

Seanad Éireann debate - Wednesday, 22 Apr 1998

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**An Bille um an Naoú Leasú Déag ar an
mBunreacht, 1998: Céim an Choiste agus na
Céimeanna a Bheidh Fágtha. - Nineteenth
Amendment of the Constitution Bill, 1998:
Committee and Remaining Stages.**

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As the substance of the debate on the Bill will relate to the wording of the proposed constitutional amendment contained in the Schedule to the Bill, and since it would be appropriate to have that Schedule decided upon before deciding on section 1 of the Bill, which actually provides for its insertion into the Constitution. I suggest that the House postpones consideration of sections 1 and 2 of the Bill until the Schedule shall have been agreed. This is a procedure which has been adopted on Committee Stage in the Seanad in the case of previous Bills to amend the Constitution and which I suggest would lend itself to a more logically ordered debate. I therefore, ask the Leader to move, in accordance with Standing Order 89, that consideration of sections 1 and 2 of the Bill be postponed until the Schedule shall have been disposed of.

Mr. Cassidy

I move:

That, in accordance with Standing Order 89 the consideration of sections 1 and 2 of the Bill be postponed until the Schedule shall have been disposed of.

Question put and agreed to.

AN SCEIDEAL.

SCHEDULE.

Tairgeadh an cheist: "Gurb é an Sceideal an Sceideal don Bhille."

Question proposed: "That the Schedule be the Schedule to the Bill."

Mr. Manning

On pages six and seven Part I is in Irish. Is there a reason for this? There is no accompanying English version of Part I.

Minister of State at the Department of Foreign Affairs (Ms O'Donnell)

I am sure there is a technical reason for that. The Bill is dense and appears to be confusing because of the need to have it in both languages. The English version of the Irish must be treated separately. I will get a more definitive reply for the Senator.

Mr. B. Ryan

Tá mé ag léamh Billí athraithe don Bhunreacht agus níor thuigeas riamh cén fath go bhfuil siad leagtha amach mar atá siad. Tá leagan Béarla ann agus ceapaim féin gur chóir go mbeadh Gaeilge ann agus Gaeilge san áit go gceapaim go mba chóir go mbeidh Béarla. Ní thuigim agus ní doigh liom go bhfuil mé chun tuiscint a fháil. The new proposed Article 3.2 is concerned with the institutions with executive powers. This matter was raised by the Fine Gael Party Leader in the Dáil. Executive powers are powers to do things. In a normal democracy where an executive body, whether it be state or otherwise, has the capacity to do things to people there must be a judicial procedure to avoid them being arbitrarily deprived of their constitutional rights. As an enthusiastic supporter of this Agreement I have no desire to be obstructive. However, if a cross-Border body makes an executive or implementation decision and this impinges on some rights, for examples a person's right to property as enshrined in the Constitution, how is it challenged under this Agreement?

Mr. Gallagher

My query is related to that raised by Senator Brendan Ryan. In the discussions I have had with people who have gone to the trouble to read the Agreement, following the debate and who are seeking to make an

informed decision in respect of their vote on 22 May, similar questions have been raised in respect of the proposed new Article 29.7.2^o and the proposed new Article 3.2, both of which permit the exercise of functions by all Ireland bodies. These questions hinge on accountability. How will the proposed all Ireland bodies be accountable from a democratic and judicial point of view?

Mr. Cassidy

Will the Minister for the Environment and Local Government ensure that the returning officers and other officials allow maximum flexibility for those who wish to vote and who cannot attend their local polling booths? From watching UTV yesterday evening I understand there is an unprecedented demand from people all over the world for use of the postal vote system. It is also examination time and there appears to be a huge increase in the number of people who will be taking holidays. I have received over 70 applications for postal votes in the small rural village of Castlepollard which has a catchment area of 2,000 voters. Will the Minister of State ensure that everybody will be allowed to cast their vote in this historic referendum?

Mr. Manning

With regard to the proposed new Article 3, the apparent absence of a definition of the national territory was raised at length in the other House today. Is the Minister of State happy that the legal definition of the national territory has been covered?

The proposed new Article 3.2 deals with cross Border bodies. I wish to raise the question of judicial appeal from any of these bodies. If I have a problem with the Department of Agriculture and Food and feel that my rights are being infringed I have the right of access to the courts to have the matter reviewed judicially. However if, say, I am a farmer in County Louth who feels that the new agricultural cross-Border council with

executive powers has acted in such a way that it has infringed my rights, do I go to the courts in Dublin? If I am a farmer in Armagh and I feel my rights have been infringed, what judicial appeal is at my disposal?

Will the Minister of State define the phrase on page eight which states: "in accordance with the generally recognised principles of international law"? What are these principles? Who recognises them? Where do they reside? Who is the final arbiter of what are generally recognised principles of international law?

On page 10, paragraph 3^o states: "If the Government declare that the State has become obliged, pursuant to the Agreement, to give effect. the Constitution shall be amended.". What is the thinking behind this? Does the Government have to consult the Houses of the Oireachtas before it does this or is it a routine matter and built into the changes we are about to make?

Mr. Mooney

With regard to the accountability aspect of the Agreement and the opportunity which both Houses in this jurisdiction will have to express their view, page 15, paragraph 5^o, states that if such a declaration is not made within 12 months these changes will not take effect. What mechanism is involved here and what accountability is there to both Houses in terms of knowing the view of the Government?

On Second Stage I expressed concerns about some of the proposed changes to Articles 2 and 3 of the Constitution which focused on the question of territory and people. We have been told that the Government of Ireland Act is to be abolished in its entirety. I understand that the wording relating to the territory of Northern Ireland remains intact but there does not appear to be a similar reference to territory in our case, other than the islands. The emphasis seems to be on the people, be they here or abroad, who subscribe to the Irish nation.

This may be an abstract point and I do not wish it to be seen as indulging in semantics, but I need to be reassured that what the British have introduced as a substitute for the Government of Ireland Act in relation to Northern Ireland is of equal status to the proposed changes to our Constitution. There should not be an imbalance in this area, about which I have concerns. One can write whatever law one likes but the reality is that the island is Ireland.

Mr. Costello

Senator Ryan and Senator Gallagher raised the issue of the absence of any reference in the text to judicial responsibility and how it might be exercised. It is easy to see the legislative extension in relation to extra territorial jurisdiction and Executive functions. However, how it will operate in a judicial capacity North and South, and to which court one appeals is another matter. Must one go to both courts? What type of expense will that involve? What mechanism does one use to vindicate one's rights if one feels they have been infringed by any of the activities of the new implementation bodies?

Article 2 states that the Irish nation cherishes its special affinity with people of Irish ancestry. This is similar to stating that the Irish nation loves its relationship with people of Irish ancestry. One cherishes people, not one's affinity with people. The other aspect relates to people of Irish ancestry living abroad. The first part deals with people who were born on

the island so the other part should refer to people outside the island. This would cover the area in a more statutory manner. The term "living" refers to people who may live abroad or on the island. However, the aspect relates to those born abroad in terms of the third section relating to people who are cherished as part of the Irish nation.

Dr. Henry

My point relates to Executive powers. I raised in the House and at the British-Irish Interparliamentary Body the problems which have arisen for people in both jurisdictions on the island with post-graduate medical degrees regarding legislation that was introduced in Great Britain. It appears it may be necessary to appeal to a European court to have the matter rectified unless that legislation is withdrawn. I ask the Minister of State to clarify to whom these institutions will be accountable.

Mr. Walsh

Regarding Article 2, people born in the North are entitled to Irish citizenship. Was any consideration given to separating the Irish diaspora? It appears that the inclusion of the Irish diaspora in the same Article dilutes the Irishness of people in the North.

Regarding the North-South bodies, there is an in-built precaution that the constitutional changes will not come into effect until other aspects of the Agreement have been implemented. However, once that is triggered and the aspects commence, if Unionists wish to undermine the North-South bodies or there is a dominant negative element in the Unionist parties in the assembly, it appears from the Agreement that they can significantly dilute the process if not make the North-South Council unworkable. What safeguards exist in that regard?

Ms O'Donnell

Regarding Senator Manning's query in relation to the density of the text and the reason for the repetition of Articles 2 and 3, the response given to me by the officials is that the English and Irish texts must amend both language versions.

Mr. Manning

My query relates to the fact that Part I of the Schedule is in Irish in both cases. There is no English version of Part I.

Ms O'Donnell

I will come back to that point when the officials convince me that is the only answer.

Senator Ryan and others raised the dispute resolution mechanism in relation to the North-South bodies and whether it will be possible to sue an implementation body for an action if a person has a grievance. This matter has been taken into account and the proposed Article 3.2 provides that if any dispute resolution mechanism is set up in relation to any of these institutions, this mechanism may function notwithstanding the conferral of exclusive jurisdiction on the courts. It may be considered appropriate to ensure that there are arbitration mechanisms to resolve disputes without reference to the courts of the two jurisdictions in all circumstances. It would be undesirable to have a position where courts on either side of the Border might arrive at different conclusions in relation to a matter which was in dispute. In relation to a certain type of dispute, it might be appropriate to provide that an arbitration body should apply the rules which are common to the two jurisdictions. Whether this mechanism must be used will depend on the detailed provisions in relation to particular implementation bodies.

All the issues in relation to the detail of the implementation bodies and how they will take decisions will be the subject of further detailed

discussions between the Government, the Northern side and the British Government in the preparations for the establishment of the implementation bodies. The issue of settlement of disputes will be regulated in the legislation on each implementation body. To avoid different judgments in the two jurisdictions, it may be best to agree to establish a single dispute resolution mechanism. These matters will be carefully considered and there will be an opportunity for democratic debate on the safeguards when the various pieces of legislation establishing the implementation bodies are debated in the Houses of the Oireachtas and in Westminster.

The Agreement contains a description of the implementation bodies and provides for their establishment under the Constitution. However, the implementation bodies will be different in nature because of the different areas which they will cover. Some of them will be cross-Border bodies while others will be all-Ireland bodies depending on the specific sector involved. All the bodies will be unique in terms of how they resolve their differences and carry out their Executive functions. I hope this satisfies the Senators' queries.

There has been a degree of curiosity about the notion of territory and its definition. It is important to be clear about the difference between a state which is a legal entity and exercises jurisdiction within a given area and a people or a nation. A sense of shared identity and belonging is fundamental. We are drawing a clearer distinction between the jurisdiction of the State on the one hand and the membership of the nation on the other hand. The jurisdiction of the State as set out in Article 3 will remain unchanged but the nation will now be defined in wide-ranging inclusive terms. There were many states with no territorial definition in their constitutions. Where there is such a definition, it usually applies simply to the extent of the state's jurisdiction. There are many cases where state and nation are not identical.

Is there a need to have a definition of the territory of the State? The

courts have held on the basis of the existing Article 3 of the 1937 Constitution that the area of jurisdiction as defined in Article 3 means Ireland minus the area of Northern Ireland. This is not being changed. The reference to Saorstát Éireann will be removed but the new definition means the same thing – the area and extent of application as the laws enacted by the pre-1937 Parliament. It is worth noting that the British, in repealing the Government of Ireland Act, will have no definition of Northern Ireland. Usage and practice over 78 years makes clear the boundaries and they see no need for a new definition.

Senator Manning also asked about extra territorial jurisdiction and the definition of generally recognised formula. Generally recognised formula is already used in Article 29.3. It is true the concept of generally recognised principles is one which may develop in the future. Both public international law and our Constitution are living organic things and it would be wrong to fossilise the State's ability to legislate with extra territorial effect. It has been placed in Article 29 to make clear that it has general applicability and it is not specifically relevant to Northern Ireland. It has always been in Article 29; interpretation is a matter of an evolving international consensus and it is desirable to leave it in this general form and not fossilise it at any particular time.

Points were raised about the North-South bodies and accountability. Accountability in relation to North-South bodies was a critical aspect of negotiations on Strand Two. It was a particular concern to the elected representatives in Northern Ireland, who were conscious of the need for accountability and an accountable structure. Most democrats would recoil from any structure which would not be accountable to the elected representatives.

The North-South Council will have power to take decisions – for example, under paragraphs 5.3 and 5.4 of Strand Two. Decisions will be taken by agreement between the two sides. That was inescapable and was envisaged in the Joint Framework Document. In other words,

decisions taken at the North-South Council would have to be by agreement. If there is no agreement, there is no decision to implement. Each side will be accountable to the assembly and to the Oireachtas, respectively. However, this does not mean the council will be in some way spenceled and that accountability is being held up as a problematical area. It is a positive requirement. The Government here is accountable to the Oireachtas and, similarly, the North-South Council will be accountable to the respective assembly in Northern Ireland and the Oireachtas.

As regards paragraph 13 of Strand Two and the use of the word "successfully", which was raised by Senator Walsh, too much should not be read into this. It is no more than a recognition that for a council made up of two sides, one from this jurisdiction and one from the assembly and its executive committee, that the two sides, including the assembly, must operate effectively if the joint body, the council, is to be effective. It was a critical aspect of the negotiations, particularly for the Unionists, on Strand Two. They were adamant that the North-South body should not have a life of its own in the sense that it would not be accountable to the elected representatives in Northern Ireland. That is a good principle. In the negotiations we were determined to ensure, while allowing accountability in the operations of the North-South Council, that the establishment of the council did not depend on a vote in the assembly. The North-South Council will be established by legislation, by the Oireachtas and Westminster. In other words, it does not depend on a vote or an agreement in the assembly in Northern Ireland if it is to be up and running.

As regards of the collapse of institutions down the road after the constitutional amendment terms come into force, there is no way to pre-empt this and we must hope for a positive dynamic. The notion of it going wrong and the Unionists approaching it in a minimalist fashion came up particularly during negotiations, and we could all take a Doomsday approach to it. What is critical is that we have put in place

the fundamental building blocks of what we wanted to achieve, that is, a North-South Council, a properly run assembly based on community participation within Northern Ireland, which will not be a return to Stormont and which will be contrary to it. It will be a modern and equality based assembly with safeguards built in for cross community participation and the protection of human rights within that assembly. A North-South Council will provide for executive decisions to be taken and for implementation bodies to allow those decision to be implemented. Those were our key objectives from the beginning and which we achieved in the Agreement.

Part I amends the Irish language text of the Articles and Part II amends the English language text. A further complication is that the proposed amendments to Articles 2 and 3 inserted into Article 29 themselves must amend, in each language version, the text in both languages because both texts are authentic. The legal advisers have every sympathy with anyone who is confused. It is probably linked to the fact the two languages are involved and the text must repeat it each time it is mentioned.

The principles of international law can be found in treaties, decisions of the International Court of Justice, the writing of learned authors on international law and the practice of states provided in the UN charter.

Dr. Henry

I raised the question of how legislation introduced in Great Britain can affect people on both parts of the island. We face a grave difficulty unless that legislation is withdrawn. My question relates to postgraduate medical degrees. The Minister cannot solve this problem for me now and we have a difficult in knowing to whom to appeal. The Minister answered my question by saying the institutions which will be set up will evolve in terms of who is answerable to whom.

Mr. Manning

I thank the Minister for her answers which have not clarified very much for me, but I do not blame her for that. One of the things about our Constitution and the complexity is that it gives us an electoral system where somebody with fewer votes can be elected over somebody with more votes. As a beneficiary of that system, I am all for complexity in certain respects. The Minister did her best to explain about the language text and I accept what the legal advisers, who have been patient today, have said.

I am not too happy – this is not the fault of the Minister – with some of the answers we have received, which is in the nature of the problem we face. Given what we have in front of us, there is an absence of certainty in some regard and ambivalence which we cannot resolve tonight. My great worry is that further down the line, maybe sooner rather than later, there will be a constitutional challenge to aspects of the Agreement, which is something about which we cannot do much now. It indicates that when the legislation is being drafted to give effect to some of these aspects, we will be faced with problems and difficult decisions, but that is for another day.

As regards Article 2, which confers citizenship, there has been some speculation – the Minister may not be able to help us – that this House may be extended to provide membership for people from Northern Ireland. This is newspaper speculation which arose because the legislation will remove the disgraceful legal barrier which meant Séamus Mallon incurred huge expense in the past when he was a member of a Northern assembly and of this House. Is there anything in the thinking whereby this House would be used for some form of representation as has been speculated in the newspapers?

Mr. Lydon

The Government of Ireland Act, 1920, is to be repealed in its entirety. Does that leave intact the British claim of sovereignty over the Six Counties through the Act of Union, 1801, and section 1 of the Northern Ireland Constitution Act, 1973, or will both or either of those be repealed also?

Mr. Dardis

One of my questions related to representation in the Seanad, raised by Senator Manning; I will not repeat it but the answer will be of interest to me. I am trying to synthesise the conundrum about the Irish version of section 1 of the Schedule. Using less complicated language than that used by the Minister, it seems that because it is an integral part of the text of the Agreement in both languages, it should therefore stand even in the English version. In other words the Irish should be included in the English version because it is an integral part and is taken as a bloc within the Agreement. If it is not a tautology, the Irish is English, so to speak, for the purposes of this discussion.

As I said on Second Stage, it is far more inclusive to use the idea of the nation rather than the idea of the territory. That was enunciated most eloquently by former Senator Lee, both when he was here and in his newspaper articles since leaving the House. We have to resist the temptation to renegotiate aspects of the Agreement. It is appropriate to raise questions about how it might be implemented or exercised but we must resist the temptation to re-open parts which I am sure were discussed exhaustively and conclusively when agreement was reached in the talks.

Mr. Mooney

As to the bodies being set up, paragraph 18 of Strand Two states that the Northern Ireland assembly and the Oireachtas can consider developing a joint parliamentary forum. That is linked to paragraph 11 of Strand

three, which states that elected institutions of the members – that will be the British-Irish Council – will be encouraged to develop interparliamentary links, perhaps building on the British-Irish Interparliamentary Body. In that overall context, could the Minister indicate whether there will be a changed role for that body? It has not been superseded but events have moved rapidly. The original concept of the body was a joint association between these Houses and the British Houses of Parliament. But there are now devolution proposals for Scotland, Wales and, as the Agreement indicates, possibly in regions of England, coupled with the consideration which will be given to North-South parliamentary bodies. Also, the Unionists have pointedly and determinedly refused to take the two seats available to them in the BIIPB since 1991. I take Senator Dardis' point about not renegotiating the Agreement but could the Minister indicate what view was taken within the negotiations about the development of these bodies, closer relations between North and South, and any change in role which is envisaged for the BIIPB?

Ms O'Donnell

There was a question about the operation of the Act of Union following the removal of the Government of Ireland Act. Both British Acts mentioned will be overruled to the extent that they conflict with the new British legislation, which stands alone as the provision which will govern matters. The Agreement states that the Government of Ireland Act is repealed and the new legislation shall have effect notwithstanding any previous enactments – in other words, it renders inoperable earlier enactments, including the Act of Union.

As to the right of Northern Irish elected representatives to seek election to the Oireachtas, forthcoming British legislation will remove the disqualification legislation which removed Séamus Mallon from the then Northern assembly when he was a Member of the Seanad. Then under British law elected representatives in Northern Ireland or at Westminster

will be able to stand for and sit in the Oireachtas. Our view is that it is open to the All-party Committee on the Constitution to consider the matter more fully.

On the parliamentary bodies, it is open for the Oireachtas, the assembly and Westminster to consider the matter. The present body is looking at its future because, as the Senator says, things have moved on. I imagine that, given the changes in mindsets, the Unionists, who have been reluctant in the past to engage in the BIIPB, will be more willing to partake in its activities. That is up to them.

Mr. Mooney

I was looking for the Minister's insight into the changes in mindsets.

Ms O'Donnell

Much has changed. I think the Senator would agree that Mr. Trimble in particular is acting as an effective persuader of his constituency and he is to be praised for that. Once we have secured agreement on all these institutions and future bodies, mindsets will change because this will be a basis for co-operation and a different attitude.

Cuireadh agus aontaíodh an cheist.

Question put and agreed to.

Ailt 1 agus 2 aontaithe.

Sections 1 and 2 agreed to.

Teideal aontaithe.

Title agreed to.

Tuairiscíodh an Bille gan leasuithe chun an breithniú deiridh a dheanamh air agus ritheadh é.

Bill reported without amendment, received for final consideration and passed.

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