

## Illegality over Northern Ireland

*Francis Bennion*

Western civilisation has long embraced the rule of law; indeed that is said to be its triumph. What do you do with that high concept when faced with insurrection? The recent answer from Northern Ireland is: you water it down when you think you have to.

Another belief of western civilisation is that people are entitled to self-determination. The inhabitants of a country have a right to choose their rulers, and their form of government. All very well, but it invites the question what is a country? The inhabitants of Gibraltar, currently under extreme pressure to unite with Spain, think their particular territory is a country on its own – and has therefore earned self-determination. The Spanish disagree.

An impartial observer might think the British Isles are a country. They share a common language, and are geographically a unit. Their populations, consisting of English, Scottish, Irish and Welsh, are interlinked by history, marriage, genetics and other powerful factors. Yet majorities of the Scottish, Irish and Welsh disagree. This is simply because the English have a vastly larger population. Under democracy, another prized concept of western civilisation, the English would therefore rule the roost if the British Isles were to be considered one country. The Scottish, Irish and Welsh, or at any rate a majority of them, are not having that.

What happens when the rule of law collides with this sort of realpolitik? Here is a recent example.

Last year the Secretary of State for Northern Ireland, Dr John Reid MP, twice misused his powers under the Northern Ireland Act 2000 by purporting to suspend the Northern Ireland Assembly one day and restoring it the next day. The first suspension was effected by the Northern Ireland Act 2000 (Suspension of Devolved Government) Order 2001 SI 2000/2884, which took effect on 11 August 2001. It was ended by the Northern Ireland Act 2000 (Restoration of Devolved Government) Order 2001 SI 2001/2895 which took effect on 12 August 2001. The second suspension was effected by the Northern Ireland Act 2000 (Suspension of Devolved Government) (No 2) Order 2001 SI 2000/3230, which took effect on 22 September 2001. It was ended by the Northern Ireland Act 2000 (Restoration of Devolved Government) (No 2) Order 2001 SI 2001/3231 which took effect on 23 September 2001).

On 28 September 2001 I had the following letter published in *The Times* of London-

For the second time, the Secretary of State for Northern Ireland has misused his powers under the Northern Ireland Act 2000 by suspending the Assembly one day and restoring it the next day. The Act gives him no power to do any such thing.

The Act says that as soon as is reasonably practicable after he has suspended the Assembly the Secretary of State must initiate a review under the Belfast Agreement, which necessarily takes at least six weeks to accomplish.

The Act further says that before restoring the Assembly the Secretary of State must take into account the result of the review. Obviously this means he has no power to

restore the Assembly until at least six weeks have passed. He certainly has no power to restore it overnight.

What this means is that any person sufficiently interested could ask the High Court to quash the recent restoration order. Whatever else that did, it would at least strike a blow for the rule of law.

The provision of the 2000 Act requiring the Secretary of State to initiate a review after suspension of the Assembly is section 2(1). The provision requiring him to consider the result of the review before restoring the Assembly is section 2 (3). Both provisions are crystal clear, leaving no room for argument. No doubt that is why Dr Reid did not answer my letter in *The Times*. There was no answer he could give, except to confess that he had acted illegally. It was a shameful position for a British Secretary of State to put himself in.

I thought the Opposition might take up the cudgels, so I wrote to Mr Quentin Davies MP, the Shadow Secretary of State for Northern Ireland. He took over a month to reply, and when it did come his answer was not very satisfactory. He said-

Thank you for your letter about the Northern Ireland Act 2000 which sets out a very persuasive case that the Government were acting illegally in suspending the Assembly. I think you make an extremely good legal case. I did not, however, feel at the time, and I do not feel now, that it would be politically very expedient to press this since the alternatives available to the Government for various reasons did not seem to me to be likely to be conducive to decommissioning, which of course is the essential element of the Belfast Agreement which is yet to be implemented.

I do, however, very much feel that the ploy of suspending and restoring the Assembly cannot be used indefinitely otherwise the whole system of devolved government will become a mockery. John Reid has said that he does not intend to use it again, and I certainly intend to hold him to that.

I really do appreciate your time and trouble in thinking through this and letting us have the benefit of your work on it. If the right opportunity offers for me to pursue the line you suggest I will not fail to make use of the arguments you so carefully set out.

This looks very like what the law calls *connivance* by Mr Quentin Davies. A distinguished American scholar, Dr Bryan A. Garner, says that connivance is “passively allowing another to act illegally or immorally – silence and neglect when one should be vocal and monitory” (“A Dictionary of Modern English Usage”, 2<sup>nd</sup> edn, 1995, p. 203). I am reminded of a fourteenth-century English entry on the Statute Roll which required every man to keep the enrolled ordinances and statutes “without addition, or fraud, by covin, evasion, art or contrivance” (10 Edw. 3 st. 3, 1336). Who would have expected such a requirement to be needed for one of Her Majesty’s Principal Secretaries of State in the twenty-first century?

That there has indeed been “covin, evasion, art or contrivance” by Dr Reid is made abundantly clear when one looks at the official Explanatory Notes appended to the Northern Ireland Act 2000. These say that section 2 “sets out the conditions that must be fulfilled before the Secretary of State can end the suspension of the Northern Ireland Assembly”. The notes go on to stress that under section 2(1) the Secretary of State has to initiate a ‘Review’ under the Validation, Implementation and Review section of the Belfast Agreement. The relevant text from the Agreement is as follows-

“If difficulties arise which require remedial action across the range of institutions, or otherwise require amendment of the British-Irish Agreement or relevant legislation, the process of review will fall to the two Governments in consultation with the parties in the Assembly. Each Government will be responsible for action in its own jurisdiction.” (paragraph 7 of Validation, Implementation and Review, Belfast Agreement (Cm 3883))

The notes say that to end the suspension of the Assembly and institutions the Secretary of State can make an order (a Restoration Order) under section 2(2) that makes section 1 of the Act (dealing with the practicalities of suspension) cease to have effect. "However, before he makes such an Order, he has to take into account the result of the Review that has been undertaken". The law could not be plainer, but has been flouted. The result is that the Northern Ireland Assembly, as functioning at the time of writing (early February 2002), is plainly illegal and invalid. Can anyone be happy about that?

*[Francis Bennion is a former UK Parliamentary Counsel and the author of several books, including the highly acclaimed Statutory Interpretation.]*

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