SECRET AND PERSONAL

33

Prime Minister.
Re degree to which Dr. Fitzgerald is talking around is very worrying & imprudent
CDP 7/3

PRIME MINISTER

ANGLO-IRISH TALKS : JOINT COURTS

I thought I should let you know of a letter I have received from Lord Lowry, the Northern Ireland Lord Chief Justice. He recently met Garret FitzGerald who (imprudently) sounded him out on the subject of joint courts made up of judges from both Northern Ireland and the Republic. Lord Lowry has now written to me (with copies to the Lord Chancellor and the Attorney-General) to state his outright opposition to joint courts. He apparently made his views clear to the Taoiseach, indicating that he would feel bound to resign rather than participate. I enclose a copy of his letter.

2. Joint courts have long been a hobby horse of the Taoiseach. They have featured strongly in the exploratory talks about an Anglo-Irish agreement which officials have had with the Irish. However, we have been aware of Lord Lowry's opposition and the difficulty of introducing new judicial arrangements in the face of resistance from the judges. For that reason in the recent talks officials have pressed that the text of any proposal for institutionalised consultation should go no further than identifying this as a matter for joint study on which proposals might be made. The Irish hanker after a far less non-committal reference that would charge any new machinery with the task of devising "the necessary steps to establish a joint court".

3. I am sending copies of this minute to the Foreign and Commonwealth Secretary, the Lord Chancellor, the Attorney-General and Sir Robert Armstrong.

D H.

D H

ssd

7 March 1985

SECRET AND PERSONAL

ROYAL COURTS OF JUSTICE
BELFAST
BT1 3JF

cc PS/S of S (B+L)
PS/Mr Scott (B+L)
PS/PUS (B+L)
PS/Mr Bloomfield
Mr Brennan
Mr Stephens
Mr Burton
Mr Chesterton
Mr Merifield
Mr Abbott
Mr Condon
Mr Lyon

SECRET

4th March, 1985

for advice by 12/3 please.

BC 12/3.

Dear Secretary of State,

I wish to inform you without delay of a suggestion made to me by the Taoiseach, Dr. Garret FitzGerald for the setting up of a Joint Court to try terrorists.

Last Thursday my wife and I accepted an invitation to lunch with the Taoiseach on Saturday at his home before the Rugby international at Lansdowne Road. We arrived at 12.15. The other guests were Mr. Justice Finlay, the new Chief Justice of Ireland, and Mrs. Finlay. We had a very nice lunch party; politics were not discussed. The Finlays left about 2.25p.m. and then the Taoiseach, who had been on his feet, immediately resumed his seat beside me and, after referring to the planned meeting with the Prime Minister, sketched a scenario for political progress in Northern Ireland, including participation by SDLP and initiatives which he expected from other parties, such as the DUP. He then said, "This would, I hope, involve a Joint Court, which would be very important".

I replied, "Judicially that would achieve nothing. It is a purely political idea, and in my opinion a very bad one. The result would be that decisions in terrorist cases would become much more controversial and attention would be focussed on the composition of the Court and on the results in a way which, on the whole, we have been lucky enough to avoid so far. We are all against the idea, including Turlough O'Donnell, and I would feel bound to resign rather than participate. I am sorry to put it this way after such a nice party, but I would be a hypocrite if I did not make my views quite clear".

The Taoiseach was very nice about it and said he would expect me to speak frankly, but I think he was considerably disappointed, and my wife formed the same view. By then it was time to set out for Lansdowne Road where we all had places in the Committee Box, but not together, and, which may be just as well, there was no further chance of discussion. I might add that I know and like Garret well and admire him in many ways.

In the very short time available I did not try to find out details; for example, whether the Court would sit in Dublin to try absconding terrorists who had been caught (a substitute for "extradition") or whether a judge or judges from the Republic would come and sit here, nor do I

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know whether a joint Court would replace or only supplement our "Diplock" courts and their Special Court. I thought it was more important to express my disapproval of the idea, than to investigate and criticise the nuts and bolts.

During the past 12 years or so, joint courts have been discussed occasionally, always by politicians and politically interested lawyers, but never by judges, except in the Law Enforcement Commission which presented its Report in May 1974 (Cmnd. 5627). We rejected the All-Ireland Court Method (Chapter II) and the Mixed Courts Method (Chapter V) and adopted the Extraterritorial Method (Chapter IV), which was the best in the opinion of the Republic's representatives and the second best, in the absence of extradition, in our opinion.

I want to send you this letter to-day and will make just a few points:-

1. A joint court would be quite inflammatory, as being seen to recognise the unity of Ireland in an important constitutional area.

2. The make-up and decisions of such a court would be highly controversial.

3. The court would suffer from the disadvantages of plural courts, to which would be added the new handicap of judges with different legal and constitutional backgrounds.

4. The administration of the laws of evidence, including special Diplock rules, would be very difficult.

5. While it is impossible to assess accurately an unformed scheme, the judge-power problems associated with plural courts must arise in some form.

6. The judicial value and effectiveness of the Court could not in reality be better than the present system.

7. The validity of everything we have done up to now would at once be put in issue.

8. Security would be a problem of even greater dimensions.

9. I refer to the points made at pp.12-13 of Cmnd. 5627 (copy herewith).

I am sending copies of this letter to the Lord Chancellor and the Attorney-General (for himself and the Solicitor-General). I should also be most grateful if you could inform the Prime Minister of my views subject, of course, to your own comments thereon.

I know you have a great deal to think about and therefore I apologise

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for the length of this letter. My excuse is that I think the subject is of very great importance, and not merely to the judges.

With best wishes,

Yours ever,

Robert Lowry.

The Rt. Hon. Douglas Hurd,
Secretary of State for
Northern Ireland,
Northern Ireland Office,
Stormont Castle,
Belfast,
BT4 3ST.

38. The following points were made in favour of mixed courts:

(*a*) their establishment would facilitate the attendance of members of the court in the place of the offence for the purpose of taking evidence as envisaged in paragraph 22 (*b*);

(*b*) a mixed court consisting of judges from each jurisdiction would enjoy greater public confidence in each jurisdiction and this would be made more evident if, in a court of three judges, two came from the other jurisdiction and the presiding judge from the trial jurisdiction;

(*c*) the proposal is the most appropriate since politically motivated offences of violence are, in effect, offences committed in both parts of the island and against the island as a whole irrespective of the jurisdiction in which they are committed;

(*d*) members of the court from one jurisdiction sitting in the court in the other would have little or no difficulty in coping with the applicable law, especially if uniformity of law and procedure was achieved in reciprocal legislation. In the Republic such a court, being a special court, would have no jurisdiction to decide any question as to the validity of any law enacted by the Oireachtas as a result of this Report: Article 34.3.2° of the Constitution. The judges could not therefore be called upon to adjudicate on such a question.

39. The following points were made against mixed courts:

(*a*) the judge from outside the jurisdiction would lack experience in the substantive law, including case law, and in the practice and procedure of the court, which would place him at a disadvantage;

(*b*) notwithstanding paragraph 38 (*d*) above, the court constituted in the Republic might in the ordinary course have to decide points arising on the interpretation and effect of the Constitution;

(*c*) the importance of points (*a*) and (*b*) above would be emphasised if the court included a majority of judges from Northern Ireland, and to have constitutional points decided by a court so constituted would, it is thought, be legally and politically unacceptable;

(*d*) the solution to the difficulty at (*a*) above would lie in the direction of greater uniformity of substantive law and procedure, but this would take time and trouble to achieve and, when achieved, would create disparities between the exercise of this extra-territorial jurisdiction and ordinary criminal jurisdiction;

(*e*) even if a judge from outside the jurisdiction were not required to take an oath or declaration which was inconsistent with his existing duty, he would be sitting to administer justice on behalf of the sovereign authority in the place of trial. Moreover, the terms of the Constitution of Ireland could embarrass judges of both the Republic and Northern Ireland when sitting outside their own jurisdictions, since it is inconsistent with the legislative sovereignty in Northern Ireland of the United Kingdom Parliament;

(*f*) the unusual composition of the court would be likely to attract rather than repel controversy and to subject its decisions to the risk of politically motivated criticism;

(*g*) a court so composed would attract attention, not always favourable, if it was present in the place of the offence for the taking of evidence on commission; its sittings, unlike those of conventional courts, would not be treated as ordinary occurrences;

(*h*) mixed courts do not make for efficiency, since the need for judges to travel wastes time and, by increasing the risk, increases demands on the security forces;

(*j*) the following points were made in respect of points (*a*) to (*d*) set out in paragraph 38 in favour of mixed courts:

(i) as to (*a*), the members of the court could merely be observers and not sit as a court; it could also be less convenient to arrange the sittings between judges of different jurisdictions;

(ii) as to (*b*), the effect on public confidence is a matter of speculation. The fact that the majority of judges must come from one jurisdiction would not promote public acceptability in the other;

(iii) as to (*c*), this argument has not, so far as we are aware, been adopted as a reason (in the absence of extradition) for setting up mixed courts in relation to hijacking and other terrorist offences. It does not seem probable that, if a wave of non-political crime (including violent crime) were to affect Ireland as a whole or the United Kingdom or any grouping of states, mixed courts would be advocated in preference to ordinary courts exercising extra-territorial jurisdiction;

(iv) as to (*d*), this argument does not suggest an advantage, but merely seeks to minimise the disadvantage of a visiting judge's comparative unfamiliarity with the local law.

40. We conclude that, for the purposes of extra-territorial jurisdiction, mixed courts confer no legal or procedural advantage over purely domestic courts, and for that reason we do not recommend them.