed the imperative of securing unionist consent for political unification following Fianna Fáil's election triumph in February 1932. In examining the State's attitude to Northern Ireland, it is worth acknowledging that such pragmatic acceptance of political reality characterised the State's position every bit as much as the more idealistic and romantic nationalist doctrines.[12] De Valera's overture to unionism reflects the manner in which the Irish State[13] was compelled to consider the practical quandaries posed by the desire to re-unify the national territory. Following the Rising of 1916, support for the disparate elements of Republicanism united around the organisation of Sinn Féin.[14] The rise of the party has been attributed to several factors. It is clear, however, that the public humiliation and execution of the rebel leaders did much to garner public opinion in their favour.[15]

More importantly, the organisational and structural aptitude of Sinn Féin as a political party did much to consolidate their success.[16] As the party was organised along quasi-"military" lines, political organisation came naturally.[17] When considered alongside the cataclysmic effects of the conscription crisis of 1918, it is easy to understand the "electoral landslide of December" that year."[18] The emphatic nature of that victory was to

[11] Eamon De Valera: 1 March,1933. As cited in McGimpsey (1990): p.3.
[12] The State's policy was always a mixture of pragmatism and nationalist ideology. The same pragmatism has been reflected in the courts' acknowledgement of Northern Ireland. See below.
[13] For the purposes of consistency all references to the State should be read as the 26 counties unless otherwise stated.
[14] Tom Garvin: *The Evolution of Irish Nationalist Politics* (Most Recent ed., Dublin, 2005): pp.126-133.
[15] F. Ryan: *Constitutional Law* (1st ed., Dublin, 2001): p.1.
[16] Garvin (2005): pp.126-133.
[17] *Ibid*.
[18] *Ibid*.

re-define Irish politics in a fundamental way. The subsequent creation of Dáil Éireann (and re-affirmation of Republic) in January 1919 was a key moment, precipitating the War of Independence which marred the succeeding years. [19] The election outcome, in one fell swoop, both galvanised the more radical elements within nationalism and made partition more likely. [20]

"The 1918 election result swept away the parliamentary nationalists……The Sinn Féin victory effectively destroyed the Home rulers' project for mitigating partition, whilst creating a context…which helped propel even pro-direct rule Unionists towards support for a northern parliament."[21]

The integration of Sinn Féin into the political mainstream, therefore, did much to enhance the probability of partition. The problem created by the need to define the relationship with Northern Ireland is a consequence of the imperfect compromise reached between the Collins faction and the British administration of Lloyd George following the War of Independence (1919-1921). The negotiations had been dominated by a determination to satisfy the demands of all sides; in particular the need to reconcile the nationalist demand for independence with the reality that the unionists (of what became Northern Ireland) would be absolved from these arrangements. When the cessation of hostilities materialised on 11 July 1921, the Northern Ireland State was "already legislated for" (by virtue of the Government of Ireland Act 1920), and the only substantive matters to be resolved concerned the type of independence that Ireland would be afforded[22] The compromise reached by the negotiators reflects the way in which Republicans were able to ally pragmatism to their more idealistic tendencies. It also demonstrates that orthodox nationalist thinking had moved some way from the inflexible, territorial definition advanced by Griffith.[23] De Valera had remained in Dublin for the duration of the negotiations. The distant approach was a clever tactic by the Republican leader. By

[19] See Garvin (2005): pp. 135-147.
[20] Paul Bew, Peter Gibbon and Henry Patterson: *Northern Ireland- Political Forces and Social Classes* (2nd ed., London, 1996): p. 11.
[21] Bew (1996): p.11.
[22] Garvin (2005): p.143. See also Bew (1996): pp.11-13, FitzPatrick (1998): p.107.
[23] Coogan (1990): Griffith was one of the more pragmatic negotiators in 1921 and was very keen to do the deal. This flexibility also reflected the massive pressure exerted on Republicans to compromise by Lloyd George and his colleagues: See Tom Garvin: *1922 The Birth of Irish Democracy* (1st ed., Dublin, 1996), Tim Pat Coogan: *Michael Collins; a Biography* (London, 1990); pp. 240-280.

remaining aloof from the talks, he could assess the Republican mood and the likelihood of him being able to sell the deal. Moreover his whereabouts made it much easier for him to absolve himself from the terms of any agreement if expedient to do so.[24] The impetus for a deal, however, was compelling and Collins' team reached the historic compromise, having received assurances on several key issues.[25] The bravery exhibited by Collins in securing the deal is emphasised by Coogan. He quotes British negotiator Lord Birkenhead commenting after the conclusion of the talks:

"I may have signed my political death warrant" The younger man (Collins) replied "I may have signed my actual death warrant."[26]

The Treaty (signed on 6 December 1921) granted Ireland "dominion status", thus falling some way short of full independence. The settlement "went well beyond the earlier Home Rule Bills, with the granting of fiscal autonomy and provision for the creation of a defence force."[27] As Garvin observes, the Treaty can be characterised as "an uneasy synthesis of post-British and republican themes"[28] , and the retention of British symbols was to haunt the new regime. The most contentious provision related to the oath of allegiance which had been retained in the protocol of the Free State.[29] Despite the propaganda of anti-Treaty elements, the oath was never as controvertible as alleged. In fact it never contained an explicit oath of allegiance to the British monarch. All the oath required deputies to swear was `fidelity` to the king and `allegiance` to the Constitution.[30] The distinction may be semantic, however. It was the effect of the oath rather than its wording that proved so unpalatable. The Treaty was accompanied by the provision for

[24] See Garvin (2005): p.143.
[25] Coogan (1990): The deal was secured following concessions on several issues, such as the timeframe within which unionists would have to decide whether or not to join the Free State, the oath of allegiance and the extent of independence: See Coogan (1990): pp. 260-280.
[26] Coogan (1990): p.276.
[27] Fitzpatrick (1998): p. 107.
[28] Garvin (2005): p.143.
[29] Garvin (2005): p.143. The oath was to prove one of the most notorious aspects of the Free State Constitution and was constantly referred to by anti-Treaty elements; thus gradually eroding the authority of the *Cumann na nGaedhal* administration.
[30] Garvin (1996): p52. The status of the oath was a key requirement of the Collins delegation in the Treaty negotiations.

the six county jurisdiction of Northern Ireland which had been established by the Government of Ireland Act 1920. The Act can be summarised thus:

"It provided for two Irish parliaments, one for Northern Ireland-i.e. the parliamentary counties of Antrim, Armagh, Down, Fermanagh, Londonderry and Tyrone…….Each was to have power to 'make laws for the peace, order and good government' of the area within its jurisdiction…..the overriding authority of Westminster was again specifically affirmed in section 75."[31]

The legislation, according to FitzPatrick, had envisioned a bicameral legislature, with authority derived from the monarch as represented by the lord lieutenant.[32] The 1920 Act effectively prescribed "Home Rule for both jurisdictions"[33] and, as such, was an extension of the earlier Home Rule Bills.[34] The rebuttal of this model by nationalists was as much to do with unionist rejection of an all Ireland solution as their Republican ideals.[35] Partition became a reality in 1921 when "Sir James Craig (Lord Craigavon)" became the "first Prime Minister" of Northern Ireland.[36]

The agreement of 1921 embodies a workable accommodation, whereby the aspirations of both unionists and nationalists were catered for. Although imperfect, the Treaty enabled both political philosophies to save face by accomplishing most of their objectives. Garvin has argued that the Treaty allowed majorities in both jurisdictions to realise their aims. Northern unionists had secured their own parliament within the U.K., while southern nationalists had achieved independence from British authority, exceeding earlier Home Rule proposals.[37] Hence the success of the Treaty: it realised the majority's expectations.[38] The only losers in this analysis were "the nationalists of Northern Ireland."[39] Another interpretation of the Treaty exists, however. The outcome had fallen

[31] James Casey: *Constitutional Law in Ireland* (3rd ed., Dublin, 2000): p.5.
[32] David FitzPatrick: *The Two Irelands 1912-1939* (Oxford, 1998): p.100.
[33] FitzPatrick (1998): pp.100-102.
[34] FitzPatrick (1998): pp. 100-102. See also Casey (2000); p.p. 6-8.
[35] See FitzPatrick (1998): pp. 100-107. The reality of partition inspired Republicans to reject Home Rule and push for more meaningful independence.
[36] Fitzpatrick (1998): p. 102. Craig succeeded Edward Carson as Unionist leader in February of that year.
[37] Garvin (1996): pp.50-52, see also Garvin (2005): pp.143-47.
[38] *Ibid*.
[39] *Ibid*.

substantially short of what the rebels had proclaimed in 1916 and, from a Republican perspective, partition remained unpalatable. Fitzpatrick interprets the Treaty thus:

"…Like most political `settlements`, partition re-directed but failed to resolve the antagonisms that engendered it. The terms of the settlement left almost all parties more or less dissatisfied, while encouraging dissident groups to challenge the legitimacy of Irish rather than British authorities."[40]

It is fair to say, however, that the Treaty did indeed represent the most realistic compromise available to all sides. The intractable and militant nature of unionism *circa* 1922 made the Republican demands of 1916 virtually impossible to attain. Moreover the *fait accompli* provided for by the 1920 Act (once endorsed by unionists) made partition inevitable.[41] In this context the only expedient route open to nationalism was to ensure that they achieved the most extensive form of independence available to them within a partitioned island. The more flexible elements of Republicanism (as personified by Collins) recognised this reality.

More importantly, the Treaty is indicative of the new State's approach to northern unionism which existed at the time, (i.e.) that the pro-Treaty elements were prepared to recognise the existence of Northern Ireland in return for the independence they had secured. (This acceptance, it should be noted, was accompanied by the aspiration that political unity would eventually be realised). The pro-Treaty position was also a realisation that the *de facto* existence of Northern Ireland made the desire for political re-unification of the national territory difficult to implement, at least in the short term. The dominance of pro-Treaty ideas is evidenced by the definitive nature of their effective victory in the ensuing Civil War (1922-23).[42] The months following the Treaty led to a clear breakdown in the Republican unity which had been so apparent in 1918.[43] The bitter divisions which were to characterise the succeeding years became increasingly evident. The Dáil endorsed the Treaty by a majority vote (January 1922), but the position within

[40] Fitzpatrick (1998): p.117.
[41] Garvin (2005): pp.143-47.
[42] *Ibid*.
[43] *Ibid.*

militant Republicanism was much more fragmented.[44] For example, as Garvin observes, the leadership of the I.R.A. voted for the Treaty but a majority of rank and file members voted against its implementation.[45] The internal divisions within Sinn Féin were symptomatic of a wider malaise within Republicanism, where constituencies, families, communities and activists remained divided over whether or not to back the Treaty.[46] Gradually the anti-Treaty forces pervaded Sinn Féin, culminating in the I.R.A's rejection of the Treaty (March 1922).[47] The Civil War, however, was a much more muted and constrained conflict than initially feared.[48] The success of the Pro-Treaty faction in winning hearts and minds is evidenced by the emphatic nature of the victory. It was clear that a majority within the State were prepared to accept the Treaty as a practical, interim solution. Those prepared to tolerate partition, at least in the short term, had won the day. As Garvin contends:

"…The Civil War that followed the Free State's attack on the Four Courts at the end of July 1922 was short. By early 1923 the republican cause had been decisively defeated by the forces of the Free State, but the true defeat of the republicans was the acceptance of the Treaty, in both 1922 and 1923, by the electorate."[49]

The Free State Constitution (1922) must be viewed, therefore, as a means of giving legal and political effect to the arrangements provided by the Treaty. A more concise document than its 1937 equivalent, "it consisted of a Preamble, three sections and two schedules (the first schedule comprising the text of the Constitution and the second, the Treaty)."[50] Article 12 of the Treaty provided that Northern Ireland could opt out of the Free State.[51] It is evident, therefore, that the constitutional position relating to Northern Ireland in 1922 was a full recognition of the existence of that jurisdiction. This position reflects the reality provided by the Treaty and the approach taken by the Free State that unity, as an

[44] Garvin (2005): p.144.
[45] *Ibid*: pp. 145-46.
[46] Garvin (2005): The fragmentation within the I.R.A post-1922 was inspired by more than just the political differences. The "Free State Army and Police" proved popular for disillusioned young men. See Garvin (2005): pp. 145-46.
[47] *Ibid*.
[48] *Ibid*.
[49] Garvin (2005): p.146.
[50] Casey (2000): p.15. See also Ryan (2001): p.2.
[51] Casey (2000): p.15.

aspiration, could only be achieved through political cooperation. The policy of the Cosgrave administration, therefore, was very much one of conciliation. The Treaty required the two governments to give full legal definition to the new entities they had created, and clarify how they would inter-relate with one another. Consequently the Boundary Commission was established with a specific remit to define the extent of the geographical borders. It was the perceived failure of this commission[52] which led to the unique Amending Agreement (known also as the Tripartite Agreement), signed on 3rd December 1925.[53] The Agreement, which was intended to definitively resolve the boundary question, was negotiated between the three governments involved and registered as an international treaty with the League of Nations by the Irish Free State.[54] The provisions were confirmed by statute in the "Schedule to the Treaty (Confirmation of Amending Agreement) Act, 1925 (No. 40 of 1925)."[55] The Agreement (and the resultant Act) conveys a desire to achieve mutual recognition of borders through a spirit of harmony and accommodation. This cooperative approach is evident in the Act. It reads:

"Whereas the progress of the events and the improved relations now subsisting between the British Government, the Government of the Irish Free State and the Government of Northern Ireland and their respective peoples make it desirable to amend and supplement the said Articles of Agreement, so as to avoid any causes of friction which might mar or retard the further growth of friendly relations between the said governments and peoples……

And whereas the British Government and the Government of the Irish Free State being united in amity in this undertaking with the Government of Northern Ireland , and being resolved mutually to aid one another in a spirit of neighbourly comradeship, hereby agree as follows:-

"1-The powers conferred by the proviso to Article 12 of the said Articles of Agreement on the Commission therein mentioned are hereby revoked, and the extent of Northern Ireland for the purposes of the Government of Ireland Act, 1920, and of the said Articles of Agreement, shall be such as was fixed by sub-section (2) of section one of that Act."[56]

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[52] The two governments failed to agree on the changes suggested by the Commission. Their suggestions included increasing Northern Ireland's territory.

[53] T John O'Dowd: Irish Law Archives-Irish Legal News: *Irish Law- Ireland and Northern Ireland* (Dublin, 1994); P.5. See *http://www.irishlaw.org/IrishLawArchives.*

[54] McGimpsey (1990): p.3. See also Casey (2000): pp.15-16, O'Dowd (1994): p.6.

[55] O'Dowd (1994): p.6.

[56] O'Dowd (1994): p.6. See also Casey (2000): pp.15-16, McGimpsey (1990): p.3, Ryan (2001): p.2.

The Agreement is indicative of the approach adopted by the Free State at the time, with its mention of being "united in amity" and "neighbourly comradeship".[57] Indeed the explicit acknowledgement of both the Northern Ireland Parliament and its "people", foreshadows the *de facto* recognition of the limitations of the State's jurisdiction enshrined in Article 3 of the 1937 Constitution.[58] In assessing the constitutional position, it is clear that despite the desire to claim sovereignty over Northern Ireland, the political reality provided by the 1921 treaty (and the Government of Ireland Act) was always fully recognised by the State. As Bew observes, the Boundary Commission and Amending Agreement, had fully secured Northern Ireland's position within the U.K.[59] He quotes Sir Wilfrid Spender, in recalling a meeting between the protagonists, where:

"Mr Cosgrave burst into tears and said that Lord Craigavon had won all down the line and begged and entreated him not to make things more difficult for him."[60]

This demonstrates how comprehensively the State had accepted the framework of partition. There is little doubt that the approach of the Free State was to resolve the competing territorial claims through political and friendly methods. Moreover the State evidently had little difficulty in recognising Northern Ireland. Although reflecting the conciliatory attitude of the Cosgrave government it is also possible that, as Bew argues, the position was determined by economic necessity.[61] He stresses the importance of signing the Amending Agreement, as it "released the Irish government from significant financial liabilities."[62]

Still, the approach of the Free State undoubtedly involved the full recognition of Northern Ireland and its borders. Such explicit recognition is the logical consequence of signing the Treaty. The arrangements agreed in the previous years provided for two jurisdictions with their own governments which would co-exist with one another. Ideologically, this didn't make the Free State any less nationalist in ethos (or Republican

[57] O'Dowd (1994): p.6, McGimpsey (1990): p.3.
[58] O'Dowd (1994): pp.6-7. See below.
[59] Bew (1996): p.12.
[60] PRONI D715: Sir Wilfrid Spender's Financial Diary, 24-29 May 1943. As cited in Bew (1996): p.12.
[61] Bew (1996): p.13.
[62] *Ibid*: p.13.

for that matter), but merely served as a reflection of its pragmatic approach to the political conditions arising in 1920s Ireland. It may have been an uneasy relationship, but the Cosgrave administration had little choice but to fully recognise and cooperate with Northern Ireland. The Free State Constitution and the Treaty obviously provided for Northern Ireland to be incorporated into the political arrangements. Therefore, the policy and objective of that State remained political unity. That re-unification failed to occur can hardly be laid at the door of the Free State alone. The State's desire to improve inter-jurisdictional relations, as reflected in the 1925 Agreement, constitute a worthy attempt to recognise the political realities and forge a practical relationship with their neighbours. The nationalist elite had come a long way from the purely geographical interpretation of the national territory. It was the alleged failure of the State to implement a Republican programme, however, and the existence of royalist symbols in its Constitution, which were to prove its undoing.

***BUNREACHT NA hÉIREANN (*1937) & THE RISE OF FIANNA FÁIL**

The spirit of harmony and accommodation that had characterised political discourse in 1925 was shattered at the beginning of the following decade. Good relations with Northern Ireland, along with the very existence of the Free State, were irrevocably threatened when Fianna Fáil swept to power in 1932. When the party emerged victorious in the general election of February that year, its clear intention was to strip away the despised symbols of monarchy.[63] This approach is illustrative of the Republican ideology espoused by De Valera and his colleagues. The accommodation of 1921 had been a bitter pill for them to swallow and they had spent the years following the Civil War frantically trying to re-establish their position. The victory in 1932 is testament to their success in building their infrastructure, party organisation and consolidating their strength post-1923.[64] The iconoclastic policy of the new regime is demonstrated by the legislation they instigated following their electoral success. One of the first Bills proposed by the new

[63] The victory was achieved initially through a coalition with the Labour party: See Casey (2000): pp. 16-17. See also Ryan (2001): pp. 2-3.
[64] See Garvin (2005): pp. 180-83.

government was the Constitution (Removal of Oath) Bill which sought to definitively settle the question of the contentious oath of allegiance.[65] The oath had been regarded as the most overt and controversial symbol of monarchy and De Valera was emphasising his Republican credentials in his resolve to dispense with it. Following some debate (including several amendments) the Constitution (Removal of Oath) Act came into existence on 3rd May 1933.[66] The alteration was rapidly succeeded by the removal of the right to appeal to the Judicial Committee of the Privy Council. [67] Both these measures prove that Fianna Fáil was not interested in mere cosmetic changes, but was determined to tear down the edifice of the Free State and its Constitution. De Valera himself re-affirmed his Republican project in 1935 when he announced his intent to construct a new Constitution to replace the 1922 document.[68] Such institutional change was inevitably going to have profound implications in terms of the State's relationship with Northern Ireland.

The unashamedly Republican character of the State's new policy threatened to destroy the harmonious and amicable relationship which had hitherto existed between the two governments in Ireland. While the prevailing mood among the government was favouring the formulation of a Republican constitution, it took some time for Fianna Fáil to create the political conditions necessary to facilitate such a change. It was events beyond the new elite's control, however, that were to provide the momentum for constitutional change. The abdication of British monarch Edward VIII (1936) provided the perfect opportunity for the State to compose a new constitution, more in keeping with the ideology and values of Fianna Fáil.[69] De Valera successfully used the abdication crisis to remove the majority of royalist symbols from the State. He accomplished this though a two fold legislative process. Firstly, he instituted the Constitution (Amendment No.27) Act which provided for the removal of the British king "from the Constitution."[70] The Act also abolished the position of Governor General. The action was to have obvious

[65] Casey (2000): The determination of Fianna Fáil to break with the past is also visible in the removal of James MacNeill as Governor General soon after they came to power: Casey (2000): p. 17.
[66] Casey (2000); p.17.
[67] *Ibid* p.17; see also Ryan (2001): p.2.
[68] *Ibid*.
[69] See Casey (2000): p.18.
[70] Casey (2000): p.18.

importance for the Republican agenda: the permanent removal of British symbolism paved the way for the new Constitution. Secondly, the Oireachtas passed the Executive Authority (External Relations) Act 1936, which effectively replaced the king as head of the Executive in Ireland with an "Executive Council." [71] The effect of this alteration was not only the elimination of the controversial trappings of monarchy, but the dismantling of all remaining practical functions of high office, which passed to the Dáil.[72] Thus the conditions had been created for the establishment of a new Constitution and a shift in the dynamics of the relationship with Northern Ireland.

The adoption of *Bunreacht na hÉireann* in 1937 marked a return to the irredentist, geographical interpretation of nationality described earlier. The codification of the new Constitution signified a new chapter in the legal and constitutional relationships between the two jurisdictions. The explicitly Republican character of the document created problems for defining the constitutional status of Northern Ireland. The Constitution can also be said to have an emphatically "Catholic" character.[73] The integration of both Republican and Catholic values into the fundamental law of the State was naturally viewed suspiciously by those with a unionist identity who didn't share those beliefs. The determination to pursue an exclusively theocratic agenda was revealed by government minister Sean McEntee who described a "Catholic constitution for a Catholic State."[74] As Bew observes, this statement, in turn, evoked Craigavon's famous declaration of a "Protestant parliament for a Protestant people"[75] in 1934.

The Constitution should be viewed, therefore, as the definitive legal expression of the Catholic, Republican values held by the drafters. [76] Nevertheless the document of 1937

[71] Casey (2005): p19; see also Ryan (2001): p.3. The king retained responsibility for foreign relations until the Republic of Ireland Act 1948.
[72] *Ibid*.
[73] See Ryan (2001): p.193.
[74] As cited in Bew (1996): p.242. See also the Preamble, Articles 41-43, and Article 45 for evidence of the Catholic emphasis.
[75] Bew (1996): p.15.
[76] It should be noted that the drafters consciously refrained from using the term Republic despite the clear Republican character of the document. It was believed that the Republic would only have practical effect once re-unification had occurred. See Garvin (2005): p.205.

shares many characteristics with its "1922 counterpart."[77] Whilst the Republican window dressing is apparent, there is a strain of "continuity" between the two Irish Constitutions.[78] For example, as Casey notes, the provisions relating to the courts, the legislature, and system of proportional representation used in elections all bear remarkable similarity with the Free State Constitution.[79] In some areas the language used is virtually "identical"; while other parts of the Constitution derive clear inspiration from their 1922 predecessor.[80] This policy was practically very sensible. It would have been unwise of the drafters to start from scratch when so many of the logistical and governmental aspects of State apparatus had already been established. As so many of these institutions were evidently working well, it would have been inexpedient to throw the baby out with the bath water. The 1937 Constitution was a more "substantial" document than its predecessor, and its provisions more comprehensive.[81] Moreover it can be viewed as more radical in tone. In fact Casey has argued that Article 29 and the provisions relating to the family represent quite "novel" innovations.[82] The new Constitution is best interpreted, therefore, as a successor rather than a replacement of the Free State Constitution.

As so much of the substance of the two documents is similar, it can be argued that too much emphasis is attached to the perceived radical character of the document. If the 1937 Constitution is merely an extension of its Free State equivalent, then surely its impact has been somewhat exaggerated? In terms of the relationship with Northern Ireland, however, it is the differences rather than the similarities that are important. Firstly, the adoption of an explicitly Catholic Constitution enshrined in Irish law a set of religious doctrines which would have alarmed the Protestant majority in Northern Ireland. The distinctly Catholic emphasis is best illustrated in the Preamble:

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[77] Casey (2000): p.23.
[78] Casey (2000): pp.22-23.
[79] Casey (2000): p.23.
[80] See Casey (2000): pp. 22-25.
[81] Casey (2000): pp. 22-23.
[82] *Ibid*. The Constitution was given full legitimacy by the plebiscite passed in July 1937. It had been provided for by the Plebiscite (Draft Constitution) Act 1937. The document was endorsed with a substantial but not resounding 62 per cent majority. See Ryan (2001): p.3.

"…We, the people of Éire humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial. Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation….And seeking to promote 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."[83]

Both the nationalist and Catholic philosophy of the Republican drafters is discernible from the Preamble, the text conveying an exclusively narrow set of values and theology.[84] Such a religious emphasis had no precedent in the 1922 document.[85] From a unionist perspective, however, the constitutional favouring of one denomination and its values made the prospect of a united Ireland tangentially unappealing.[86] The overtly Catholic nature of the Constitution obviously had implications for a unionist population who inhabited a political hegemony, exercising power virtually unopposed in their own parliament, where they could protect whatever ideals they wished. Already opposed to the idea of political re-unification, the adoption of an explicitly Catholic Constitution made unionists feel completely alienated from the southern State. Although the intention of De Valera and his party in drafting a new Constitution was to enhance the prospects of political re-unification, the reality of unionist resistance produced a very different response. This theological opposition to the values drafted in the Constitution would have been enough in itself to encourage unionist antagonism with the State. The inclusion of the territorial, political claim to govern Northern Ireland ensured outright hostility to the Fianna Fáil project. The policy of the Cosgrave government had been determined by a pragmatic realism, which recognised unionist opposition to re-unification and respected the legal boundaries provided by the Anglo-Irish Treaty. The objective of political unity was retained, but co-existed alongside a desire to maintain amicable relations with

[83] Preamble: 1937 Constitution. The Catholic emphasis is also visible in Articles 41-44.
[84] See Ryan (2001) pp.33-41, pp.221-225.
[85] Casey (2000): p.22.
[86] There is something of an irony here. Although unionists have traditionally been alarmed by the supposedly Catholic nature of the Irish State, they share many of the values. For example, the promotion of marriage/family, opposition to abortion, and social conservatism are all shared by the main Protestant denominations.

Northern Ireland.[87] The installation of the controversial Articles marked irrefutable evidence that this policy was being permanently discarded.

The dynamic of North-South relations had thus altered drastically from the spirit of the Tripartite Agreement. In line with the Republican ideals cherished by DeValera, the State had now reverted to an irredentist policy in relation to Northern Ireland. A political claim over Northern Ireland had come into existence: the State was asserting in emphatic terms a right to govern that territory. As such, the policy regarding Northern Ireland at this time was now clear. The State had reverted to the territorial, geographical definition of the nation outlined by Griffith. Although the precise nature of the claim had yet to be given full legal definition, there is no doubt that a political claim to govern Northern Ireland had been established. The traditional interpretation of the claim was it represented a political aspiration, a desire to re-unify the national territory as defined in the Constitution. The identification of the Articles as a substantive legal claim to govern Northern Ireland had yet to be definitively proven.[88] Nevertheless the nature of the relationship between the two jurisdictions had irrevocably altered. Their definitions of sovereignty (as existed at the time) had been exposed as being incompatible. Whilst an explicit *de jure* claim to govern Northern Ireland remained, reconciliation between the two traditions on the island would prove difficult. In assessing the State's constitutional position relating to Northern Ireland in 1937, Garvin argues:

"…The 1937 Constitution eliminated the remaining symbols of the imperial link and also withdrew full recognition of the State of Northern Ireland…..and was intended to complete the legitimisation of the State. It also echoed in its phraseology a draft constitution of the Republic of Ireland produced by the rump Sinn Féin party between 1929 and 1933. The Sinn Féin document was heavily Catholic in tone and also heavily Gaelic, anti-British and anti-Free Stater. De Valera's 1937 Constitution was, by comparison, a liberal document, but the similarities in phraseology indicate who, or what tradition, it was that De Valera was trying to pacify."[89]

[87] See above. See also Casey (2000): pp.22-24.
[88] The view was traditionally held that the Articles represented no more than a political aspiration. It was only when the courts considered the nature of the claim that the idea of a "constitutional imperative" was defined. See below; cf. *Russell v .Fanning* [1988] I.R. 505 and *McGimpsey vIreland* [1990] I.R. 110.
[89] Garvin (2005): p.205.

De Valera, therefore, succeeded in re-establishing his Republican credentials and dismantling the constitutional framework agreed in 1921. Although many of the practical structures of government remained intact, the symbolism so despised by Republicans had been destroyed. The Free State's determination to achieve political unity by cooperation had been replaced by a contentious and divisive claim to govern Northern Ireland. In the minds of Republicans the State had moved a step closer to securing re-unification. The reality of this policy, however, was that unionists now felt even more disenfranchised from the State. In this sense the repercussions flowing from the inclusion of Articles 2 and 3 in the Constitution were colossal, impeding good relations between the jurisdictions, and hampering attempts to achieve a political settlement in the years that followed. De Valera had emphatically succeeded in asserting that the policy of the State involved the re-integration of Northern Ireland, a policy which had now been afforded constitutional protection.

REVIEW OF THE CONSTITUTION (1967)

Post-1937 one of the primary objectives of the State was the reconciliation of the *de jure* claim with the *de facto* reality of Northern Ireland. Successive governments (as well as the courts) wrestled venerably with the dilemma posed by the 1937 Constitution. At this point, it is worth noting that Articles 2 and 3 were never intended to be viewed in isolation, but form part of an overall, harmonious interpretation of the document. The intention of the drafters was that Articles 2 and 3 would be interpreted in tandem with the other Articles of the Constitution and the Preamble. The need to interpret Articles 2 and 3 in a harmonious manner has been accentuated regularly by the jurisprudence of the courts.[90] In particular, due to the obvious connection between the State's foreign policy and the manner in which it interacts with other nations, Articles 2 and 3 need to be read alongside Article 29 of the Constitution. This article provides a legal basis for the need to cooperate peacefully with other nations and membership of supra-national/international bodies. It reads:

[90] See below.

"1. Ireland affirms its devotion to the ideal of peace and friendly cooperation amongst nations founded on international justice and morality.

2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.

3. Ireland accepts the generally recognised principles of international law as its rule of conduct with other States."[91]

The Article requires the State to resolve international disputes in a peaceful and amicable manner (this principle forming the cornerstone of the State's policy of neutrality[92]). As such, the Article evokes the spirit of cooperation legislated in the Tripartite Agreement. The orthodox interpretation of Article 29 is that it places an obligation on the State to resolve international conflict through political means. The clarification of this requirement is important when considered alongside the political claim over Northern Ireland, and the desire to re-unify the national territory. It seems that Article 29 compels the State to work alongside other nations in a friendly manner, specifically in relation to the resolution of conflicts. In the context of Northern Ireland, the logical conclusion of Article 29 is that it demands that the State work with the U.K. government to resolve the conflict peacefully. After all, it is inconsistent to advocate that the State is legally required to resolve disputes amicably and in accordance with international law, but not extend this provision to Northern Ireland.

When interpreting Articles 2 and 3, therefore, it is not desirable but essential to read Article 29.[93] In fact, it can be argued, that Article 29 has always placed a restriction on the scope of Articles 2 and 3 by its insistence on complying with international law and cooperating to resolve conflict. The old Articles (specifically Article 3) inherently recognised the *de facto* existence of Northern Ireland by their acceptance that "the laws enacted by that Parliament shall have the like area and extent of application as the laws of

[91] Article 29: 1937 Constitution. See also O'Dowd (1994): p.2. It should be noted that Article 29 is aspirational and does not preclude the State declaring war. See Article 28.3.
[92] The Irish policy of neutrality is merely a convention and has no legal effect. See *Horgan v. An Taoiseach* [2003] 2 I.R. 468.
[93] Case law has consistently invoked Article 29 when interpreting Articles 2 and 3. See below.

Saorstát Éireann and the like extra-territorial effect". Including Article 29, the constitutional arrangements provided in 1937, arguably, have always constrained the State from pursuing re-unification militarily, and compel it to work peacefully with the U.K. to settle the Northern Ireland question. Certainly the cooperative, multilateral language of Article 29 appears to place an onus on the State to resolve the competing territorial claims through accommodation. The obligation to comply with international law presented a further problem for the State in relation to Articles 2 and 3. International law prohibits states from making claims on other territories.[94] It was always the contention of unionists, therefore, that Articles 2 and 3 constituted a breach of international law.[95] The provision of Article 29 to recognise the principles of international law in the State's dealings with other governments can be said to further limit the scope of Articles 2 and 3. Nevertheless it remains evident that the policy of the State post-1937 remained the re-unification of the national territory. As such, the State's attitude to Northern Ireland reflected a territorial interpretation of nationality. In the assessment of the constitutional position, however, it is always wise to consider the effect of Article 29.

Although the policy of the State remained wedded to the principles of 1937, there was always an acknowledgement that the position could be improved. From an Irish perspective, the first venerable attempt at modernising the Articles, and producing a more universally acceptable form of words, came with the comprehensive review of the Constitution (1967). As part of a wider debate on constitutional change, an all party group reviewed the wording of Articles 2 and 3. This consultation led to the recommendation that "Article 3 should be amended. (The committee did not propose to alter Article 2)."[96] The proposed change read:

[94] Ireland has been a signatory to several international agreements which underline the need to resolve international disputes by peaceful methods; notably "the United Nations Charter, the Helsinki Final Act 1975, and the Paris charter for a New Europe." See *Making Sense* Magazine: March/April 1991 Ed., pp.5-8.
[95] See below.
[96] O'Dowd (1994): p.3.

"1. The Irish nation hereby proclaims its firm will that its territory be re-united 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".[97]

The debate indicates flexibility in State policy and reflects the *real politik* which existed alongside strict adherence to Republican ideology. The intervention is significant, implying that the original construction of the Articles was controversial. This suggests that there had been recognition by elements within the State that the Articles, in their current guise, were unacceptable to unionism.

The comprehensive nature of the exercise signifies that a firm opinion had developed that the Articles required amendment. The fact that amendment was even being discussed shows that the State had moved from the inflexible position of 1937. Furthermore the substance of the proposals would provide inspiration for future attempts to solve the constitutional problem.[98] It was already becoming apparent that changes to Articles 2 and 3 would form part of any negotiated political agreement. Although such amendment was merely theoretical at this stage, it was evident that the outline for any changes was crystallising. The template for change had been established: the explicit claim would be replaced by a less contentious, more aspirational form of words. Finding the required political formula for agreement (and implementation of) such changes was to prove more problematic. Even the possibility of substantive negotiations appeared elusive at this point. Nonetheless the work of the 1967 commission is evidence that the State was beginning to appreciate the need to amend the Articles. This, in turn, would make the Constitution more amenable to unionists and help facilitate an eventual settlement. The State was prepared, therefore, to consider amending the Constitution in the context of a

[97] All party committee review of the Constitution (1967): as cited by O'Dowd (1994): p.3.
[98] Indeed the language of the proposal is remarkably similar to the 19th Amendment that followed the Good Friday Agreement. See below.

comprehensive agreement.[99] These alterations were not adopted by the government. They remain important, however, as providing the framework for constitutional change and as a starting point for future negotiations. It is likely that the State wished to hold back amendment to the Articles and save it as a bargaining chip in such talks.

SUNNINGDALE (1973)

The State's preparedness to consider changes to Articles 2 and 3 (in the context of an agreed political settlement) was given expression in the Sunningdale Agreement (1973). The attempt at political reform within Northern Ireland was inspired by a desire to end the violence which had characterised the preceding years. Since the suspension of the Stormont Parliament (24 March 1972), Northern Ireland had been engulfed by unprecedented levels of violence, perpetrated by the Provisional I.R.A. The inter-governmental Agreement (signed at Sunningdale Park, Berkshire on 9 December 1973) came at one of the most violent interludes in the State's history.[100] It should be noted that the Sunningdale "Agreement" was never an international agreement as such. The document is better characterised as a communiqué between the two governments.[101] The crisis had commenced with the refusal of unionist prime minister, Brian Faulkner to permit Westminster to assume control of the security functions enjoyed by the Parliament.[102] The control of security was considered vital in the ongoing battle with militant Republicanism. The suspension of the Parliament was a controversial decision, eroding unionist confidence in the British government, and opening a vacuum within which violence could flourish As Bew has observed:

[99] This position was followed in Sunningdale and Hillsborough. See below.
[100] See Bew (19960: p.145.
[101] See below: the status of Sunningdale was debated by the courts in *Boland v. An Taoiseach* [1974] I.R. 338, which defined the Agreement as a mere "declaration of policy".
[102] Bew (1996): p.145.

"…This process coincided with the administrative centralisation of almost all the hotly disputed functions of local government in Northern Ireland. Taken together, these events signified the end of the Northern Ireland state."[103]

Certainly suspension had created a political crisis which urgently needed to be solved. The inspiration of the British government to attempt political conciliation was two fold, motivated by a determination to end both the political vacuum caused by suspension and violence on the streets. It was hoped that an agreed political settlement would remove any lingering justification for violence. The political process commenced with the publishing of a "white paper by the British government" (3 May 1973), proposing a cross-community assembly to be elected by "proportional representation."[104] Institutionally, the arrangements would involve three strands: the Assembly (replacing the old Northern Ireland Parliament), a Council of Ireland (which proposed to give the southern State an unprecedented voice in Northern affairs), and an Executive formed by coalition, constituted on the basis of power sharing.[105] The Northern Ireland Assembly Bill, resulting from the white paper, paved the way for Assembly elections, which occurred on 28 June 1973.[106] This political movement generated genuine hope; with the Ulster Unionists, S.D.L.P, and cross-community Alliance Party all actively participating in the elections.[107] As such, the Agreement represented the first occasion that an authentic, multi-party effort had been made to resolve the political stalemate. Perhaps terminally, however, a substantial proportion of the broad unionist constituency remained instinctively opposed to the power sharing element of the Agreement, whilst militant Republicanism stayed outside the arrangements and "boycotted the elections."[108] Although pro-agreement parties triumphed in the election by a clear majority, there remained a substantial enough minority opposed to the new administration to cause it difficulty.[109]

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[103] *Ibid:* p.145.
[104] For a brief synopsis of the Agreement see *www.absoluteastronomy.com/topics/Sunningdale Agreement.*
[105] *Ibid*.
[106] *Ibid*. See also Bew (1996): p.197.
[107] See Bew (1996): p.197.
[108] *Ibid*.
[109] Pro-agreement parties won a healthy majority of seats (52 as opposed to 26), but the margin was never comfortable enough to ensure an easy ride for the Executive. See Bew (1996): p.197.

Electoral success for the pro-agreement parties was just the first step, however. The more tangible difficulty concerned finding enough of a consensus between the parties to facilitate the formation of an Executive. To that end, negotiations commenced as soon as the election results were announced, with the objective of "securing agreement for the basis of an Executive" as soon as practicable.[110] All moderate parties were in favour of the new political arrangements (although Faulkner had important internal critics), but the resolution of the outstanding disputes between them remained a formidable challenge. Discord emerged in relation to the modalities of the Executive, for example how the parties would conduct business with each other and how the government would function.[111] Displaying remarkable political maturity, the parties reached an accommodation and the method of voluntary coalition was rubberstamped on 21 November 1973.[112] As a powerful symbol of the new inclusiveness, former unionist Prime Minister Brian Faulkner was appointed as Chief Executive of the new government with S.D.L.P. leader Gerry Fitt as his Deputy.[113] The whole concept of power-sharing was problematic for the unionist leader. The Unionist party had enjoyed virtual dominance of the political system since Northern Ireland's inception, with only the ineffectual Nationalist party providing token opposition. The Civil Rights movement had changed the dynamic of Northern Irish politics permanently, however; creating a more radical nationalism which was no longer prepared to meekly accept inequality.[114] This created a new set of realities with which unionists were forced to contend.

Moreover, the emergence of the Provisional I.R.A. as an uncompromising agent for re-unification through violence, put the existence of the Northern Ireland State and, (for perhaps the first time since 1922) Northern Ireland's status within the U.K, in danger. In the context of continuing Republican violence, British commitment to maintaining the Union, according to Bew, could no longer be guaranteed.[115] Faulkner, therefore, was

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[110] *www.absoluteastronomy.com/topics/Sunningdale*. See also Bew (1996): p.197.
[111] *Ibid*.
[112] *Ibid*.
[113] The website goes on to inform us that: "John Hume was appointed Minister of Finance, whilst Oliver Napier of the Alliance Party became Legal Minister and head of the office of Law Reform." See *www.absoluteastronomy.com/topics/Sunningdale*
[114] See Bew (1996): pp. 197-199.
[115] *Ibid*.

taking a massive political gamble in his advocacy of power sharing. It was, however, a calculated risk. The unionist leader was seeking to balance the obvious dissatisfaction within his party with the reality that a British withdrawal from Northern Ireland could not be ruled out.[116] Indeed, it is possible that had a political settlement not been attempted at this time, the British would have actively sought disengagement.[117] By committing to the Executive, Faulkner was making a strategic compromise. He had assessed that unionist interests were better served in the Executive, and that by showing his preparedness to accommodate, he was making the prospect of British withdrawal much more remote. The key to the success of his strategy, however, was his ability to persuade enough moderates to support his vision, thus sidelining the hardliners. The long term stability of the Executive could only be guaranteed by Faulkner demonstrating to a sceptical constituency, that the Executive provided the best mechanism for maintaining the Union, rather than being a sell out to nationalism. It was the failure to allay these concerns that sounded the death knell for the Executive.

Unionist opposition to the arrangements were to focus not on the principle of power sharing (as one might have expected), but on the third strand of the institutional framework. The Agreement provided for a Council of Ireland, giving the State an unprecedented role in the internal government of Northern Ireland. The idea was nothing new (it had actually been provided for in the Government of Ireland Act), but the very idea of the South having an executive function in Northern Ireland was anathema to unionists.[118] There had been, however, discussion among the parties about how best to formalise relations between the two jurisdictions and what role the South would play in the new arrangements. Nationalists (for obvious reasons) were keen to maximise North-South cooperation. To help realise this objective, negotiations occurred between the British government and the administration of Liam Cosgrave; from 6 to 9 December.[119] They agreed to resurrect the Council of Ireland idea; the Agreement providing for a

[116] *Ibid*.
[117] British policy, according to Bew, had started to hint that withdrawal could be an option: see Bew (1996): pp.197-198.
[118] See Bew (1996): pp. 197-99.
[119] *Ibid*.

Council of Ministers, comprising "seven members from both governments."[120] The Council was to have an "`executive` and `consultative`" role.[121] In addition, Sunningdale provided for a consultative Assembly; composed of thirty members from the Dáil and thirty from the Northern Assembly.[122] It was the vehement nature of unionist opposition to this idea that proved fatal for the Agreement. The honeymoon period didn't last long: the day after the Agreement was signed the Ulster Workers Council was formed, a shady collection of loyalist paramilitaries opposed to the Agreement.[123] The move highlighted the extent of unionist concern over the Agreement and marked a turn towards extremism within unionism. The insistence of the S.D.L.P. on pushing the Council of Ireland idea played into the hands of these sinister elements; presenting the sceptics with a propaganda victory. Already sceptical over the very idea of Southern involvement in internal Northern Irish affairs, the anti-Agreement faction portrayed the Council as a "Trojan horse" which would precipitate the advent of a united Ireland.[124] The calamitous effect of the Council is described by Bew:

> "All hope for accommodationist unionism evaporated when to the cross of power sharing was added the new affliction of a vaguely defined Council of Ireland which the S.D.L.P., to the exultant choruses of the unionist right, depicted as a crucial mechanism for easing the transition to a united Ireland."[125]

Unionism in the 1970s was able to contemplate power sharing with nationalists, but a Council of Ireland which was increasingly viewed as a vehicle for destroying the Union, was too hard a sell. The Council was a bridge too far for unionists at this time. Resistance to the Agreement was becoming ever more militant, with the controversial Vanguard movement joining the main Loyalist paramilitary groups and Ian Paisley's D.U.P in opposition to the Executive.[126] It was the internal machinations of the Ulster Unionists, however, that determined the downfall of the Executive. A meeting of the Ulster Unionist

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[120] *Ibid*.
[121] Bew (1996): p.197.
[122] *Ibid*. This body was to have "advisory" and "review" functions.
[123] See Bew (1996): pp.197-99. See also *www.absoluteastronomy.com/topics/Sunningdale Agreement.*
[124] *Ibid.* The idea of a Trojan horse was well established within unionism. The website reveals that anti-Agreement fears were, "confirmed when S.D.L.P. councillor Hugh Logue publicly described the council of Ireland as 'the vehicle that would trundle unionists into a united Ireland'": see also Bew (1996), p.197.
[125] Bew (1996): p.197.
[126] *Ibid*.

Council in January 1974 had made Faulkner's position untenable, prompting his resignation, to be replaced by Harry West.[127]

With Faulkner *in situ*, the Executive stood a real chance of success. Convincing the broad unionist constituency of the merits of an all- island agreement was never going to be an easy task, but the success the project depended entirely on Faulkner's survival. With his demise, the failure of the Agreement became inevitable.[128] This is proven by the rout of pro-agreement candidates in the General Election of February 1974; anti-agreement candidates winning a remarkable eleven of the twelve Northern Ireland Westminster seats.[129] The result was emphatic, enabling recalcitrant unionists to portray the election as a democratic rejection of the Agreement. On analysis of the evidence, it is difficult to reject this position. It is fair to surmise that the Agreement constituted the best attempt to resolve the constitutional position of Northern Ireland since the formation of the State. It also refutes the myth that unionists are essentially unyielding, the Agreement representing a triumph of pragmatism and compromise. It will be remembered historically as one of the great missed opportunities, with hope extinguished by a mixture of genuine concern over the Council of Ireland, and the dark shadow of Loyalist extremism. The decisive blow came with the announcement that the Unionist party were discontinuing their support for Sunningdale (March 1974); calling for the Southern State to amend Articles 2 and 3 in the process.[130]

The involvement of the Irish government in Sunningdale raises some important constitutional questions. By conceding the reality of British government authority in Northern Ireland, it can be argued that the State was acting contrary to its own Constitution. Through signing the Agreement, the State was recognising the legitimacy of the British governing that jurisdiction.[131] Certainly the involvement in negotiations reflects a pragmatic realisation that, on a *de facto* level, Northern Ireland was part of the U.K. Despite the constitutional rhetoric there was always a practical recognition of the

[127] *Ibid*.
[128] See Bew (1996): pp.197-98.
[129] Gerry Fitt in West Belfast was the only pro-agreement candidate elected. Bew (1996): p.197.
[130] Bew (1996): p.198. See also *www.absoluteastronomy.com/topics/Sunningdale Agreement.*
[131] See below: *Boland v. An Taoiseach* [1974]. I.R.338.

political realities provided by partition. This sensible approach is reflected in every inter-governmental area of cross border cooperation; from security to agriculture and commerce. The preparedness to recognise the *de facto* reality of Northern Ireland's existence has always characterised Irish government policy. Statutes, official bodies, ministers and agencies of government have all recognised the existence of Northern Ireland.[132] Cooperation further reflects a constitutional reality: the old Articles 2 and 3 always provided for this recognition. The reality of Northern Ireland's existence is inherent in the old Article 3. In a sense this reflects the sensibilities of those who framed the Constitution. De Valera wished to emphasise his Republican credentials, but also account for the practical considerations of government (particularly the State's relations with its nearest neighbour).

The Articles, therefore, performed two principal functions: the claim over the national territory *and* the recognition that, pending the re-integration of that territory, the State could only exercise jurisdiction within Treaty boundaries. This is provided by Article 3. Indeed the old Article 3 cleverly balanced the political aspiration of re-unification with the *de facto* position. Irish participation at Sunningdale is merely a practical expression of this constitutional position. As subsequent case law has affirmed, this cooperation was not incompatible with the Constitution and, in no way diminished the claim over Northern Ireland.[133] The Sunningdale negotiations were characterised by political expediency, and such involvement can be viewed as the logical extension of the State's constitutional obligations. Articles 2, 3 and 29 can all be read as compelling the State to make peace with Northern Ireland. If we accept that the State is politically implored to seek re-unification by Articles 2 and 3, then surely negotiations such as Sunningdale are merely the logical consequence of that constitutional impulsion. The Agreement demonstrates that the attitude of the State in relation to Northern Ireland had matured considerably since 1937. Instead of demanding re-unification, the State was seeking accommodation through politics and cooperation. Unity remained the objective, but the State had recognised that this would only be achieved through a negotiated settlement.

[132] See below. Case law has confirmed that such recognition is compatible with the Constitution.
[133] See below.

That in itself was progress. Although it can be reasoned that inter-governmental accommodation over Northern Ireland was compatible with the Constitution, this had yet to be fully tested by the Courts. Nevertheless the willingness of the State to help facilitate an agreed settlement was an important step forward. The ultimate failure of Sunningdale (as venerable a political experiment as it may have been) was that it left the constitutional dispute unresolved.

THE ANGLO IRISH AGREEMENT (1985)

"…In the history of Ireland-both North and South…reality and myth from the seventeenth century to the 1920s take on an almost Balkan immediacy. Distrust mounting to hatred and revenge is never far beneath the political surface. And those who step on it must do so gingerly."[134]

So Margaret Thatcher described the pitfalls of involvement in Irish disputes. Undoubtedly, in terms of Anglo-Irish policy, the so-called `Irish question` was viewed as very much a poisoned chalice, one that Prime Ministers from both sides of the Irish Sea were loath to become inculpated in. The reluctance to settle the question of Northern Ireland was understandable. Previous attempts at arbitration (such as Sunningdale) had demonstrated the difficulty in coercing the antagonists to compromise over historical disputes. The intense bitterness that characterised the conflict was intrinsically off-putting for successive British governments. Moreover the ongoing violence, although providing a compelling reason to pursue peace, warned of the dangers posed in becoming too directly involved. Another explanation for the reticence was that Northern Ireland is one of the few issues which have the capacity to upset the `special relationship` between Britain and the United States.[135] That is not to say the British hadn't been concerned with the resolution of the Northern Ireland problem. They had always offered the hope of a negotiated settlement, whilst contact with Republicans had continued during even the

[134] Margaret Thatcher: *The Downing Street Years*: p.385. As cited in Bew (1996): p.216.
[135] Although the policy of the United States government tended to be neutral on the Northern Ireland question, Irish America was always sympathetic to the nationalist cause. Therefore, the dangers posed to Anglo-American relations by becoming too directly involved in the Northern Irish question were obvious.

darkest days of the Troubles.[136] The scale of continuing violence had brought the need to resolve the impasse into sharp focus. Sustained negotiations aimed at facilitating a settlement had proved elusive, however.

Several developments helped reverse this established policy. Firstly the election of Garret Fitzgerald as Taoiseach (for his second term in office in November 1982), heralded a new philosophy in the Irish government. The premiership of Fitzgerald had been characterised by a willingness to champion inclusiveness and promote change. Despite economic difficulties, his time in office featured a more liberal and secular approach. By Irish standards, his agenda can be considered fairly radical.[137] The nature of this agenda is witnessed by his failed attempts to amend the constitutional ban on divorce, and his rather more successful further liberalisation of contraception.[138] This desire to facilitate change extended to the vexed question of Northern Ireland, where the Taoiseach conveyed a willingness to engage with unionists. This programme of outreach found its expression in the creation of the New Ireland Forum in May 1983. The forum was intended to be a vehicle for democratic parties (elected in both jurisdictions) to discuss methods of resolving the conflict. Although all democratic parties were invited to attend, both the Ulster Unionists and Alliance Party declined the invitation. The S.D.L.P. joined the main Southern parties in addressing the debate.[139] The establishment of the forum is typical of the approach adopted by Fitzgerald in his Northern Ireland policy. The intervention of the Taoiseach reflected a belief that the question of Northern Ireland needed to be addressed urgently.

The electoral success enjoyed by Sinn Féin following the Hunger Strikes in 1981 (confirmed most spectacularly by the election of Bobby Sands as M.P. for Fermanagh-South Tyrone) had shocked constitutional nationalism to its core. Bew argues that the

[136] Even during the Hunger Strikes there were channels of contact between British negotiators and the I.R.A. See Bew (1996): pp. 212-216.
[137] See Ryan (2001) pp.141-51.
[138] Contraception had already been introduced into Ireland by C.J. Haughey in the Health (Family Planning) Act 1979.
[139] Although unionists boycotted the event the forum received submissions from interest groups from all over Ireland. Two individuals who made submissions were the plaintiffs in *McGimpsey v.Ireland*. I.R. 110 [1990], Chris and Michael McGimpsey. See Bew (1996): pp.210-212.

ousting of Gerry Fitt by Gerry Adams in the 1983 General Election was one of the factors which inspired the search for an agreement.[140] Certainly the political rise of violent Republicanism provided a compelling reason for engagement. As Bew reveals, "it was assumed in many quarters that the surge to Sinn Féin was now irresistible".[141] The concern, held by the political establishment on both sides of the Irish Sea, was that once Sinn Féin had generated electoral momentum, their progress would be impossible to contain.[142] Although negotiations commenced later in 1983[143], it was the events of the following year that underpinned British desire for a settlement. At the Conservative Party Conference, the I.R.A. bombed the Grand Hotel in Brighton (12 October 1984), killing five people and injuring thirty four others. Although Margaret Thatcher survived the attack, several prominent Conservatives were killed[144], whilst the wife of Norman Tebbit was seriously injured. The fact that the I.R.A. could get so close to assassinating key members of the British Cabinet marked an escalation in the threat posed. Such an audacious attack had never been tried before. Although the I.R.A had targeted senior politicians and members of the British establishment[145] before, the stature (and scale) of the Brighton bomb was far beyond anything which had been hitherto attempted. The events of Brighton were, therefore, completely unprecedented. Thatcher's response to the carnage had been typically resolute and defiant. Refusing to be cowed, she continued with the Conservative Conference; confident in her belief that the bombing was a fortuitous one off, never to be repeated. According to Thatcher the I.R.A. had merely been lucky. Their infamous response was chilling:

"Today we were unlucky, but remember, we only have to be lucky once; you will have to be lucky always. Give Ireland peace and there will be no war."[146]

[140] Bew (1996): p.212.
[141] *Ibid*.
[142] *Ibid.*
[143] *Ibid*.
[144] Conservative M.P. Sir Anthony Berry was one of the five fatalities.
[145] Before Brighton, the most prominent establishment figure killed by the I.R.A was the Queen's cousin Lord Louis Mountbatten, who was murdered off the west coast of Sligo on 27 August 1979.
[146] I.R.A Statement: 13 October 1984.

The statement articulates the futility in attempting to defeat terrorism militarily: although governments can be successful in preventing atrocities ninety-nine per cent of the time, it only takes one breach to cause devastation. As Garret Fitzgerald later observed:

"A major factor in the tragedy of the last three decades was the difficulty successive British governments had in grasping the futility of treating this crisis as one that could be solved by security measures. Such measures gradually drove an ever growing proportion of the northern nationalist community into the arms of the I.R.A., and it took two full decades for Irish politicians to convince British governments to review radically that flawed policy."[147]

The Brighton bomb highlighted the necessity of finding a workable settlement in Northern Ireland to prevent further outrages. In its ruthlessness, the bombing had confirmed the need to emphasise the primacy of politics in Northern Ireland, thus alienating the terrorists. The Anglo-Irish Agreement must be viewed in the context of this renewed desire to facilitate a peaceful settlement. In discussing the constitutional position of the State prior to the 19th Amendment, it is clear that the Agrement was the critical development which provided the impetus for change. The Agreement (signed on 15 November 1985) produced the definitive framework upon which amendments to Articles 2 and 3 could be drafted. From a British perspective, the primary motivation appears to have been to "secure" more effective political "cooperation."[148] This, in turn, reveals Bew, would help facilitate "better cooperation in the security field."[149] The emphasis on security was paramount.[150] I.R.A. violence could only be countered by a coherent, collaborative approach. It was evident from the earliest stages that the existence of Articles 2 and 3 was going to play an important role in the negotiations.[151] Bew has suggested that Thatcher's strategy in the talks concerned securing amendment to the Articles in exchange for an Irish involvement in Northern Ireland, which would place "emphasis on security" but fall "short of joint authority." [152] He maintains that she

[147] Garret Fitzgerald: *The Irish Times* (2001). As cited in Brian Feeney: *Sinn Féin A Hundred Turbulent Years* (Dublin, 2002): p.16.
[148] Bew (1996): p.212.
[149] Bew (1996): p.213.
[150] *Ibid*.
[151] See Bew (1996): pp.212-214.
[152] Bew (1996): p.213.

retreated, however, when the Irish made clear that they were only prepared to contemplate changes to their Constitution in the event of joint authority.[153]

Nevertheless, the Hillsborough Agreement was significant from a constitutional perspective. Firstly the Agreement enshrined the principle of consent, whereby changes to the constitutional status of Northern Ireland could only be sanctioned with the support of a majority of its people. Equally importantly, the Agreement provided that the Irish State (for the first time since 1922) would have an internal role in the governance of Northern Ireland, predicated on the basis of governmental cooperation.[154] The Agreement was endorsed by the Parliaments of both States and registered with the United Nations.[155] Article 1 of the text reads:

"The two Governments:

a) 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.

b) Recognise that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland.

c) 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, they will introduce and support in their respective Parliaments legislation to give effect to that wish."[156]

In relation to the constitutional issue, the change is obvious. The Agreement represented the first time that the consent principle had been officially endorsed by an Irish government since the inception of the State. This is a clear deviation from the 1937 Constitution. Although re-unification remained the determined goal of the Irish State, it

[153] Bew (1996): p.214.
[154] *Ibid.*
[155] O'Dowd (1994): p.3.
[156] O'Dowd (1994): p.3.

would only be realised with the consent of the people of Northern Ireland.[157] The new position also implied that the State was prepared to amend the Constitution in the context of a political settlement. In practical terms, the Agreement meant that unionists, as the majority community in Northern Ireland, would exert considerable influence over any constitutional change. While not giving unionists a veto, formal recognition of the consent principle underlined the fact that re-unification could only be achieved by persuading unionists of its merits.

Acceptance of the consent principle is something which had long been demanded by unionists. Despite the realisation of this concession, the Agreement proved immensely unpopular with the unionist community, provoking widespread protests. The undemocratic nature of the Agreement obscured any satisfaction gleaned from Southern acceptance of the consent principle. It is one of the bitter ironies of Hillsborough. Persuading the Irish government to sign up to consent had been the central objective of the unionist political establishment and yet, when it had been delivered, they were unable to endorse the Agreement. Although the perceived undemocratic nature of the Agreement accounts for much of the unionist unease, it was not the primary obstacle. Unionist opposition to the Agreement revolved around the same issue as Sunningdale: the extent of Irish involvement in the government of Northern Ireland.

The Agreement had provided, on an institutional level, for the creation of "formal links" between the two governments, with the aim of providing more stable administration for Northern Ireland.[158] An Inter-governmental Conference was to be established which, in turn, would be attended by both British and Irish ministers.[159] Controversially, from a unionist perspective, a "permanent secretariat" was to be based at Maryfield, and administered by civil servants from both jurisdictions.[160] The creation of an official Irish presence in Northern Ireland, with responsibility for assisting in internal government, was

[157] The Hillsborough Agreement was the first occasion that the State had categorically accepted the consent principle. It should be noted, however, that clause 5 of the failed Sunningdale communiqué also referenced consent. See below: *Boland v. An Taoiseach* [1974] I.R. 338.
[158] See Bew (1996): pp.212-214.
[159] Bew (1996): p.214.
[160] *Ibid*.

a significant development. The permanent nature of its existence was particularly striking (the secretariat was only replaced by the institutions established under the Good Friday Agreement). The remit of the body was wide ranging, but focused primarily on "political, legal, and security" issues.[161] Various strands of cross-border cooperation were agreed. The key area of concern was security, but other matters were provided for, including justice and infrastructure.[162]

It was the symbolism of Southern involvement in Northern Ireland, however, that proved so repulsive to unionists. The extent of involvement certainly went beyond mere "consultation", providing for a full cooperative role in the affairs of Northern Ireland. It was equally evident, Bew argues, that the Southern role "fell short" of the co-decision level nationalists desired. Although unionists portrayed the Agreement as *de facto* joint authority, there is no doubt that it failed to realise such aspirations.[163] Nevertheless, the extent of Southern input remained unpalatable to the majority community. The spectre of the `Trojan horse` had returned. It is worth noting the contrasting unionist and nationalist interpretations of the Agreement. Unionists argued that the two governments had negotiated an agreement that favoured the nationalist perspective. Nationalists did not necessarily share this point of view. In his assessment of the impact the Agreement had on the constitutional position, Garret Fitzgerald lamented that:

"Nothing substantive had changed."[164]

Although not strictly accurate, Fitzgerald's summary betrays the impression that the Agreement did not alter the constitutional position in a radical way.[165] Whilst the recognition of consent and the creation of an executive role in Northern Ireland were important developments, it can be argued that they weren't a huge departure from

[161] *Ibid***.**
[162] *Ibid*.
[163] *Ibid*.
[164] *Ibid*.
[165]It was not only the Irish for whom the Agreement fell short of expectations. Bew (1996) has argued that Thatcher felt that British concessions had not been reciprocated by Irish movement on "security cooperation." p.214.

established practice.[166] As the constitutional review of 1967 and Sunningdale had proven, the State was prepared to conceive of changes to its Constitution on the basis of a negotiated settlement. The State, on a practical level, had made allowance for the existence of Northern Ireland from its earliest days. Viewed in that context, the changes negotiated at Hillsborough were not as far reaching as they initially appear. Indeed, echoing Fitzgerald's conclusion, it can be argued that the Agreement owed more to political expediency and spin, than substantive constitutional change. Although obviously more than a cosmetic exercise, the Agreement can be viewed as a means of boosting public confidence and easing the violence. A political imperative existed which demanded action, and the Agreement represented the most workable compromise the governments could make. Nationalists had achieved an Irish input into the government of Northern Ireland, while unionists had secured acceptance of the consent principle. The need to be seen to be addressing the Northern Ireland problem, therefore, was more important than the constitutional effect.

Unionists, however, did not share this analysis, and remained fixated on the granting of an executive function to the Irish government. Their concern was not just the level of involvement, but how that might evolve over time. I would also contend that a revisionist interpretation of the Anglo-Irish Agreement underestimates the extent of constitutional change provided. Firstly, the Agreement heralded the first time the Irish State had secured an executive function in the internal government of Northern Ireland. Although it had been conceded eleven years earlier, the change had now been put into practice and had been enshrined in international law. More importantly, the State had formally accepted that a change in the constitutional status of Northern Ireland would only occur through the consent of a majority if its people. The importance of this development is self-evident, contradicting the inalienable right to national territory and self-determination enshrined in the 1937 Constitution. In so doing, the Irish State had moved some way not just from that document, but Sunningdale.[167] According to the logic of the

[166] See above.
[167] The Hillsborough Agreement offered a more substantial commitment to the consent principle than Sunningdale. More importantly, Hillsborough (unlike Sunningdale) was a fully fledged international agreement. See below.

Agreement, the Irish constitutional position was no longer based solely on the irredentist demand for re-unification, but was now underpinned by the notion of consent. Therefore, while the State remained committed to pursuing the ideal of unity it had accepted, on a practical level, that it could only be achieved through the consent of a majority in Northern Ireland. Such an unambiguous recognition of consent exhibits a clear shift in the policy of the State.

The extent of the constitutional significance is, however, a matter of debate.[168] Whether one views the Agreement as contrary to the Constitution hinges on the interpretation of Article 1 (a). An acceptance of consent, it can be argued, reinforces the status of Northern Ireland as part of the United Kingdom. Moreover Article 1 establishes that this status will only be altered when the consent of the people of Northern Ireland has been obtained. The reading of this Article gets to the crux of the matter: is such formal recognition of Northern Ireland at odds with the Constitution? Article 1 of the Agreement was the central tenet of the *McGimpsey* case. Unionist opposition to the Anglo-Irish Agreement revolved around its undemocratic nature, and the way in which it ceded authority to the Irish government which was, in their view, unjustifiable.[169] What made this new Irish dimension more unpalatable was that it was seemingly in contradiction of its own Constitution. How could Ireland assume authority to help administer Northern Ireland (or indeed recognise the consent principle), when its Constitution failed to recognise the existence of that jurisdiction? The constitutional uncertainty which lay at the heart of the Agreement gave unionists a foundation upon which to challenge its existence.[170] John Hume, according to Bew, had a rather different understanding of the Article.[171] He interpreted Article 1(c) as proving that the British government had no vested "interest" in remaining in Northern Ireland.[172] Not for the last time, Hume was advancing the argument that Britain had become "neutral" on the Irish question and was prepared to disengage.[173] He cited clause C as evidence of this position.[174] According to this theory,

[168] See below: *McGimpsey v. Ireland* [1990] I.R.110.
[169] See Bew (1996): pp.212-215.
[170] See Bew (1996): p.215.
[171] *Ibid*.
[172] Bew (1996): p.215.
[173] *Ibid*.

British policy had changed in a more fundamental way than Irish policy. The truth is that the Agreement can be characterised as fudge. By placing an emphasis on consent while at the same time accentuating the Irish dimension, and holding out hope of re-unification, it can be argued that the governments were deliberately trying to "avoid a clash" with the "Irish Constitution."[175] Such ambiguity made the Agreement ripe for constitutional challenge. While there was even the hint of unconstitutionality, the authority of the Agreement was undermined.[176] That is why it was so important to test the legality of the Agreement in the courts.

Although unionist objections to Hillsborough are well documented, perhaps the more important aspect of the Anglo-Irish Agreement was the manner in which it emboldened nationalism. The Agreement paved the way for the historic Hume-Adams dialogue, a pivotal development in the peace process. In 1988, once the Hillsborough Agreement had gestated, the S.D.L.P. leader initiated talks with his Sinn Féin counterpart, Gerry Adams. In the modern context of Sinn Féin Ministers and political respectability, it is difficult to conceive just how controversial this dialogue was at the time. For a start, the I.R.A was still wedded to violence and continuing its armed campaign, both within Northern Ireland and in Britain Sinn Féin had opposed the Anglo-Irish Agreement as a "partition based solution" which had failed to achieve Irish unity.[177] The political ostracising of Sinn Féin was most visibly demonstrated by the broadcasting ban imposed by the Thatcher government.[178] Therefore, by engaging with Sinn Féin, Hume was displaying remarkable political courage. The dialogue was to prove extremely profitable, however. The talks helped drive Sinn Féin into the political mainstream, the hope being that this would secure a cessation of violence. The Republican movement had been flirting with electoral politics since the Hunger Strikes, but the leadership remained unconvinced that it

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[174] *Ibid.*
[175] *Ibid*.
[176] See below. See also Bew (1996): pp.212-215.
[177] Gerry Adams described the Agreement as giving `formal recognition` to the partition of Ireland. See Feeney (2002): pp. 335-343.
[178] *Ibid*: The ban was imposed following a controversial B.B.C. documentary of 1985 called "Real Lives". The programme had featured two politicians from Derry, Martin McGuinness of Sinn Féin and Gregory Campbell of the D.U.P. In implementing the ban Thatcher stated that she wanted to starve "terrorists of the oxygen of publicity". See also s. 31 of the Broadcasting Act 1960 in Ireland.

provided the only mechanism for achieving a united Ireland. The election of Bobby Sands had highlighted the potential for political expansion, although that success had failed to turn the movement from violence. The opposition of Republicans to the Agreement provided further evidence that they were still on the outside of the body politic.

It is no exaggeration to state that the Hume-Adams dialogue constituted the most important step in convincing Republicans of the primacy of politics. First, the engagement demonstrated that constitutional politicians were prepared to enter into dialogue with Republicans. This conferring of democratic legitimacy helped persuade Sinn Féin that its future strategic direction lay with mainstream politics.[179] The interaction with the S.D.L.P. did much to advance the idea that re-unification could be achieved through politics alone. One of Hume's first tasks was to convince a sceptical Adams that not only was Britain neutral on the constitutional question, but that, under the right circumstances, they could act as persuaders for Irish unity. One of the Republican arguments against full scale political engagement was that as long as a British presence remained in Ireland, an accommodation between the two traditions would be impossible. Hume again advanced the argument that the British had no long term, strategic interest in maintaining the Union.[180] The receipt, and acceptance, of this argument, proved crucial in the assertion of political primacy within the Republican movement. Subsequent developments gave credence to Hume's advocacy of British neutrality.[181] Combined with its own electoral success, the Hume-Adams dialogue provided Sinn Féin with evidence that the best prospects for success lay with politics. Without this intervention, it is doubtful that the original I.R.A. ceasefire of 1994 would have been achieved. The importance of the Anglo-Irish Agreement, from a nationalist perspective, cannot be over stated. It marked the beginning of a new pan-nationalist agenda, which characterised Irish politics for the next decade, and culminated in the Good Friday Agreement. As Bew observes:

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[179] See Bew (1996): pp.215-221.
[180] See above, Bew (1996): p.215.
[181] See below.

"Constitutional and revolutionary nationalism were profoundly convinced that the Agreement was the clearest indication that the tide of history was running their way. It was the first semi-constitutional recognition of longer term structural shifts which were consigning unionists to the category of defeated peoples."[182]

The Agreement was a key turning point for all sides. For nationalists, it represented the first occasion that their political aspirations had found expression in a Northern Irish context. The political framework provided a tangible link between the State and the nationalists of Northern Ireland, something the 1921 Treaty had manifestly failed to do.[183] Moreover the Agreement had established a template for the realisation of political re-unification. For Republicans, the Agreement, through its inspiration for the Hume-Adams dialogue, aided their journey towards political legitimacy and constitutional politics. In that sense the Agreement had perhaps achieved one of its primary aims, namely the demonstration that political violence was counter-productive. Although it took nearly a decade to facilitate a ceasefire, the inter-governmental approach adopted at Hillsborough demonstrated that a political settlement was possible, and that I.R.A. violence was hindering that vision.

For unionists, the Agreement represented a watershed of a different kind, underlining the need for political engagement within Northern Ireland. That way, an Agreement of this nature could never be implemented over their heads again. The Agreement heralded a more pragmatic approach by unionism, as demonstrated by the policy of James Molyneaux and his successor David Trimble, who both sought to end the conflict by engaging with other parties. From a constitutional viewpoint, the Agreement should be viewed as a significant development. The granting of an executive role to the Irish government in Northern Ireland and Southern acceptance of the consent principle represented real change. The contention of unionist opponents was that such changes in Irish policy were incompatible with the Constitution. It was the Irish courts who settled the question: not only were Articles 2 and 3 fully compatible with the Agreement but

[182] Bew (1996): p.221.
[183] See above, Garvin (2005): p.143.

they provided a "constitutional imperative" for re-unification.[184] The *de facto* existence of Northern Ireland was, therefore, fully compatible with the Articles; a recognition which is inherent in Article 3.[185]

THE DOWNING STREET DECLARATION (1993)

The commitment of the State to constitutional change in the context of an agreed political settlement was re-iterated in the Downing Street Declaration of December, 1993.[186] The Declaration resulted from the momentum created by the Hume-Adams process, whereby the governments became convinced that political progress was possible. Although in admiration of the potential generated by Hume-Adams, the British government, according to Bew, was concerned that they failed to give adequate cognisance to the "consent" principle.[187] In order to build on this potential, Prime Minister John Major and Taoiseach Albert Reynolds instigated a political process which they hoped would produce substantive change.[188] In one sense the inter-governmental Agreement constituted a confirmation of its predecessor, negotiated at Hillsborough eight years earlier. The Downing Street Declaration, however, was to alter the political landscape in a fundamental way. Two notable concessions were to have a profound impact:

"…He (Major) re-iterates, on behalf of the British government, that they have no selfish strategic or economic interest in Northern Ireland. The British government agrees that it is for the people of the island of Ireland alone, by agreement between the two parts respectively, to exercise their right to self-determination on the basis of consent, freely and concurrently given, north and South, to bring about a united Ireland, if that is their wish.

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[184] See below.
[185] A fuller discussion of *McGimpseyv.Ireland* [1990] I.R.110 and other case law is detailed in Chapters 2 and 3.
[186] The Declaration was followed by the controversial "Frameworks Document", which provided an institutional framework for constitutional change.
[187] Bew (1996): pp.227-228.
[188] *Ibid*.

The Taoiseach …considers that…..it would be wrong to attempt to impose a united Ireland, in the absence of the freely given consent of a majority of the people of Northern Ireland. He accepts…that the democratic right of self-determination by the people of Ireland as a whole must be achieved and exercised with, and subject to, the agreement and consent of a majority of the people of Northern Ireland and must, consistent with justice and equity, respect the democratic dignity and the civil rights and religious liberties of both communities…..

The Taoiseach also acknowledges the presence in the Constitution of the Republic of elements which are deeply resented by Northern unionists, but which at the same time reflect the hopes and ideals which lie deep in the hearts of many Irish men and women."[189]

The unprecedented admission by the British government that they had no "selfish, strategic or economic interest" in Northern Ireland was one of the key moments of the peace process. Without the statement, it is unlikely that an I.R.A. ceasefire could have been delivered. John Hume had spent much of the preceding five years attempting to convince Republicans that the British had no vested interest and could play the role of honest broker in negotiations. Sinn Féin had been sceptical, the party being historically suspicious of British intentions in Northern Ireland. Here it was, however, in black and white: the British stating in unambiguous terms that they had no selfish motive in remaining in Northern Ireland.[190] Hume's position in his dialogue with Adams had been vindicated.[191] The British policy now appeared to be neutral regarding the future of Northern Ireland. While the British government had not emerged as persuaders for Irish unity, the Declaration committed the U.K. to neutrality, ensuring that one community could not dominate the other. Historical discrimination such as gerrymandering would never be repeated. The concession by the Taoiseach that the Constitution contained elements which are offensive to unionists was also significant.[192] Albert Reynolds emphasised that the best prospect for progress lay in the acknowledgement of all identities in "more balanced ways."[193] The statement served a double purpose; re-iterating to unionists that they had nothing to fear from the State, while implying that

[189] O'Dowd (1994): p.4. See also Bew (1996): p.229.
[190] This statement was the result of sustained negotiations by Irish civil servants. So intensive were the talks that mandarins even argued over whether to put a comma in the sentence. See Bew (1996): pp. 227-230.
[191] *Ibid.*
[192] The statement was possibly an allusion to Articles 2 and 3.
[193] As cited in O'Dowd (1994): p.4. See O'Dowd (1994): pp.2-5.

Articles 2 and 3 could be amended in the context of a settlement. By accentuating the flaws in its Constitution, the Taoiseach was holding out the possibility that the Constitution could be amended to make it more amenable to unionists.[194] The Declaration stated that any change to the constitutional position of Northern Ireland would only occur on the basis of consent.[195] As a means of reinforcing that idea, the governments declared that they would only introduce legislation to give effect to that change when the consent of both jurisdictions for such developments had been determined.[196] The Declaration should be viewed as an important milestone in the journey towards the removal of the legal claim. The categorical statement by the British government about their long term intentions in relation to Northern Ireland helped provide the political context within which the Dublin administration could contemplate changes to Articles 2 and 3.

By making recognition of the consent principle a central tenet of any future settlement, the Governments were reassuring unionists that any changes to the status of Northern Ireland could only occur through the support of a majority of its people.[197] Both the Hillsborough and Downing Street Declarations provided the framework for changes to Articles 2 and 3. The Declaration demonstrates that the State had no difficulty endorsing the consent principle. In so doing, Albert Reynolds was in no way abandoning a policy of re-unification. On the contrary, the Irish government interpreted the Declaration as enhancing the prospects for political unity, enshrining that permanent *rapprochement* between the two parts of Ireland would only be achieved through consent. Moreover it was clear that the State did not regard this policy as being contrary to its own Constitution. Bew assesses the importance of the Declaration thus:

"The self-determination of the Irish people was conceded by Britain, but only on the basis that the Irish government wished to operate that principle in favour of Irish unity with the support of a majority in the North…The British, it is true, were now `facilitators` though not for Irish unity but for an agreed Ireland,

[194] *Ibid*.
[195] See above, O'Dowd (1994): p.4.
[196] See above. *Ibid*.
[197] See above. See also Bew (1996): pp.221-229.

and an `agreed` Ireland, by definition, could not be a united Ireland until there was majority consent in the North."[198]

THE GOOD FRIDAY AGREEMENT (1998)

"……The Agreement reached in the Multi-Party negotiations is a major achievement, both for its negotiators and the peoples of Ireland and Britain. To make it, many politicians, officials, paramilitaries and ordinary citizens had been through trials by ordeal. It emerged from a political desert whose only landmarks were failed initiatives."[199]

With nearly twelve years having elapsed since its signing, it is difficult to put the Good Friday Agreement into its proper context. Given that its aftermath has witnessed a Sinn Féin-D.U.P. partnership in government, Martin McGuinness as Deputy First Minister, and the virtual retirement of the I.R.A., it is easy to forget the truly historic nature of the compromise. Although previous attempts at accommodation had generated hope, ultimately they had resulted in failure and recrimination. The Good Friday Agreement, and the protracted negotiations which preceded it, represent the triumph of hope over despair. Given the seemingly irreconcilable positions of unionism and Republicanism that had existed pre-1998, the Agreement is nothing short of a political miracle. Over a decade later, it is still the shining beacon for other attempts at conflict resolution around the world. Israel-Palestine, Tibet, and even South Africa, can only dream of the institutional, security and political stability, afforded to Northern Ireland by the Belfast Agreement. It would be disingenuous not to recognise the Agreement's inherent flaws, notably its sectarian and tribal nature. Nonetheless the Agreement is the most important Irish political development of the latter half of the 20th century, an unprecedented attempt at reconciling the two main political traditions on this island. The fruit of years of

[198] Bew (1996): p.229.
[199] John McGarry and Brendan O'Leary: *The Northern Ireland Conflict: Consociational Engagements*. (Oxford, 2004): p.261.

painstaking negotiations, the Good Friday Agreement represents the most important constitutional change since 1922. As such, it should be considered a monumental achievement.

The achievement is remarkable, considering that it occurred amidst a background of violence. The I.R.A. had declared a complete cessation of violence on 31 August 1994, offering the potential for a political settlement.[200] The nature of the ceasefire was a matter of fierce debate, but the development paved the way for inclusive all party talks involving Sinn Féin.[201] The momentum dissipated, however, as the months elapsed. The most destabilising influence was the vexed issue of decommissioning. The key unionist pre-condition for the entry of Sinn Féin into negotiations was that the vast arsenal of I.R.A. weapons would have to be decommissioned. The purpose was to prove the credentials of Sinn Féin as a democratic party, and test the sincerity of the I.R.A. cessation. Bearing in mind the recent history of Republican involvement in internecine, sectarian violence, unionists considered decommissioning to be a legitimate test of their democratic credentials.[202] Republicans adopted a different position, viewing their place at the negotiating table as an elected right, derived from their mandate. That is not to say that all Republicans were averse to decommissioning as a concept. The Sinn Féin leadership had been keen to emphasise that an unarmed society was the logical consequence of conflict resolution.[203] They remained obstinately opposed, however, to the use of decommissioning as a pre-condition.[204] Many Republicans viewed the unionist insistence on decommissioning as a way of excluding them from talks.

The governments, therefore, had a difficult task in attempting to square this circle. The original position had not been a million miles away from the unionist viewpoint, i.e. that a start to decommissioning would have to be made before Sinn Féin could command their

[200] See Bew (1996): pp.220-227.
[201] The ceasefire had resulted from intensive behind the scenes negotiations and the diplomatic efforts of British, American, and Irish officials. There were several notable milestones along the way, but one of the most important was the granting of a visa to Gerry Adams by the Clinton administration. See Bew (1996): pp.220-227.
[202] *Ibid*.
[203] Bew (1996): pp.220-227.
[204] *Ibid*.

place at the negotiating table.[205] The British government in particular advocated that a gesture on decommissioning was essential in securing unionist acceptance of Sinn Féin participation in the talks.[206] Nationalists, on the other hand, were instinctively sceptical of this position, realising that too adamantine an approach to the issue would threaten to destroy the opportunity created by the ceasefire. John Hume had been particularly vigorous on this point.[207] By insisting in prior decommissioning as a pre-condition, unionists were threatening to destroy conditions which had taken years to create.[208] Moreover the dynamic of the peace process had changed from a Southern perspective. Following the collapse of the Reynolds government in December 1994, John Bruton formed the `Rainbow Coalition`, comprising Fine Gael, Labour and Democratic Left.[209] The change in administration had repercussions for the peace process. Reynolds had been an ardent supporter of the Hume-Adams approach.[210] Bruton was to take a more neutral line, seeking common ground with the Major government. Bruton seemed to have been persuaded that the policy of prior decommissioning was correct.[211]

Meanwhile British policy also appeared to be drifting in a more unionist direction.[212] The u-turn was inspired by practical rather than ideological considerations. Throughout 1995 and 1996, Major's government had been paralysed by infighting and discord, particularly over Europe. More alarmingly, his majority had been steadily dwindling through defections and by-election results.[213] Naturally this made Major reliant on smaller parties to shore up his administration. One ally in this period was David Trimble, who had succeeded Molyneux as leader of the Ulster Unionist Party in 1995.[214] Nationalists had been suspicious that the parliamentary alliance with Trimble had

[205] *Ibid*.
[206] *Ibid*.
[207] *Ibid*.
[208] See Bew (1996): pp.227-239.
[209] Democratic Left had emerged from the Workers Party and Official Sinn Féin. Because of their background the party tended to have strong views on Northern Ireland.
[210] See Bew (1996): pp.220-227.
[211] Feeney (2002): p.214.
[212] *Ibid*.
[213] Allegations of sleaze and scandal further diminished morale. By December 1996 the Conservative majority had disappeared altogether.
[214] See Bew (1996): pp.220-227.

influenced Major's policy in the peace process. The Anglo-Irish insistence on prior decommissioning must be viewed in this context.

The new policy placed the Adams leadership in a quandary. Much had been sacrificed to create an environment where inclusive peace talks were possible. Republicans had invested too much in the Hume-Adams approach to jeopardise the peace process by a return to full scale violence. Decommissioning was at this point, however, impossible for Sinn Féin to deliver.[215] In the end, the resolution that prior decommissioning was essential for Republican admission to talks proved terminal for this phase of the process.[216] The I.R.A. broke their cessation in spectacular fashion by planting a bomb in Canary Wharf on 9 February 1996.[217] The ceasefire had lasted a mere seventeen months and all the momentum generated had apparently been lost. At this stage, the prospect of a negotiated settlement seemed very remote indeed.

The peace process was to secure a much needed lifeline with the landslide election victory of Tony Blair on 1 May 1997.[218] The change in administration removed all the obstacles to progress. Blair's election promised a new attitude in relation to the peace process. Not only was the Labour party traditionally perceived as being more sympathetic to the nationalist cause, Blair himself had committed his premiership to resolving the Northern Ireland issue.[219] Northern Ireland was a clear priority for the new government. The most urgent focus was the reinstatement of the cessation, which in turn would open up the possibility of all-party talks. Blair abandoned the flawed policy of prior decommissioning, arguing instead that decommissioning could occur in parallel with talks.[220] Moreover the Prime Minister made it clear that Sinn Féin would be included in the negotiations if the cessation was restored. The new approach was markedly more successful than the obfuscation of Major, his healthy majority enabling Blair to act as an

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[215] *Ibid*.
[216] *Ibid*.
[217] The bomb destroyed much of the premier financial area in London, causing "£85m worth of damage." See Feeney (2002): p.214.
[218] *Ibid:* pp.214-230.
[219] *Ibid*.
[220] The idea of parallel decommissioning emerged as a means of ensuring Sinn Féin's admittance to the talks, while at the same time placating unionists over the disarmament issue.

objective broker, free from the need to pander to the Ulster Unionists in parliament. The change in government created fresh optimism that political progress could be renewed.

"…Those who accepted the nationalist view of the peace process believed that a Labour Government, with its large majority and traditional sympathy for Irish unity, would easily succeed where the Conservatives had failed."[221]

The "complete cessation of military operations" was reinstated on 20 July 1997.[222] The main barrier to the commencement of all-party negotiations had been removed, but difficulties remained and unionists became increasingly concerned. The breakdown of the original ceasefire had augmented unionist worries that the cessation was neither sincere nor permanent. In addition, the removal of prior decommissioning as a pre-condition for entry into talks had alarmed the unionist grassroots. A belief was fermenting that the new government was biased in favour of the nationalist position. Pacification of the unionist constituency was paramount if the mistakes of 1974 were to be avoided. Even if strategically Trimble was inclined to lead his party into inclusive negotiations, there would be no prospect of success if he was unable to deliver the broad unionist constituency.

Trimble's plight was made more perilous by the fact the D.U.P. was characteristically standing by to protest, accusing the Official Unionists of betrayal. Blair, therefore, sought to reassure Trimble that the Union was secure and that any negotiations would occur on the basis of consent.[223] In summarising his position, he affirmed "the principle of consent will be at the heart of my government's policy on Northern Ireland, it's the key principle."[224] Despite internal dissent, Trimble calculated that unionists could exert more influence within the talks. As a constitutional lawyer, he realised the importance of the negotiations; that unionists could not afford another Hillsborough scenario where a deal could be implemented over their heads. In a display of political fortitude, he entered the

[221] Paul Dixon: *Northern Ireland: The Politics of War and Peace* (London, 2001): p.266.
[222] I.R.A Statement: 20 July 1997.
[223] See Bew (1996): pp.220-227.
[224] Dixon (2001): p. 267.

talks on 9 September 1997, flanked by members of fringe Loyalist parties.[225] With Trimble safely on board, all barriers to the inclusion of Sinn Féin had been removed. Nevertheless Blair, acutely aware of the risks Trimble was taking, was keen to reassure unionists and protect the Ulster Unionist leader from his critics.[226] Following the beginning of talks, he commented:

"Trimble has come further than Unionists wanted him to……It was important to remember that Trimble was under constant attack from Paisley and (Robert) McCartney, so giving comfort to the Ulster Unionists was vital."[227]

The talks were convened under the chairmanship of George Mitchell, the senior United States diplomat, who had previously been involved in the process as chairman of the Independent International Commission on Decommissioning.[228] The strategy of Trimble in negotiations was probably rather straightforward i.e. to cement acceptance of the consent principle and seek assurances on Articles 2 and 3.[229] He was in quite a strong position, therefore. His primary problem was that throughout negotiations he was constantly undermined by unionist critics, both within and without his party. As well as nationalist opponents, Trimble had to contend with the traditional unionist belief that they were victims of a sell out. This fear was expressed with typical loquaciousness by Robert McCartney:

"Without doubt the whole purpose of these talks is to wring further concessions from the majority that would both undermine the strength of the Union and the quality and nature of their British citizenship and identity."[230]

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[225] The so called fringe Loyalists played a prominent role in this phase of the peace process. The P.U.P and U.D.P did much to secure the` Combined Loyalist Military Command` ceasefire of 1994 and were heavily involved in the talks. The former even secured two seats in the 1998 Assembly elections. The P.U.P was led by David Ervine and the U.D.P by Gary McMichael, the son of a prominent Loyalist who had been murdered by the I.R.A.

[226] Bew (1996): pp.220-227.

[227] As cited in Dixon (2001): p.268.

[228] *Ibid*: Mitchell, a confidant of Bill Clinton, was an admired negotiator. As part of his remit, he had composed the Mitchell Report which had attempted to quantify how the issue of decommissioning could be resolved. He also set out the `Mitchell Principles` of non-violence, a code of behaviours and values that all parties in the talks had to sign up to.

[229] Bew (1996): pp.220-227.

[230] Michael Cox, Adrian Guelke and Fiona Stephen: *A Farewell to Arms? Beyond the Good Friday Agreement* (2nd ed. Manchester, 2006): p.91.

The priority for nationalists, meanwhile, was to maximise the Irish dimension in negotiations.[231] Although maintaining that re-unification remained their bottom line, even Sinn Féin was realistic in its expectations.[232] This attitude provided nationalists with a certain freedom in negotiations. Echoing previous talks, the perception was that northern nationalists had everything to gain, whereas unionists considered themselves as having everything to lose. The traditional `siege mentality` posed a very real danger to the process. Nationalist negotiators were sensitive to the internal machinations within unionism. Enthusiasm for securing the best deal for their own constituency was tempered by a desire not to push for a settlement that could not be sold to unionists.[233] A determination existed not to repeat the mistakes of 1974. As Dixon reveals:

"…Sunningdale cast a long shadow over negotiations. A senior S.D.L.P representative said that his party was conscious over Trimble's difficulties and of the danger of a `dramatic scenario with echoes of 1974`……..The two governments once again appeared to be playing their role as champions for their clients in Northern Ireland. U.U.P sources claimed `The Irish government are fully batting for Sinn Féin and giving Sinn Féin a veto` and unionists expected Blair to `do for us what the Irish government appears to be doing for nationalists` ."[234]

The strategy of the governments seems to have been that they would each use their influence where appropriate. The Irish government engaged with Sinn Féin, with the British concerned with shoring up Trimble.[235] The approach appeared controversial; conveying the impression of Anglo-Irish partisanship i.e. that the British were adopting a unionist position, while Ahern's administration was advancing a pan-nationalist agenda. The implication drawn was that the previous British policy of neutrality had been abandoned in favour of support for the unionist position. This impression is misleading. The pre-occupation of British negotiators with the Ulster Unionists should not be interpreted as a return to a unionist position; rather it reflects the reality that Trimble

[231] *Ibid*.
[232] *ibid*.
[233] *Ibid*.
[234] Dixon (2001): p.269.
[235] The Americans, to a lesser extent, were also involved in assisting the Ulster Unionist leader. See Dixon (2001): p.269.

could only manage internal difficulties with the support of Blair.[236] Trimble's negotiating hand was improved significantly with the withdrawal of the D.U.P. and U.K.U.P. from talks. Although the dissenters could still protest from outside the talks, their absence gave Trimble latitude for negotiation that would not have been possible otherwise. The inclusion of the D.U.P., in particular, would have paralysed the process. Any conciliation by Trimble would have been met with accusations of treachery. The importance attached to the boycott of negotiations by the more implacable unionist parties is explained by Mitchell:

"No-one can ever know for certain what might have been, but I believe that had Paisley and McCartney stayed and fought from within there would have been no agreement."[237]

The path was now cleared for Trimble to compromise. Accommodation seemed to be the preferred strategy for the Ulster Unionist leader, who had absorbed the lessons of 1985.[238] According to Cox, "the lesson of the Anglo-Irish Agreement appeared to be that unionists could not afford to be on the outside of a process that would determine their future."[239] Despite his internal difficulties, Trimble was edging closer to a deal. The likelihood of a settlement was increased not just by Trimble's willingness to compromise, but by the pressure exerted by the governments who did not want to see the historic opportunity wasted.[240] Still, the process went to the wire. Initially the target for agreement had been New Year 1998, but as the months progressed it became obvious that substantial differences remained.[241] Primarily, these concerned the extent of North-South cooperation and decommissioning. The issue of Irish involvement was emotive for unionism. Trimble had accepted that a North-South dimension would form part of the settlement, but sought assurances regarding the extent of its remit. Unionist concern initially revolved around whether these bodies would have `executive` functions.[242] Friction became inevitable as the nationalist parties were adamant that unless the North-

[236] See Dixon (2001): p.269.
[237] As cited in Cox (2006): p.91.
[238] Cox (2006): pp.90-92.
[239] Cox (2006):p.92.
[240] *Ibid*.
[241] *Ibid*.
[242] *Ibid*.

South institutions possessed an executive function, they would be rendered meaningless. As the deadlines extended, it seemed that a settlement would collapse on the same basis as 1974. Unionist opposition to the idea of executive North-South bodies appeared to soften, however. Rather than limit their role to that of consultation, Trimble instead demanded that the institutions be accountable to the Northern Ireland Assembly, created as part of the Agreement.[243] It was a clever tactic by the Ulster Unionist leader, highlighting that he was prepared to compromise over the Irish dimension, whilst ensuring that the bodies would be accountable. Moreover, by insisting that North-South bodies be accountable rather than `stand alone`, he made it easier to sell the idea to the unionist constituency. Nationalists, therefore, would achieve North-South bodies with the level of authority they deemed necessary. At the same time unionists could argue that they had limited the extent of these bodies. The *quid pro quo* for unionist acceptance of executive North-South bodies was the removal of the legal claim over Northern Ireland.[244]

Decommissioning had proved a much trickier issue to resolve. As the talks progressed, it became evident that paramilitary disarmament would not happen in parallel. The failure to achieve decommissioning became a source of considerable disaffection within the Ulster Unionist Party.[245] The completion of decommissioning had been a pre-condition of the party's entry into inclusive negotiations. The fact that this process had still not even started seriously hampered the ability of Trimble to complete the deal. By early spring 1998, the substance of the deal had largely been agreed. The main elements comprising an elected Assembly, North-South institutions and a British-Irish council had been approved.[246] Positive statements emanated from the talks, increasing optimism that a settlement was possible. Trimble, in summarising his hopes for the Assembly, stated that he wanted it to be a "pluralist parliament for a pluralist people".[247] In echoing Craig's declaration, Trimble was emphasising that the new Assembly would break from the past; represent all communities and be free from discrimination. Decommissioning represented

[243] *Ibid*.
[244] *Ibid*.
[245] See Cox (2006): pp.90-93.
[246] *Ibid*.
[247] Cox (2006):p.93.

the last major hurdle to having this vision realised. Frantic diplomatic efforts involving the governments continued into April 1998, aimed at resolving the impasse.[248]

The focus moved to reassuring unionists that decommissioning would be commenced before Sinn Féin could be included in the Executive. It was a delicate balancing act. Without reassuring Ulster Unionists an agreement would be impossible, but the governments did not want to go so far that they alienated Republicans. Pressure was exerted on all parties to compromise, with Bill Clinton personally contacting Trimble to commend him on his conciliatory stance.[249] A mood of uncertainty prevailed throughout the final days, the Ulster Unionists unsure that they had received enough assurances on decommissioning to sell the deal to their electorate.[250] Following intensive negotiations which lasted through the night, the desire to settle prevailed. On 10 April 1998, all the parties involved in the negotiations (including the two governments) signed the accord. An historic compromise had been achieved, completely unprecedented in modern Irish history. Sunningdale had been ambitious in its intent, but here was a settlement that included virtually all the main parties.[251] The only significant constituency unrepresented had been the dissenting unionists. The Agreement had even surpassed Sunningdale by providing an all-Ireland framework which had been accepted by the Ulster Unionist Party. Remarkably, the Ulster Unionists had assented to the compromise in spite of their internal concerns.[252] The basis for an inclusive and workable system of government had finally been agreed.

As Kelly acknowledges, the Agreement consisted of two elements; "the multi party Agreement, and the inter-governmental Agreement."[253] The Agreement had been divided into three principal areas or `strands`.[254] Strand one provided for a 108 member cross-

[248] *Ibid*.
[249] *Ibid*.
[250] *ibid*.
[251] The main nationalist and unionist parties, Sinn Féin, the Alliance Party, Women's Coalition, and the Loyalist representatives all signed the Agreement.
[252] The main dissenting voice within the Ulster Unionist Party was that of Jeffrey Donaldson, who walked out on the last day of the talks over what he regarded as a lack of clarity on decommissioning.
[253] J.M. Kelly: *The Irish Constitution* (4th ed. Dublin, 2004): p.70.
[254] *Ibid*.

community Assembly, Strand two for the North-South Ministerial Council, which would deal with areas of mutual cooperation and Strand three, which provided for the establishment of the British-Irish Council.[255] . The system incorporated in built systems of checks and balances, designed to prevent discrimination and the domination of one community over the other.[256] The Assembly was conceived to act as a legislature and executive, the governmental aspect provided by a ten person Executive and headed by a First and Deputy First Minister.[257] Although "distinct" for practical purposes, the positions of First and Deputy Minister are essentially "equal."[258] Thus all important decisions had to be made jointly.

As such, no one community could advance their agenda at the expense of the other. Cross-community consensus lies at the heart of the Agreement's apparatus.[259] The most notable safeguard is the controversial D'Hondt mechanism for appointing members of the Executive.[260] . The idea is to spread authority over as many parties as possible, provided that they have sufficient votes.[261] Further restrictions were applied to prevent any possibility of sectarian domination.[262] For example, there is the system of cross-community designation where every member of the Assembly is required to designate themselves as `nationalist`, `unionist` or `other`.[263] .The North-South Ministerial Council allows Ministers from both sides of the border to meet and discuss 12 areas of mutual cooperation.[264] The British-Irish Council represented the East-West element of the

[255] Dixon (2001): p.269. See also Ryan (2001), p.41.
[256] *Ibid*.
[257] Dixon (2001): p.268.
[258] *Ibid*.
[259] *Ibid*.
[260] Devised by a Belgian mathematician, the system appoints members based on their party strength in the Assembly. Other safeguards are used for major decisions such as including cross-community voting mechanisms, such as "parallel consent and weighted majority voting." See Dixon (2001): pp.268-269.
[261] Dixon (2001): p.270.
[262] *Ibid*.
[263] See Dixon (2001): p.269. The system of cross-community designation has proved controversial in practice. The biggest controversy concerned the restoration of the Executive in November 2001, where David Trimble and Mark Durkan could only be elected as First Ministers by the re-designation of members of the Alliance Party and Women's Coalition.
[264] The twelve areas of cooperation involved six subjects for cooperation ("Transport, Agriculture, Education, Health, the Environment and Tourism) and six implementation bodies (Inland waterways, Food Safety, Trade and Business Development, Special E.U programmes, Language and Agricultural/Marine matters)." See Dixon (2001): p.70.

Agreement.[265] [266] The main criticism of the Agreement was that it institutionalised sectarianism rather than eradicating it. The argument is that by having a mandatory as opposed to a voluntary coalition, divisions are merely reinforced. Some commentators have attacked the Agreement on this basis.[267] According to O'Leary, this argument is flawed. He writes:

"The unionist intellectual Robert McCartney, ironically mimics anti-Agreement Republicans in claiming that the power sharing institutions are `impermanent`, dysfunctional` and `unworkable`……..
These criticisms are not convincing…There is a basic inability to distinguish, between on the one hand, policies that promote injustice and incite conflict between groups, and policies that are designed to promote equitable settlements and better inter-group relations."[268]

It is better to view the Agreement as a workable framework within a divided society. Although imperfect, the checks and balances were necessary to safeguard against the discrimination suffered by nationalists in the past. There was still no guarantee at this stage that the Agreement would be endorsed. Nationalists were overwhelmingly in favour, but anxiety remained within unionism over decommissioning and other controversial elements.[269] An intensive P.R. campaign was launched to counter this concern, the governments realising that the Agreement would only have authority if endorsed by majorities in both jurisdictions. Key moments included David Trimble and John Hume appearing with U2, and Tony Blair offering a series of handwritten pledges to reassure the unionist electorate. The pledges were seen as a seminal moment in turning unionist opinion as they included an assurance that Republicans would only be included in an Executive once a process of decommissioning had been initiated.[270] The campaign

[265] *Ibid*: The Council provided for an irregular, but informal meeting of representatives from the U.K. parliament, Irish parliament, and the devolved Assemblies of Scotland and Wales.
[266] There was also to be representation from the Channel Islands and other smaller jurisdictions.
[267] Socialist writer Eamonn McCann is one such critic, claiming that the tribal nature of the institutions prevents conventional left/right politics from emerging in Northern Ireland.
[268] O'Leary (2004): p.341.
[269] The proposed release of paramilitary prisoners was a particular concern.
[270] See O'Leary (2004): pp.340-341.

evidently worked: the referendum was passed by a 71.1% majority.[271] A majority of both communities had supported the Agreement, giving it the democratic approval required for implementation.

From a constitutional perspective, the most important aspect was the removal of the legal claim over Northern Ireland. The new Articles read:

Article 2: It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and its seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Article 3: It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people democratically expressed, in both jurisdictions of the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution.[272]

The amended Articles convey a more aspirational tone. The Agreement, therefore, represented a watershed in the State's relationship with Northern Ireland. It had accepted that unity could only be realised through reconciliation of the Irish people. The nation had now been defined in popular terms. Moreover the nation had been extended to people of Irish origin living abroad, removing an anomaly in the 1937 Constitution.[273] The ambition for unity had not been abandoned, merely updated. Re-unification would only come about through the will of the people democratically expressed, north and south.[274] The new Articles are grounded on the principle of consent; unity will not be realised until a majority in both jurisdictions agree to the change. Although merely a codification of the Irish policy which had pertained since Hillsborough, the consent principle had now been

[271] Dixon (2001): A high turnout of 81 % helped the pro-agreement cause. Protestant support was much less emphatic, however. "An R.T.E poll suggested that only 51% of Protestants" backed the Agreement. Dixon (2001): p.273.
[272] Constitution of Ireland: the new Articles, as provided by the Nineteenth Amendment.
[273] People of Irish origin living abroad were still not technically included in the Irish nation. Instead, the revised Articles 2 and 3 expressed an "affinity" with Irish people overseas. See below.
[274] See O'Leary (2004): p.341.

afforded constitutional protection. Recognition of Northern Ireland's status as part of the United Kingdom had now been enshrined in the fundamental law of the State.

The context for this change was provided by the establishment of the North-South Ministerial Council. For the first time the State would have a fully Executive role in Northern Ireland, extending its authority beyond the cooperative model agreed in 1985. The assumption of this function heralds the most important constitutional provision to affect both jurisdictions in Ireland since 1937. Although underpinned by consent, the State now had a direct role in the governance of Northern Ireland, which nationalists hoped would form an institutional basis for achieving unity. Moreover the role had been enshrined as permanent and,[275] although unionists could maintain that the bodies were accountable to the Assembly, their very existence signalled closer integration between the two jurisdictions. Previously Southern input into Northern Ireland could only be exercised at the discretion of the British government. Now the State exercised an Executive role independent of British goodwill. The correlation between the North-South Ministerial Council and the 19th Amendment is evidenced by the timing of the implementation. Despite being ratified in 1998, the Amendment only became effective once the Council had been established in December 1999.[276] The establishment of the North-South Ministerial Council, therefore, had been a pre-condition for the removal of the legal claim. The Irish government had been prepared to sacrifice the legal claim over Northern Ireland for a direct role in its government.[277]

The Agreement signifies something deeper, however. Irish nationalism (and the Irish State in particular), had moved beyond the irredentist values of 1937. There had been an acceptance that unity could not be achieved through coercion. Re-unification would not be achieved by simply inculcating unionists with nationalist ideas. Although political re-

[275] The independent nature of the North-South bodies is highlighted by the fact that they continued to meet even during periods of suspension of the Executive.
[276] The nature of the Amendment was debated in *Riordan v. An Taoiseach* [1999] 2 I.R. 337. The plaintiff had claimed that this method of amendment was unconstitutional. The Supreme Court held that the people, being fully sovereign, could amend the Constitution in whatever manner they wished. See Ryan (2001): p.41.
[277] The comprehensive manner in which the State dropped the legal claim implies that it was never overly committed to its retention.

unification remained a key nationalist objective, the signatories to the Agreement had accepted that it could only be realised by consent. Nationalism had become more relaxed and confident about the national question, secure in the belief that unity would occur eventually. Militant Republicans perceived the existence of the old Articles as justification for continued violence.[278] Armed groups had viewed themselves as fulfilling a constitutional requirement. All such justifications had been removed. The template for national re-unification had been established: two jurisdictions living in harmony and respect, who would only seek to unite once consent had been established. The Irish State had resolved to constitutionally persuade its unionist neighbours to share its political ambitions, rather than demand compliance. As such, the nationalist representatives who signed the Agreement had come a considerable way from their predecessors of 1937. The evolution in nationalist thought throughout the intervening years had been remarkable. Politics alone do not do justice to the enormity of this journey. The eradication of the legal claim over Northern Ireland owes just as much to the protracted debate conducted by the Irish courts.

[278] See above.

NORTHERN IRELAND AND THE IRISH CONSTITUTION: PRAGMATISM OR PRINCIPLE?-THE *MCGIMPSEY* CASE

CHAPER 2: CASE LAW RELATING TO ARTICLES 2 AND 3

"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 the….Republic of Ireland and in Northern Ireland together formed the Irish Nation; that a nation has a right to unity of territory in some form, be it as a unitary or federal state, and that the Government of Ireland Act 1920, though legally binding, was a violation of that right to unity which was superior to positive law. This national claim to unity exists not in legal but in the political order and is one of the rights which was envisaged in Article 2."[1]

So the Supreme Court (O'Higgins C.J.) interpreted the legal claim over Northern Ireland in *Re Article 26 and the Criminal Law (Jurisdiction) Bill 1975* [1977]. The 1937 Constitution had created a problem for the courts. The existence of Northern Ireland had been provided for by the Anglo-Irish Treaty (1921), and had been given legal recognition by the Government of Ireland Act 1920. Northern Ireland, therefore, had been afforded full legal status, and was consequently protected by international law. A universally recognised provision of international law is that it is illegal for states to claim jurisdiction over other sovereign states. Protection for the sovereignty of individual states is given expression in several international agreements; notably the U.N. Charter.[2] The adoption of the new Constitution meant that the fundamental law of the State was now in conflict

[1] *Re Article and the Criminal Law (Jurisdiction) Bill 1975* [1977] I.R. 127 at 147. As cited in Kelly (2004): p.70.

[2] See above: it should be noted that the Constitution (as the fundamental law of the State) takes precedence over international law. Nevertheless the political significance of an apparent conflict between the Constitution and international law remained significant.

with these international agreements and legislation. Whilst the Constitution remained largely impervious to allegations that it was incompatible with central tenets of international law, the potential conflict left the State vulnerable to both internal and external criticism. Therefore, although the Constitution was legally protected from such allegations, the charge that a part of the document was contrary to the principles of international law was more difficult to justify in terms of international opinion. It was the perceived political vulnerability of the vexatious Articles that the McGimpsey brothers sought to exploit in their landmark case.[3] In this context, Articles 2 and 3 placed an obligation on the courts to reconcile the political claim over Northern Ireland with the *de facto* reality on the ground. One of the ways the judiciary had attempted to resolve the quandary was by advancing the argument outlined above. Political theory had long held that a nation (as a political idea) was distinct from a state, and that a nation possessed rights. Among these rights is the right to unity of territory and the right to decide its own political future (self-determination).[4] According to Clarke the concept of nationality is inextricably connected to the idea of statehood. Thus, if a people share common characteristics and aspire to nationhood, then the logical consequence of that shared identity is the realisation of statehood. As Clarke explains:

"…Whether nations evolve into states or states cultivate nationalism to provide political unity in times of crisis or transition, it is widely assumed that nations have a right to self-determination. This is reflected, for example, in the fact that Article 1 of two United Nations Covenants, the *Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* both begin with exactly the same provision:

` 1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development [5]`."

[3] See below.
[4] Desmond Clarke: *Nationalism, the Irish Constitution, and Multicultural Citizenship.* As cited in Northern Ireland Legal Quarterly [Vol.51.No.1] (2000): pp.101-119.
[5] *Ibid*: p.3.

The theory is linked to the traditionally geographic notion of nationality; that a nation is perpetually bound to a defined territory. Moreover, this right is characterised as inalienable, and, as such, supersedes all other law. Hence the nation is more important than any transient legal framework, and the rights it possesses entitle citizens to determine their own political destiny. In this context, nationalism is viewed as a dominant philosophy and, provided that nationhood can be established, the inhabitants of that nation are free to pursue their own destiny, regardless of existing political arrangements. The right of the Irish nation to self-determination is codified in Article 1 of the Constitution:

Article 1: "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."[6]

The constitutional elevation of the concept of nationality is given clearest expression in the distinction between the nation and the state. Although the state provides a necessary legal framework for government, it is separate from the nation which pre-dates its creation.[7] Indeed according to this definition of nationality the nation may prosper long after the state has ceased to exist.[8] Legal structures, therefore, are transient and impermanent entities, whilst the nation exists in perpetuity; possessing its own rights which are inherently superior to those rights possessed by the state. In explaining the nationalist ethos which inspired the Constitution, Clarke writes:

"Since the vote to enact the Constitution was a majority decision by those who were registered in what was then called the Irish Free State, it is consistent with both the reality of the referendum and with the legal implications of Article 4 to suggest that the `people of Éire` mentioned in the Preamble are not identical with the Irish nation, but with the citizens of the Irish Free State who claimed to speak on its behalf. So

[6] Article1: 1937 Constitution.
[7] See Clarke (2000): pp.101-119.
[8] Although without the legal apparatus of the state it is doubtful that a nation could prosper for long.

when the Constitution refers to `the people`, it is referring to the Free State; the nation is a separate and autonomous entity."[9]

It is worth noting that such an essentialist and absolutist interpretation of nationality is far from universally accepted. Modern nationality, after all, is basically a construct, an invented idea which came to prominence in the 18th and 19th centuries.[10] Although nationalism has evolved into an ascendant philosophy, it is worth remembering its recent antecedence, whilst events of the 20th century offer a vivid demonstration of the negative connotations that can be attached to the idea of nationality. In an Irish context, the pre-eminence of nationalism as an ideology cannot be disputed. With the concept of the Irish nation well established, the more pertinent question perhaps is not whether or not an Irish nation exists, but rather who is it comprised of, and who is excluded? For unionists this is the key question posed by Irish nationalism. Are they excluded from the nation by virtue of their own political beliefs? The interpretation of Irish nationalism goes to the heart of any discussion about Articles 2 and 3.

In his endorsement of the theory that the right to unity of territory and self-determination is superior to positive law, O'Higgins C.J. is referencing an interpretation of Irish nationalism that has traditionally been favoured by the Irish courts. Nationalist philosophy held that as the right to unity of territory was inalienable, it could not be eroded by statute law.[11] As in other rights protected by the Constitution, self-determination is innate, a birthright of every Irishman which cannot be undermined by passing political caprice. Therefore, as the right to unity pre-dates the creation of the State, it is superior to the legislation which enacted partition. The idea is consistent with constitutional theory of modern times, and has parallels in the U.S. Constitution which

[9] Clarke (2000): p.105. See also Ryan (2001): pp.2-4.
[10] The invented nature of nationality was illustrated by Austrian statesman Metternich who, prior to the campaign to achieve Italian unification, described Italy as a "geographical expression". See Bew (1996): 227-239.
[11] See Clarke (2000):pp.105.119.

characterises certain rights as inalienable and thus superior to positive law. As Clarke explains:

"The classification of this right as inalienable suggests that it belongs to the same genre as the `inalienable and imprescriptible rights, antecedent and superior to positive law` that are attributable to the family in Article 41.1.1, or the `inalienable right…of parents to provide….for the religious and moral education of their children (Article 42.1)."[12]

The interpretation of the right to unity of territory advanced by O'Higgins C.J., therefore, is consistent with the nationalist ethos pervading the Constitution. The collective rights of the nation were inalienable and irrefutable; providing the cornerstone of the constitutional determination to re-unify the national territory.[13] It was through such an exalted definition of nationality that the courts have been able to reconcile the constitutional requirement to advance re-unification with the political reality provided by the existence of Northern Ireland. By expounding this ideology and adhering to a strictly geographical idea of nationality, the Irish courts (prior to the Good Friday Agreement) have helped the Irish State retain an irredentist policy in relation to Northern Ireland. This concept of national sovereignty is manifestly evident in the old Articles 2 and 3: the Irish nation possessed a right to self-determination, as expressed through a desire to unify the national territory. Therefore, the achievement of re-unification became a legal necessity, and was codified in the fundamental law of the State.

The 1937 Constitution, however, posed a dilemma for Irish law. By making re-unification a central tenet of the Constitution, the framers had placed the State at odds with several international agreements (not least the legislation that had enacted partition; the Government of Ireland Act and the 1921 Treaty).[14] The inclusion of a legal and

[12] Clarke (2000): p.108.
[13] *Ibid*.
[14] The Government of Ireland Act was not an international agreement but an internal legislative measure within the United Kingdom. The Act did, however, have inter-jurisdictional implications as the piece of

political claim over Northern Ireland, therefore, potentially held the Constitution open to the allegation that the document was incompatible with international law. That is not to mention the effect the claim had on relations between the State and the United Kingdom. The emphatic nature of the claim over Northern Ireland, and the consequent legal compulsion to pursue unity, created a tangible problem for the State in terms of definition. How could the Constitution (and specifically Articles 2 and 3) be made compatible with both the principles of international law, and the *de facto* existence of Northern Ireland? This was perhaps the key legal dilemma provided by De Valera's Constitution. In the end, it was left to the judiciary and case law to fill the legal void.

BOLAND V.AN TAOISEACH [1974]

Despite the obvious constitutional importance of this issue, there has been relatively little case caw dealing with the national question. Given the magnitude of the problem, the lack of jurisprudence is surprising. It must be remembered, however, that Northern Ireland remains of the most politically and constitutionally sensitive issues involving the Irish State. The controversial nature of the Northern Ireland question was magnified by the emergence of wholesale political violence in the late 1960s. In terms of Anglo-Irish relations, the issue was conscientiously avoided by a succession of governments.[15] Given the polarising effect of Northern Ireland and the political sensitivities involved, it was perhaps understandable that the issue seldom came before the courts. In our attempts to clarify the constitutional position, however, such inaction is rather unhelpful.

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legislation that formalised the partition of Ireland and the creation of two parliaments within the island. See above.

[15] A notable exception to this policy of evasion was the all party Constitutional review (1966/67) which suggested an amendment to Article 2. See above.

Of course the judiciary can only intervene if the matter is referred to them, and it is hardly the fault of the courts that there has been such a dearth of relevant cases for them to consider. There does seem, nevertheless, to be a distinct lack of litigants in relation to this issue. Perhaps inspired by an inevitable desire to avoid political controversy, very few cases involving Articles 2 and 3 have been referred to the courts, and those which have been considered have tended to shy away from political controversy. Thankfully the cases that have sought to raise their head above the parapet have done much to enhance our understanding of the legal claim. These interventions are significant: it is impossible to definitively interpret *McGimpsey* without understanding the cases that preceded it. Thus, the interpretation of case law is essential in the attempt to define the constitutional position, and the manner in which the *McGimpsey* case reflected State policy.

The inaction of the court in terms of providing assistance in relation to the legal claim is highlighted by the fact that the first major case to wrestle with this issue occurred nearly 40 years after the codification of the 1937 Constitution. This, in itself, provides clear evidence of the political sensibilities involved. The gap in time between the writing of the Constitution and the advent of this case is one of the reasons why *Boland v.An Taioseach*[16] is so significant. The correlation between this case and the later *McGimpsey* case is obvious, with *Boland* foreshadowing the legal issues arising in *McGimpsey*.[17] The case concerned the intergovernmental agreement negotiated at Sunningdale, which had sought to give the State an enhanced role in the affairs of Northern Ireland. The plaintiff (Kevin Boland)[18] had objected to the Agreement on the basis that it contravened Articles 2 and 3. His argument was that, by entering into the agreement, the Irish government was contradicting its own Constitution. Thus, as the State (by virtue of Articles 2 and 3) didn't recognise the existence of Northern Ireland, it was unconstitutional for it to negotiate the

[16] *Boland v. An Taoiseach* [1974] I.R. 338.
[17] See below.
[18] Kevin Boland was a prominent Fianna Fáil politician and former Irish government minister. He was elected to the Dáil in 1957, and served as a Minister for Defence and Social Welfare.

future of that jurisdiction. More relevantly, the plaintiff contended that as the Articles claim a *de jure* right to govern Northern Ireland, they expressly prohibit the State "conceding the right of another State (the United Kingdom) to exercise jurisdiction over a part of the national territory." [19] The motivation of the plaintiff is explained in the introductory case notes:

"On 17 December 1973, the plaintiff issued a summons in the High Court in which he claimed that the signing of any agreement, formal or informal, by the Government of Ireland in terms of the communiqué would be repugnant to the Constitution of Ireland (1937), and he claimed an injunction restraining the Government of Ireland from implementing any part of the communiqué and from 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".[20]

The argument of the plaintiff was that the Irish government (by signing the communiqué) had acted unconstitutionally as Articles 2 and 3 expressly forbid the recognition of Northern Ireland. In particular, the plaintiff objected to clause 5 of the communiqué which contained explicit references to Northern Ireland. In paragraph 8 of his statement of claim, he argued that clause 5 was repugnant to Articles 1-6 and 34 of the Constitution in that:

"(a) it acknowledged that a portion of Ireland described as "Northern Ireland" was part of the United Kingdom.

(b) It acknowledged that "Northern Ireland" cannot be re-integrated into the national territory until…..a majority of the people of Northern Ireland indicate a wish to become part of a united Ireland."[21]

[19] Casey (2000): pp.249-250.
[20] *Boland v. An Taoiseach* [1974] I.R. 338: p. 338.
[21] *Ibid*: p.339.

The apparent endorsement of the consent principle by the Irish government appears to have provided particular motivation for the plaintiff's challenge. The plaintiff claimed that the rights of Irish citizens living in Northern Ireland would be aversely affected by this concession.[22] In the High Court Murnaghan J. rejected the claim. He stated:

"It was submitted that clause 5 of the communiqué is to be read as an entity and was a joint declaration. I reject that submission….I read that portion of clause 5 as relating to the *de facto* status of Northern Ireland and as a statement of policy of the Irish Government, bearing in mind the contents of clause 3 of the communiqué….I am unable to accept that those citizens of the Republic of Ireland who might now be resident in Northern Ireland have any or greater rights than those citizens at present residing in the Republic."[23]

On appeal, the Supreme Court concurred that Sunningdale was not unconstitutional. The case serves as an important precursor to *McGimpsey*, but although the Supreme Court held that Sunningdale did not contravene Articles 2 and 3, the court offered very different logic to that employed in *McGimpsey*. Rather than providing a definitive interpretation of the legal claim, the court instead rejected the plaintiff's claim on "the basis of jurisdiction."[24] The Court argued that as foreign policy was the sole responsibility of the Executive, the courts had no authority to interfere.[25] The Supreme Court was effectively invoking the Separation of Powers doctrine and, in so doing, avoided having to adjudicate over whether Sunningdale breached Articles 2 and 3. The logic seems to be that, under Separation of Powers, the court has no right to intervene in foreign policy i.e. that the Executive is exclusively responsible for this area of government.[26] As Fitzgerald C.J. explains:

"In my opinion the courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a

[22] See Ryan (2001):pp.38-39.
[23] *Boland v. An Taoiseach* [1974] I.R. 338: p.353.
[24] Casey (2000): p.249.
[25] *Ibid*.
[26] See Casey (2000):p.249.

clear disregard by the Government of the powers and duties conferred upon it by the Constitution…..the status of Northern Ireland and the acceptance of it is, to my mind, a reference to the *de facto* position of Northern Ireland and to nothing else and the respective declarations are no more than assertions of the policies of the respective Governments and matters clearly within their respective executive functions. Consequently clause 5, in my opinion, is not capable of being construed as any action by the Government which would bring it within the jurisdiction of the courts to supervise or restrain".[27]

Even if we accept this premise, the question of Judicial Review arises. If the courts have no constitutional authority to regulate foreign policy, are they still able to judicially review an international agreement if it conflicts with the Constitution? The traditional theory was that foreign policy was the sole preserve of the Executive and the courts have no authority to intervene.[28] The summation of Fitzgerald C.J. reflects this judicial reticence to become involved in foreign policy. In *Boland* the Supreme Court is less than emphatic on the issue. The court held that such an agreement or measure could only be subject to Judicial Review "if it subsequently became statute." [29] This implies that an international agreement (such as Sunningdale) falls outside the remit of Judicial Review i.e. that the courts can only judicially review a measure if it has been translated into statute law. Later case law, however, has indeed confirmed that international agreements do fall under the scope of Judicial Review. *Crotty v.An Taoiseach* definitively held that an international treaty (the Single European Act) fell within the authority of the courts to judicially review legislation, and that this function in no way contravened the Separation of Powers doctrine.[30] *Boland,* therefore, can be viewed as having rejected the plaintiff's claim on rather shaky logic. As the Executive had not intended to infringe Articles 2 and 3 and, as the government has sole authority to formulate foreign policy, Sunningdale was not unconstitutional.[31] The courts' ability to intervene in this area of foreign policy seems to hinge on whether Sunningdale is

[27] *Boland v. An Taoiseach* [1974] I.R. 338: pp.362-363.
[28] See Casey (2000):p.249, Ryan (2001):pp.38-39.
[29] Casey (2000): p.249.
[30] *Crotty v. An Taoiseach* [1987] I.R. 713, See Ryan (2001):pp.60-62. See below.
[31] Kelly (2004): p.863.

considered to be a legally binding international agreement. As Casey acknowledges, both *Boland* and *Crotty* are somewhat vague over whether Sunningdale is a *bona fide* international treaty. He observes:

"The ratio of that decision (*Boland*), as Walsh J. pointed out in *Crotty's* case (at 779-780) seems to have been that the Sunningdale Agreement was not an agreement or treaty, but merely a declaration of policy and hence not restrainable."[32]

Budd J. agreed with his Chief Justice that the Separation of Powers doctrine prevented the courts from interfering in foreign policy. Moreover he seems to endorse the view that the Sunningdale communiqué was merely an expression of policy rather than a legally binding international agreement. He argued:

"The judiciary has its own particular ambit of functions under the Constitution. Mainly it deals with justiciable controversies between citizen and citizen or the citizen and the State and matters pertaining thereto. Such matters have nothing to do with matters of State policy…..It would seem that that would be an attempted interference with matters which are functions of the Executive and no part of the functions of the Judiciary….the declaration in the communiqué by the Irish Government of its policy does not affect the legal rights of any citizen."[33]

Here the indecisive nature of the judgement is evident: the Supreme Court does not seem to be saying that an international agreement could never be subject to Judicial Review but rather that Sunningdale, as it was constituted, fell outside that remit.[34] Clarke agrees that the Supreme Court is open to criticism.

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[32] Casey (2000): p.217.
[33] *Boland v. An Taoiseach* I.R. 338: pp.366-367. The language used by the Supreme Court is interesting here. The use of the phrase "foreign policy" in relation to Northern Ireland is telling and indicates an acceptance by the courts that Northern Ireland is a foreign policy issue. Such rationale seems contrary to the statement in Article 3 that the Oireachtas has the right to legislate for the island of Ireland.
[34] See Ryan (2000):pp.39-39.

He writes:

"In the course of explaining their decisions, O'Keefe J. argued that it would have been *ultra vires* for an Irish government to have agreed that the State does…..not claim to be entitled `as of right` to jurisdiction over Northern Ireland`, and Budd J. interpreted Sunningdale as merely an expression of `policy` on the part of the State rather than an `agreement as to the future of Northern Ireland`".[35]

It is fair to observe, therefore, that the rejection of the plaintiff's claim resulted from a legal technicality rather than a substantive assessment of whether the Agreement had breached Articles 2 and 3. In that sense, the decision in *Boland* sidestepped having to resolve the issue. Instead of providing clear legal guidance over whether the State (in pursuing a policy to facilitate peace in Northern Ireland) was acting unconstitutionally, the Supreme Court avoided the question. Their rationale was that as foreign policy was the constitutionally protected function of the executive branch of government, they had no jurisdiction to interfere.[36] This decision does appear vulnerable to criticism and, on reflection, seems to be rather unsatisfactory. If the court was so convinced that Articles 2 and 3 held up to legal scrutiny, and did not in any way inhibit the Executive from pursuing peace in Northern Ireland, it would have been very easy for them to affirm that position. The fact that they did not suggests to me that the Court itself was perhaps unsure over the coherence of the Articles. Although the Court had held that Sunningdale did not contravene the Articles 2 and 3 as the Articles provide for the existence of Northern Ireland, their argument is unconvincing.

There is a strong legal argument to be made that the old Articles (particularly Article 3) provide for a definitive definition of territoriality that respects the boundaries established by the 1921 Treaty. Article 3 expressly provides that until re-unification is realised, the authority of the State shall be limited to Free State boundaries. So although the

[35] Clarke (2000): p.109. See also I.R. 338: p.363.
[36] See above; Casey (2000):p.249.

Constitution claims a *de jure* right to unify the national territory, it has always recognised the *de facto* limits of the State's jurisdiction. Subsequent case law was much more confident about the reliability of the old Articles; not only did they accept the limit of the State's jurisdiction, but they created a constitutional imperative for re-unification.[37] Later cases were also mindful that Articles 2 and 3 cannot be interpreted without a harmonious reading of the Constitution, incorporating Articles 1, 29 and the Preamble.[38] That the Supreme Court in *Boland* was not similarly emphatic about the legality of Articles 2 and 3 betrays doubt over the coherence (or even the political defensibility) of the Articles.[39]

Boland also reflects a distinct reticence by the courts to interpret the scope of the Articles. This again is a consequence of the political sensitivities involved. The question arises over whether the Court was subject to any political influence to reach that decision. In interpreting the judgement it is beneficial to go beyond a simple recitation of the facts, a deeper analysis requires a jurisprudential perspective. When interpreting decisions with such inherent political ramifications, it is helpful to consider the existence of a realist influence. According to Penner the philosophy of realism emerged in the 19th century as "a reaction to formalism" and the more structured application of the law.[40] Along with its sister philosophy of legal positivism, realism seeks to interpret law and to describe it accurately.[41] Ratnapala observes that the two philosophies differ in terms of legal characterisation. Positivists contend that law is derived primarily from statute, whereas realists suggest that it is necessary to analyse other ancillary factors such as politics.[42]

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[37] See below: *Russell v.Fanning* [1988] I.R. 505, *McGimpsey v.Ireland* [1990] I.R.110.
[38] See above.
[39] As part of the Constitution the legal legitimacy of Articles 2 and 3 was indisputable. What was much less certain was the political reliability of the old Articles. The controversial nature of Articles 2 and 3 made them vulnerable to political challenge and perhaps an uncertainty over their political legitimacy is being alluded to in the decision. See below.
[40] See J. Penner: *McCoubrey and White's Textbook on Jurisprudence* (Oxford 4th ed., 2008): chapter 4. See also Suri Ratnapala: *Jurisprudence* (Cambridge, 2009): pp.99-109, F. Ryan: handout on American realism, 2010.
[41] *Ibid.*
[42] *Ibid*. See F. Ryan: handout on American realism, 2010.

The difference in emphasis is explained by Ratnapala thus:

"Realists are also positivists in the sense that they seek to explain the law as it is as opposed to what the law ought to be….[but]…..theirs is a very different complaint: namely that positivists misrepresent the nature of law by their undue focus on its formal features".[43]

A key theme of the realist position is that judges make decisions based on external influences,[44] i.e. that non-legal factors (both subtle and overt) may affect judgements.[45] Realism, according to Penner, is the antithesis of the "formalist" theory of law, which decrees that decisions are reached according to a logical and structured assessment of the evidence.[46] Realists accept that decisions are reached through a reasoned analysis of the evidence, but maintain that other factors are equally important in judicial decision making.[47] As such, Penner argues, "realism rejects a simplistic and syllogistic interpretation of law."[48] The emergence of this "pragmatic" ideology owes much to Oliver Wendell Holmes Jr., regarded as the father of American realism.[49] Wendell Holmes expounded his theory as a response to the "orthodox" legal thinking that was prevalent at the time.[50] Wendell Holmes believed that a host of external factors exerted a tangible influence over judges in terms of decision making[51]. As he explained:

"…The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the

[43] Ratnapala (2009): p.93. See F. Ryan, handout on American realism, 2010.

[44] See Penner (2008): chapter 4.
[45] *Ibid*. These influences can even occur unconsciously.
[46] *Ibid*. See also F. Ryan, handout on American realism, 2010.
[47] *Ibid*.
[48] Penner (2008): chapter 4.
[49] Wendell Holmes (1841-1935) was a U.S Supreme Court Justice who is widely regarded as having created American realism. He believed that the law should not be interpreted in an overtly formal manner and, controversially, that judicial decisions should play a part in the legislative process. See *Ibid*: chapter 4.
[50] *Ibid*.
[51] *Ibid*.

prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."[52]

As Penner confirms, the theory does have its detractors, the most common critique being the manner in which realist philosophy potentially usurps the democratic function of the legislative branch of government to enact legislation.[53] Indeed Karl Llewellyn goes even further; arguing that judicial input into "legislative" decision making was essential for probity and morality in "society."[54] What is certain is that judges are subject to indirect and subtle external influences. All cases (especially those involving matters of acute political sensitivity) should be viewed in this context. Whatever its deficiencies, realism is an important philosophy, serving a valuable purpose in the attempt to decipher judicial decisions. Decisions relating to areas of political controversy always benefit from a realist interpretation. Certainly the interpretation of case law in relation to Articles 2 and 3 is advanced by an understanding of realist philosophy and, in discussing the more contentious cases; it is helpful to keep the theory in mind.

Certainly the political establishment would have wished to see the credibility of Articles 2 and 3 endorsed, thus confirming that the Constitution was fully compatible with international law. The government of the day would have been appalled at the prospect of being prevented from advancing peace in Northern Ireland by its own Constitution. The decision of the Supreme Court, however, reflects judicial sensitivity over these issues as opposed to any overt political pressure. In reaching its decision, the Supreme Court would have realised that a judgement in favour of the plaintiff would have had the potential to destroy any political settlement. I submit that it is likely that the Court would

[52] O Wendell Holmes: *The Common Law*, 1881, Penner (2008): chapter 4. See F. Ryan: handout on American realism, 2010.
[53] *Ibid*.
[54] Penner (2008): chapter 4. See F. Ryan, handout on American realism, 2010.

have approached their decision with a realist perspective in mind, and that the justices would have had due cognisance of the potential consequences arising from a judgement in favour of the plaintiff. This, therefore, placed an onus on the courts to reach a decision that would leave Sunningdale intact. That is not to accuse the courts of negligence in reaching their decision: there is no reason to think that the constitutional issues were not debated thoroughly. It is evident that the judgement represented the Court's interpretation of the constitutional position as it stood at the time. Equally, it must be remembered that the unique opportunity offered by Sunningdale potentially exerted pressure on the Court to reject the plaintiff's claim. Had the plaintiff's claim been upheld, the whole edifice of Sunningdale would have crumbled and the Supreme Court would have shouldered the brunt of the blame. It is hard to deny that such considerations would have weighed heavily with the Supreme Court in reaching its decision. Of course it was still possible that the Court could have endorsed the plaintiff's claim. If the judges had decided that Sunningdale was not compatible with the Constitution, they would have been compelled to take action. It is clear, however, that the conditions prevailing at the time favoured a rejection of the plaintiff's claim.

Although primarily concerned with the Separation of Powers doctrine and the issue of legal jurisdiction, *Boland* also has some important points to make in relation to the discussion of Articles 2 and 3. The *Boland* case provides an accurate representation of the constitutional position as had been defined post-1937. Articles 2 and 3 had traditionally been perceived as fundamentally political in nature: symbolising an ideal of the Nation and a broad aspiration for unity.[55] This interpretation held that whilst the Articles expressly referred to the national territory as the whole island, they should be characterised as an aspiration.[56] Therefore, they were viewed as representing a political idea which sought the unification of the geographic area comprising the island, its islands and the territorial seas. The chief importance of *Boland* was that it as well as endorsing

[55] See above, Ryan (2001):pp.38-39.
[56] *Ibid*.

the idea that Articles 2 and 3 constituted a political claim over Northern Ireland, the case clarified the constitutional position For the first time since 1937 the Supreme Court implicitly established that the nature of the claim was not merely political, but a legal claim (*de jure*) to govern Northern Ireland.[57]

The idea that the claim over the North could be considered as something more than a simple political aspiration first surfaced in this case. The possible identification of a substantive legal claim to exercise jurisdiction over Northern Ireland was derived from a statement made by O'Keefe P.[58] In discussing the nature of Articles 2 and 3, the former President of the High Court seems to imply that the legitimacy of the Oireachtas to legislate for the whole of the national territory exists as of legal right. He stated:

"An acknowledgement by the Government that 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."[59]

The statement is significant, and represents the first occasion where such a suggestion had been raised. If endorsed, the opinion of O'Keefe P. would serve to confirm that Articles 2 and 3 should no longer be considered as simply a political aspiration which expressed the hope that the national territory would eventually be re-united, but should instead be characterised as a fully fledged legal claim to govern Northern Ireland. It should be acknowledged, however, that the statement is far from emphatic, and its slightly ambiguous nature leaves the opinion open to interpretation. O'Keefe P. is far from definitive about the precise nature of the claim over Northern Ireland, and it was left to subsequent cases to provide a more reliable definition.[60] Nevertheless, the importance

[57] See Ryan (2001): pp. 38-41.
[58] *Ibid*.
[59] *Boland v. An Taoiseach* [1974] I.R. 338: p.363. See also Clarke (2000): p.109.
[60] See below. See also Clarke (2000):pp.105-119.

of the statement in the evolution of the constitutional position should not be understated , as it is the first time an Irish court appears to endorse the view that the claim to exercise jurisdiction over Northern Ireland exists as of legal right.[61] Indeed the significance of the assertion is substantiated by the fact that the opinion offered by O'Keefe P. is acknowledged by both parties in the *McGimpsey* case, and referenced by Barrington J. in his summary in the High Court.[62] Whilst acknowledging the significance of the statement, it is necessary to remember that O'Keefe P. merely implied that the nature of the claim was legal and alluded to its existence. It was left to subsequent case law to provide a more thorough and reliable definition of the nature of Articles 2 and 3.[63]

Here an obvious parallel with *McGimpsey* is discernible: the later case followed the logic that the constitutional position should be defined in terms of a substantive legal claim rather than a political aspiration.[64] *Boland,* therefore, should be considered an important milestone in the evolution of the constitutional position and the first notable precursor to *McGimpsey*. The precedent had been established that Articles 2 and 3 could be defended on the basis that they codify a legal claim, and consequently place a constitutional obligation on the State to pursue re-unification of the national territory. *Boland* is a marker for *McGimpsey* in another sense as well. It established that an international agreement could be challenged on the basis that it conflicted with the Constitution. [65]Although unsuccessful, a legal template for constitutional challenge had been set. More importantly, the precedent had been established that such a constitutional challenge could be rejected on the basis that an international treaty (such as Sunningdale) did not contravene Articles 2 and 3 on the basis of Separation of Powers.[66] By advancing the

[61] See below, Ryan (2001):pp.38-40.
[62] *McGimpsey v. Ireland* [1988] I.R. 567: p. 586. See below.
[63] See Ryan (2001): pp.38-41, Clarke (2000): p.109.
[64] See below.
[65] See above.
[66] That is if we accept that Sunningdale should be considered an international agreement. Case law has tended towards the view that the communiqué should be viewed as a mere "expression of policy". See above. See Casey (2000):p.249.

argument that Articles 2 and 3 constituted a legal claim, and that foreign policy should not be interfered with by the courts[67], the Supreme Court had expressed an interpretation of the Constitution that it was free to follow in *McGimpsey*.

The rationale that international treaties do not conflict with the Constitution is rooted in an interpretation of Article 3. Article 3, in particular, makes plain that the State cannot exercise jurisdiction over the entire island. The old Articles are something of a contradiction: although they claim that the State has a legal right to govern the territory of Northern Ireland, they are equally adamant that, under the political arrangements that existed at the time the Constitution was written, the State is unable to exercise that right. [68]Something that is often overlooked in constitutional discussions is that the old Article 3 provided for the existence of Northern Ireland. Whilst the Articles were intended to convey an aspiration that the island should be re-united, they recognised that under the terms of the 1921 Treaty that ambition had still to be realised. The language that is used in Article 3 makes a constitutional challenge, as in *Boland*, very unlikely to succeed. In order to mount a successful challenge, the plaintiff needed to demonstrate that the State's complicity in the Sunningdale Agreement was incompatible with Articles 2 and 3. The old Articles, along with Article 29 and the Preamble, have proved remarkably robust to successful constitutional challenge. The reason for this is two fold. It is my contention that a harmonious reading of the Constitution which places Articles 2 and 3 in the context of the overall document makes it very difficult to challenge them politically. Moreover the framers of the Constitution undoubtedly intended Articles 2 and 3 to be read in harmony with the other Articles.[69] Viewing Articles 2 and 3 alongside the provisions relating to international diplomacy in Article 29 and the definition of nationhood offered in the Preamble, the Constitution is perfectly compatible with governmental participation in an international agreement or communiqué intended to achieve peace in Northern

[67] Unless there is a "clear disregard" of the Constitution. See above.
[68] See above.
[69] See Ryan (2001):pp.9-11.

Ireland. The wording of Article 3, specifically, makes it emphatically clear that until such times as re-unification is realised, the State will only exercise jurisdiction within Free State borders. In that sense invoking Articles 2 and 3 to challenge the Constitution politically is a fraught exercise; case law has demonstrated that the Constitution has been immune to such challenges.

The importance of *Boland* is obvious. Although ostensibly concerned with the Separation of Powers doctrine, the case did much to enhance our understanding of Articles 2 and 3.[70] It endorsed and supported the retention of the political claim in the Constitution. Indeed it was the first case to affirm that Articles 2 and 3 constituted a fully legal claim to govern Northern Ireland.[71] At this stage, however, the identification of a substantively legal claim had merely been implied rather than confirmed. As well as that, *Boland* provided an inspiration for the *McGimpsey* case in that it established that an international agreement could be challenged on the basis that it conflicted with Articles 2 and 3. In the overall assessment of case law relating to this issue, however, the judgement in *Boland* can be considered a failure. The Supreme Court shirked having to decide whether Sunningdale contravenes the Constitution. By rejecting the plaintiff's claim on the basis of the Separation of Powers doctrine, the Court avoided the substantive constitutional issue. That is the missed opportunity of the case; the failure to provide clear legal guidance on the scope and meaning of Articles 2 and 3. Article 3 provides a clear legal basis for rejecting the plaintiff's claim and it was a pity that the Court did not have the confidence to defend the Constitution. It was left to subsequent case law to offer more thorough guidance, and a more formidable defence of Articles 2 and 3.[72]

[70] See Ryan (2001):pp.38-41.
[71] *Ibid*.
[72] See below.

STATE (DEVINE) V. LARKIN [1977]

The question of how the courts reconciled the existence of Northern Ireland with Articles 2 and 3 arose again in this case.[73] It provides another example of the difficulties created by the 1937 Constitution and its claim over Northern Ireland. Again it fell to case law to provide the definition of how the borders created in 1921 could be compatible with the claim. The case demonstrates the manner in which partition (and the later 1937 Constitution) had made the application of law throughout the island problematic, particularly in border areas. *State (Devine) v. Larkin* concerned the Foyle Fisheries Act 1952.[74] The prosecutor (Brendan Devine) had been convicted under the said act and attempted to have their convictions quashed on the basis that the Act contravened Articles 2 and 3.[75] The background to the case is explained in the case notes:

"The prosecutors on these applications…..are seeking to have made absolute, notwithstanding cause shown, the conditional orders of certiorari made on 14 May 1975, for the purpose of quashing certain orders and convictions made by District Judge Larkin in the District Court area of Newtowncunningham in the county of Donegal on 28 January 1975. The prosecutors are resident in the said District Court area and the orders sought to be quashed are convictions made by the District Justice on foot of a number of summonses charging the prosecutors jointly with fishery offences under the Foyle Fisheries Act 1952, and the Regulations made under 5.13 of that Act and entitled the Foyle Area (Control of Netting) Regulations, 1966."[76]

The parallels with its predecessor, the *Boland* case, are obvious, but here it was domestic law that was being challenged on the grounds that it was incompatible with Articles 2 and

[73] *State (Devine) v. Larkin* [1974] I.R.24.
[74] For a fuller discussion of the case see Casey (2000): pp.38-39.
[75] See Casey (2000): pp.38-39.
[76] *State (Devine) v. Larkin* [1977] I.R 24: pp.26-27. See also Casey (2000): pp.38-39.

3. The prosecutors contended that Article 3 limited the power of the Oireachtas to "enact laws which had extra-territorial effect."[77] As the Foyle Fisheries Act concerned inter-jurisdictional relations with Northern Ireland it would naturally come within the terms of any such restriction.[78] Specifically, the prosecutors argued that the language of Article 3 rendered the Act unconstitutional.[79] They contended that the reference in Article 3 'to the laws of *Saorstat Éireann*' "was restricted to laws existing whenever the 1937 Constitution was created."[80] Thus, as Casey explains, the prosecutors contended that as "the 1952 legislation had not been in place in 1937, the provisions applying to extra-territorial effect could not be invoked in relation to it."[81]

McMahon J. rejected the claim on the basis that it would be "illogical if the State created in 1937 did not have the same capability to make laws as the Free State." [82] Therefore, as the 1937 Constitution represents the fundamental law of the State, it is rational that the State created under it should have equal legislative power as its predecessor.[83] As Casey notes, it would be inconsistent for laws enacted after 1937 "not to have the same extra-territorial effect as those created by the Free State."[84] The judge argued that Article 3 should permit laws made by the Oireachtas to have "the same level of extra-territoriality as those enacted by Saorstát Éireann."[85] He states:

"If power to make regulations can validly be delegated to one authority, I see no reason why power cannot be validly delegated to another authority…..having a legitimate interest in the matter."[86]

[77] Casey (2000): pp. 38-39.
[78] *Ibid*.
[79] Casey (2000): p.38.
[80] *Ibid*.
[81] Casey (2000): p.39.
[82] Kelly (2004): p.385.
[83] Casey (2000): pp. 38-39.
[84] *Ibid*.
[85] *Ibid*.
[86] *State (Devine) v. Larkin* [1977] I.R. 24: p.30, as cited in Casey (2000): p.39.

The judge did, however, hold that some of the extra-territorial legislation passed in 1966 did contravene the Constitution.[87] The 1952 Act, however, did not come under these constitutional restrictions.[88] McMahon J. held that "the regulations established by the Foyle Fisheries Act" were valid on the basis that:

"Reciprocal arrangements cannot be unilaterally altered (i.e.) that the transfer of functions in Northern Ireland was ineffective to validate them here; a separate Act of the Oireachtas would be required."[89]

The rationale does seem to be rather shaky: the assertion that reciprocal arrangements can never be unilaterally altered is surely legally suspect. If domestic law is found to contravene the Constitution, then surely the courts are legally bound to strike it down, regardless of whether or not the law is formulated through an arrangement with another jurisdiction. If the logic of the judgement is followed through, it provides that any legal arrangement entered into with another jurisdiction cannot be found to be unconstitutional. The assertion is manifestly untrue: although the presumption of constitutionality does apply in relation to domestic legislation the courts are nevertheless required to intervene if domestic law is found to be in conflict with the Constitution.[90] Political sensitivity, therefore, perhaps played a part in the judgement.[91] Inter-governmental cooperation was a sensitive issue in the 1970s. The I.R.A. campaign was at its most violent and had brought the issue of cooperation with the U.K. into sharp focus. This context of violence and sectarian tension had highlighted the necessity of the two governments working together. In that sense, the same judicial logic that had applied post-Sunningdale would have weighed heavily here. As in *Boland*, the courts would have been very reluctant to strike down any legislation or treaty which had been secured through negotiation with the U.K.

[87] Casey (2000) p.39.
[88] *Ibid.*
[89] *State (Devine) v. Larkin* [1977] I.R.24: p.30, as cited in Kelly (2004): p.98. See also Casey (2000): pp.38-39.
[90] See Ryan (2001):pp.38-41.
[91] See above: the influence of realist philosophy in judicial decision making.

That is not to say the courts would not have intervened had the legislation been found to conflict with the Constitution; they surely would have. It is fair to say, however, that the judiciary would have been aware of the potential political consequences accruing from striking down such legislation. It was important to maintain good relations with the U.K. government for a host of reasons, and the courts would have been reluctant to go against State policy in this respect without good reason.

The case is another good example of the position adopted by the courts in relation to Northern Ireland. As well as demonstrating a judicial reluctance to become involved in issues relating to Northern Ireland, the case shows that in any dispute the courts were inclined to determine against a breach of Articles 2 and 3. There may be political reasons for this position, but I think it reflects the legal effect of the old Articles. Like *Boland*, this case demonstrates the difficulty in proving a breach of Articles 2 and 3. The formidable nature of the old Articles is once again evident. In order to prove a breach of the Articles, the claimant must show that the Act or measure concerned is incompatible with their existence. The wording of Article 3, however, makes that task very difficult. As outlined above, Articles 2 and 3 have proved consistently difficult to challenge politically.[92] The *Larkin* case, therefore, re-iterates the constitutional position of the State in relation to Northern Ireland which was outlined in *Boland*. Although there existed a constitutional claim to govern Northern Ireland by right, Article 3 accepted that until such times as re-unification is realised, the jurisdiction of the State would only apply to Free State boundaries.[93] Judicial interpretation of the constitutional position had been consistent: whilst the Constitution expressed a *de jure* right to govern Northern Ireland Articles 2 and 3 were fully compatible with the existence of that jurisdiction.[94] Article 3, in particular, is relevant here. Without the mention of Free State limitations, the old Articles would have proved much more difficult to defend legally.

[92] See above.
[93] See Ryan (2001):pp.38-41.
[94] See above.

The wording of Article 3 makes it plain, however, that the *de jure* claim is restricted by the *de facto* reality. Hence governmental cooperation with Northern Ireland (like the Foyle Fisheries Act) is protected against constitutional challenge. The question of whether more wide ranging governmental measures were similarly protected had yet to be definitively decided, but *Larkin* makes it clear that the old Articles in no way prevented the government interacting with Northern Ireland in areas of mutual cooperation. The case is another important signpost in the journey towards judicial clarification. It confirms the constitutional position offered in *Boland*; supporting the view that the courts were loathe to intervene in legislation on the basis that it breached Articles 2 and 3. The case re-iterates that the old Articles can be considered fully compatible with the existence of Northern Ireland. The invocation of Article 3 is an important precursor to *McGimpsey*. By rejecting a breach of the Articles on the basis that they support recognition of Northern Ireland, the courts were adopting a position that was followed (and extended) in *McGimpsey*.[95] Although it was the most important milestone, the judgement in the *McGimpsey* case merely extended a judicial precedent that had already been well established: Articles 2 and 3 were fully compliant with the existence of Northern Ireland.

THE STATE (GILSENAN) V. MCMORROW [1978]

The practical outworking of the constitutional position in relation to Northern Ireland is again evident in this case.[96] Here the courts again appeared to have little constitutional difficulty in recognising Northern Ireland.[97] The case concerned a car which had been stolen in Northern Ireland, with the defendant being charged under the Larceny Act

[95] See below.
[96] *The State (Gilsenan) v. McMorrow* [1978] I.R. 360.
[97] See Casey (2000): p.39.

1916.[98] Articles 2 and 3 were invoked by the defence and went to the very heart of the case. It was alleged that as the State did not recognise the existence of Northern Ireland, it could not bring charges relating to an offence that had originated in that jurisdiction.[99] A breach of Articles 2 and 3 was again being claimed, although this time indirectly.[100] The essence of the defence hinges on the interpretation of the 1937 Constitution. If we read the Constitution as having a *de jure* claim to govern Northern Ireland and which precludes recognition of that jurisdiction, then it is logical that it is difficult to charge a citizen of the State with an offence that originated in Northern Ireland. An ideologically Republican reading of the Constitution supports such a viewpoint i.e. that Articles 2 and 3 express a geographical notion of the Irish nation which claims that the State has the right to govern the whole island, its islands and territorial seas. This right is inalienable and supersedes all other claims of jurisdiction and authority. According to this definition the national territory (and hence the State) can only consist of the whole island, and that any rival entity (such as Northern Ireland) cannot be recognised constitutionally.

The courts have never subscribed to such a narrow definition, however. The courts and institutions of the State have always forged a more practical definition of the territorial claim. The attitude of the State to Northern Ireland has been driven primarily by expediency. Despite the Republican nature of the Constitution, the Treaty arrangements of 1921 had created a set of circumstances which required practical cooperation with Northern Ireland. Rhetoric aside, it would have been impossible for the State post-1937 to deny the existence of Northern Ireland and avoid cooperation. A whole plethora of governmental departments and responsibilities (particularly in border areas) demanded not only cooperation but close integration.[101] In such an inter-dependent context, complete insularity was simply not feasible. More relevantly, Articles 2 and 3 compel the State to pursue re-unification. If the Constitution places an onus on the State to advance

[98] Casey (2000): p.39.
[99] *Ibid*.
[100] For a more in depth discussion of the case see Casey (2000): pp.38-40.
[101] See Casey (2000):pp.39-40.

unity, then surely this requires interaction (and indeed negotiation) with Northern Ireland. This reveals the ideological paradox at the heart of the 1937 Constitution. It is impossible to pursue a policy of re-unification if the existence of Northern Ireland is denied; the two positions are logically incompatible with one another. The constitutional obligation to advance unity, therefore, demanded a more practical interpretation of Articles 2 and 3.[102] A more harmonious interpretation of the Constitution must acknowledge the balancing of the *de jure* claim with the *de facto* reality.[103] The courts have consistently applied this logic. Here the Supreme Court followed the earlier decisions in re-iterating that Articles 2 and 3 were compatible with the existence of Northern Ireland. Gannon J. stated:

"It is true that since 1937 there has been no general statutory interpretation or adaptation of the expression `Northern Ireland`, but the frequency with which it occurs in our statutes, the unambiguous way in which it has been used to identify the six counties over which the State does not exercise jurisdiction, and the clear intention of the legislature in such use that the Courts of this State should give judicial recognition to the identity of the territory comprehended by the expression….would make it impossible for our courts to say that Northern Ireland is other than an officially recognised and clear appellation for the part of this island which has remained within the United Kingdom."[104]

So we can see a clear demarcation between the ideology of the Constitution and the practical policy of the State, as interpreted by the courts. Although the Constitution placed a requirement on the State to pursue unity, since its inception it clearly had little difficulty in recognising Northern Ireland on a practical level. The courts, therefore, rather than following an ideologically rigid interpretation of the Constitution, have instead respected this practical reconciliation of the legal claim with the reality on the ground. This attitude represents a judicial recognition of the need to balance the *de jure* claim with the *de facto* reality inherent in the old Article 3.[105] The case provides another

[102] See below.
[103] See Ryan (2001):pp.9-11.
[104] *State (Gilsenan) v. McMorrow* I.R.360: pp.370-371, as cited in Casey (2000): p.40.
[105] See above.

illustration of the way in which the courts have interpreted Articles 2 and 3, affirming the constitutional position that the old Articles do not preclude cooperation with Northern Ireland

RUSSELL V. FANNING [1988]

The manner in which the judiciary interpreted the scope of Articles 2 and 3 is more clearly visible in subsequent case law.[106] In assessing the constitutional position which applied pre-1998, the case of *Russell v. Fanning*[107] was one of the most important components in terms of definition. Moreover the case was to prove the most relevant precursor to the judgement provided by the Supreme Court in the *McGimpsey* case. Indeed the judgement in this case was cited by Finlay C.J. in his summation when *McGimpsey* reached the Supreme Court.[108] It is impossible, therefore, to understand the constitutional interpretation offered in *McGimpsey* without reference to this important predecessor.[109] It is fair to say that the position adopted by the Supreme Court in the latter case would not have been possible had the constitutional principle defined in *Russell v. Fanning* not been established. In our analysis of the way in which the constitutional position evolved in *McGimpsey* the earlier case is of fundamental importance. The case concerned the vexed issue of extradition, with the plaintiff (Robert Peter Russell) claiming the right to be protected under the Extradition Act 1965.[110]

The background to the case is explained in the case notes:

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[106] See below.
[107] *Russell v. Fanning* [1988] I.R. 505
[108] *McGimpsey v. Ireland* [1990] I.R.110. See later discussion.
[109] For an in depth discussion of the case see Kelly (2004): pp.104-106.
[110] Kelly (2004): p.104.

"The plaintiff, a member of the Irish Republican Army, was convicted at Belfast Crown Court of attempted murder and sentenced to twenty years imprisonment. He subsequently escaped from prison. Some time later he was arrested in Dublin on….nineteen warrants from Northern Ireland backed for execution in the State by the first defendant….The plaintiff applied to the High Court for release on divers grounds, including that the offences for which he sought to be extradited were political offences or offences connected with political offences."[111]

The case offered an insight into the legal questions raised by the Extradition Act 1965; in particular the provisions relating to political offences (S.50). S.50 offered an "exemption" to defendants who had been charged with such offences.[112] The plaintiff's legal team had sought to use the exemption to prevent his extradition to Northern Ireland.[113] Extradition had proved to be a particularly sensitive issue in the context of the ongoing I.R.A. (and indeed I.N.L.A.) campaign and had strained relations between the State and the United Kingdom. In fact there had been a whole series of cases where offences had been committed in the U.K. and the alleged perpetrators had fled to the Irish State.[114] The U.K. government, in turn, had been quite zealous in insisting that individuals charged with these offences (many of whom were members of the Provisional I.R.A.) be tried in its own courts. The policy of the British government, in such circumstances, had been to seek extradition of suspects to U.K. jurisdiction wherever practically possible.[115] This policy set the U.K. on a potential collision course with the Irish courts which, inevitably, proved more amenable to Irish suspects being tried within their own jurisdiction.[116] In attempting to resolve this tension, the Irish courts became the venues where this friction between the two states was played out.

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[111] *Russell v. Fanning* [1988] I.R. 505: p.505.
[112] See Kelly (2004): pp.104-106. Casey (2000) explains the exemptions as pertaining to "revenue offences, political offences, and offences connected with a political offence or where there is a real danger that a person extradited would be ill-treated in breach of his/her constitutional rights." See Casey (2000): p.235.
[113] See Kelly (2004): pp.104-106.
[114] See Kelly (2004):pp.104-106.
[115] *Ibid.*
[116] Disputes arose in spite of the safeguards provided by the Criminal Law Jurisdiction Act 1976 which had been formulated to prevent such quarrels.

As well as the practical issue of extradition, the case became embroiled in a philosophical and legal debate about the nature of re-unification.[117] In considering the arguments of the defence, the Supreme Court conducted a fierce and comprehensive debate regarding the way in which the Constitution deals with the issue of Irish unity. The debate was of critical importance in helping us to understand the constitutional position relating to Northern Ireland. The Court considered, in a harmonious manner, how Articles 2 and 3 co-existed with the rest of the document. As such, it was the first occasion that the Supreme Court had debated the national question in a thorough manner, and opened up the prospect of a definitive definition of the legal status of the old Articles.[118] In fact the debate provoked a split within the opinion of the Court.[119] The deliberations centred on how the issue of national re-unification was defined by the Constitution in its entirety. The judges considered not only Articles 2 and 3, but also how other relevant Articles of the Constitution defined national unity. In particular, they wrestled with the scope of Article 6, and how it fitted in with the requirement to pursue re-unification.[120] It reads:

1. "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.

2. These powers of government are exercisable only by or on the authority of the organs of State established by the Constitution."[121]

The debate focused on how Article 6 could be compatible with Articles 2 and 3 and their claim over Northern Ireland. The issue was of supreme importance when considered in the context of I.R.A. violence. Articles 2 and 3 had traditionally been used by armed

[117] Kelly (2006): pp.104-106.
[118] *Ibid*.
[119] *Ibid*.
[120] *Ibid*.
[121] Article 6: 1937 Constitution.

groups as justification for their campaign.[122] The argument held that such groups were following the impulsion demanded by the Constitution i.e. that they too were pursuing a policy of re-unification, but were merely using other means. The traditionally Republican interpretation of Articles 2 and 3 was explained by John Bruton in a Dáil debate on the issue. He argued:

"The Provisional I.R.A. defend their murders by reference to the so-called national struggle. These Articles of our Constitution (Articles 2 and 3) define this nation in a way that gives a spurious justification to what the I.R.A. do."[123]

The reading of Article 6, in unison with Articles 2 and 3, goes to very heart of the matter. Do Articles 2 and 3 vindicate the utilisation of violence in pursuit of re-unification or does Article 6 preclude any organisation outside the Oireachtas from advancing unity? The answer depends on the interpretation of Article 6. One reading of the Article is that it asserts that the people (through their elected representatives) are the sole arbiter of the national good and, as such, only the people can advance the cause of re-unification.[124] The theory is that the Constitution confers legitimacy on Oireachtas deputies who, as the elected representatives of the people, are the only body capable of determining the national good. Hence no other unelected body (such as the Provisional I.R.A.) possesses the democratic legitimacy to express the popular will. Popular sovereignty, therefore, is defined exclusively by the representatives of the people, democratically elected to parliament.[125] Only they can determine the democratic wishes of the people. In this analysis, only members of the democratically elected legislature and Executive are

[122] See above.
[123] Dáil debate on Articles 2 and 3 which followed a bill proposed by the Workers Party to amend the Articles: December, 1990. Bruton was supporting the proposal to amend the Articles. As cited in *Making Sense Magazine*: March/April 1991: p.7.
[124] See Kelly (2004):104-106.
[125] *Ibid*.

permitted to determine the national good, and are thus the only organisation which has the legitimate right to work towards unity.[126]

This theory is diametrically opposed to Republican ideology which holds that the Army Council of the Provisional I.R.A. is the only body possessing the popular mandate to determine the national good.[127] Such a perspective is fundamentally unconstitutional, but derives from the belief that the I.R.A. is the successor to the only legitimately democratic parliament to be elected on this island.[128] As the direct descendant of the Provisional Dáil proclaimed in 1916 (and endorsed in 1918), Republicans viewed themselves as the only legitimate political authority on the island. This idea gave rise to the notion that the I.R.A. campaign was merely an expression of the popular will; that militant Republicans were attempting to realise the vision of the Republic. Articles 2 and 3 were viewed as adding another layer of justification to this position, in that I.R.A. violence was fulfilling a constitutional requirement. The debate in this case sought to provide definitive legal definition of the constitutional position on the national question.

O'Hanlon J. refuted the idea that armed Republicans were performing the constitutional will of the people. He argued instead that the I.R.A. campaign to unify the national territory conflicted directly with Article 6.[129] In relation to the rights enshrined in Article 6 and how they could be invoked, a schism emerged within the Supreme Court: "Finlay C.J., Henchy and Griffin JJ. were on one side of the debate with Hederman and McCarthy JJ.", adopting an opposite position.[130] The former contingent argued in favour of the rights protected by Article 6; stating that as the Oireachtas is the only legitimate authority

[126]There is no doubt that it was never possible to justify I.R.A violence by reference to the Constitution. See Article 15 which stipulates that only the Oireachtas may raise an army and Article 28.3 which states that only the Dáil can declare war.
[127] See above, see also Clarke (2000):pp.101-119.
[128] See above.
[129] Kelly (2004): p.104.
[130] *Ibid*.

to act in pursuit of re-unification the I.R.A. campaign was "subverting the Constitution and usurping the functions of government".[131] The logic employed by the judges is a complete inversion of Republican ideology. Republicans had claimed that they, as the successors to the 1916 Dáil, were the only body with a democratic mandate to advance re-unification. Moreover they viewed the 1937 Constitution, and Articles 2 and 3, as giving constitutional protection to their violent ideology. The argument advanced by this faction of the Supreme Court rejected the view that Articles 2 and 3 provide any sort of constitutional justification for the I.R.A. campaign.[132] They used this rationale to reject the defendant's claim, arguing that members of the I.R.A. "should be denied the protection and benefits offered by s. 50 of the Extradition Act 1965".[133]

The latter contingent, however, offered a different interpretation. In particular, McCarthy J. interpreted Article 6 as "simply defining the Separation of Powers" and that the Article in no way prevented other organisations from advancing national unity. [134] As Kelly observes, the judge rejected the idea that just because an action facilitating re-unification was "opposed by the government", it was therefore contrary to Article 6.[135] He reasons that, under such circumstances, a defendant was still entitled to the protection offered by the Extradition Act. He states:

" If Article 6 is to be read as, in my judgement, it should be read, as merely defining the Separation of Powers into legislative, executive and judicial and their derivation under God, from the people, this unhappy result will not follow, Article 6 is one of the Articles in the schematic arrangement of the Constitution under the general heading of "The State"….I do not accept that an act committed for the purpose of pursuing a particular policy which may be opposed to that expressed by the government of the day whether or not expressly endorsed by the legislature, can, on a construction of Article 6, be deprived of the protection of section 50…… The people, in final appeal, must decide all questions of national policy

[131] *Russell v. Fanning* [1988] I.R.505: p.547, see Kelly (2004): p.106.
[132] *Ibid*.
[133] Kelly (2004): p.106.
[134] *Russell v. Fanning* [1988] I.R. 505: p.547, see Kelly (2004): p.106.
[135] Kelly (2004): p.106.

and decide them according to the requirements of the common good……It seems clear that the legislature has no power to decide on questions of national policy to the exclusion of the people's power".[136]

McCarthy J., therefore, offers a wider definition of popular sovereignty than that which restricts the concept exclusively to Oireachtas deputies. He argued that the Executive (or legislature) alone cannot unilaterally determine the method of re-unification. and that the constitutional role of the people must be protected.[137] Presumably he is referring to the right of the people to ratify constitutional change by referendum. Such a broader definition of national sovereignty is definitely more in keeping with the ideals of the Constitution. Undoubtedly the founding fathers would have envisaged the people, as referred to in the Constitution, as encompassing much more than elected representatives at any given time. The notion of the "people" was intended to be an inclusive one, which would comprise all members of the nation. Indeed the "people", rather than being confined solely to parliamentary representatives, were intended to act as a check and balance to the government of the day.[138] If we accept the argument that the "people" of Ireland refers to more than the Oireachtas, then it logically follows that other groups can work towards unity (provided they do so within the limits of the law). At first glance, the stance adopted by McCarthy appears to be controversial, giving succour to the idea that the I.R.A. is legitimately pursuing re-unification by other means. Such an interpretation is a misunderstanding of the judge's position, however. First he is advocating that organisations other than the State can only pursue unity if the means employed are constitutional. As the I.R.A. campaign is neither legal nor constitutional it clearly falls outside the judge's definition. Rather than endorsing the Republican position, McCarthy J. is instead making the wider constitutional point that the Oireachtas is not the only organisation which can legitimately pursue unity.[139] Under Article 2 of the 1922

[136] *Russell v. Fanning* [1988] I.R. 505: p.554. As cited in Kelly (2004): p.106.
[137] *Ibid.*
[138] See Clarke (2000):pp.105-119.
[139] See Kelly (2004):pp.104-106.

Constitution (and followed in the 1937 document) the people of Ireland are sovereign: hence it is the people who must decide on the timing and method of re-unification.[140] The judge is also alluding to an interpretation of the Separation of Powers doctrine. As the Constitution makes plain, the authority of the Executive and legislature are limited. It rationally follows, therefore, that they do not possess an exclusive role in determining the method of national unity. [141]

The most important aspect of the judgement in relation to the *McGimpsey* case was the assertion by Hederman J. about the nature of the obligation to re-unify the national territory, as imposed by Articles 2 and 3. The judge reasoned that Articles 2 and 3 placed a constitutional obligation on the State to pursue re-unification. Rather than merely representing a political aspiration, Hederman J. held that Articles 2 and 3 represented a "constitutional imperative".[142] On the nature of the right to unify the national territory, the judge extends the constitutional position considerably further than previous case law. He argued:

"The re-unification of the national territory, which consists of the whole island of Ireland, its islands and territorial seas, is by the provisions of the Preamble to the Constitution and of Article 3 of the Constitution a constitutional imperative and not one the pursuit or non pursuit of…is within the discretion of the Government or any other organ of State. Therefore, the only question of policy which arises is as to the manner in which this may be achieved."[143]

The importance of the opinion in relation to the *McGimpsey* case cannot be overstated. The judge's assertion represented not just a repetition, but an extension of the constitutional position in relation to Northern Ireland. Previous case law had implied that Articles 2 and 3 should be characterised as constituting a legal claim over Northern

[140] Ryan (2001): p.46. The concept of popular sovereignty was established in *Byrne v. Ireland* [1972] I.R. 241. The case affirmed that the State had not merely inherited the prerogatives of the Crown and was instead subservient to the "people" who the Constitution confirms as sovereign.
[141] See Ryan (2001):pp.9-47.
[142] *Russell v. Fanning* [1988] I.R. 505: pp. 530-570. See Kelly (2004): p.106.
[143] *Ibid*: p.537. See Clarke (2000): p.109.

Ireland, and that they codify a political aspiration to govern that jurisdiction.[144] Hederman J. had gone a step further: Articles 2 and 3 not only represented an aspiration but a constitutional imperative, which legally compelled the Irish State to seek re-unification. Articles 2 and 3, therefore, amount to a substantive legal claim which placed a constitutional obligation on the State to pursue a policy of unity.[145] The extension of the constitutional position is significant. According to this interpretation unity was not an option which could be discarded according to the political whim of the government. Unity was no longer a populist issue which could be flirted with by successive governments as they saw fit. If Hederman J's logic is endorsed, all governments, regardless of affiliation, are legally bound to actively advance the cause of Irish unity. This delineates the ultimate significance of the "constitutional imperative" idea: all citizens of the State are subject to a constitutional obligation requiring them to work towards securing the assimilation of Northern Ireland into the State. As well as establishing this principle, the case provided another important precedent for *McGimpsey* in that Hederman J. invoked the Preamble to support his argument.[146]

Although dissenting, the opinion of Hederman J. is of paramount importance in the clarification and evolution of the constitutional position. Moreover his assertion was to have profound implications for the *McGimpsey* case. In the latter case Finlay C.J. followed the constitutional interpretation offered by Hederman J.[147] In so doing, he established the definitive constitutional nature of Articles 2 and 3. They constituted a legal claim to govern Northern Ireland by right (*de jure*), and placed a constitutional onus on the Irish State to realise that right. The die had now been cast. Previous assertions that Articles 2 and 3 represented no more than political aspiration had been made redundant. The constitutional position defined in earlier cases had not been discarded, however.

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[144] See above.
[145] See Kelly (2004):pp.104-106.
[146] *Russell v. Fanning* [1988] I.R. 505: pp.550-570, the Constitutional Review Group (1996) had established that the Preamble was capable of having legal effect. See Kelly (2004): pp.55-57.
[147] See below: *McGimpsey v. Ireland* [1990] I.R. 110.

Hederman J. had re-iterated the effect of Articles 2 and 3, and their interpretation has been fairly consistent throughout case law. *Russell v. Fanning* did mark the vital first step towards the evolution of the constitutional position, and the affirmation that the Constitution provided not just an aspiration for unity but an obligation. Without this development, the judgement in *McGimpsey* would simply not have been possible. The idea of "constitutional imperative" had replaced that of constitutional aspiration. Although it took two years for the Supreme Court to ratify Hederman's position, the principle had been established. Although not his intention, the judge had unwittingly confirmed what unionists had always suspected to be the true constitutional position. In so doing, he gave renewed hope to unionists who sought to negotiate amendments to Articles 2 and 3. When the opinion of Hederman was finally followed in *McGimpsey*, the plaintiffs in that case viewed the opinion as a vindication of their position.

FINUCANE V. MCMAHON [1990]

Another case which featured the Extradition Act 1965, and its implications, was *Finucane v. McMahon*[148]. The case occurred in the aftermath of the infamous escape by 38 I.R.A. prisoners from the Maze prison in September 1983. [149] Although daring, the escape was a controversial affair; during the break out several officers were injured and one subsequently died of a heart attack.[150] Inevitably the escape provoked tensions inside the prison and the ensuing period witnessed claim and counter-claim.[151] The remaining prisoners alleged a policy of "retribution" by prisoner officers, whilst the prison authorities refuted all such allegations.[152] When the accusations were investigated

[148] *Finucane v. McMahon* [1990] I.R.165.
[149] One of those to flee was Gerry Kelly, now a senior Sinn Féin politician and the party's spokesperson on Policing and Justice.
[150] Kelly (2004): p.43.
[151] For a more detailed discussion of the case see Kelly (2004): pp.43-44.
[152] *Ibid*.

internally, the prison officers emphatically denied any part in the attacks. [153] Amidst such a rancorous background, it proved difficult to establish the true state of relations within the prison. Republican prisoners had traditionally accused prison authorities of mistreatment and prison officers were deemed legitimate targets during the Troubles as a consequence.[154] On the other hand, the prison authorities would have remained sceptical about the alleged malpractice, viewing it as a means of retrospectively justifying the escape in the aftermath of the fatality. Despite the contradictory nature of the evidence, and with both sides attempting to vindicate their version of events, the truth gradually began to emerge. Allegations of prisoner mistreatment, according to Kelly, were substantiated in "*Pettigrew v. Northern Ireland Office* (1989)",[155] where a prisoner brought a civil action against the prison authorities. Here the court endorsed the view that some prisoners had been subjected to orchestrated discrimination by the authorities in the Maze.[156] The implications of the judgement are obvious: if such abuse had occurred in the Maze, then it is likely that the behaviour was being replicated in other prisons throughout Northern Ireland. Bearing in mind the history of mutual animosity between Republican prisoners and prison officers, this seemed a logical conclusion to make.[157]

Either way, the decision in *Pettigrew* engendered a negative perception of both prison officers and the entire Northern Ireland prison system. Consequently some officials in the (Irish) State lost faith in the integrity of the arrangements for incarceration within Northern Ireland.[158] In my opinion such an attitude can be considered naïve and rather unfair. Prison officers in Northern Ireland operated in extremely taxing circumstances; their personal safety and lives being under constant threat from both Republican and

[153] Kelly (2004): p.43.
[154] During the Troubles prison officers were subject to intimidation and attack from moth Loyalist and Republican paramilitaries. See Kelly (2004):pp.104-106.
[155] *Pettigrew v. Northern Ireland Office* [1988] 3B.N.L: 83. Here Lord Hutton in the High Court of Northern Ireland awarded damages to the plaintiff. As cited in Kelly (2004): pp.42-43.
[156] Kelly (2004): p.43.
[157] See Kelly (204):pp.43-44.
[158] *Ibid*.

Loyalist paramilitaries. Despite this context, there is no evidence to suggest that the vast majority of prison officers did not discharge their duties in a professional and lawful manner. Moreover, at the time of the escape prison officers in the Maze had been operating against a backdrop of sectarian murder, which directly impacted their capacity to carry out their jobs effectively. As well as that, any maltreatment by prison officers in the aftermath of the escape needs to put in the context of the breakout, which witnessed their colleagues being terrorised and injured. Although nothing justifies the abuse of their position by prison authorities (any mistreatment is deplorable), circumstances within the Maze need to be understood within this overall context. Also, it is worth noting that *Pettigrew* had merely confirmed that mistreatment of prisoners had occurred at the hands of certain prison officers. It had not established that such practices were endemic or institutionalised.[159] Nor had the case concluded that a policy of discrimination was being operated by the prison service.[160] Whether the maltreatment related to isolated incidents, or was typical of behaviour throughout the prison system had yet to be established. We must remember, however, that under the terms of the Extradition Act 1965, the courts would have been obliged to refuse extradition if they believed that the "constitutional rights of the plaintiff" would be adversely affected by the intervention.[161] The outcome of the case had, therefore, aroused concern within the Irish judiciary over the state of prisoner welfare in Northern Ireland.[162]

Finucane v. McMahon occurred against this backdrop of suspicion. In the case the plaintiffs had objected to their extradition to Northern Ireland under the Extradition Act 1965 on the basis that they would be subject to "discrimination" and mistreatment.[163] They argued that placement within a prison Northern in Ireland would pose a tangible

[159] See Kelly (2004): pp. 42-43.
[160] *Ibid*.
[161] One of the exemptions provided for by the Extradition Act 1965 involved circumstances where a person's constitutional rights were deemed to have been adversely affected by the proposed extradition. See above: Casey (2000): p.235.
[162] See Kelly (2004):pp.104-106.
[163] Casey (2000): p.235.

risk to their personal safety.[164] In their assessment of the evidence, all Supreme Court justices agreed that the risk of personal injury was sufficient to refuse the request for extradition.[165] Explaining their position Finlay C.J. reasoned:

"I have come to the conclusion that there is probable risk ….. that he (the plaintiff) would be assaulted or injured by the illegal actions of prison staff. The total absence of any repercussions on the staff as a result of the ill treatment of prisoners….would appear to make the applicant….a probable target for ill treatment."[166]

The judgement offered by the Supreme Court is important on several levels. First, as Kelly acknowledges, by refusing to approve the request for extradition the Supreme Court is "making a judgement on the conditions of prisons within another jurisdiction."[167] Essentially the Court was suggesting that the conditions of prisons and prisoner welfare within "another jurisdiction" were of a lesser standard than that pertaining within the State's jurisdiction.[168] As such, the Supreme Court accepted the premise that the personal safety of the prisoners was likely to be compromised if they were extradited to Northern Ireland.[169] The judgement does appear overtly political and controversial. As Kelly acknowledges, the interpretation of the Supreme Court pre-supposes a level of condition of the prison facilities that existed in Northern Ireland.[170] The consequence of this presumption was that it created potential for political disagreement with the U.K. authorities who were responsible for maintaining prison standards within their jurisdiction.[171]

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[164] Kelly (2004): pp.42-43, Casey (2000): p.235.
[165] *Ibid*.
[166] I.R. 165 (1990): p.205. I.L.R.M: 510 (1990). As cited in Kelly (2004): p.43. Kelly *ibid* invites comparison with the judgement in *Soering v. United Kingdom* (1989): I.I.E.H.R.R 439.
[167] Kelly (2004): pp.42-43.
[168] *Ibid*.
[169] *Ibid*.
[170] *Ibid*.
[171] Kelly (2004): pp.42-44.

Certainly the Supreme Court judges would have been aware of the political sensitivities involved in reaching a decision which pronounced on prison standards within Northern Ireland.[172] Whether any external political pressure existed which impacted the Court's decision is questionable. What the judgement does demonstrate, according to Kelly, is that the Irish Judiciary was prepared to "comment" on the internal conditions within the Northern Ireland Prison Service.[173] In this sense the judgement is indicative of the constitutional position as it was defined at the time. Not only were the courts prepared to fully recognise the existence of Northern Ireland, they were comfortable with "contrasting" their own legal standards with those of that jurisdiction.[174] The judgement highlights that the Irish judiciary was prepared to comment and make judgements regarding Northern Ireland.[175] Such an attitude can only be realised through the constitutional position as it was interpreted at the time. A rigid, ideological interpretation of Articles 2 and 3 prohibits recognition of Northern Ireland, thus rendering any commentary on internal conditions within Northern Ireland impossible.[176] The Irish courts have never abided by such limiting principles, however. Instead the courts have always reflected the pragmatic position adopted by the State, which necessitated working in partnership with their neighbouring jurisdiction. This approach is made possible by the nature of the old Articles, and their capacity to recognise the existence of Northern Ireland.[177] The case is therefore typical of the constitutional position as it was recognised at the time.

Moreover the case is following the rationale of the contemporary *McGimpsey* case. The parallels are clear: Articles 2 and 3 being interpreted as representing a legal claim over

[172] *Ibid*.
[173] *Ibid*.
[174] Kelly (2004): p.44.
[175] *Ibid*.
[176] See Kelly (2004):pp.43-44.
[177] See above.

Northern Ireland, but at the same time being fully compliant with the *de facto* existence of the territory. *McGimpsey* confirmed the dissenting opinion offered by Hederman J. in *Russell v. Fanning* i.e. that re-unification was a constitutional imperative requiring the State to advance unity.[178] In addition, the *McGimpsey* case re-affirmed the constitutional position which had been established by earlier case law, that Articles 2 and 3 profess a legal claim to govern Northern Ireland and a resolution that the national territory consists of the whole island.[179] One of the central tenets of judgement in *McGimpsey* was that the Irish government's signing of the Anglo-Irish Agreement was compatible with the Constitution on the basis that Articles 2 and 3 provide for the existence of the jurisdiction.[180] Indeed in his summary Finlay C.J. specifically refers to the recognition of the *de facto* position enshrined in Article 3.[181] This case, therefore, is in keeping with the constitutional position that was confirmed and extended in *McGimpsey*.[182]

Finlay C.J. is thus applying consistent legal logic to the two cases in 1990 in which the Supreme Court was forced to consider the nature of the legal claim. In both cases the Chief Justice's analysis of the constitutional position is clear. Articles 2 and 3 do not prohibit recognition of Northern Ireland and are fully compatible with the State interacting with its neighbour. Although the Supreme Court had extended the constitutional interpretation with their endorsement of Hederman J. in *McGimpsey*, the fundamentals remain the same. Articles 2 and 3 represented a constitutional obligation to unify the national territory, which is balanced by an acceptance of the reality on the ground. *Finucane v. McMahon* reflects the essence of the constitutional position applied by the Irish courts in relation to Northern Ireland pre-1998. [183]

[178] See above.
[179] See below.
[180] See below.
[181] See below.
[182] Kelly (2004):pp.104-106.
[183] See above.

MCGLINCHEY V. IRELAND [1990]

Another contemporary case which affirmed the constitutional interpretation outlined in *McGimpsey* is *McGlinchey v. Ireland*[184]. Again the Extradition Act 1965 had produced circumstances which forced the courts to consider prisoner welfare in Northern Ireland. The plaintiff had objected to being moved to a prison in Northern Ireland by virtue of the Act.[185] Echoing the concerns expressed in *Finucane*, the plaintiff argued that his personal safety would be compromised should he be moved to Northern Ireland.[186] The case forced the courts to consider "conditions" existing within Northern Ireland, as well as the wider question of whether the Constitution restricted their ability to pronounce on Northern Irish affairs.[187] Here the question again arose: did Articles 2 and 3 prohibit Irish courts from recognising the jurisdiction of Northern Ireland? The plaintiff had used the same arguments outlined in earlier cases i.e. that the claim over Northern Ireland legally invalidated the implementation of the Extradition Act in relation to Northern Ireland.[188] The court had to determine if the plaintiff possessed the *locus standi* to challenge the Act; i.e. whether his personal safety was sufficiently threatened by the prospect of extradition.[189] After consideration, Costello J. permitted the plaintiff to challenge the Act on the basis that his personal safety was potentially threatened by a move to a prison in Northern Ireland.[190] The learned judge stated:

"The particular and highly exceptional circumstances of the case, the plaintiff's apprehensions that his liberty may be curtailed by a request for extradition to Northern Ireland gave him……the

[184] *McGlinchey v. Ireland* [1990] I.R. 220.
[185] For a more detailed discussion of the case see Kelly (2004): p.828.
[186] Kelly (2004): p.828.
[187] *Ibid*.
[188] *Ibid*.
[189] See Kelly (2004): p.828.
[190] *Ibid*.

standing to challenge the constitutionality of the statute by which that request would be implemented" i.e. the Extradition Act 1965.[191]

The judgement in the case goes on to confirm that the terms of the Extradition Act are limited by the circumstances existing in Northern Ireland.[192] The judgement reflects the constitutional position as defined at this time and is in line with the judicial interpretation outlined in the other cases of that year. First, the case re-affirms that Articles 2 and 3 in no way inhibit the judiciary from recognising the jurisdiction of Northern Ireland. Moreover *McGlinchey* highlights that the Irish courts were not only comfortable with recognising Northern Ireland but also "commenting" on internal affairs within that jurisdiction.[193] The judgement, according to Kelly, demonstrates that the courts had no difficulty in making a judgement about "conditions" in Northern Ireland in circumstances where they considered that the rights of a citizen of the State had been infringed.[194] In its interpretation of the constitutional position, the Court had left itself vulnerable to the accusation that it was adopting a political position. By commenting on the circumstances existing within another jurisdiction the Court was risking inducing political controversy.[195] The judgment, however, should not be read as overtly political or controversial. The case does not reflect a judicial determination or policy to prevent extradition to Northern Ireland, but rather a venerable attempt to clarify a difficult area of law.[196]

The application of the Extradition Act had created a palpable problem for the courts when confronted with attempts to extradite prisoners to Northern Ireland.[197] How could such pieces of legislation be fully implemented when the Constitution included an

[191] I.R. 220: p.225, Kelly (2004): p.828; see also pp.1650-1651.
[192] *Ibid*.
[193] *Ibid*.
[194] *Ibid*.
[195] See Kelly (2004): p.828.
[196] *Ibid*.
[197] *Ibid*.

explicit, inalienable claim to govern Northern Ireland? The Court's quandary was made more acute by the backdrop of intensifying levels of violence in Northern Ireland which had forced them to consider this issue on a regular basis. The exemptions provided by the Extradition Act 1965 (particularly those relating to political offences) added a further complication. Moreover it was common practice for prisoners who committed offences in Northern Ireland to seek sanctuary in the Irish State.

The courts resolved the issue by reference to the State's own constitution. Rather than being the cause of the problem, Articles 2 and 3 provided the solution. The courts confirmed the constitutional position which had been applied since the signing of the 1937 Constitution. Clarke has argued that judicial interpretation of Articles 2 and 3 has been vague and inconsistent. He states that, on the issue of the legal effect of the Articles, the courts "have been neither clear nor consistent".[198] I am not inclined to agree. Certainly *Boland* abdicated thorough judicial scrutiny of the Articles at a time when a definitive interpretation of the claim would have been invaluable. In that case the Supreme Court fudged the issue, and the judgement is neither satisfactory nor authoritative. The Court had tantalisingly raised the suggestion that the claim over Northern Ireland contained legal and political elements, but stopped short of a definitive assessment.[199] A more comprehensive interpretation of Articles 2 and 3 had yet to be delivered. Thereafter the courts have applied a consistent interpretation of the legal claim, rooted in the language of the Articles themselves. Articles 2 and 3 did indeed represent a legal and *de jure* claim to govern Northern Ireland. This claim, however, was restricted by the recognition in the Constitution that the boundaries of the State would be confined to Free State borders until unification is realised.[200] Subsequent cases expanded on the theme; confirming that the claim was essentially political and legal in nature.[201] Even a cursory reading of Article 3 confirms this position. If we include the other

[198] Clarke (2000): p.109.
[199] See above, Ryan (2001):pp.38-41.
[200] See above.
[201] See below.

Articles of the Constitution (specifically Articles 1, 29 and the Preamble), then it is clear why the Irish courts have had such little difficulty in recognising Northern Ireland. Clumsily constructed and restrictive they may have been, but the old Articles were legally sound. In assessing the case law which deals with the national question, what becomes apparent is just how robust the old Articles were against political challenge. This invulnerability can only be partly explained by a judicial reticence to pronounce on a politically sensitive area of the Constitution. Instead, it reflects the reality that Articles 2 and 3 provided for co-existence with Northern Ireland. The Articles successfully marry the Republican ideal of re-unifying the national territory with the reality provided by the 1921 Treaty.[202] Perhaps the nature of Articles 2 and 3 made it virtually impossible to successfully challenge them in the Irish courts. The earlier cases had confirmed that such challenges were fraught with difficulty. The Constitution protected the claim over Northern Ireland, whilst the Irish government and judiciary formed a homogenous and formidable legal establishment which tended to support a Nationalist interpretation of the national territory. In this context, the prospect of a successful legal challenge to Articles 2 and 3 in the Irish courts seemed very unlikely indeed. If the Articles were exposed as being politically indefensible, it was deduced, the Irish government would be subjected to overwhelming pressure to amend them. The Anglo-Irish Agreement had induced a rancorous and febrile set of political circumstances, but had also created an opportunity where a political challenge to the retention of the claim over Northern Ireland could be mounted. There is no doubt that a successful challenge in the Irish courts constituted a tall order. A daunting challenge it may have been, but motivated by their determination to prove the political illegitimacy of the Articles, it was the McGimpsey brothers who came closest to achieving that objective.

[202] See above.

NORTHERN IRELAND AND THE IRISH CONSTITUTION: PRAGMATISM OR PRINCIPLE?-THE *MCGIMPSEY* CASE

CHAPTER 3: *MCGIMPSEY V. IRELAND*

"If Irish nationalists had attempted to attract and encourage Irish unionists to espouse their dream of a united Ireland, they would today be closer to achieving their aim than they are."[1]

In these terms Chris McGimpsey described the negative effect the constitutional claim had on the realisation of Irish unity. The words were written in 1990, in the immediate aftermath of the Supreme Court decision in *McGimpsey v. Ireland*.[2] Twenty years on, however, the sentiments are just as relevant. Although the claim over Northern Ireland has long been consigned to history, the basic principle remains the same. Unity can only be achieved through the consent of Irish unionists. That is why the *McGimpsey* case is so important. It demonstrates how exclusive nationalist ideology needed to be updated in order to facilitate accommodation between the main traditions. It is for this reason that the case forms the foundation of my thesis. Indeed Dr. McGimpsey himself was keen to share his own recollections on how the case came to exert such a pivotal influence.[3]

It is easy to underestimate the radical manner in which *McGimpsey v. Ireland* extended the constitutional position. As previous case law has testified, the interpretation of Articles 2 and 3 by the courts has been fairly consistent.[4] Although different judges had applied varied interpretations, the underlying constitutional reality stayed constant. Articles 2 and 3 should be considered a legal claim to govern the territory of Northern Ireland, but with that right being impeded by the political conditions on the ground.[5]

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[1] Cited from *That this house would abolish the Constitutional Claim to Northern Ireland*: speech delivered by Dr. C.D McGimpsey to the Philosophical Society, University College, Cork, 15 December, 1990.
[2] *McGimpsey v. Ireland* [1990] I.R. 110.
[3] As part of my methodology, I conducted interviews with the plaintiff, Chris McGimpsey. Here, Dr. McGimpsey articulated his own thoughts on the relevance of the case.
[4] See above.
[5] It is important to note that previous case law had only implied that the claim to exercise jurisdiction over Northern Ireland was *de jure*. *Boland* had only hinted that the claim was legal while Hederman's assertion that the claim was a "constitutional imperative" (cf. *Russell v. Fanning* [1988] I.R. 505) was delivered as part of a dissenting opinion. The chief importance of *McGimpsey* was that it represented the first occasion

While the assessment of the constitutional position by Hederman J. in *Russell v. Fanning*[6] had been important, his views had been expressed as part of a dissenting opinion. As such, they could not be said to definitively represent the constitutional position. Consequently the opinion carried limited legal weight. Until the objection to the Anglo-Irish Agreement by the McGimpsey brothers reached the Supreme Court, Hederman's opinion would continue to have limited constitutional impact. Although the notion of "constitutional imperative" had been established, it had yet to be accepted as the definitive interpretation of Articles 2 and 3. That is why Finlay's invocation of Hederman J. assumed such importance.[7] Hitherto the claim over Northern Ireland could be perceived as a constitutional aspiration, a codification of the political idea that re-unification of the national territory was a worthy constitutional objective.

By following Hederman J., Finlay C.J. is saying something much more significant. Re-unification of the national territory is demanded by the Constitution, and placed an obligation on all citizens (and thus the government) to realise that imperative.[8] The decision was to have far reaching consequences. Unionists had always claimed that Articles 2 and 3 should be characterised as an illegal, irredentist claim by one state to exercise jurisdiction over another, contrary to accepted principles of international law.[9] The Irish courts had traditionally shied away from such a radical interpretation, preferring to view Articles 2 and 3 as complementing other Articles that articulate a nationalist ethos which aspired to unite Ireland. Here, however, was the Supreme Court apparently endorsing the view that Articles 2 and 3 form part of a substantive, legal claim to exercise jurisdiction over another sovereign state.[10] The interpretation of Articles 2 and 3 as a "constitutional imperative" had now been given authority by the highest court in the State. The perception of Articles 2 and 3 had been altered permanently. Nationalists now had to accept that the Constitution contained a *de jure* claim to govern Northern Ireland. Unionists, meanwhile, had obtained confirmation in the Supreme Court that the

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where the Supreme Court had confirmed unanimously that Articles 2 and 3 constituted a fully legal claim to govern Northern Ireland. See below.

[6] *Russell v. Fanning* [1988] I.R. 505.

[7] See below.

[8] See later discussion.

[9] See above.

[10] See below.

Constitution insisted on the right to exercise jurisdiction over them. Articles 2 and 3 had again assumed centre stage in the political arena, and a chain of events had been put in place which would culminate in their amendment.

THE *CROTTY* INSPIRATION

According to Chris McGimpsey the motivation to challenge Articles 2 and 3 in the Irish courts stemmed from the perceived injustice of the Anglo-Irish Agreement. The signing of the Agreement had provoked widespread anger within the unionist community. The pervading attitude was that an unjust and illegitimate treaty had been implemented over the heads of the majority community in Northern Ireland. The fact that the people of Northern Ireland had been unable to either endorse or reject the Agreement added to the sense of grievance. The underlying feeling was that Hillsborough had not been democratically approved, and was therefore invalid. Attempts by the unionist parties to stimulate democratic debate on the Agreement met only with stern resistance. For example, a motion in the Northern Ireland Assembly[11] calling for a referendum on the Agreement was effectively ignored.[12] The first reaction to the sense of injustice within the unionist community was typically demagogic: a series of protest marches and demonstrations were mounted in order to apply pressure on the British government to abandon the Agreement. The traditionally partisan unionist parties united against the Agreement, forming an uneasy alliance of U.U.P., D.U.P., the Orange Order and the more marginal pro-Union parties.[13] Although the demonstrations confirmed the level of

[11] An Assembly was introduced into Northern Ireland (1982-86) to help ease the political situation. Conceived as a way to end the "democratic deficit", the experiment was initially hailed as a success with elections being contested by both traditions. Nationalists and the Alliance party later boycotted the body, and it became dominated by unionists. It remained important as a forum for debate, particularly in the aftermath of the Anglo-Irish Agreement where it became a conduit for unionist dissatisfaction. See Bew (1996): pp. 192-227.

[12] 16 November 1985.

[13] The most famous demonstration occurred on Saturday 23 November 1985 when an estimated crowd of over 100 000 people protested outside Belfast City Hall. The speakers included James M olyneaux and Ian Paisley. This event was the occasion where Dr Paisley uttered his famous declaration "Never, never, never" in relation to Southern involvement in the affairs of Northern Ireland. It was also, incidentally, an important event in terms of the *McGimpsey* case. Chris McGimpsey attended the demonstration and he remembers the day as one of the first occasions where he began to seriously ruminate about the possibility of a legal challenge. See Bew (1996): pp.201-206.

public opposition to the Agreement, the British government remained insistent that Hillsborough remained the only viable political solution.

An opinion developed, therefore, that a more coherent strategy was needed. It is in this context that the idea of a legal challenge to the Agreement originated. A belief had already developed that the Agreement was potentially incompatible with the Irish Constitution, and it was logical that any challenge would revolve around Articles 2 and 3.[14] Although a legal challenge provided a structured path for opponents of the Agreement to follow, the strategy was never officially endorsed by the Ulster Unionist Party. Nor did the party provide the inspiration for the case. Instead the case was the brainchild of Dr. Chris McGimpsey, then a 35 year old property developer from Belfast.[15] An Ulster Unionist Party activist from a traditionally unionist family, it was Dr. McGimpsey who came up with the idea of challenging the Agreement in the Irish courts. In recalling his reaction to the Agreement, Chris McGimpsey explains how the idea of a legal challenge germinated:

"I was reading a lot about the 1937 Constitution at the time and couldn't help but compare the document with the Anglo-Irish Agreement, particularly Article 1. One of the things that struck me about the Anglo-Irish Agreement was that it seemed (by attaching so much emphasis to the consent principle) to be placing the self-determination of Ireland in the hands of a majority in Northern Ireland. By stating that constitutional change could only come about through a majority vote in Northern Ireland, the Agreement was effectively giving citizens in that jurisdiction a veto over constitutional change. To my mind, this clause served to discriminate against citizens in the 26 counties. I reasoned that such discrimination must surely be unconstitutional. The legal challenge developed from this original idea."[16]

Dr. McGimpsey chose to employ an essentially nationalist argument to challenge the authority of the Agreement. By attacking the defects of the Agreement from a nationalist

[14] As the legal foundation of the constitutional claim over Northern Ireland, it was inevitable that Articles 2 and 3 would be at the centre of any prospective constitutional challenge.
[15] Maginnis (1990): p.2. It was Chris McGimpsey who first conceived of challenging the Anglo-Irish Agreement in the Irish courts. An Irish historian, he attained a PhD. from Edinburgh University and is a "former fellow of the Institute of Irish Studies, Queen's University, Belfast." Dr. McGimpsey was heavily involved in the organisation of the Peace Train Committee. He also served as a Belfast city councillor for twelve years and is still an active member of the Ulster Unionist Party. See Ken Maginnis: *McGimpsey & McGimpsey v. Ireland* (Dungannon, 1990): p.2.
[16] In interview with myself.

perspective, Dr. McGimpsey was increasing the likelihood of his complaint being received favourably in the Irish courts. The first issue facing the potential plaintiff was that of funding. A legal challenge was invariably going to prove expensive, and the hierarchy of the Ulster Unionist Party were reticent to support a costly legal process. In response, Dr. McGimpsey established a fund to cover the costs of the action, with supporters being invited to contribute.[17] The case would not have been possible without financial contributions from all sections of unionist society, and the success of the fund is testament to both the efficiency of the campaign, and the palpable anger within unionism over the Hillsborough Agreement. Chris McGimpsey was undoubtedly the inspiration behind the case and its figurehead. That being said, Dr. McGimpsey would be the first to admit that the constitutional challenge would never have materialised without the assistance of other unionist supporters. For the case to succeed, Dr. McGimpsey needed to marshal organisation and expertise. To that end, he enlisted the support of his brother Michael, a fellow businessman and member of the Ulster Unionist Party, who had also maintained an interest in Irish politics.[18] Together the two brothers became the bedrock of what became known as the *McGimpsey* case.

What is not as well known is that another figure within the Ulster Unionist Party was extremely influential in the challenge. That figure was Ken Maginnis[19], the serving M.P. for Fermanagh and South Tyrone, and fellow moderate within the Official Unionist Party. Maginnis provided vital assistance to the brothers, canvassing the unionist population for financial and political support. Maginnis also advanced the merits of the constitutional challenge within the party. Moreover Maginnis played a prominent role in the organisation of the legal fund, helping to raise thousands of pounds to cover the costs of the case. Although often neglected in historical accounts of the case, the role played by

[17] The first three contributions to the fund came from Dublin and a pensioner in Northern Ireland. The original plan was to raise the necessary funds in 6 months. In fact, the McGimpseys met their target in a mere 3 months. See Maginnis (1990): p.2.

[18] Maginnis (1990): p.2: Michael McGimpsey graduated in History and Economics at Trinity College, Dublin. An active member of the Ulster Unionist Party, he has served as a Belfast city councillor and is a former member of Queen's University Senate. He is currently an M.L.A. for South Belfast and the Minister for Health in the Northern Ireland Executive. See Maginnis (1990): p.2

[19] Lord Maginnis remains a member of the Ulster Unionist Party and is currently serving as a life peer in the House of Lords.

Maginnis was immense. As Chris McGimpsey puts it, "Without Ken, the case would simply not have been possible." The next step for the plaintiffs was to assemble a legal team with sufficient constitutional expertise to challenge the Agreement in the Irish courts. The brothers did not disappoint, constructing a formidable team with the experience and legal acumen to mount a successful constitutional challenge. As Maginnis reveals, the team included: "Hugh O'Flaherty S.C.[20], Frank Clarke S.C.[21], and Gerard Hogan B.L." The counsel was ably supported by solicitor Brendan Walsh.[22]

With a formidable legal team assembled, the only remaining obstacle concerned the financing of the case. That hurdle was eventually surmounted by the tireless work of Ken Maginnis. Maginnis was relentless in helping to raise the necessary funds, as well as garnering unionist support in favour of the challenge. With the required funding in place, the brothers were now free to take their challenge to the High Court. What still needed to be established, however, was whether two unionist individuals possessed the legal standing to challenge the Constitution in the Irish courts.[23] It was unprecedented for a unionist to seek constitutional redress in this manner, but the aftermath of the Anglo-Irish Agreement had created a unique set of political conditions. Such was the extent of unionist dissatisfaction over the undemocratic Agreement; the arguments in favour of the challenge became compelling. Recent events, moreover, had created a legal precedent for the successful challenge of an international agreement in the Irish courts. The impetus behind the case is explained by Maginnis:

"When the Anglo-Irish Agreement was signed on 15 November, 1985 it provoked from the McGimpsey brothers…exactly the same traumatic reaction as it engendered throughout the entire Unionist community. But while they identified with, and joined in, Unionists' protests against the unjust imposition of the Diktat, they were soon convinced that only through legal action could there be any hope of proving just how dangerous and deceitful it really was. Being historians, who had taken a special interest in Irish affairs, they concluded that the best chance of success would be through the Irish Republic's courts. While a similar

[20] O'Flaherty J. was later appointed as a justice of the Supreme Court.
[21] Frank Clarke also became a member of the judiciary.
[22] Maginnis (1990): p.2. The initial legal opinion had been provided by "Finbar Murphy B.L. who resigned from the Bar to take up a position in banking" before he could play a prominent role in the case. See Maginnis (1990): p.2
[23] The issue of *locus standi*: see below.

action against the Agreement to be taken by Enoch Powell in the High Court in London would soon run into the sand, because the United Kingdom does not have a written constitution, the McGimpseys' initiative was based on the fact that the Irish Republic had. Moreover, the Republic's Constitution had been the basis for a successful legal challenge in respect of a previous international agreement entered into by the Government of the day."[24]

While the prevailing mood within the unionist community favoured a challenge to the Anglo-Irish Agreement, the brothers had still not received official endorsement from their party. To that extent the case remained something of a personal crusade by the McGimpsey brothers, representing the concerns of thousands of ordinary unionists who were appalled that an undemocratic agreement could be implemented over their heads. The challenge appeared daunting: two private citizens taking on the might of the Irish State in its own courts. The McGimpseys, however, were now backed by a sizeable contingent of sympathetic supporters. In addition, recent case law suggested that the time was right to mount a constitutional challenge.[25]

The "successful legal challenge" that Maginnis is alluding to occurred a year before Chris and Michael McGimpsey were heard by the High Court. The former case provided the clear inspiration for the McGimpseys' action. Events of 1987 had given credence to the view that an international agreement could be successfully challenged in the Irish courts. Previous case law had been less than encouraging. *Boland* had established a precedent for challenging an international agreement, but had ultimately ended in failure. The invocation of the Separation of Powers Doctrine in that case demonstrated the reluctance of the judiciary to adjudicate on matters of foreign policy.[26] If *Boland* had been the only previous example, it is doubtful that a constitutional challenge would have been attempted. Although the motivation for the *McGimpsey* case had been provided by the reaction to the Anglo-Irish Agreement, the timing was influenced just as much by the decision in *Crotty v. An Taoiseach*.[27] After the initial optimism had subsided, doubts began to emerge within the legal team about the feasibility of the case. Consequently the

[24] Maginnis (1990): p.3.
[25] *Ibid*.
[26] See above.
[27] *Crotty v. An Taoiseach* [1987] I.R. 713.

mood within the *McGimpsey* camp had become rather despondent. That feeling dissipated, however, when Dr. McGimpsey received a call from one of his solicitors to advise that the challenge was indeed legally justifiable. The decision by the Supreme Court in *Crotty* had changed everything. That case also involved the challenging of an international agreement by a private citizen.[28] The plaintiff (Raymond Crotty)[29] had objected to Ireland's implementation of the Single European Act 1986. "The Act was the first major amendment to the Treaty of Rome" and its ratification was to have implications for the Constitution.[30] In particular, Crotty objected to Title III of the Treaty which committed Ireland to the "implementation of a common and single European foreign policy."[31] The constitutional implications of such a radical commitment are obvious.[32] Foreign policy is the constitutionally protected preserve of the Executive. According to Doyle, by ceding this function to a supra-national body, the S.E.A. was potentially conflicting with several central tenets of the Constitution, including "Articles 1, 6 and 29."[33] As Casey states, the Act could also be interpreted as placing restrictions on the Separation of Powers doctrine, impinging on the "sovereignty of the Irish people."[34]

The issue of *locus standi* was central to the case. Traditionally in constitutional law, an individual had been required to demonstrate that they had been "personally or individually affected" by a measure, in order to challenge its constitutionality.[35] The defence claimed that Crotty had not been any more adversely affected by the ratification of the Act than any other member of society and, therefore, did not possess sufficient *locus standi* to challenge it.[36] The question arose: had the rights of the plaintiff been affected by the implementation of the Act and did he possess any individual grievance

[28] See Casey (2000): pp.214-219.
[29] Crotty was an historian and social scientist who had objected to the methods employed by the Irish government in their attempt to ratify the Single European Act.
[30] See Doyle (2008): pp.340-343.
[31] *Ibid*.
[32] See also Ryan (2001): pp.18-21.
[33] *Ibid*.
[34] For a detailed discussion of the case see Casey (2000): pp.214-219.
[35] See Ryan (2001): pp.18-20.
[36] *Ibid*.

against its successful ratification?[37] Both the High Court and Supreme Court held that, as a concerned member of society, whose constitutional rights were potentially threatened by the Act, the plaintiff had the *locus standi* to challenge its ratification.[38] A majority in the Supreme Court concurred that it had been unconstitutional for the Irish government to acquiesce in Title III of the Single European Act. Walsh J. argued:

"(Title 3) impinges upon the freedom of action of the State not only in certain areas of foreign policy but even within international organisations such as the United Nations or the Council of Europe…I mentioned earlier in this judgement that the government is the sole organ of the State in the field of international relations. This power is conferred on it by the Constitution (Article 29.4)….The freedom to formulate foreign policy is just as much a mark of sovereignty as the freedom to form economic policy and the freedom to legislate……To acquire the power to do so would, in my opinion, require a recourse to the people `whose right it is` in the words of Article 6…. `to decide all questions of national policy, according to the common good`. In the last analysis it is the people themselves who are the guardians of the Constitution…..the assent of the people is a necessary prerequisite to the ratification of so much of the Single European Act, as consists of Title 3 thereof."[39]

Walsh J. argued that by assenting to Title III, the government was conflicting with the ideal of popular sovereignty inherent in the Constitution. In particular, he reasoned that the implementation of the S.E.A. into domestic law conflicted with "the right of the people to decide the common good", enshrined in Article 6.[40] The inspiration for the *McGimpsey* case is evident: a clear legal precedent had been established that an international agreement could be challenged on the basis that it was contrary to the Constitution. Therefore, if an agreement is found to be incompatible with the Constitution, it is consequently rendered illegal. The ratio of Walsh J. clearly creates an authority for the courts to judicially review an international agreement.[41] The Separation of Powers doctrine, therefore, does not restrain the courts from striking down international agreements if they are found to be unconstitutional.[42] As the fundamental law of the State the Constitution (whose authority derives directly from the people),

[37] Ryan (2001): p.18.
[38] *Ibid*.
[39] *Crotty v. An Taoiseach* [1987] I.R. 713: pp.782-784. See Doyle (2008): p.343.
[40] Doyle (2008): p.343.
[41] *Ibid*.
[42] *Ibid*.

overrides any international body.[43] This includes the European Union, despite the fact that membership is provided for in Article 29.4.[44]The decision provided for the extension of Judicial Review to cover international agreements entered into by the government of the day.[45] It should be noted, however, that not every justice in the Supreme Court agreed with Walsh's logic. Finlay C.J. and Griffin J., although agreeing in principle that the courts can strike down a foreign treaty if it is found to be unconstitutional, didn't feel that the S.EA. showed enough of a "clear disregard" to justify judicial intervention.[46] Finlay C.J. reasoned:

> "I interpret the decision of Griffin J. in *Boland* as being consistent with the view already expressed by me that where an individual comes before the courts and establishes that action on the part of the Executive has breached…….one of his constitutional rights that the courts must intervene to protect those rights…..It appears probable that under modern conditions a state seeking cooperation with other states in the sphere of foreign policy must be prepared to enter into not merely vague promises, but actual arrangements….I can find no warrant in the Constitution for suggesting that this activity would be inconsistent with the Constitution and would…..require a specific amendment to the Constitution."[47]

Although disagreeing on whether the constitutional right of the government to formulate foreign policy had been breached, both factions seemed to agree that it would be unconstitutional for the Executive to "cede this jurisdiction to an external authority."[48] A clear legal precedent for challenging an international agreement as unconstitutional had been established, however. *Crotty* was to have profound implications for the proposed *McGimpsey* case. The brothers were arguing that the recognition of Northern Ireland in Article 1 of the Anglo-Irish Agreement breached Articles 2 and 3. As Doyle observes, the Agreement also appeared to cede a "constitutionally protected provision (the right to exercise jurisdiction over Northern Ireland) to a third party (the U.K. government)."[49]

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[43] See Ryan (2001): pp.18-20.
[44] See Ryan (2001): pp.18-23.
[45] *Ibid.*
[46] Doyle (2008): p.343.
[47] *Crotty v. An Taoiseach* [1987] I.R. 713:pp.774-775. As cited in Doyle (2008): p.343.
[48] Doyle (2008): pp.342-343.
[49] Doyle (2008): p.343. See also Bew (1996): pp.214-221.

Under the logic of Walsh J. in Crotty, it would seem that such recognition is unconstitutional.[50]

For a challenge to be feasible the plaintiffs needed not only motivation, but also a clear path to follow. The Anglo-Irish Agreement engendered the motivation, but it was the *Crotty* case which provided the legal precedent. According to Maginnis the judgement in *Crotty* was central to the *McGimpsey* case and its prospects for success. He writes:

> "It was the case of *Crotty v. An Taoiseach* which provided the real impetus for the McGimpseys. Here the Dublin Supreme Court had ruled that the Republic's government did not have the competence to implement the Single European Act without the consent of the electorate, through a referendum. The crux of the Crotty argument was that no aspect of foreign policy could be ceded by the Republic's government to another government or, in that case, subordinated to a European Community decision. The Irish Constitution, under Articles 28 and 29, precludes any fettering of the power of the Government in its conduct of the external affairs of the State. The McGimpseys to mount a successful challenge had therefore to prove:
> 1. That Article 2 of the Irish Constitution was intended to be a legal claim and not merely a political aspiration; and if this was so,
> 2. That Article 1 of the Anglo-Irish Agreement constrained the Republic's government from pursuing that legal claim, is so far as it was a recognition of a *de jure* right of the United Kingdom's government to govern Northern Ireland, and hence, to dictate foreign policy for that part of the island of Ireland."[51]

Therefore, in order to mount a successful challenge, the McGimpsey brothers decided to follow the example of *Crotty*.[52] They argued that the Anglo-Irish Agreement ceded the constitutionally protected right of the State to govern Northern Ireland to "another jurisdiction."[53] Moreover the plaintiffs argued that the constitutionally protected right of the State to formulate foreign policy (cf. Articles 6, 28 and 29) included Northern Ireland as part of the "national territory".[54] By following *Crotty*, the McGimpseys were maximising their chances of success. The inspiration provided by the *Crotty* case is confirmed in the legal opinion provided to the McGimpseys before they embarked on their challenge. In respect of *Crotty*, Finbar Murphy B.L confirmed:

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[50] *Ibid*.
[51] Maginnis (1990): p.3.
[52] *Ibid*.
[53] *Ibid*. See also Doyle (2008): p.343. See above, Ryan (2001): pp.18-20.
[54] See Doyle (2008): pp.342-343, Maginnis (1990): p.3.

"The first difficulty querists have to overcome is the issue of *locus standi*. In *Cahill v. Sutton* (1980) I.R. 269 the Supreme Court held that plaintiffs in constitutional actions must…`be able to assert that, because of the alleged unconstitutionality, his or other person's interests have been adversely affected`. (per Henchy J). His (Crotty) argument was that if the Government deposited the instrument of ratification of the Single European Act, that act would be immune from constitutional challenge thereafter….. In the Supreme Court Mr. Crotty was held to possess the necessary *locus standi* notwithstanding his failure to prove the threat of any special injury or prejudice to him, as distinct from any other person……Another conclusion flowing from the Supreme Court judgement in the *Crotty* case is that international agreements which have not been converted into domestic law do not enjoy a presumption of validity…….The language of title 3 is not coercive but aspirational….nonetheless, because these aspirations appeared in a `solemnly covenanted commitment` which was not submitted to the people and was not in the form of an act of Parliament, they were deemed to be unconstitutional. The Anglo-Irish Agreement is a solemnly covenanted commitment` which has not been submitted to the people. The language of the Agreement is equally aspirational….In my opinion, the reasons for rejecting Title 3 of the Sibgle European Act are equally applicable to the Anglo-Irish Agreement…… As O'Keefe J. said in *Boland* `An acknowledgement by the Government that 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`….Therefore, the Government has, contrary to Articles 2 and 3 of the Constitution, conceded the right of the British Government to exercise sovereignty over Northern Ireland, and this concession has been made in an internationally binding agreement. According to the decision of the Supreme Court in *Boland* and *Crotty*, this unconstitutional action is reviewable by the courts."[55]

Crotty, therefore, set the template for the McGimpsey brothers to follow in several respects. First it demonstrated that an international agreement could be successfully challenged in the Irish courts on the basis of its unconstitutionality. As such, the judgement offered encouragement that the challenge was feasible.[56] Moreover the case challenged the presumption of constitutionality in relation to international agreements.[57] Previously the courts had been loath to involve themselves in any aspect of foreign policy, believing it to be the exclusive preserve of the Executive.[58] *Crotty* confirmed that international agreements could be subject to Judicial Review. More importantly, the case had established that an individual did not need to demonstrate any "individual grievance"

[55] Legal opinion provided by Finbar Murphy B.L: 12 May 1987. As cited in Maginnis (1990): pp.4-5.
[56] ***Ibid.***
[57] See above, Doyle (2008): p.343. Casey (2000): pp.214-219.
[58] See above, Casey (2000): pp.214-219.

in order to possess sufficient *locus standi* to challenge a constitutional measure.[59] An inspiration and strategy for the legal team had been identified. It is fair to say that without *Crotty*, the challenge of the McGimpsey brothers would never have got off the ground.

THE HIGH COURT CASE

With the funding in place and the legal precedent established, the path was now clear for the brothers to take their case to the High Court. The challenge of 1988 aspired to succeed legally where no individual had succeeded before. Despite the magnitude of the challenge, the McGimpseys had high hopes for success. They believed that the endorsement of consent in the Anglo-Irish Agreement conflicted with the Irish Constitution, and their legal opinion had confirmed that a challenge on that basis was feasible.[60] Their rationale is explained by Barrington J. thus:

"Both (plaintiffs) complain that the Irish government, in entering into the Anglo-Irish Agreement, neglected its duty to the majority community in Northern Ireland and violated the provisions of its own Constitution."[61]

In the aftermath of *Crotty*, the circumstances appeared conducive for a successful challenge to the Hillsborough Agreement.[62] While the McGimpsey brothers and their supporters entertained such lofty ambitions, it remained uncertain whether their case would get a sympathetic hearing in the High Court. After all it was completely unprecedented for a unionist to use the Irish legal system in such a manner. A difficult few weeks lay ahead, especially given the political nature of the case. In the circumstances, it was debatable if the brothers even possessed the necessary standing to challenge the Constitution in the courts.[63]

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[59] See above. See also Ryan (2001): pp.18-20.
[60] See Maginnis (1990): pp.2-5.
[61] *McGimpsey v. Ireland* [1988] I.R. 567: pp.570-571.
[62] See above, Maginnis (1990): pp.2-5.
[63] See Casey (2000): pp.214-219. See above.

Locus Standi

In the early skirmishes of the case, the issue of *locus standi* loomed large. Irish legal convention decreed that a plaintiff must prove an "individual or special grievance" in order to challenge an aspect of the Irish Constitution.[64] In practice this qualification meant that an individual was only deemed capable of challenging a measure if they could demonstrate that they had been personally affected by its existence.[65] If *Crotty* had shattered that assumption, there remained the condition that an individual needed to be a citizen of Ireland in order to plead a breach of the Constitution.[66] Invariably this provision caused difficulties for the two brothers, who unashamedly referred to themselves as British, rejecting the imposition of Irish citizenship upon them. The defence invoked the restrictions imposed by *locus standi* to refute the entire basis upon which the brothers were mounting their challenge.[67] The issue did appear to present a hurdle for the plaintiffs to overcome. How could individuals who rejected Irish citizenship then rely on Articles of the Constitution which had been designed to protect the rights of citizens?[68] The issue of *locus standi* threatened to derail the case before the proceedings had commenced in earnest. The invocation of *locus standi* was a useful tactic by the defence, at once turning the strength of the plaintiffs (their status as two unionist individuals who had been affected by the ostensibly unjust imposition of the Anglo-Irish Agreement), into a potential weakness. The argument advanced by the defence is explained in the Supreme Court case notes:

"The plaintiffs do not have the *locus standi* necessary to seek the reliefs sought in the statement of claim on the grounds that neither of them has any interest or right which has or will suffer any injury or prejudice by reason of the coming into force of the said agreement, nor has either a common interest with any person who could claim to be or to be likely to be adversely affected thereby."[69]

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[64] See above; see also Ryan (2001): p.19, the case of *Martin v. Dublin Corporation*, unreported, High Court, November 14 1978.
[65] *Ibid*.
[66] *Ibid*.
[67] See Maginnis (1990): pp.2-5. See also Casey (2000): pp.364-366.
[68] See Maginnis (1990): pp.2-5.
[69] *McGimpsey v. Ireland* [1990] I.R. 110: pp.110-119, see also I.R. 567 [1988]: pp.569-571. See above: the "personal grievance" argument.

As well as claiming that the plaintiffs could not demonstrate that they had been prejudiced by the Agreement, the defence claimed that the McGimpsey brothers could not invoke Articles 2 and 3 because they "do not believe that the national territory consists of the whole island of Ireland."[70] The rationale of the defence was simple. As the plaintiffs did not consider themselves to be citizens of Ireland, and did not agree with the definition of the national territory outlined in the Constitution, they could not then claim a breach of Articles 2 and 3 which provided that definition. Effectively the defence was putting forward a two-sided objection. First they were claiming that as the plaintiffs had not been personally affected by the implementation of the Anglo-Irish Agreement, they did not possess the *locus standi* to challenge its constitutionality. [71]The argument follows the traditional logic that an individual can only challenge the constitutionality of a measure if they can demonstrate that they have been individually affected by its existence.[72] As *Crotty* had restricted the reliability of that dictum, however, the defence needed another argument in terms of *locus standi*.[73] That is where the issue of nationality came in. The defence shrewdly invoked the plaintiffs' own denial of Irish citizenship in an attempt to deny their *locus standi*. [74]They reasoned that Articles 2 and 3 defined the Irish nation and were thus intended to protect the rights of Irish citizens by delineating the national territory.[75] As the Articles relate directly to nationality, therefore, they could not be relied upon by individuals who expressly refuse to accept Irish nationality.[76] As the plaintiffs did not agree with the constitutional definition of the nation offered by Articles 2 and 3, it was illogical for them to oppose the Anglo-Irish Agreement on the grounds that they had been breached.[77] The argument was explained by the defence in the Supreme Court thus:

[70] *McGimpsey v. Ireland* [1988] I.R.567: pp.570-571. See also Maginnis (1990): pp.2-5.
[71] See Casey (2000): p.364-366.
[72] See above.
[73] See Casey (2000): pp.364-366, Ryan (2001): pp.18-20.
[74] *Ibid*.
[75] *Ibid*.
[76] See Casey (2000): pp.264-266.
[77] *Ibid*.

"The statement of claim contains no claim that either plaintiff is a citizen of Ireland, although it is stated that the first plaintiff (Chris McGimpsey) is the holder of an Irish passport. No evidence was given by either plaintiff that either he or any of his parents had made the prescribed declaration pursuant to section 7; sub-section 1 of the Irish Nationality and Citizenship Act 1956, or of any facts which would indicate that he was otherwise an Irish citizen."[78]

The defence, therefore, linked Irish nationality with citizenship. Their argument was that if someone is entitled to citizenship but decides to reject it, they can't reasonably expect to rely on constitutional protections reserved for Irish citizens.[79] According to this logic, a unionist could never possess the *locus standi* necessary to prove a breach of the Constitution. This logic is in itself suspect, contradicting the proclamation in Article 2 that the national territory consists of the entire island of Ireland. If unionists inhabit the territory that comprises the nation, then surely they are a part of that nation, regardless of whether they choose to define themselves as British? The plaintiffs refuted this claim by arguing that, as unionists living in Northern Ireland, they had been directly and demonstrably affected by the undemocratic imposition of the Agreement.[80] Moreover, as Articles 2 and 3 defined the national territory as comprising the whole island, it is only logical that a unionist (according to the Constitution) is a citizen of Ireland, and perfectly entitled to invoke any Article thereof.[81] To deny this fact is to reject the values of the Constitution. Chris McGimpsey claimed that the decision of the Irish State to grant him a passport confirmed that they had accepted his entitlement to citizenship, validating his right to mount such a challenge.[82] Barrington J. rejected the defence's contention that the unionist background of the plaintiffs prevented them from having the required *locus standi* to take the case. The learned judge argued:

"Both plaintiffs were born in Ireland and are therefore, in contemplation of Irish law, citizens of Ireland."[83]

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[78] *McGimpsey v. Ireland* [1990] I.R. 110: pp.110-119, see also *McGimpsey v. Ireland* [1988] I.R. 567: pp.567-570.
[79] Casey (2000): pp.264-266, see also Maginnis (1990: pp.2-5.
[80] See Maginnis (1990): pp.2-5.
[81] *Ibid*.
[82] *Ibid*.
[83] *McGimpsey v. Ireland* [1988] I.R. 567: p.570.

The Constitution makes the position clear. Article 2 confirms the national territory as comprising the entire island. All inhabitants of the national territory, therefore, (including unionists who refuse to define themselves as Irish), have a constitutional right to citizenship.[84] Even if they decide not to fulfil the legal requirements of citizenship (or indeed refuse to even consider themselves Irish), their right to be part of the Irish nation is enshrined in the Constitution.[85] As Barrington J. explained:

"The defendants plead that the plaintiffs have no *locus standi* to put forward any of these submissions and they rely upon the decision of the Supreme Court in *Cahill v.Sutton* I.R. 269. The defendants admit-indeed claim- that both plaintiffs are citizens of Ireland but they deny that that fact alone gives them status to mount the present proceedings. In *Crotty v. An Taoiseach* the Supreme Court, and indeed the High Court, accepted that a citizen who is exposed to no greater injury than that of the citizens at large might still have status to challenge legislation or a treaty if he could show that the proposed action violated the Constitution and that he, in common with his fellow citizens, was being denied the right to be consulted in a referendum….The present case is, to say the least, unusual and there is no exact precedent governing it. But it appears to me that the plaintiffs are patently sincere and serious people who have raised an important constitutional issue which affects them and thousands of others on both sides of the border. Having regard to these factors and having regard to the wording of the Preamble and of Articles 2 and 3, it appears to me that it would be inappropriate for this court to refuse to listen to their complaints."[86]

Barrington, therefore, had accepted the rationale of *Crotty* that a citizen did not need to demonstrate any individual grievance in order to possess the *locus standi* to invoke the Constitution in an Irish court.[87] A concerned citizen merely had to demonstrate that they, in common with other citizens, had experienced general injury as a result of a measure which potentially conflicted with the Constitution.[88] The first hurdle had been overcome. More importantly, Barrington J. rejected the contention of the defence that the plaintiffs' unionist beliefs prevented them from invoking Articles 2 and 3. As Barrington acknowledges, such an argument is unconstitutional, and fundamentally "anti-

[84] See above, Ryan (2001): pp.18-21.
[85] *Ibid*. See also Casey (2000): pp.364-366.
[86] *McGimpsey v. Ireland* [1988] I.R. 567: p.580.
[87] See above.
[88] Ryan (2001): pp.18-20.

Republican."[89] As Article 2 defined the national territory as the whole island, all the people residing on the island are considered part of the nation. Moreover Article 3 confirmed that the Irish people possessed a "right" to govern the whole island. All unionists, therefore, have a right to belong to the nation and be considered citizens of Ireland. If Articles 2 and 3 confirmed these rights, it followed that unionists were just as entitled to invoke the Articles as any other citizen. As legally recognised citizens of Ireland who could demonstrate that they had cause to object to the Anglo-Irish Agreement, the McGimpsey brothers had exhibited the standing necessary to take the case.[90]

With the issue of *locus standi* resolved, the plaintiffs were left with the more challenging task of proving that Hillsborough contravened Articles 2 and 3. The early stages of the case, however, imbued the plaintiffs with confidence that their concerns would receive a sympathetic hearing. The Court's acceptance of their *locus standi* was an encouraging signal that it would listen respectfully to their concerns. Even if the brothers were to be unsuccessful in their primary ambition of striking down the Anglo-Irish Agreement, there remained hope that they could accomplish their ancillary objective of proving the incoherence of Articles 2 and 3.[91] After all, if the Court could accept their credentials as citizens with enough of a vested interest to take the case, then it was possible that it could also accept that the letter and spirit of the Anglo-Irish Agreement contravened Articles 2 and 3. As their legal team had confirmed, the brothers had a sound argument that Article 1 of the Agreement was incompatible with the Constitution.[92] Moreover *Crotty* had confirmed that an international treaty could be subject to Judicial Review.[93] In this context the plaintiffs were hopeful that a positive response to their claim would be forthcoming. The aspirations held by the plaintiffs (and the unionist community in general), are summarised by Maginnis thus:

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[89] *McGimpsey v. Ireland* [1988] I.R. 567: pp.570-580.
[90] See Maginnis (1990): pp.2-55.
[91] *Ibid*.
[92] See above, Maginnis (1990): pp.2-5.
[93] See above.

"If the McGimpseys were correct in their "legal claim" thesis then unionist fears of being subsumed within a politically united Ireland would be justified but, at least, the hated Agreement must then be deemed unconstitutional and would, we reasoned, have to be abandoned. On the other hand, if the "political aspiration" argument was correct there would be an end to unionist fears……The atmosphere of suspicion and distrust-the unionist "siege mentality"- which has pervaded our community since the Irish Republic's Constitution was adopted in 1937 would change, and the basis for new relationships would be created."[94]

Although the case was gathering momentum, significant obstacles remained. The conditions prevailing at the time favoured a rejection of the plaintiffs' claim. First we must consider the unprecedented nature of the exercise. No unionist had hitherto even contemplated using Irish courts to challenge the Constitution. What the brothers were attempting was both daunting and unique. It must be remembered that the legal precedents that the McGimpseys were relying upon were far from watertight. If their claim was successful, the plaintiffs would have achieved something that had never been accomplished before. *Boland* had proven that an international agreement could be challenged in the courts, but the claim had ultimately failed.[95] Although *Crotty* had succeeded in proving that the original ratification of the S.E.A. was unconstitutional, the case had failed to prevent the assimilation of the Treaty into Irish law.[96] So there existed no exact precedent for what the McGimpseys were attempting to achieve. In addition, there remained concern over whether the politicians would receive equitable treatment in an Irish court. That is not to accuse the judiciary of sectarianism. The judicial system protects the rights of all citizens regardless of political affiliation, while the description of the plaintiffs as "sincere and serious people" was an encouraging sign that the McGimpseys' concerns were being received positively.[97] Nevertheless the plaintiffs were navigating in uncharted waters. As there were no historical parallels, it was difficult to assess their prospects for success. Previous case law had suggested that the Irish courts tended to favour the traditionally Republican interpretation of the national question.[98]

[94] Maginnis (1990): p.3.
[95] See above.
[96] The Irish government merely amended their means of ratification to ensure that Ireland benefited from the provisions of the S.E.A.
[97] See above, see also Maginnis (1990): pp.2-5.
[98] See above.

Bearing in mind the lessons of the previous cases, history did not seem to favour the McGimpsey project. Moreover the traditional reticence of the judiciary to involve themselves in areas of political sensitivity militated against a successful outcome in the plaintiffs' favour. The Anglo-Irish Agreement had been perceived in nationalist Ireland as a workable settlement, a sensible accommodation which catered for the aspirations of all communities. The Irish courts, therefore, were always likely to be more sympathetic to the Agreement than a unionist community who viewed the document very differently. As in *Boland*, the courts would have been aware of the potential difficulties arising from an acceptance of the plaintiffs' claim and, consequently, would have been loath to reach any decision which placed the Agreement in jeopardy. [99]

When the judgement was delivered on 29 July 1988, therefore, it was not the outcome the plaintiffs had been hoping for. Although the Court had recognised the sincerity of their protest and listened sympathetically to their arguments, the plaintiffs' claim had ultimately been rejected. In delivering his assessment, Barrington J. referenced *Boland* in interpreting the Constitution as establishing a claim to govern Northern Ireland "by right".[100] The argument appears to be that no Irish government, having regard to the Constitution, could deny the right to govern Northern Ireland.[101] Therefore, in signing the Anglo-Irish Agreement, the Irish government could not be accepting the right of the U.K. to govern Northern Ireland as such a position is unconstitutional.[102] All references to the consent principle contained in the Agreement, therefore, were merely acknowledging the situation on the ground.[103] This acknowledgement of the *de facto* reality did not compromise the right to govern the whole of the national territory.[104]

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[99] It is my belief that judicial decisions are reached according to realist logic. The philosophy of realism dictates that the judiciary takes into account the practical and policy implications of their decisions. The realist perspective contrasts with that of positivists who suggest that decisions are reached according to a rigid application of legal rules. See Penner: *McCoubrey and White's Textbook on Jurisprudence* (Oxford, 4th ed, 2008): Chapter 4. See above.

[100] *McGimpsey v. Ireland* [1988] I.R. 567: pp. 585-586. See also Clarke (2000): pp.109-119.

[101] *Ibid*.

[102] *Ibid*.

[103] See Maginnis (1990): pp.2-4.

[104] See above.

Barrington J. is offering an interpretation of the Anglo-Irish Agreement that differs significantly from the commonly accepted wisdom. Article 1 had been perceived as recognition of the consent principle by the Irish government, an acceptance that had been enshrined in a legally binding international treaty. The orthodox interpretation held that the Agreement confirmed that the State now embraced the consent principle, and that this position was protected by international law.[105] Unionists had never accepted this version of events. The majority in the unionist community argued that the Anglo-Irish Agreement had been conceived as a vehicle to facilitate enhanced cooperation between the British and Irish governments in respect of Northern Ireland.[106] They reasoned that the entire *raison d'être* of Hillsborough had been to give the State an enhanced role in the affairs of Northern Ireland. In this analysis any concessions relating to the consent principle were merely cosmetic, and did not alter the legal substance of the Agreement. Any lip service paid to the consent principle did not in any way diminish the legal claim.[107]

The McGimpseys had not accepted this wisdom. It was their view that Article 1 did endorse the consent principle, and that the endorsement conflicted with Articles 2 and 3. [108]The widely held belief within the unionist community that Article 1 did not compromise the legal claim is rooted in the Constitution.[109] The McGimpseys argued that any references to consent were invalidated by Articles 2 and 3. As Articles 2 and 3 asserted the right of the Irish State to govern the whole of the national territory, any admission of U.K. jurisdiction over Northern Ireland, they argued, was unconstitutional.[110] The Irish government, therefore, did not possess the authority to sign up to the Agreement as the Constitution prohibited the State from recognising the right of the U.K. to govern Northern Ireland.[111] As such, the unionist analysis echoed the well worn path that had been followed in previous case law. The most important aspect of the judgement delivered by Barrington J. is his apparent endorsement of this interpretation. Although Barrington was careful not to say anything that denied the legitimacy of the

[105] See above.
[106] See Maginnis (1990): pp.2-5.
[107] *Ibid*.
[108] *Ibid*.
[109] See above.
[110] *McGimpsey v. Ireland* [1988] I.R. 567: pp.570-580.
[111] See Maginnis (1990): pp.2-4.

Hillsborough Agreement, he seemed to agree that Articles 2 and 3 prevented the State from recognising external authority in relation to Northern Ireland. The judge followed *Boland*, arguing that the Irish government's recognition of Northern Ireland as nothing more than an observation of the *de facto* reality on the ground.[112] As in Sunningdale, the Irish government had merely referred to the *de facto* reality.[113] The Agreement did not alter the legal claim.[114] Barrington seemed to be saying that the adoption of any other position by the Irish government would have been unconstitutional. He appeared to believe that any emphatic endorsement of the consent principle was prohibited by Articles 2 and 3. In rejecting the plaintiffs' claim Barrington J. explained:

"The plaintiffs claim that since the dissolution of the Stormont Parliament and the collapse of the Power Sharing Executive they have largely been governed by….direct rule. They have still, of course, got their representatives in the Imperial Parliament in Westminster but they complain that the system of rule by Orders in Council is largely undemocratic. This may be so but I doubt that the Anglo-Irish Agreement can be blamed for it.….Under these circumstances it appears that the plaintiffs' constitutional challenge to the Anglo-Irish Agreement fails."[115]

Ostensibly the McGimpseys' case had failed, and their attempt to have the Anglo-Irish Agreement revoked lay in tatters. Several aspects of the judgement were unsatisfactory, however. First the assertion by the Court that the Agreement did not recognise U.K authority in Northern Ireland is questionable. The Agreement[116] was a legally binding international treaty between two sovereign governments, which provided for an enhanced role in the government of Northern Ireland by the State.[117] Moreover Article 1 of the Agreement explicitly states that there can be no change to the constitutional status of Northern Ireland until the "consent" of the majority in that jurisdiction is established.[118] Therefore it is incongruous to suggest that the Agreement does not refer to U.K.

[112] See above.
[113] See above.
[114] See Maginnis (1990): pp.2-5.
[115] *McGimpsey v. Ireland* [1988] I.R. 567: p.592.
[116] Any reference to "the Agreement" in this chapter is acknowledging the Anglo-Irish Agreement, unless otherwise stated.
[117] See above.
[118] See above.

jurisdiction in Northern Ireland. Both the letter and spirit of the Agreement provide for governmental cooperation in Northern Ireland. The consent principle is clearly expressed throughout the document, and underpins the Agreement. Bearing that in mind, the contention that these clauses refer only to the *de facto* situation on the ground was surely open to challenge.[119]

We have seen that the Irish courts have always been comfortable with recognising Northern Ireland, and that Article 3 provided constitutional protection for this position.[120] In that sense Barrington J. was merely following the legal precedents established from earlier cases. His view that Hillsborough referred only to the *de facto* position is certainly debatable. Although inspired by Sunningdale, the provisions contained in the Agreement went well beyond those agreed eleven years previously. The extent of governmental cooperation and the unambiguous references to consent enshrined in Hillsborough, are greater than those conceived by Sunningdale. Furthermore, while the judiciary had been somewhat uncertain as to the exact nature of Sunningdale, there could be no doubt as to the true character of Hillsborough. The Anglo-Irish Agreement was universally recognised as a legally binding international treaty, and was registered as such with the United Nations.[121] Sunningdale may have been ambiguous, but it was impossible to dismiss the Anglo-Irish Agreement as simply a "declaration of policy".[122] As a signatory to the Agreement, therefore, the Irish government was legally obliged to ensure that its terms were constitutional. On the face of it, the McGimpseys had a sound legal case that Article 1 conflicted with Articles 2 and 3. Barrington's assertion that the recognition of Northern Ireland acknowledged only the *de facto* reality was far from convincing. The weakness of this argument alone gave the plaintiffs grounds for appeal.[123]

[119] As the Anglo-Irish Agreement was predicated on enhanced governmental cooperation it would have been meaningless had it not recognised that Northern Ireland was part of the United Kingdom.
[120] See above.
[121] See above, O'Dowd (1994): pp.2-6.
[122] See above: *Boland v. An Taoiseach* [1974] I.R. 338.
[123] See Maginnis (1990): pp.2-5.

Maginnis has observed that rather than endorsing consent, the Irish government may have "deliberately left their assurances vague."[124] He quotes senior counsel for the defence, who suggested that the Irish government's commitment to consent had been far from resolute. During the case Mr Fitzsimons S.C. commented:

"Now, Mr O'Flaherty referred to Article 1, my Lord, headed "The Status of Northern Ireland". When one reads that Article, one looks at the status of Northern Ireland, it is not defined at all. It is carefully not defined my Lord, carefully not defined."[125]

By this statement, the counsel seems to be suggesting that Article 1 should not be interpreted as an endorsement of consent. Instead, the Irish government deliberately left the references to Northern Ireland vague in order to "avoid a conflict with the Constitution."[126] The suggestion is in line with Barrington's synopsis that Article 1 could not be emphatic as the Constitution forbade the Irish government from making such a commitment.[127] The rationale appears to be that because such an undertaking is clearly unconstitutional, it is illogical to suggest that the Irish government entered into it. According to this interpretation, Article 1 should be read as recognition of the reality on the ground, and nothing more.[128] The argument employed by the defence (and seemingly endorsed by the Court) doesn't really hold up to scrutiny. Rather it seems to be a retrospective downgrading of the consent provisions in order to avoid doubts over the constitutionality of the Agreement. What is more, the evidence of the Agreement counteracts the defence's assertion. On the issue of consent, the Anglo-Irish Agreement is emphatic. Article 1 (a) states:

"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."[129]

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[124] Maginnis (1990): p.6.
[125] Maginnis (1990): p.6.
[126] *Ibid*.
[127] See above.
[128] See above.
[129] Anglo-Irish Agreement, 1985. See O'Dowd (1994): pp.2-6.

Even accounting for the latitude to recognise Northern Ireland granted by Article 3, the commitment offered by the Irish government is hard to reconcile with the Constitution. Certainly the consent principle appears to be comprehensively endorsed by the pledge. Given such an emphatic recognition, it is difficult to support the contention that Article 1 refers solely to the *de facto* position of Northern Ireland. It is true that previous case law had confirmed that the existence of Northern Ireland was compatible with the legal claim.[130] As discussed above, Articles 2 and 3 successfully combined an expression of the right to govern Northern Ireland with the *de facto* reality of U.K. jurisdiction. Nevertheless it is harder to see how the unambiguous ratification of the consent principle in Article 1, is consistent with the nationalist ideals of the Constitution. It is doubtful that the Republican founding fathers would have considered Articles 2 and 3 compatible with such explicit recognition of the U.K. role in Northern Ireland.

Such pragmatic acceptance of realities is, however, typical of the manner in which the courts have interpreted the legal claim.[131] Barrington's assessment of the constitutional position provides further acceptance that recognition of Northern Ireland by the Irish government was fully constitutional. As such, the High Court judgement is confirmation of the judicial position adopted in earlier cases. However the disparity between the endorsement of the consent principle, and the claim to govern Northern Ireland by "right" enshrined in Article 3 of the Constitution, gave the McGimpseys a firm basis upon which to lodge an appeal. An opinion formed within the camp that an appeal to the Supreme Court was feasible and, rather than being defeatist, the mood within the team was cautiously optimistic.[132] The hope was grounded in the seemingly unsatisfactory nature of Barrington's judgement. As Maginnis remembers:

"The judgement was generally considered by lawyers to be a clever "fudge", in so far as Mr Barrington, while rehearsing the relevant arguments arising from previous cases involving a constitutional challenge, carefully avoided any examination of anomalies which appeared to exist as a result of those decisions. For

[130] See above.
[131] See above.
[132] See Maginnis (1990): pp.2-6.

the McGimpseys it was an unsatisfactory, if not unexpected, outcome. An appeal to the Supreme Court was now a necessity."[133]

The inevitability of the appeal is confirmed by Chris McGimpsey, who recalls that his intention had always been for the case to reach the Supreme Court:

"We always expected to go to the Supreme Court. If we had won in the High Court the State would have appealed, and it was always our determination that we would appeal if we lost. There was great excitement in the High Court, and our evidence was received with courtesy and respect. But the decision was no surprise. Justice Barrington and I were both involved in the Irish Association for Cultural, Economic and Social Relations, so I knew our complaints would be taken seriously. There was a feeling that Barrington's judgement was clever, and framed in such a way as to give grounds for us to appeal. Barrington felt that the evidence obliged him to find in favour of the State, but he knew the case needed to go to the Supreme Court. Barrington had a judicious and brilliant legal mind, and knew it was necessary for the Supreme Court to decide."[134]

Chris McGimpsey is not questioning the integrity of Barrington J., who he held in the highest esteem. Dr. McGimpsey is stating an opinion that the judge, contemplating the magnitude of the issue, realised that an appeal to the Supreme Court was necessary. In offering this analysis, Dr. McGimpsey is adopting an essentially realist interpretation of the decision.

The brothers approached the appeal with confidence. Although their claim had failed, the High Court had received their arguments more favourably than many had anticipated. Most strikingly, Barrington J. seemed to agree that any Agreement that emphatically accepted the consent principle would be unconstitutional.[135] Where the Court differed from the McGimpseys was in its assessment of whether the Agreement had caused such a breach. The plaintiffs had advanced the commonly accepted definition of the Agreement (namely that it copperfastened consent), whereas Barrington had invoked *Boland* in

[133] Maginnis (1990): p.6.
[134] The *Irish Association for Cultural, Economic and Social Relations* is a liberal think-tank which seeks to promote tolerance and reconciliation throughout the island of Ireland. The *Irish Association* is comprised of unionist and nationalist members.
[135] See above, Maginnis (1990): pp.2-6.

viewing such commitments as an acceptance of the *de facto* position.[136] With their central supporting argument having been accepted, the McGimpseys did not have too far to travel to persuade the Supreme Court that the Anglo-Irish Agreement conflicted with Articles 2 and 3. It was clear that the plaintiffs did not view the appeal as another opportunity to rehash unsuccessful arguments. They genuinely believed that they had a reasonable chance of winning. As Chris McGimpsey reveals, "we wouldn't have gone (to the Supreme Court) if we didn't think we could succeed." Whether the soundness of their case would translate into success, however, was another matter. The Supreme Court would not be any more inclined than the High Court to jeopardise the Agreement. On appeal, the plaintiffs still faced a daunting task. The lack of clarity by Barrington, however, had offered hope that the brothers could (at the very least) use the appeal to demonstrate the anomalies inherent in the Anglo-Irish Agreement.

APPEAL TO THE SUPREME COURT

"…..The High Court decided that the claim about "the national territory" in Article 2 "exists in the political and not in the legal order" (at p.584). However, the Supreme Court on appeal decided not to follow the interpretation of the High Court and decided instead that Article 2 represented a "claim of legal right" about the extent of the national territory, and that Article 3 expressed a constitutional imperative for its eventual re-integration…..It is not clear what "a claim of legal right" means here. The use of the term "claim" suggests that Article 2 involves a claim in international law which has not been decided by any relevant legal authority, and it is not clear what such an authority might be. Perhaps a "claim of legal right" is a claim made by a given jurisdiction that it has a right to legislate for a specific region, even though the claim is not accepted by other claimants. In that case (*McGimpsey*) it seems as if the claim itself is a political or moral claim, rather than a legal claim, and hence the Supreme Court decision differs rhetorically, rather than legally, from the earlier decisions in *Boland, Crotty*, and *Russell v. Fanning*."[137]

So Clarke assesses the ideological differences between the decisions reached by the High Court and Supreme Court. It has become legal gospel that the chief importance of the

[136] See above.
[137] Clarke (2000): p.110.

Supreme Court decision was that it shattered the old constitutional assumptions about Articles 2 and 3, by confirming that the claim was a legal right rather than a political aspiration.[138] If correct, the judgement represented a vindication of the McGimpsey brothers' claims. Clarke, however, disputes the simplicity of this analysis, and questions what the Supreme Court meant by claim "as of legal right".[139] The interpretation of this contentious phrase goes to the heart of the matter. Does acceptance of the "constitutional imperative" position nullify the traditional view of Articles 2 and 3, or is the judgement simply an extension of the position endorsed in earlier case law? Clarke seems to suggest that the use of the expression is not as legally significant as one may assume, viewing it as a rhetorical accentuation of the political aspiration as opposed to a re-definition of the legal nature of the claim.[140] Certainly the judgement in *McGimpsey* takes its inspiration from earlier decisions, relying heavily on *Boland* and *Russell v. Fanning*.[141]

Clarke seems to be suggesting that the Supreme Court in *McGimpsey* was following the interpretation of Articles 2 and 3 established by earlier case law.[142] This theory fits in with my thesis that the interpretation of the claim by the Irish courts has been rigidly consistent. The former Articles 2 and 3 expressed a determination to re-unite the national territory, based on a belief that the State was entitled to govern the whole of that territory by right, but that this right was restricted by recognition of the *de facto* reality. Such *de facto* recognition, however, in no way diminished the legal claim which existed by right, and was inalienable.[143] This has been the consistent position of the Irish courts from *Boland* onwards, enabling the judiciary to reconcile the nature of the legal claim with the existence of Northern Ireland. A pragmatic interpretation of the claim helped accommodate Republican ideology with practical political realities. Perhaps a reassessment of the meaning of *McGimpsey* is overdue. If the traditional interpretation of the case holds true, the plaintiffs were vindicated in their contention that Articles 2 and 3 expressed a substantive legal claim to govern Northern Ireland. If Clarke's assessment is

[138] *Ibid*, see also Maginnis (1990): pp.2-6.
[139] *Ibid*.
[140] Clarke (2000): p.110.
[141] See above.
[142] See Clarke (2000): pp.110-112.
[143] See above.

correct, perhaps O'Higgins C.J. was valid in his assertion that the claim existed "not in the legal but the political order."[144]

So, at the beginning of their appeal to the Supreme Court, the ambitions for the McGimpsey brothers remained the same as those stated before the High Court. The interpretation of the nature of the claim by the Supreme Court, therefore, would go a long way to determining whether the case had been successful. From the outset, most unionists realised that the primary objective of proving a breach of Articles 2 and 3, and thus invalidating the Anglo-Irish Agreement, was a daunting task. A more realistic objective was the ancillary ambition of proving that the Articles represented a substantive legal claim to govern Northern Ireland. Therefore, even if the primary aim of striking down the Anglo-Irish Agreement was not attained, the brothers would secure a moral victory by revealing what they regarded as the true nature of Articles 2 and 3. The High Court judgement, although accepting that Articles 2 and 3 contained a determination to govern Northern Ireland, seemed to follow the traditional stance of the courts which viewed the claim as essentially political rather than legal.[145]

The need for a definitive definition is one of the reasons why the appeal assumed importance far beyond the vested interests of the unionist constituency. Previous jurisprudence had been reasonably consistent about the nature of Articles 2 and 3. *Boland* had first raised the suggestion that the essence of the claim was legal, and that position had been followed intermittently by subsequent cases.[146] The overriding position, however, was that the claim contained political and legal elements.[147] A definitive interpretation in relation to the nature of the claim was essential. The approach of the courts had been to interpret Articles 2 and 3 by reference to their semantic meaning, considering them in harmony with other Articles of the Constitution. By placing the Articles in their proper context, the courts have achieved a coherent interpretation of the

[144] *Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129: p.147.
[145] Although previous cases (such as *Boland*) had hinted that Articles 2 and 3 expressed a legal claim, the emphasis seemed to be that the claim was a legal codification of a political aspiration. See above. See also Clarke (2000): pp.110-119.
[146] See above.
[147] See Clarke (2000): pp.110-119.

claim over Northern Ireland. The only dissenting voice within the constitutional position was raised by O'Higgins C.J. in 1977. His placing of the claim in the political rather than the legal order, enabled the State to retain the claim, and made it difficult for opponents to challenge it politically. By emphasising the political nature of the claim, the courts were able to deflect criticism of the constitutional position, given the incompatibility of a legal claim with international law.[148] O'Higgins' assessment of the claim was in keeping with how the Constitution had been viewed by many within the State i.e. that it codified the idea that the national territory should be united, but conveyed a political aspiration rather than a constitutional obligation.[149]

O'Higgins' interpretation may have reflected political theory popular at the time, but created a conflict with the other cases that contemplated the nature of the claim. Certainly *Boland* (and subsequent cases) felt more inclined to present the claim over Northern Ireland as containing political *AND* legal elements.[150] The hallmark of the judicial definition was that Articles 2 and 3 should be viewed as construing a political determination to govern Northern Ireland, whilst at the same time affirming that the State's authority to legislate for the whole island existed by right.[151] This inalienable right was only frustrated by positive law.[152] In that sense *Re: Article 26 and the Criminal Law (Jurisdiction) Bill 1975* can be viewed as striking something of a discordant note. It should be noted, however, that O'Higgins is emphatic about other elements of the claim, asserting the right of the Irish nation to self-determination, and confirming that this right is superior to positive law.[153] The identification of the claim as political is significant, however. The importance of O'Higgins' position is magnified by the fact that his interpretation is seemingly followed in the High Court case. Barrington appears to concur that the claim is essentially political rather than legal.[154] In this context, the Supreme Court's interpretation was going to prove crucial. Was it going to endorse the view of previous cases (principally *Boland* and *Russell v. Fanning*), that the claim over Northern

[148] See Maginnis (1990): pp.2-6.
[149] See above.
[150] See above, Clarke (2000): pp.110-119.
[151] See above.
[152] See above, Clarke (2000): pp.110-112.
[153] See above.
[154] Clarke (2000): p.110.

Ireland was legal as well as political? Or would the Court agree with O'Higgins and Barrington that the claim was political in nature? The McGimpseys' appeal held out the prospect of a definitive interpretation of the claim. Whatever opinion the Supreme Court favoured, their assessment was going to be critical in terms of whether the plaintiffs succeeded or failed in their objectives.

The plaintiffs hoped that the Supreme Court would endorse their belief that Articles 2 and 3 amounted to a legal claim, and that the `political aspiration` argument would be definitively refuted. Barrington J. and the High Court had remained vague on the issue, and the appeal provided scope for a more reliable interpretation. As in the High Court case, the first obstacle to overcome was *locus standi*.[155] Although the High Court had accepted the constitutional standing of the plaintiffs to present their case, there was no guarantee that the Supreme Court would follow suit. After all, the Supreme Court could avoid having to adjudicate on such a politically sensitive matter if it rejected the right of the plaintiffs to mount their challenge. Bearing in mind the potential political controversy accruing from considering these issues, a denial of *locus standi* seemed an expedient path for the Supreme Court to follow.[156] After consideration, the Court confirmed that because the McGimpseys can be considered Irish citizens, they possessed the *locus standi* for their case to the heard. The case notes state:

"The defendants claimed (in the High Court) that the plaintiffs could not invoke Article 2 of the Constitution because they themselves "do not believe the national territory consists of the whole island of Ireland". However, the trial judge responded that `the plaintiffs were born in Ireland and are therefore, in contemplation of Irish law, citizens of Ireland."[157]

The appeal hinged on the plaintiffs' ability to prove that Article 1 (of the Agreement) directly conflicted with Articles 2 and 3.[158] Once that principle had been established, the plaintiffs' objectives were two fold: the identification of the claim as legal rather than

[155] See above.
[156] Assuming that is that the Court were considering the evidence from a realist perspective. See above.
[157] *McGimpsey v. Ireland* [1990] I.R. 110: pp.110-116.
[158] See Maginnis (1990): pp.2-6.

political, and the consequent striking down of the Agreement as unconstitutional. It was the language of the High Court decision that gave the McGimpseys cause for optimism. Barrington's ambiguity on the nature of Articles 2 and 3 provided the appeal with a clear focus. If the brothers could prove that Articles 2 and 3 amounted to a *de jure* claim to govern Northern Ireland, they only had to demonstrate that the Agreement conflicted with that claim. Given the emphatic endorsement of the consent principle elucidated in Article 1, the brothers had considerable grounds for buoyancy. By following O'Higgins' rationale that the claim existed predominantly in the political order, Barrington had provided a clear interpretation for the legal team to challenge.[159] If the McGimpseys could confirm that Articles 2 and 3 represented a *de jure* claim to govern Northern Ireland, their appeal stood a reasonable chance of success.[160]

There was every reason to think that the Supreme Court would agree with the plaintiffs' assertion. Case law from *Boland* onwards had tended towards a legal and political definition of the claim.[161] O'Higgins had been a fairly solitary voice in his insistence that the Articles should be characterised as purely political. By accepting the McGimpseys' contention, therefore, the Court would be merely following the accepted legal wisdom. The plaintiffs, therefore, had a sound legal case to bring before the Supreme Court. The success of the appeal hinged on whether they could definitively assert the legal nature of Articles 2 and 3. If so, then it was reasonable to expect that the Agreement could be invalidated on that basis. The defence, on the other hand, appeared to rely solely on their belief that Article 1 (of the Agreement) referred exclusively to the *de facto* position.[162] Such a stance may have shielded Articles 2 and 3 from political challenge previously, but the emphatic recognition of consent in the Agreement would prove much more difficult to defend.[163] If the McGimpseys could convince the Court of the merits of their interpretation, there was every reason to believe the appeal could succeed. From a legal perspective at least, the plaintiffs appeared to have grounds for optimism.

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[159] *Ibid*.
[160] *ibid*.
[161] See above, see also Clarke (2000): pp.110-119.
[162] See above.
[163] See above: *Boland v. An Taoiseach* [1974] I.R. 338.

It was not only legal considerations, however, that would sway the opinion of the Supreme Court.[164] The Court would have been acutely aware of the political fallout accruing from an acceptance of the plaintiffs' claims. In nationalist Ireland the Anglo-Irish Agreement was widely heralded as a permanent and balanced solution to the Northern Ireland problem.[165] In the context of escalating violence, the Agreement was viewed as an essential step towards ending the conflict. The Agreement had been achieved through painstaking negotiations, and had required a sustained involvement from politicians on both sides of the Irish Sea. Many important constituencies of Irish society had a vested interest in the success of the Agreement; from lawyers and politicians to civil servants and administrators. The Agreement represented a significant political investment from the political establishment in Britain and Ireland, with both administrations wedded to its success. For Thatcher and Fitzgerald in particular, it was inconceivable that Hillsborough would be permitted to fail.[166] For the Irish negotiators especially, it would have been particularly unpalatable for their pet project to fail because it was deemed unconstitutional. The Agreement could unravel due to a number of factors, but being discarded because it had been struck down by the Irish courts was not something the Irish government was prepared to contemplate.[167]

Fitzgerald in particular had invested heavily in the Agreement from a personal perspective. Hillsborough was the culmination of a concerted policy of engagement in Northern Ireland.[168] The engagement had been characterised by interaction with the unionist community, and a determination to bring the conflict to a conclusion.[169] The Fitzgerald administration had staked their political credibility on the success of the Agreement, and was resolved to follow though on its commitments. Much energy and effort had been expended on the Agreement, underlining the importance of its implementation. Obviously the Supreme Court had not been subject to overt political pressure to reject the plaintiffs' claims, but it is fair to say that the Court would have been

[164] See above: the existence of realist influence.
[165] See above
[166] See O'Dowd (2004): pp.2-4.
[167] *Ibid*.
[168] See above.
[169] See above.

aware of the consequences arising from condemning the Agreement as unconstitutional. Conditions prevailing at the time favoured a realist interpretation of the evidence. Indeed it would have been virtually impossible for the Court to have remained oblivious to the political consequences of their decision. The political significance of the Agreement, and the importance attached to its success, would certainly not have been lost on its Chief Justice. By 1990 Thomas Finlay had enjoyed a long and distinguished career as a Senior Counsel and later trial judge, maintaining an active history of involvement in Irish politics. [170] Along with the other justices of the Court, Finlay would have been very reluctant to confirm a breach of Articles 2 and 3. Some subtle but influential factors would have affected the Supreme Court's assessment of the case.

First there is the traditional reluctance of the courts to involve themselves in areas of political sensitivity.[171] As in previous cases of political relevance, the natural inclination of the judiciary was to avoid controversy.[172] It is not an accident that a breach of Articles 2 and 3 had never been successfully proven in the Irish courts. Finlay and his colleagues would have been all too aware that the impetus was against a successful challenge. Moreover the political background of the plaintiffs may have influenced the Court. By this I don't mean to accuse the Court of a sectarian bias, but the suspicion remained that the McGimpseys faced a daunting task in attempting to persuade the Court to strike down an area of the Irish Constitution. The Irish courts would have been reluctant to take action that would jeopardise the Agreement in any event, but would perhaps have been wary of doing so at the behest of two politicians from outside the State, regardless of their *locus standi*. It is my thesis that the judgement of the Court was consistent with previous case law, and was certainly the result of a detailed analysis of the evidence. It is equally obvious, however, that in reaching its decision, the Court was subject to a whole host of influences. Too much had been invested in Hillsborough for it to fall at the first major

[170] Finlay C.J. was a former Fine Gael politician who had been elected to the Dáil in 1954. Thereafter he enjoyed an accomplished legal career, encompassing several influential positions. He was appointed to the High Court in 1971, and became its President in 1974. He was appointed Chief Justice of the Supreme Court in 1985.
[171] See above.
[172] See above; see also Clarke (2000): pp.110-119.

hurdle. Despite the validity of the plaintiffs' case, the political conditions prevailing at the time still favoured a rejection of their claim.

THE SUPREME COURT DECISION

The initial optimism garnered by the appeal soon gave way to a realisation of the massive odds the McGimpseys and their supporters were confronting. A sound legal case in itself was never going to be enough to convince a sceptical judiciary to deviate from its established position in relation to Northern Ireland. The brothers needed to convince the Court that the terms of the Anglo-Irish Agreement were so repugnant to the Constitution it would have no option, but to declare the Agreement unconstitutional. The plaintiffs were thus asking the court to do something completely unprecedented, and adopt a position which would fly in the face of the established constitutional position in relation to Northern Ireland.[173] . In order to succeed, the plaintiffs had to demonstrate two factors: 1) that Articles 2 and 3 stated a full legal claim to govern Northern Ireland, and 2) that Article 1 of the Anglo-Irish Agreement referred to more than the *de facto* position of Northern Ireland. By proving these two factors the legal team could assert that they were constitutionally incompatible with one another.[174] In the final analysis, this was further than the Court was prepared to go. Relying on the authority and precedent of previous case law, the Supreme Court followed Barrington in rejecting the plaintiffs' claim. The judgement (delivered on 1 March 1990) was provided by "Finlay C.J., with Griffin, Hederman and Walsh JJ. agreeing." McCarthy J., in delivering his assessment, chose only to concur with his Chief Justice.[175] Disappointing as the judgement was for the McGimpseys, the Supreme Court had remained consistent re: the constitutional position that had been traditionally interpreted by the courts. The decision was reached according to established legal rationale, and derived, in no small part, from the potential political

[173] See above. See also Clarke (2000): pp.110-112.
[174] See above.
[175] See Richard Humphreys: *Countdown to Unity: Debating Irish Reunification* (Dublin, 2009): p.57. See also Maginnis (1990): p.7.

implications that weighed heavily on the Court's shoulders. In the end, the Court rejected the plaintiffs' central arguments. As Finlay C.J explains:

"With regard to these three main grounds of appeal I have come to the following conclusions.

1) Inconsistency of the Agreement with Articles 2 and 3 of the Constitution.

The main source of this submission was Article 1 of the Anglo-Irish Agreement. In the course of his judgement Barrington, after considering the details and other provisions of the Agreement concluded:-
"It appears to me that in Article 1 of the Agreement the two governments merely recognise the situation on the ground in Northern Ireland"……I find myself in agreement with this economic but precise analysis of the provisions of Article 1. The learned trial judge then concluded that on any interpretation of the provisions of Articles 2 and 3 of the Constitution, these provisions of the Agreement were not in any way inconsistent with either of those two Articles. With that conclusion I am in complete agreement. There can be no doubt that the only reasonable interpretation of Article 1, taken in conjunction with….Article 2 (b) of the Agreement is that it constitutes a recognition of the *de facto* situation in Northern Ireland but does so without abandoning the claim to the re-integration of the national territory……In so far as they accept the concept of change in the *de facto* status of Northern Ireland as being something which would require the consent of the majority of the people of Northern Ireland these Articles of the Agreement seem to me to be compatible with the obligations undertaken by the State in Article 29.1 and 29.2 of the Constitution whereby Ireland affirms its devotion to the ideal of peace and friendly cooperation and its adherence to the pacific settlement of international disputes."[176]

The judgement may be in line with the interpretation offered in previous cases, but represented a real blow to the McGimpseys' aspirations. The plaintiffs had hoped to prove the true nature of Articles 2 and 3 and, in so doing, render the Anglo-Irish Agreement invalid. The judgement delivered by Finlay C.J. should (in one sense) be characterised not just as a rejection of their claim, but a systematic deconstruction of the plaintiffs' arguments. Finlay delivered a double rebuttal of the plaintiffs' assertions. Firstly the judge rejected the argument that Article 1 referred to acceptance of the consent principle by the Irish government. In referencing Barrington, Finlay agreed that the Agreement referred only to the *de facto* position of Northern Ireland.[177]

[176] *McGimpsey v. Ireland* [1990] I.R. 110: p.119. See Kelly (2004): p.344.
[177] See Clarke (2000): pp.110-119.

The other central plank of the case was the inspiration drawn from the *Crotty*, i.e. that international agreements can be subject to Judicial Review, and successfully challenged on the basis of unconstitutionality.[178] Finlay rejected the parallel with *Crotty*, stating that the conditions which influenced the Supreme Court to accept Crotty's objection to the S.E.A., did not apply in this case.[179] The *Crotty* decision had been interpreted as confirming that international agreements (such as the S.E.A.) could restrict the government in its ability to implement foreign policy.[180] The Chief Justice disputed the comparison.[181] He stated:

"The basis of the decision of this Court in *Crotty v. An Taoiseach* was that the terms of the Single European Act could oblige the Government in carrying out the foreign policy of the State to make the national interests of the State…….subservient to the national interests of other member States. I have no doubt that there is a vast and determining difference between the provisions of this Agreement and the provisions of the Single European Act, as interpreted by this Court in *Crotty v. An Taoiseach*."[182]

The logic of the Chief Justice is interesting. He is not saying that international agreements cannot be subject to Judicial Review. The decision in *Crotty* clearly affirmed that such treaties can be subject to judicial supervision.[183] Nor is Finlay arguing that aspects of the S.E.A. (as it was originally being implemented) were not incompatible with the Constitution. Finlay is instead arguing that the terms of the Anglo-Irish Agreement are sufficiently different as to "render any comparison invalid."[184] Just because the plaintiffs' claim had been rejected, therefore, it did not follow that it was impossible for the Anglo-Irish Agreement to be found unconstitutional. The terms of the Anglo-Irish Agreement are merely different. It did not diminish the precedents established by the Supreme Court in *Crotty*.[185] International agreements are subject to Judicial Review and,

[178] See above; see also Maginnis (1990): pp.2-6.
[179] Kelly (2004): P.345.
[180] *Ibid*.
[181] *Ibid*.
[182] *McGimpsey v. Ireland* [1990] I.R. 110: p.121. See Kelly (2004): p.345.
[183] See above: Casey (2000): pp.214-219.
[184] See Kelly (2004): p.345.
[185] Kelly (2004): p.345.

in the right circumstances, can be found to be unconstitutional.[186] The State's participation in the Anglo-Irish Agreement, however, did not meet this legal threshold.[187] The argument employed by the Court says something about its rationale in reaching the decision. The Supreme Court did not believe that the McGimpseys had provided enough evidence to prove that the Agreement was unconstitutional, so had no option but reject their claim. The Court did want to ensure, however, that the decision was framed in such a way as not to compromise the earlier decision reached in *Crotty*.[188] The Court seemed to have been determined to express the rejection of the McGimpseys' claim in a way that left the *Crotty* judgement intact.

Another pivotal element of the McGimpseys' case was their objection to the inherently undemocratic nature of the Hillsborough Agreement. The plaintiffs had reasoned that such disregard of the democratic process served to discriminate against the majority community in Northern Ireland. *Ergo,* as the people of Northern Ireland had no opportunity to either approve or reject the Agreement, it is rendered undemocratic. The unjust and undemocratic nature of the Agreement, the McGimpseys argued, served to undermine and erode its political credibility. The Chief Justice rejected this proposition. He argued:

Disregard of the "majority" community in Northern Ireland

"It does not seem to me that there are any grounds for suggesting that there has been an in invidious or any discrimination between the two communities in Northern Ireland by virtue of the terms of the Anglo-Irish Agreement. I am satisfied, therefore, that all the grounds of the appeal brought by the plaintiffs must fail. I come to that conclusion from an analysis of each of the submissions that have been made….I would also point out.....looking at the Anglo-Irish Agreement in its totality and looking at the entire scheme and thrust of the Constitution of Ireland a high improbability that a clear attempt to resolve the position of Northern Ireland by a process of consultation, discussion and reasoned argument structured by constant communication between servants of each of the two states concerned could ever be inconsistent with a

[186] *Ibid*.
[187] See below.
[188] See Clarke (2000): pp.110-119.

Constitution devoted to the ideals of ordered , peaceful international relations. I would dismiss this appeal."[189]

The Court had delivered an emphatic response to the plaintiffs' arguments, with the Chief Justice refuting each of their legal team's central arguments. As Casey explains:

"That instrument (the Agreement), they (the plaintiffs) contended, was invalid in that it flouted Articles 2 and 3 of *Bunreacht na hÉireann*, and that it unconstitutionally fettered the executive in its conduct of international relations under Articles 28 and 29 of the Constitution. The Supreme Court unanimously repelled these objections, holding that though Articles 2 and 3 made re-integration of the national territory a constitutional imperative, the Anglo-Irish Agreement did not run afoul of this. Nor had the executive unconstitutionally fettered its power to conduct the State's international relations; the analogy sought to be drawn between the Anglo-Irish Agreement and the Single European Act was misconceived."[190]

Ostensibly the judgement seems to be an emphatic rejection of the plaintiffs' claim. The McGimpseys' case had revolved around two central legal planks: the belief that the Anglo-Irish Agreement represented an unconstitutional endorsement of consent, and the provision that an international agreement could be successfully challenged on the basis that it conflicted with the Constitution.[191] In one fell swoop Finlay C.J. had definitively rebutted those arguments, thus eliminating any prospect that the Agreement would be dismissed as constitutionally invalid. Both central arguments of the McGimpseys' legal team had been rejected. Article 1 of the Anglo-Irish Agreement referred only to the *de facto* existence of Northern Ireland, and the parallel with the *Crotty* decision was unreliable, due to the intrinsic differences between the terms of the Agreement and the S.E.A.[192]

Several aspects of the judgement are rather unconvincing. First, the assertion that Article 1 is not an endorsement of the consent principle is refuted by the evidence of the Agreement. Even a cursory reading of the Agreement confirms that Article 1 refers

[189] *McGimpsey v. Ireland* [1990]: I.R. 110: p.122.
[190] Casey (2000): p.218.
[191] See Maginnis (1990): pp.2-6.
[192] See above.

unambiguously to the right of the people of Northern Ireland to determine their own future.[193] It is difficult to conceive of a more definitive confirmation of the consent principle. Moreover, in its categorical reference to the "people of Northern Ireland" and its statement that constitutional change could only be achieved through the consent of a majority in both jurisdictions, it is clear that Article 1 refers to more than the *de facto* reality on the ground.[194] Although probably not the intention of the Irish negotiators, Article 1 seems to incontrovertibly assert the right of the people of Northern Ireland to remain in the U.K. as long as a majority there wishes that to be the case. The principle of consent underpins the Agreement. It is the immutable principle at its heart. Constitutional logic decrees that such endorsement is inevitably at odds with a document that claims to govern Northern Ireland by legal right. [195]Finlay's position is perfectly consistent, however, with the constitutional position as interpreted by the Irish courts. Case law had long since adjudged that the claim to govern Northern Ireland could co-exist with the reality on the ground.[196] So although the decision may appear inconsistent with the Agreement, Finlay's interpretation is simply an extension of the position established in the earlier cases.[197] On the face of it, the judgement appeared to be a clear rejection of the McGimpseys' claims, signalling an end to their ambition of destroying the Anglo-Irish Agreement. Maginnis summarises unionist reaction to the decision thus:

"The immediate reaction to the harsh, uncompromising and strictly nationalistic terms in which the McGimpsey judgement was given was predictable. Unionists found the whole thing highly offensive and believed that any self-respecting British government should share that sense of grievance."[198]

THE LEGAL STATUS OF ARTICLES 2 AND 3

To many observers it seemed that the case had been a failure, albeit one which had elucidated the sense of injustice felt within the unionist community. The ultimate goal of destroying the Agreement had not been achieved, while the claim over Northern Ireland

[193] See O'Dowd (1994): pp.2-4.
[194] See above.
[195] See Clarke (2000): pp.110-119.
[196] See above.
[197] See below.
[198] Maginnis (1990): p.13.

remained not only intact but strengthened. The McGimpseys felt that the judgement secured an important victory in one sense, however. The brothers had stated at the outset that they wished to prove the real nature of Articles 2 and 3, i.e. that they claimed an authority to govern Northern Ireland by right.[199] In terms of the nature of the claim, the Court was certain over the legal status of the Articles. On the subject of whether the claim existed in the political or legal order, Finlay is emphatic:

"With Articles 2 and 3 of the Constitution should be read the Preamble, and I am satisfied that the true interpretation of these constitutional provisions is as follows:

1. The re-integration of the national territory is a constitutional imperative (cf. Hederman J. in *Russell v. Fanning* [1988] I.R. 505).

2. Article 2 of the Constitution consists of a declaration of the extent of the national territory as a claim of legal right.

3. Article 3 of the Constitution prohibits, pending the re-integration of the national territory, the enactment of laws with any greater area or extent of application or extra-territorial effect than the laws of Saorstát Éireann and this prohibits the enactment of laws applicable in the counties of Northern Ireland.

4. The restriction imposed by Article 3 pending the re-integration of the national territory in no way derogates from the claim as a legal right to the entire national territory."[200]

By following Hederman's interpretation of the claim, rather than the `political` alternative offered by Barrington J., Finlay C.J. had provided the brothers with confirmation that the Constitution expressed a *de jure* right to govern Northern Ireland.[201] Their ancillary objective of proving the legal nature of the claim had been achieved.

The importance of this development is manifold. The brothers had set the identification of the legal claim as a central ambition of the case for good reason. The McGimpseys had

[199] See Maginnis (2000): pp.2-7.
[200] *McGimpsey v. Ireland* [1990] I.R. 110: pp.110-119. See also Clarke (2000): p.110.
[201] See Clarke (2000): pp.110-112.

deduced that the confirmation of the nature of the claim by the Irish courts would undermine the entire validity of Articles 2 and 3, making their retention unjustifiable. If Articles 2 and 3 were exposed as being contrary to international law, they reasoned, the Irish State would be placed under overwhelming pressure to amend the Articles.[202] The fact that their legal status had been verified by the State's own courts compounded the pressure on the Irish government to consider constitutional change. The momentum to update the Constitution, in respect of its outdated interpretation of the national territory, was now being applied from within. As well as being exposed to external pressure to amend the Articles, the State was now compelled to consider an internal assessment of its own Constitution. The definitive interpretation of the legal claim by the Supreme Court was not something the State could easily ignore. The need for (at the very least) a debate on constitutional reform, in relation to this issue, had to be acknowledged by the government. The wheels had been set in motion for the eventual amendment of Articles 2 and 3. [203] For the plaintiffs, this acknowledgment represents the ultimate legacy of the case. As Chris McGimpsey has stated, the acknowledgement of the *de jure* nature of the claim, highlighted its anomalous place in the Constitution. According to Dr. McGimpsey the Court's verdict, "made the retention of the claim insupportable."

The rationale used by the Court is noteworthy. From a legal perspective, Finlay's decision underlines that the case, rather than offering a fresh slant on the constitutional position, is merely a successor to the landmark cases that preceded it.[204] Although the accentuation of the *de jure* aspect of Articles 2 and 3 is significant, the Supreme Court decision should be viewed as an extension of the existing constitutional position. In that sense, the judgement is in line with the interpretation offered in the earlier cases. Instead of rejecting the authority that had already been established, Finlay invoked existing precedent to deliver what he considered the definitive interpretation of the constitutional position. It is through a consistent application of legal logic that the courts have been able to reconcile the existence of Northern Ireland with Articles 2 and 3. The Supreme Court, in rejecting the plaintiffs' claims, had relied on this authority. Invoking previous Supreme

[202] See Maginnis (1990): pp.2-7.
[203] See below.
[204] See above.

Court judgements, Finlay re-iterated that, in relation to Articles 2 and 3, the Constitution needed to be interpreted harmoniously.[205] Without acknowledging the other relevant Articles of the Constitution, the Chief Justice argued, it was impossible to place Articles 2 and 3 in their proper constitutional context.[206] It is a familiar argument, one that has been at the epicentre of the constitutional position relating to Northern Ireland.[207] In particular, Finlay stated that the Articles should be read with the Preamble and Article 29.[208] Opponents of Articles 2 and 3 could easily attack the Constitution by reference to international law. As a consequence, it became difficult for the Irish State to refute the argument that the Articles were irredentist. After all, if they express a *de jure* right to govern Northern Ireland, then surely that claim placed the Constitution at odds with the claim of the U.K. government to exercise jurisdiction over the same territory?[209] It was a difficult quandary for the Irish legal system, compelling the courts to defend a position that was dubious in the eyes of international law. The only way the courts have been able to square this circle is by placing Articles 2 and 3 in the context of the overall Constitution. This interpretation has been followed consistently by the courts.[210] Indeed Finlay's argument bears remarkable similarity to the position followed in earlier Supreme Court decisions.[211] Without a harmonious interpretation of the Constitution, a robust defence of Articles 2 and 3 was difficult. By incorporating other Articles, particularly the provisions on international relations enshrined in Article 29, the courts have been able to protect Articles 2 and 3 from political challenge. By applying similar logic, Finlay C.J. is following the established authority of earlier case law.

[205] *McGimpsey v. Ireland* [1990] I.R. 110: pp.112-119. See above.
[206] *McGimpsey v. Ireland* [1990] I.R. 110: pp.110-119.
[207] See above.
[208] *Ibid*.
[209] See Maginnis (1990): pp.2-7.
[210] See above.
[211] In *Boland* the Supreme Court also justified Articles 2 and 3 by reference to other Articles of the Constitution, while a similar argument was deployed by Hederman J. in *Russell v. Fanning*. See above.

SIGNIFICANCE OF THE CASE

What can be considered the ultimate legacy of the McGimpsey case? What did the brothers achieve? In the final analysis, how did the decision help clarify the constitutional position? The answer depends on the perspective from which we interpret the evidence. In a legal sense, there is little doubt about the true significance of the decision. The judgement offered in *McGimpsey* provided clear legal guidance on the scope and relevance of Articles 2 and 3. Previous case law had been vague and ambiguous.[212] Such ambiguity, in turn, influenced how the Articles were defined in terms of international opinion. Although the other cases can be considered fairly consistent in their understanding of Articles 2 and 3, they failed to provide a definitive analysis of the claim. Some cases had characterised the claim as primarily political in nature[213], whilst the other cases had tended to favour the view that the claim should be considered as having political and legal elements.[214] However the summary of Finlay C.J. had provided a definitive and authoritative interpretation of the legal nature of the old Articles 2 and 3. The Articles formed a substantive, legal claim to govern the whole of the national territory by right.[215] In addition, the Articles were fully compatible with the recognition of Northern Ireland, but this recognition referred solely to the *de facto* situation on the ground, without diminishing the legal nature of the claim.[216] The legal status of Articles 2 and 3 was re-iterated by McCarthy J. In his endorsement of the constitutional position that had been defined by the Chief Justice, he argued:

"I have read the judgement delivered by the Chief Justice and I wholly agree with the conclusion that the plaintiffs have failed in their challenge to the Anglo-Irish Agreement. I would wish to state my firm opinion, that, whatever the political background to the wording of Article 2 of the Constitution, it is an unequivocal claim as of legal right that the national territory consists of the whole island of Ireland, its islands and territorial seas. (See O'Keefe P. in *Boland v. An Taoiseach* [1974] I.R. 338 at 363)."[217]

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[212] See above.
[213] *Re: Article 26 and the Criminal Law (Jurisdiction) Bill 1975* [1977] I.R. 129. See above.
[214] See above: *Boland v. An Taoiseach* [1974] I.R. 338, *Russell v. Fanning* [1988} I.R. 505.
[215] See above; see also Clarke (2000): pp.110-119.
[216] Clarke (2000): pp.110-119.
[217] *McGimpsey v. Ireland* [1990] I.R. 110: p.125.

The reaction of legal academics to the case seemed to confirm its fundamental importance. David Gwynn Morgan, writing in *The Irish Times*, assessed the significance of *McGimpsey* thus:

"….The McGimpsey case upheld the constitutionality of the Anglo-Irish Agreement. What is more significant for the future of the island, however, was that a unanimous court held that Articles 2 and 3…enjoy legal and not merely political status. …..The question of whether these Articles are legally binding arises because the Constitution is not only a legal instrument, it is also a political document; one of the symbols, like the national flag or anthem, through which a polity proclaims itself to outsiders: "This is who we are". It is the focus of loyalty, a statement of national beliefs, ideals and aspirations…..The McGimpsey decision may be regarded as similar to the *Crotty* case. There, too, the issue involved the matter of international relations which it is plausibly thought had been left to the discretion of the elected government. *Crotty* was an important case, but Northern Ireland is an issue rather closer to the Irish psyche than the S.E.A. Accordingly, in the medium term, McGimpsey is likely to hold even more significance than did *Crotty.*"[218]

From a legal perspective, the argument had been settled. Articles 2 and 3 constituted a legal claim by the Irish Constitution to exercise jurisdiction over Northern Ireland. As such, *McGimpsey* can be considered a natural successor to the earlier cases, where the principle had already been established that the Articles reconciled the *de jure* claim with the *de facto* reality.[219]

With the legal status of the Articles having been confirmed, the question remains as to the wider significance of the decision. For unionists, the decision seemed to vindicate their belief that the Constitution required amendment. Although they had failed to achieve the dismantling of the Anglo-Irish Agreement, the McGimpsey team believed that the identification of a legal claim had highlighted the unsustainable nature of the Hillsborough Agreement.[220]

[218] *The Irish Times:* 5 March, 1990. David Gwynn Morgan was a regular commentator on legal matters for the newspaper and a lecturer in law at University College, Cork. See Maginnis (1990): p.16.
[219] See below.
[220] See above.

As Maginnis has argued:

"The Anglo-Irish Agreement, Unionists were told in 1985, would bring peace, stability and reconciliation; an end to megaphone diplomacy; a recognition of the status of Northern Ireland; better security and extradition for terrorist offences. It has constructively and systematically (and I choose my words carefully) failed to deliver on a single one of those promises…..The Agreement may still be in place but it means nothing and can never be an instrument for progress."[221]

The belief persisted within the unionist community that although the Supreme Court had rejected the McGimpseys' claims, the decision was a validation of their objections to the Agreement. The confirmation of the legal nature of the claim, therefore, had provided the McGimpseys with a victory of sorts. The decision had highlighted the political incongruity of Articles 2 and 3, paving the way for their eventual amendment. This interpretation is endorsed in an *Irish News* editorial that followed the decision. The paper argued:

"The confirmation of the legal status of Articles 2 and 3 could be highly significant in lending support to Unionist claims on the essential duplicity of the overall Agreement, regardless of its precise legal status…Similarly, future political events may yet show that, while the McGimpsey brothers have lost the short term legal battle, they may have helped win the Unionist war."[222]

The article reflected the gut feeling within the unionist community that although the Supreme Court had effectively rejected their claims, the brothers had achieved a moral victory by revealing the legal status of Articles 2 and 3. Certainly that was the reaction of the plaintiffs. The revelation of the existence of a *de jure* claim to govern Northern Ireland had made the amendment of Articles 2 and 3 inevitable, by exposing their inherent weakness. In the opinion of Chris McGimpsey, the Supreme Court decision had shattered the political foundation that had protected the Articles from challenge.

[221] Maginnis (1990): p.14.
[222] *The Irish News*: 12 March, 1990: Editorial: *Lost a Battle, Won a War*. See Maginnis (1990): p.19.

He argues:

"Once the claim was exposed as being *de jure*, the continued existence of Articles 2 and 3 became indefensible. By retaining the Articles, the Irish State was making a claim over not just a territory, but a people. Such practice could no longer be justified. While it may have been possible to justify Articles 2 and legally, from a political perspective, they were no longer sustainable. After the Supreme Court decision Articles 2 and 3 were dead on their feet."

For nationalists, the decision was no less significant. By confirming the *de jure* claim over Northern Ireland, the Supreme Court had set in motion a chain of events which would culminate in the amendment of Articles 2 and 3. Following the case, the pertinent question became when, not if, the Articles would be amended. Although the prospect of amending the Articles had sporadically arisen in Southern political discourse, this had never let to a concerted debate.[223] The chief importance of the *McGimpsey* case, from a Southern perspective, was that it led to an acknowledgment that the Articles required amendment, and that this would form an intrinsic part of any negotiated settlement. It is my belief that the *McGimpsey* case precipitated this understanding within the Irish political establishment. For ideological and symbolic reasons, the Irish State had retained Articles 2 and 3 in the same format since 1937; as a political re-iteration of the State's determination to re-unify the national territory. The Supreme Court decision had exposed that conceit as being no longer politically sustainable. The revelation of a fully legal claim to exercise jurisdiction over Northern Ireland, contrary to established principles of international law, exerted pressure on the State to consider constitutional change.[224] Obviously the State wished to retain the status of Articles 2 and 3 as a bargaining chip in future negotiations. The Irish government recognised the importance of the issue in the unionist mindset, that the Articles conveyed a symbolic importance far beyond their legal

[223] Humphreys (2009): pp.54-58: The review of the Constitution (1966/67) had raised the possibility of amending Articles 2 and 3 but the proposal had never been implemented. The momentum then subsided until the signing of the Anglo-Irish Agreement which precipitated a debate on whether the Articles should be revised. In 1985, the Progressive Democrats suggested the possibility of amending the Articles in the context of a general re-codification of the Constitution. Then, following the *McGimpsey* decision in 1990, further changes were suggested. As Humphreys reveals, "the Workers Party proposed a private member's bill to amend Articles 2 and 3, which was duly defeated in December 1990, with the Progressive Democrats joining Fianna Fáil to vote down a concept they had proposed two years before." See Humphreys (2009): pp.54-58.

[224] See above.

status. Such symbolism meant that the existence of Articles 2 and 3 would have an axiomatic part in any future settlement. The State certainly recognised the value of Articles 2 and 3 at the negotiating table, explaining why the eventual amendment was not agreed until eight years after the *McGimpsey* decision. Although the political establishment had recognised that Articles 2 and 3 needed to be amended, they would have realised that such constitutional change could only occur as the result of a political settlement. Even the inevitable posturing over the timing of amendment was disingenuous, however. Articles 2 and 3 had been validated as legally sound, but exposed as politically insupportable. That is the ultimate legacy of the case. It made the removal of the political claim inevitable.

There is a tendency among some commentators to think that the *McGimpsey* case re-invented the wheel in relation to the claim over Northern Ireland, that the case heralded a sea change in our understanding of Articles 2 and 3. I make no such claims or assertions. Of course the case provided a definitive definition of the Articles when other cases had offered only vagueness and obfuscation.[225] *McGimpsey*, at the very least, had provided a definitive and authoritative answer. Articles 2 and 3 were intended to convey a *de jure* claim to exercise jurisdiction over the whole of the national territory, whilst at the same time acknowledging the *de facto* limitations applied to that right, and the restrictions relating to extra-territoriality.[226] There is no doubt that *McGimpsey* extended the constitutional position beyond anything heretofore interpreted by the Irish courts. The legal importance of the case should not be diminished. The Supreme Court decision represents the only occasion where the existence of a fully legal claim was acknowledged and confirmed. In that sense, the case did considerably more than any of its predecessors to elucidate the nature of Articles 2 and 3.

The decision, however, should never be viewed in isolation. The *McGimpsey* case forms part of a distinguished jurisprudential lineage, which provided the necessary reconciliation between the 1937 Constitution and the existence of Northern Ireland.

[225] See above.
[226] See above.

Without such reconciliation, the claim over Northern Ireland would not have endured unfettered for over 60 years. The Irish State and courts have both applied the same pragmatic interpretation of Articles 2 and 3. The old Articles were conceived primarily as a political device, intended to accentuate the existence of a defined national territory; reassuring Northern nationalists that the State remained wedded to the re-integration of that territory. The insertion of this profoundly political device created a problem for the judiciary, in reconciling the idealistic Republican vision with the political reality. In reality, however, the State created in 1937 had negligible difficulty in so doing. A strain of pragmatism had always characterised the institutions of the State in its interaction with its nearest neighbour.[227] An exclusively ideological interpretation of Articles 2 and 3 would never have endured, and the legal claim would have been consigned to history long before the conception of the Good Friday Agreement. The imaginative construction of Articles 2 and 3 made such pragmatism unnecessary, however. The old Articles were fundamentally sound from a legal perspective, successfully accommodating the desire to re-unify the national territory with the political reality pertaining on the ground. That is the rarely acknowledged strength of the old Articles. They enabled the political determination to re-unify Ireland to co-exist with the legal frameworks that had been necessitated by partition. By achieving these twin objectives, the old Articles allowed the courts to consistently reconcile the existence of Articles 2 and 3 with the State's inevitable interaction with Northern Ireland.

Which brings us back to the argument (expressed by Clarke), that the legal significance of the *McGimpsey* case has perhaps been overstated.[228] I contend that the *McGimpsey* case went substantially further than any of its predecessors. The identification of the *de jure* claim remains the key legal ramification of the case. Such narrow legal considerations, however, do not paint the full picture. Although the legal status of the Articles was important, their political status bore greater significance. The Articles were conceived as a political symbol which would advance the prospect of unity, but would also serve a transient purpose, in their acknowledgement of the Treaty arrangements the

[227] See below.
[228] Clarke (2000): p.110. See above.

Republican drafters sought to destroy. In that sense, the language of the Articles reflected the pragmatic principles which complement Republican ideology at the heart of the Constitution. On the question of pragmatism or principle, the State's position definitely erred towards pragmatism. Such a spirit of conciliation demonstrates the flexibility and compromise which characterised the State post-1937. A pragmatism that is rarely acknowledged, but is embedded in the history of the Republican tradition. This pragmatic spirit is epitomised by the constitutional interpretation that has been consistently applied to Articles 2 and 3, and was essential for maintaining a workable relationship with their neighbouring jurisdiction.[229]

The identification of Articles 2 and 3 as a legal claim was momentous, but the Articles epitomized so much more. They embodied a significance that extended far beyond mere legal definition. The interpretation of the claim applied by the courts was part of a deliberate process designed to maintain a vision of the Irish nation. Articles 2 and 3, therefore, need to be understood in a holistic, rather than a narrow, legal sense. The claim to exercise jurisdiction over the whole island was sagaciously political, and was formulated to convey a message that unity remained a realistic objective. More than anything, Articles 2 and 3 must be understood in the context of the political conditions that had been created by partition. One of the Articles' fundamental political functions was to impart a message of solidarity to Northern nationalists, who had benefited least from the political machinations of 1921.[230] Articles 2 and 3 sent out a powerful message that Northern nationalists had not been forgotten about, that their aspirations would still be recognised within the new constitutional arrangements. Articles 2 and 3 asserted categorically that unity remained a central objective of the State. In attempting to communicate this message of national unanimity, however, the State managed to alienate the unionist community whose complicity was crucial if political unity was ever to be realised. The ultimate irony of the claim over Northern Ireland was that its very existence became detrimental to the realisation of the ambition it was intended to achieve. In that sense, the claim had become counter-productive, its removal necessary to achieve a

[229] See above.
[230] Garvin (2005): pp.126-148.

political settlement. The precise legal status of the Articles was a moot point. Their retention had become anathema to unionists, and their amendment was an essential component of the Good Friday Agreement. That Agreement signalled that the Irish government had conceded that unity would be achieved by conciliation, rather than coercion.

One of the reasons Chris McGimpsey decided to pursue legal action, was his belief that mass protests alone were never going to be sufficiently effective to encourage constitutional change. Although he supported the protest marches as a valuable means for expressing democratic dissatisfaction with the *status quo*, Dr. McGimpsey recognised that street politics alone would not be enough to produce change. A coherent, organised approach was needed. For the Irish government to even contemplate amending the Constitution unionism needed to offer more than the usual philippic rhetoric. That is why the constitutional challenge assumed such importance. The *McGimpsey* case provided a focal point for unionists implacably opposed to the perceived injustice of the Anglo-Irish Agreement. Without the case, it is unlikely that constitutional change would ever have occurred as expediently or conclusively. The confirmation of the existence of a *de jure* claim to govern Northern Ireland was an essential component in the campaign to encourage constitutional amendment. For Chris McGimpsey, the case also involved the realisation of a more personal ambition. He argues that *McGimpsey v. Ireland* permanently altered the way unionists were perceived in the South:

"The result (the decision of the Supreme Court) was important, and was crucial in the achievement of a settlement in Ireland. But just as important was the massive effect the case had on Southern public opinion. Here was a unionist who identified himself as an Irishman, and was able to use the institutions of the State to affect change like any other citizen. In terms of public opinion, the case altered the perception of unionists permanently. Previously there had been a massive negative stereotype of Ulster Unionists (particularly Presbyterians) in Dublin. The case shattered all those old assumptions."

The *McGimpsey* case proved that unionists could express their grievances in a coherent and intelligent manner, enabling them to be taken seriously by the Irish political establishment. The reasoning employed in the case certainly assisted their cause. The

advancement of a fundamentally nationalist argument was crucial in the Courts' decision to recognise their standing as fully fledged Irish citizens. The unprecedented involvement of unionists in the centre of constitutional discourse proved to be of enduring importance. The manner in which the courts recognised the sincerity of the McGimpseys' protests presaged the sustained interaction between the two traditions in Ireland, which culminated in the Good Friday Agreement. A settlement would never have been achieved by isolationism and exclusivity. It was only made possible by dialogue, and accommodation between the traditions. The *McGimpsey* case had illustrated that Articles 2 and 3 needed to be amended in order for the founding fathers' utopian vision of Irish unity to become achievable. That is the supreme legacy of the case. By exposing the redundant nature of Articles 2 and 3, it paved the way for more meaningful interaction between the two main traditions which inhabit this island. Perhaps the *Irish News* assessment of the McGimpseys' legacy is correct. The brothers may have lost the battle, but they ultimately won the war.

NORTHERN IRELAND AND THE IRISH CONSTITUTION: PRAGMATISM OR PRINCIPLE?-THE *MCGIMPSEY* CASE

CONCLUSION:

"….Why should the people of a given geographical region re-think their national identity? Why should they re-write their history-that is, the account of their past to which they have become accustomed-and perhaps, in doing so, re-evaluate the honorific status of those who engaged in the "heroic and unremitting struggle" for the international recognition of Ireland as a distinct nation? Is it not an extreme and implausible form of revisionism not only to re-evaluate the past but also to attempt to change our identity by modifying our current beliefs about who we are? The answer to the first question, in summary form, is easy: because justice demands it. Justice demands, in a region that includes individuals with diverse cultural identities, that their cultural diversity should be acknowledged and that no group should be allowed to impose its culture, by exclusion or enforced inclusion, on others."[1]

So Clarke encapsulates the dilemma facing Irish nationalism as it headed into a new millennium.[2] How could the nationalist tradition extricate itself from the intractable notions of exclusivity that characterised its philosophy during the 20th century?[3] The need to re-define Irish nationalism became more acute when considered in the light of the great swathes of immigration that have descended upon this island in the last twenty years. This immense influx, with all the consequent semantic, cultural and ethnic diversity that it brought, posed a challenge to Irish nationalism and its perception of the nation.[4] The rapidly evolving social conditions of the last two decades provided just as compelling a reason to re-define our conception of Irishness as the exigent need to make peace between the two predominant traditions that inhabit this island. As important as it was to create a workable political framework which both nationalism and unionism could

[1] Clarke (2000): p.116.
[2] Clarke (2000): pp101-119.
[3] *Ibid.*
[4] See Clarke (2000): pp101-119.

subscribe to, the emergent multiculturalism that was beginning to characterise Irish society at the turn of the millennium meant that the very notion of Irish nationality needed to be re-defined in a fundamental way.[5] That is why the Good Friday Agreement assumed such critical importance for the Irish nation. Not only did the Agreement herald a conciliatory structure of mutual cooperation which enabled both jurisdictions in Ireland to co-exist with one another, it also opened up the possibility for a long overdue modification of our collective idea of nationality.[6] The decline of the vituperative dialogue and antagonism that had characterised the relationship between the main traditions since (at the very least) the 19th century, had engendered an environment where a wholesale revision of Irish nationality and citizenship had become possible.[7] By updating and modernising our essential idea of the nation, the Agreement challenged the orthodox principles of nationalism, precipitating the facilitation of a new dispensation, where the nation could be defined in a more inclusive manner.[8] The exclusively nationalist ideology of De Valera and the other founding fathers had been replaced by a new conception that was characterised by inclusiveness and commonality. [9]

That is not to say that the revision of nationality that emanated from the Agreement imposed a standardised version of Irishness upon everyone on the island. In fact the negotiators had been keen to challenge the exclusive and constraining philosophies which had only served to prolong the conflict.[10] The updated concept of nationality sought to respect individual traditions and affiliations, but within a common framework that would apply to everyone who chose to embrace it. In particular, the Agreement aspired to update the inter-related ideas of nationality and citizenship.[11] The aspiration was that citizenship (and the more abstract idea of the Irish nation) would be extended the

[5] Clarke (2000): pp.105-119. For a full discussion of the way in which multiculturalism affected Irish nationality see *ibid*: pp101-119.
[6] See Clarke (2000): pp101-119. See also Humphreys (2009): pp58-82.
[7] See Clarke (2000): pp.109-119.
[8] *Ibid*.
[9] See the discussion in Clarke (2000): pp.101-119.
[10] Humphreys (2009): pp78-82.
[11] Clarke (2000): pp109-119. See also Ryan (2001): pp40-42.

unionists of Northern Ireland, and other groups entitled by statute.[12] The re-integration of unionism within the Irish nation was an essential component of conflict resolution; relations between the two traditions being long overdue for revision. In addition, the challenges posed by immigration demanded a wholesale clarification of citizenship.[13] The amended Articles 2 and 3 have updated the meaning of Irishness by defining nationality according to those who wish to belong to the nation.[14] Hence the inhabitants of Northern Ireland are free to delineate themselves as Irish, British or both.[15] Nationalism had seemed to have moved beyond its previously restrictive and exclusive parameters, giving rise instead to a more inclusive, broader definition. Nationalism (as an idea) has always been quite elusive and adaptable, adjusting to the evolving needs and trends of society. As such, the idea of nationality has always been open to interpretation. Indeed the construction of nationality can be extremely multi-faceted and complex.[16] The Irish conflict should be viewed as a microcosm of the myriad of problems caused by nationhood.[17]

The difficulties inherent in nationality are illustrated by the different understandings of the concept which have been exhibited by the two main traditions in Ireland. Not only do the traditions differ over whether or not to define themselves as "Irish", they often apply diametrically opposed interpretations about what the nation actually is. Irish nationalists have tended to perceive the nation in absolutist terms; as an exclusive philosophy where nationality is applied to the inhabitants of a defined geographical territory.[18] According to this definition nationality is interpreted restrictively, the nation being the preserve of an exclusive number of people who subscribe to a homogenous culture and tradition.[19] Thus, as Clarke notes, Irish nationality was traditionally linked with related expressions of culture and identity, notably language, "native" sports, music, and other cultural

[12] See Clarke (2000): pp110-119.
[13] *Ibid*.
[14] See Clarke (2000): pp101-119.
[15] See the definition of citizenship outlined in the Good Friday Agreement, Humphreys (2009): p.76.
[16] See Clarke (2000): pp105-119.
[17] In this context I am referring to nationalism as a general philosophy. For the purposes of simplicity I will distinguish Irish nationalism by using the prefix "Irish".
[18] See above: the former Article 2 and its definition of the Irish nation. See also Clarke (2000): pp.105-119.
[19] See Clarke (2000): pp.105-119.

reference points.[20] Although not exhaustive, these expressions of identity were viewed as unlocking the barriers for admission to the nation.[21] From a unionist perspective, the unspoken implication derived from such a narrow application of Irishness was that those living in Ireland who didn't share the same cultural reference points were consequently excluded from the nation.[22] While unionists, by definition, tend to define themselves as British, it is my observation that they have also rejected such a limited idea of Irishness. By opposing their conscription into the Irish nation, unionists have hinted that a more credible interpretation of the Irish nation can be effected from defining the nation in broader terms.[23] Here we can distil one of the main conundrums confronting Irish nationalism at the beginning of the 21st century. In order to realise the vision of re-unification nationalists needed to move away from the ideologically restrictive definitions of nationality they had traditionally espoused.[24]

Nationalism is fundamentally a political idea, an idea which derives from a rather idealistic and romantic understanding of human distinction and society.[25] Perhaps this is the reason for the ubiquitous distinction between nation and state which is described in the Constitution.[26] The distinction was perhaps borne of necessity, as a rhetorical means of underlining the political relevance of the nation and the unique characteristics it possessed.[27] As such, the Constitution is keen to differentiate the nation from the transient legal framework of the State. The consequence of the accentuation of the nation and its cultural components has been a divergence between the idea of nationhood and citizenship.[28] The definition of citizenship offered in the Constitution (and by Irish nationalism generally) is linked more closely to the idea of statehood. The consequence of that distinction has been that Irish nationality has moved away from the idea of

[20] Clarke (2000): p.117.
[21] Clarke (2000): pp105-119.
[22] See Clarke (2000): pp101-119.
[23] The broader unionist understanding of "Irishness" is evidenced by the opinion of Chris McGimpsey as revealed in *McGimpsey v. Ireland* [1990] I.R. 110. The plaintiff had no difficulty in reconciling his Irish identity with his British citizenship. See above.
[24] See Clarke (2000): pp101-119.
[25] Clarke (2000): pp105-119.
[26] See Clarke (2000): pp101-119, see also Ryan (2001): pp37-50.
[27] See Clarke (2000): pp110-119.
[28] *Ibid*.

citizenship, with the latter concept being more closely connected to the State.[29] One of the consequences of the Good Friday Agreement is that there has been a re-convergence of nationality and citizenship, with nationalism being defined in terms of people and citizens.[30] According to the revised definition of Irish nationality all citizens are deemed to belong to the nation regardless of their ethnic or political background.[31] The re-definition of nationality codified in the Agreement afforded individuals from a diversity of ethnic backgrounds an opportunity to become part of the nation.[32] The revision of nationality, moreover, would necessarily find room to accommodate people from the unionist tradition who also regarded themselves as Irishmen. Unionists, therefore, were just as entitled to participate in the nation as their nationalist counterparts. Both traditions were free to characterise themselves as Irish, with only subtle but significant differences in interpretation. Herein lay one of the principal benefits of the Agreement from a unionist perspective. All potential barriers for assimilation into the nation had been removed, enabling all Irishmen to be included.[33] Equally importantly, the Good Friday Agreement provided for unionists to define themselves as British and opt out of the Irish nation, thus counteracting the traditionally (Irish) nationalist idea that unionists could be conscripted into the nation by virtue of their residence on the island. In describing the re-evaluation of Irish nationality prescribed by the Agreement, and the importance of the extension of the nation, Clarke writes:

"…The extension of membership of the Irish nation cannot deprive those who so choose of their British nationality. By conceding the right of the people of Northern Ireland to hold both British and Irish citizenship, and by recognising that the relevant people have a choice, the Agreement implies that membership of one nation may overlap with that of another."[34]

[29] See Clarke (2000): pp.105-119.
[30] See 19th amendment of the Constitution and the new Articles 2 and 3 which define the nation in popular rather than geographical terms. See also Clarke (2000): pp.105-119, Ryan (2001): pp40-42.
[31] See Clarke (2000): pp101-119.
[32] *Ibid*.
[33] Clarke (2000): pp105-119.
[34] Clarke (2000): p. 111.

Humphreys agrees that the correlation between nationality and citizenship is important, as is the stipulation that citizens of Northern Ireland are free to choose which nationality to define themselves as. He writes:

"…The governments…..agreed that, whichever of them would exercise sovereignty over Northern Ireland……the birthright of all the people of Northern Ireland to identify themselves and be accepted as, British or Irish or both, and to hold British or Irish citizenship, was accepted and `would not be affected by any future change in the status of Northern Ireland`. This provision might be regarded as envisaging that the Good Friday Agreement was intended to continue, at least to some extent, following Irish unity."[35]

There was no need for unionists to be rapacious. In the final analysis, the Good Friday Agreement enabled them to achieve most of their primary objectives. The consent principle had been universally recognised, Articles 2 and 3 had been amended satisfactorily, and the two governments had agreed a new framework of nationality and citizenship that could be endorsed by both traditions. A template had been established for a re-definition of Irishness that would permit a new sense of enfranchisement, whereby a more diverse cross-section of people would be admitted into the Irish nation.[36] The re-definition had been long overdue and represents the ultimate legacy of the Good Friday Agreement: the nation had been extended beyond the traditionally exclusive parameters which had been prescribed by the 1937 Constitution.[37] Thus the 19th Amendment had a profound effect on both jurisdictions. The concepts of nationality and citizenship had converged and the nation had now been defined inclusively. The nation was now defined in popular rather than geographical terms, while anyone born on the island was considered to possess a birthright to be included in the Irish nation, including those otherwise entitled to citizenship.[38] The changes affected by the amendment promised a new era of inclusiveness, an era which would be based on mutual tolerance and respect.[39] Ideas of equality, diversity and multiculturalism underpinned the changes.[40] The Good

[35] Humphreys (2009): p.76.
[36] See Clarke (2000): pp101-119.
[37] See above. See also Clarke (2000): pp101-119.
[38] Ryan (2001): pp.41-42, see also Clarke (2000): pp.105-119.
[39] Clarke (2000): pp101-119.
[40] *Ibid*.

Friday Agreement (and consequent 19th Amendment) represented real innovation, heralding a radical re-definition of the Irish nation.

That is not to say the revised definition didn't foment a new set of problems. In particular, the amended Article 2 engendered an unintended consequence. The provision that every person born on the island had an entitlement to be part of the nation caused an unforeseen dilemma for the Irish State. The Amendment had intended to secure a noble objective, i.e. emphasising the inclusive nature of the nation, whereby everyone born on the island would be entitled to membership.[41] The nation, therefore, would be comprised of everyone born on the island who desired inclusion, particularly nationalists and unionists from Northern Ireland. This stipulation enabled the Irish State to accentuate their new definition of nationality whilst retaining an aspiration for unity. Although the claim over Northern Ireland had been discarded, the State was keen to emphasise that re-unification remained one of its central objectives. The extension of nationality to everyone born on the island was an important symbolic device to assure Northern nationalists that they remained an integral part of the nation. What the lawyers and civil servants who composed the Amendment failed to envisage was the effect the re-definition would have on immigration policy.[42] During the Celtic Tiger years Ireland had become an attractive destination, and a fear emerged within government that Article 2 could be abused as a basis for assuming citizenship, in circumvention of normal rules.[43] Officials became anxious that a loophole had been created, whereby a foreign national could become pregnant and the resultant offspring would have an automatic, constitutionally protected right to citizenship.[44] An apparent influx of foreign nationals into the State seemed to substantiate officials' concerns.

In reality, the political reaction owed more to the typical hysteria over immigration being disseminated by sections of the media. Such anxiety did, however, lead to demands for

[41] Clarke (2000): pp101-119.
[42] For a detailed analysis of the effect of the 19th Amendment see Kelly (2004): pp.69-71.
[43] Doyle (2008): p.4, Kelly (2004): pp.69-71, Ryan (2001): pp.41-42.
[44] Doyle (2008): p.4. See also Kelly (2004): pp.69-71.

government intervention to clarify the rules in relation to citizenship.[45] In response the government introduced proposals to amend Article 9 and its eligibility provisions. As Doyle explains "In *Lobe v. Minister for Justice* [2003] I.R. 1, the Supreme Court commented that the *ius soli* definition of citizenship had been given constitutional protection by Article 2. The government's response was to propose amendments to Article 9 [2004] which were subsequently endorsed by referendum".[46] The amendment of Article 9 sought to limit the scope of the revised Article 2 by placing restrictions on membership of the nation.[47] "The revised Article 9 (2) reads:"

"Notwithstanding any other provision of this Constitution, a person born in the island of Ireland….who does not have at the time of the birth of that person at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality , unless provided for by law."[48]

The amendment superseded the revised Article 2 by asserting the primacy of the Oireachtas in the determination of citizenship, returning precedence to statute law.[49] In effect the Amendment restricts citizenship to those who have a parent who is a citizen or who is otherwise entitled by law.[50] The Amendment provided much needed clarification on the limitations of Irish citizenship and nationality in the post Good Friday Agreement era. As Doyle has observed, however, these limitations are not necessarily permanent.[51] By returning responsibility to the Oireachtas the Amendment provided for extension of the definition.[52] An extension is duly provided by the Irish Nationality and Citizenship Act 2004[53] which provided further clarification. The restrictions and qualifications imposed during the succeeding years need to be kept in mind in any authoritative assessment of the re-definition of nationality provided by the Good Friday Agreement.

[45] See Doyle (2008): pp2-4.
[46] *Ibid*.
[47] *Ibid*.
[48] Doyle (2008): p.4.
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*.
[52] Doyle (2008): pp.4-5.
[53] Doyle (2008): The Act provides that where a child is born to a non-citizen who has been living in Ireland for more than three of the past four years, that child is entitled to citizenship. P.4.

Subsequent modification notwithstanding, the Agreement still constituted a radical re-evaluation of the idea of Irish nationality.[54] The accord heralded a new era of inclusive politics and citizenship, predicated on notions of equality.[55] The realisation of re-unification had effectively been put on the back burner until such times as majorities in both jurisdictions felt comfortable with the idea. The Agreement envisioned that unity would evolve organically through reconciliation between the two main traditions, and would consequently stand a much better chance of enduring than if pushed through by coercive dogma. The new emphasis reflected a developing belief that unity should not be impelled, that a sustained push for re-unification would be profoundly counter-productive. John Hume has frequently spoken of a "post-nationalist world", where the old ideologies of the past assume less importance.[56] Real unity, therefore, is achieved not by a forced congruence of unionists and nationalists, but by both communities working together civically and politically. Through such cooperation, it is argued; the desirability of permanent political unity will become evident and inspire a renewed debate on the issue.[57]

The Agreement demonstrates a paradox inherent in 21st century Irish nationalism; namely that an excessive and sustained focus on re-unification makes its prospect less likely. Hence the success of the Good Friday Agreement: both unionists and nationalists could be convinced that the institutions provide a mechanism for the constitutional issue to be permanently resolved in the fullness of time. Neither community needed to seek victory over the other, constitutional change would evolve incrementally. From a political perspective, the Good Friday Agreement achieved the laudable objective of satisfying the ambitions of both main traditions in the short to medium term. Unionists had safeguarded the position of Northern Ireland within the United Kingdom through acceptance of the consent principle. Nationalists, on the other hand, had secured an institutional framework which they hoped would eventually lead to political re-unification. The Agreement had achieved the apparently impossible objective of keeping both communities satisfied in

[54] See Clarke (2000): pp101-119.
[55] See above.
[56] See Bew (1996) pp.200-227.
[57] See Clarke (2000): pp101-119.

the interim term. Two irreconcilable positions had been accommodated, creating conditions where more meaningful dialogue between nationalists and unionists would emerge.

So how has Ireland reached this critical interlude in its history? The political conditions that spawned the Good Friday Agreement derive in no small part from the *McGimpsey* case. By elucidating the political indefensibility of the old Articles 2 and 3, the McGimpsey brothers precipitated their amendment. Without their intervention it is difficult to conceive that amendment would have occurred as quickly or comprehensively. By exposing that the 1937 Constitution contained a *de jure* claim to govern Northern Ireland, the *McGimpsey* case paved the way for its amendment as part of a political settlement. Would the Good Friday Agreement (with the emphasis on amending Articles 2 and 3) have been delivered otherwise? In all probability it would have been, the prevailing will of the Irish people at the end of the 20th century tended towards reconciliation and ending the conflict.[58] There is no doubt, however, that the case played a small but significant part, helping to inspire the political conditions that culminated in the Good Friday Agreement. Once the *de jure* nature of Articles 2 and 3 had been established their amendment became inevitable. By revealing the essence of the claim the Articles (in their former guise) had been exposed as politically insupportable. In the aftermath of the case the pertinent question became when, not if, the Irish government would concede that the Articles were redundant? Surviving only as an iconic symbol of outdated nationalist philosophy, their amendment had become certain.[59] In that sense, the *McGimpsey* decision had rendered subsequent political negotiations over Articles 2 and 3 meaningless. The invalidity of the Articles had been extrapolated by the case, and made their retention anomalous. The enduring legacy of *McGimpsey* is the intrinsic part the case played in the eventual revision and amendment of Articles 2 and 3.

In my view, a wider significance can also be attributed to the case. By elucidating unionist unease at the constitutional interpretation of the national territory, the

[58] See Clarke (2000): pp101-119.
[59] *Ibid*.

McGimpsey case enabled Irish nationalism to confront some home truths. By 1998 it was evident that while the irredentist philosophy that underpinned the Constitution served an important symbolic function, the claim had become detrimental to the realisation of the aspiration that it espoused. Unionists could not be coerced or trampled into submission. Nor could they be convinced of the perceived error of their convictions. Democracy and equality decreed that the aspirations of all traditions be respected.[60] The constitutional protection and defence of one tradition at the expense of another was not a viable formula for political stability and progress.[61] Meaningful change could only be achieved through a re-definition of the nationalist philosophy expressed in the 1937 Constitution.[62] Only by re-evaluating and modernising these values could Irish nationalism enter into dialogue with their unionist counterparts, based on mutual tolerance and respect.[63] The negotiations that produced the Good Friday Agreement merely represent the end of a torturous and prolonged journey. That ultimate destination would never have been possible had Irish nationalism not been inclined to reassess its image of itself, and its relationship with unionism. In order to achieve reconciliation it became necessary for nationalism to discard some of its central and sacred tenets.[64] Amending Articles 2 and 3 were just a narrow but significant part of a compendious, radical re-assessment.

A more significant revelation had occurred. Nationalism had realised that strict adherence to an outdated and redundant ideology was incapable of creating the political conditions necessary to undertake a radical revision of our constitutional framework. The Good Friday Agreement could only be facilitated by a sincere and thorough re-evaluation of the nationalist position. The definition of the national territory needed to be updated from the irredentist and territorial manifestation of 1937 to a more inclusive definition, encompassing all the Irish people.[65] Irish nationalism has traditionally been characterised by a willingness to contemplate conciliation and ideological revision if it was deemed to benefit society. From Parnell, to Collins, to Adams, the majority tradition on this island

[60] Clarke (2000): pp101-119.
[61] *Ibid*.
[62] See the discussion in Clarke (2000): pp101-119.
[63] Clarke (2000): pp101-119.
[64] *Ibid*.
[65] See Clarke (2000): pp101-119, see also Ryan (2001): pp40-42.

has historically been prepared to compromise on its convictions in order to improve institutional arrangements. The accommodation at the heart of the Good Friday Agreement is merely the descendant of that pragmatic disposition. While not quite a *rapprochement* between the two main traditions, the principles of the Agreement represent an attempt to understand each other. Although retaining their ideological differences, unionists and nationalists realised that negotiations could only be conducted through a willingness to listen to the perspective of the other side. Such profitable interaction was derived from recognition that the political aspirations of both communities could only be reconciled through engagement. An emerging unionist moderation undoubtedly played its part, but the underlying success of the Agreement is attributable to the preparedness of nationalism to challenge its fundamental ideals and values. Nationalist Ireland had accepted that unity could only be achieved through persuasion, by convincing unionists of its virtues. Accordingly the exclusivist interpretation of the nation had to be revised and replaced with a more accommodating vision.[66] Without this nationalist revision, meaningful dialogue between the two traditions would never have been possible.[67] The accomplishment of the Good Friday Agreement derives from a wide variety of sources and influences. The basic principles at the heart of the Agreement, however, were facilitated by the re-assessment of nationalist paragons and ideals.[68] The starting point for the revision is the acknowledgement that Articles 2 and 3 required amendment. The *McGimpsey* case provided an initial inspiration, and underlined the need for constitutional change.

In erring towards the pragmatic interpretation, we must remember that nationalist Ireland had a strict ideological foundation. An over-emphasis on the pragmatic qualities of nationalism can never fully account for the traditional definition of the nation. Nationalism tended to define itself according to what Garvin has called "romantic, idealistic Republicanism."[69] The ability to make peace, however, owes much to Republicanism's ability to rein in and curb its more idealistic tendencies. A spirit of

[66] Clarke (2000): pp101-119.
[67] *Ibid*.
[68] *Ibid*. See also Bew (1996): pp227-239.
[69] Garvin (2005): pp.38-60.

conciliation and compromise was endemic in Republicanism and co-existed seamlessly with the purer quixotic ideology. Without these pragmatic influences the Good Friday Agreement would never have been achieved. The pragmatic qualities exhibited by Republicanism are far from novel, and can be traced back to the very genesis of Irish Republican thought. For evidence of the pragmatic disposition we need only refer to one of the earliest republican icons, a man who flirted with ideas of commonwealth and dual monarchy in tandem with republicanism.[70] As a means of illustrating the pragmatic strain inherent in Republicanism it seems fitting to conclude with a quote from the founder of Sinn Féin. I started this thesis with a quote from Arthur Griffith and consider it appropriate to end with a quote from this most cultured of Republican ideologues. As far back as 1907 Griffith was extolling the virtues of a broad and conciliatory Republicanism. Writing in the *Sinn Féin* newspaper, he argued:

"The Sinn Féin platform is and is intended to be broad enough to hold all Irishmen who believe in Irish independence, whether they be republicans or whether they be not. Republicanism as republicanism has no necessary connection with Irish nationalism; but numbers of Irishmen during the last 116 years have regarded it as the best form for an independent Irish government. What the best form of an Irish national government should be is an interesting but not a material question. It is the thing itself, regardless of its form, Ireland wants."[71]

Similarly, the pragmatic application of the Constitution by the Irish State demonstrates that a fundamental strain of pragmatism has run concurrently alongside more inflexible Republican ideology. Republicans maintained allegiance to their dogmatic influences, but came to realise that re-unification would only evolve from a remote dream to a practical reality through reconciliation and accommodation. It was through the mutable juxtaposition of pragmatism and principle that the Irish State was able to engage, and eventually make peace with, Ulster Unionism.

R.W McGimpsey

[70] See Feeney (2002): pp.42-43.
[71] Feeney (2002): p.43.

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