

FROM:

THE RT. HON. LORD HAILSHAM OF ST. MARYLEBONE, C.H., F.R.S., D.C.L.

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HOUSE OF LORDS,  
LONDON SW1A 0PW

SECRET

Prime Minister

Prime Minister

Lord Lowry's disquiet is  
not really justified. But it  
will be useful vis-a-vis  
the Taoiseach.

Joint Irish Court

CDP 29/5.

I thought that you would wish to see the enclosed letter from the Lord Chief Justice of Northern Ireland about the proposal to create a joint Irish court. It indicates the strength of the disquiet felt by the Northern Irish judiciary about this issue and emphasises, rightly I believe, that the reaction of the Protestant majority in the province might be formidable were such a court to be created.

I am copying this minute to the Secretary of State for Northern Ireland and the Attorney General.

H: of S: M.

If this is the strength of feeling  
on the Bench, it seems to me  
very unwise even to include  
the study in the memorandum.  
no

24th May, 1985

SECRET



ROYAL COURTS OF JUSTICE  
BELFAST  
BTI 3JF

SECRET

21st May, 1985

*Dear Lord Chancellor,*

So far, regarding the Irish Government's proposals about our courts, I have dealt with the Northern Ireland Office, as the Department responsible for this part of the United Kingdom, and have kept you in touch with the situation. This time I write to you as the Minister responsible for our courts and judges and, even more, as someone who is deeply concerned for their standing and well-being and who understands what is at stake. Several Departments, and not merely NIO, appear to be concerned with the "Irish negotiations".

The immediate cause of my troubling you is an article on page 1 of last Thursday's "Irish Times", which I mentioned to the Permanent Secretary and which you may have read. While it is foolish to give excessive significance to newspaper articles, there are some special aspects of this one. I held a short judges' meeting before court on Friday, which endorsed my intention to write and considered that my letter should go to you.

Before and since our lunch on 2nd March the Taoiseach has persistently promoted the idea of mixed courts, which has greatly worried the Northern Ireland judges. When I saw the Secretary of State and his PUS on 30th April, the latter stated that the Southern judges had not yet been consulted, which again shows, if any illustration is required, that the idea - like the NIO consideration of it - is purely political. I surmise that, if NIO felt obliged to accept the proposal, they would find consolation in a three-judge court, (which has been advocated at times from both ends of the political spectrum) despite its most recent rejection by Baker and my advice from 1972 up to now. The proposal would involve using two of our judges for every one needed at present and, presumably, one judge in Dublin. Apart from all the other drawbacks, we cannot do this without destroying the senior Bar.

This, however, is only by the way. The Secretary of State confirmed on 30th April that U.K. policy was still based on the "three points" clearly enunciated by the Prime Minister after her meeting with the Taoiseach. I said that to adopt the mixed courts proposal would be a clear and grave infringement of sovereignty and therefore in

/conflict

← conflict with the Prime Minister's three points and declared Government policy. (The Irish Government would no doubt view differently our judges sitting in Dublin, owing to the legal fiction contained in Articles 2 and 3 of their Constitution.)

May I just refer to the article, which continues on page 7 under the cross-heading "N.I. role for judges urged". It probably is Irish Government inspired and reflects their thinking. After describing the three-judge mixed court, it goes on:

"The British negotiators in the Anglo-Irish talks are, however, resisting the idea, according to highly placed sources in London, though the possibility of the 'outside' judge sitting in as an observer has not been ruled out."

The next paragraph but one states:

"The Irish Government case is believed to be based on the proposition that terrorism is an all-Ireland problem and that a Southern judge sitting in a Northern Court, operating legislation agreed between the British and Irish Parliaments, would give a nationalist dimension to the Northern Ireland legal system, from which the nationalist minority has traditionally been alienated."

The observer proposal is referred to again on page 7:

"As before, the key element will be Mrs. Thatcher. It is predicted that she would be prepared to accept a dual court system but only with outside judges acting as observers, and that she is more sympathetic to getting agreement rather than calling off the talks."

It is reassuring to know that mixed courts are resisted, as plainly they must be if the Prime Minister's policy is followed; but it is alarming to hear that the observer alternative is being considered, especially when the writer attributes to the Prime Minister a possibly favourable attitude.

I wrote at length about mixed courts on 4th March and have little to add beyond emphasising my point on sovereignty, which you were good enough to endorse when I visited you on 2nd May and which I would be most anxious to have noted by the Prime Minister - at your behest, if you think that would be the proper course. The idea is nakedly political, since it could not improve the standard or acceptability of the judging, North and South. The arguments for it are specious and, while stressing alienation of the minority, deliberately ignore the dramatic and inevitable effect which its introduction would have on the majority. After all, the Taoiseach repeatedly stresses the need for a solution "acceptable to both communities in Northern Ireland". It is not difficult, either, to foresee the effect on the standing of the Bench and on the credibility of all convictions already reached under the present system.

I have always valued the wisdom and sound advice of your Permanent Secretary, who - very logically - considers the mixed courts proposal so impracticable as not to be a runner. That, of course, ought to be correct but, in any event, the idea ought to have been clearly ruled out before now, and it was still alive on 30th April. Furthermore, we are now afflicted with the new observer idea. I first heard of it as a "serious proposition" on 26th April, but the Secretary of State had not heard of it on 30th April. I did not think to ask the PUS whether he knew about it; at all events he said nothing. As you see, it is prominent in the "Irish Times" and is, perhaps, my main motive for this letter.

The dangerous attraction of the observer proposal, and therefore the cause of my alarm (which is wholeheartedly shared by all the other judges), is that it would not require legislation and could be represented to the Prime Minister as a palliative idea which would not breach sovereignty. For our part, we find the idea completely unacceptable and we consider that to have judges from the Republic sitting on the Bench would be an intolerable intrusion on our efforts to do justice in terrorist cases and an implied condemnation of all we have done so far. As well as that, if we were to permit this innovation, I consider that the social and political effect would be disastrous and quite the opposite of what is hoped.

I do not need to explain to you, although others may be unwilling to understand, that the observer idea is something quite different from the judicial comity which often causes a judge in the civil courts to ask a distinguished visitor to join him on the Bench for a while. Nor have I forgotten that paragraph 3(1) of Schedule 4 to the Criminal Justice Act 1975 (which deals with the examination of witnesses in Northern Ireland to assist a court in the Republic of Ireland) allows a judge of the court in the Republic, which is conducting a relevant trial and has issued letters of request, to attend the examination of a witness in Northern Ireland and to suggest to the Commissioner questions to be put to the witness. In fact Hutton J., as the trial judge, attended such an examination in Dublin under the reciprocal legislation. But that is quite different. The sitting is in connection with the trial being conducted by that judge in the other jurisdiction and no question of "observing" or monitoring someone else's trial arises.

The presence of observers on the Bench would be an affront to our judges, particularly in view of the Taoiseach's critical and frequent remarks about us, and could not achieve what he and Fine Gael say they are looking for.

A less important point mentioned is the "ending of informer trials by agreement". We have simply tried the cases put before us, with varying results, according to our assessment of the evidence, and many of the cases already heard are under appeal. The speculation which I have read seems to politicise the judicial process, just as the court proposals do.

Looking again at page 7:

"There is a recognition in the British Government that Dr. FitzGerald must be given time to allow any arrangements to be seen to work before the next Irish General Election in two years."

That statement resembles my own observation in paragraph 3 of my letter of 28th March to the Secretary of State. I should be happy to feel that my diagnosis was completely mistaken. It is a little worrying that the Secretary of State has been forthright in rejecting suggestions about the UDR but publicly silent about the Courts.

If the ideas being canvassed could do the slightest good, then it would be my duty to consider the wider picture. But I am convinced that they would do great harm to the community and would, in the process, reduce the courts to the status of a political football, as never before.

I know that you understand these things and therefore, respectfully and with complete trust, rely on you to do whatever you think is best.

*Yours sincerely,*

*Robert Lowry*

Rt. Hon. the Lord Hailsham of St. Marylebone,  
C.H., F.R.S., D.C.L.,  
Lord High Chancellor of Great Britain,  
House of Lords,  
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