

# Dáil Éireann debate - Wednesday, 22 Apr 1998

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## **An Bille um an Naoú Leasú Déag ar an mBunreacht, 1998: Ceim an Choiste. - Nineteenth Amendment of the Constitution Bill, 1998: Committee Stage.**

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### **An Ceann Comhairle**

The usual practice on Bills to amend the Constitution is that the sections are postponed until consideration of the Schedule has been completed, as the sections themselves are merely technical and the main object of the legislation is contained in the Schedule.

### **The Taoiseach**

I move that sections 1 and 2 be postponed.

### **An Ceann Comhairle**

Is that agreed? Agreed.

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

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

**Mr. J. Bruton**

I would like to raise a number of points in regard to this Schedule. Before doing so, however, I would like to draw attention to the unprecedented nature of this debate. A fundamental change to the Constitution is being proposed by the Government and that change has the enthusiastic support of the Opposition. Not only has the Opposition indicated that it will support the change in the House, it will also campaign vigorously for it in the country.

The unprecedented nature of this matter ought to be drawn attention to against the background, for example, of the Anglo-Irish Agreement which was also something upon which my party had been working when previously in Government. The Anglo-Irish Agreement was not only opposed in this House but even in the United States by the then Opposition, now in Government.

It can also be contrasted with the attitude of the then main Opposition party, now in Government, in regard to the divorce referendum. While it did not oppose the measure, it took no useful part in the campaign to have it passed. If the divorce referendum had not been passed it would not have been possible to achieve the sort of approach that has made the present Agreement possible. I have no doubt that a defeat of the proposal to allow divorce in this country would have been seen by Northern unionists as confirming the sectarian nature of this State in a way that would have made it impossible for them to assent to the sort of arrangements to which they are now assenting. I draw attention to the fact that when the divorce referendum was being campaigned for in the country, and very narrowly passed, the main party now in Government took no useful part in assisting the then Government in having it passed.

Notwithstanding the fact that it understood fully the need for it, that party took no position of value in terms of support for the then Government on divorce. Without that having been passed – and it was very narrowly passed and only passed as a result of last minute interventions by myself and others – that would not have happened.

However, on this occasion that is not the case. This constitutional change is being vigorously supported by the Opposition. I am conscious that a price is paid by an Opposition for giving such support, even to the extent that in the major national newspapers one's contributions can be dropped from the copy when the debate is reported, simply because one is not opposing it. That conflict engendered concept of media reporting is unusual.

Having said that, I wish to draw attention to a number of issues in this Bill which need to be addressed. The provisions in Articles 2 and 3 of the Constitution as now drafted have to be read in conjunction with the existing provisions of the Constitution. Article 2 of the Constitution will now state that "every person born in the island of Ireland [shall have the right] to be part of the Irish nation". The Article goes on to say that "the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity .".

Article 1 of the Constitution states that "the nation hereby affirms its inalienable, indefeasible and sovereign right to choose its own form of Government".

Article 2 of the Constitution as now drafted will include, within the Irish nation, people not living in this jurisdiction but who consider themselves part of the Irish nation by virtue of living on the island. They will thereby be conferred with rights under Article 1 of the Constitution to have a choice in the form of Government of the State. How are they to exercise that choice? Currently they have no votes in Dáil or Seanad elections.

Article 3 of the Constitution as drafted at present allows no difficulty to be created in regard to that because it makes it clear that the jurisdiction of this parliament is confined to the territory of Saorstat Éireann. However, as regards the new provisions for Article 3 there is an issue as to whether someone who is living on this island, but not in this State, could take an action under Article 1 of the Constitution for the right to a vote in Dáil and Seanad elections.

Similarly, Article 16.1.1° states: "Every citizen without distinction of sex who has reached the age of 21 years, and who is not placed under disability or incapacity by this Constitution or by law, shall be eligible for membership of Dáil Éireann."

That is already the case and is accepted, but Article 16.1.2° states that "all citizens . who have reached the age of 18 years who are not disqualified by law . shall have the right to vote at an election for Members of Dáil Éireann". Given that it is now to be the entitlement and birthright of everybody born in the island of Ireland to be part of the Irish nation, does that not mean that every Irish person no matter where they are living in the world, who was born here, would be entitled to vote in a Dáil election, under Article 2 when read in conjunction with Articles 1 and 16?

This will be a constitutional provision which, by its very nature, supersedes and overrides any provision of the law. If we have legislation in the House which says, for instance, that the right to vote is confined to people living within the jurisdiction or who have lived within the jurisdiction within the last five years, I would have to ask whether that legislation would be constitutional. Is there not a possibility that under Articles 1 or 16 such a person, now that the new provision for Article 2 is in place, would be able to claim a vote? Even somebody who is 60 or 70 years of age and who left this country when they were 3, and who has never paid taxes here or has no direct involvement with the running of the State, would be constitutionally entitled to a vote under the new Articles 1, 2 and 16. That is not an insubstantial question which needs to



be clarified.

I am aware of the difficulties there have been in the past with proposals for conferring votes on people living outside the jurisdiction. The difficulties have been considerable.

Another possibility also needs to be reflected upon. It is that Members elected to the House of Commons at Westminster might present themselves at the doors of Dáil Éireann and claim that under Article 1 — which gives them and the people they represent the sovereign right to choose the form of Government of this State — they are entitled to a seat here, under the constitutional provisions as now drafted by the Government and presented to this House.

I raise these substantial issues against a background whereby this draft amendment to the Constitution was only presented to the House for consideration yesterday. I fully understand and accept the reasons for the speed involved but we also need to take time to reflect on these matters so that we can overcome them. I appreciate that this issue may fall to be considered by the Committee on the Constitution which this House has established.

That is of no value if the Constitution is already being changed. If the Constitution is changed as a result of the referendum on 22 May to incorporate these provisions without any savers, then it does not matter what the committee on the Constitution decides should be the provision as regards votes for people in Northern Ireland or for those who left this country at the age of three. The Constitution will have created a new right which will supersede any deliberations of that committee or any legislation the Dáil might pass consequent on the committee's recommendations.

Paragraph (iv) of Article 3 states that the State "may exercise extra-territorial jurisdiction in accordance with the generally recognised

principles of international law". It might be argued that for us to grant a vote to people in Dáil elections who do not live in this jurisdiction could be construed as contrary to international law vis-à-vis the rights of the country which has jurisdiction in that area. I am not sure that is necessarily the case because we are referring to "generally recognised principles of international law". The use of the words "generally recognised" in the Constitution, a document which should create certainty, seems to be inappropriate. The use of such words, which infer subjective judgments that can change over time, seems to import a degree of uncertainty into the Constitution as to what exactly is the extraterritorial jurisdiction of the State. It should not be left to international lawyers at seminars in Berne or the Hague to say what is generally recognised. The Constitution requires certainty and there is no certainty in any provision which refers to something as being "generally recognised". Generally recognised by whom, by what means and in what definite sense?

Citizens of the United States have a right to vote in US presidential elections. That provision is in accordance with the generally recognised principles of international law. If that is the case, what claim could there be against an Irish person living in New York who was born here but emigrated at the age of three claiming a right to vote? What arrangements will we make for that and for taxing powers in particular? The Constitution already makes a distinction in respect of the powers of the Seanad and the Dáil in terms of taxation. It makes it clear that taxation and financial provisions are a matter only for the Dáil. Will that saver, which confines to the Dáil, which is popularly elected, the right to impose taxation, be diluted by the fact that people who are not liable to pay taxation in this jurisdiction because they do not live here will be able to claim under these constitutional provisions the right to a vote here and the right to a vote on the rate of taxation that applies here? Has that matter been considered? Relying solely on reference to generally recognised principles of international law does not seem to be a sufficient defence against a legal claim.

Other issues also need to be considered. Let us consider the example of a Sinn Féin member who is elected to a constituency in west Belfast or mid-Ulster. They say they are part of the Irish nation but they do not want to take their seat in Westminster on principle. Under Article 1 they are entitled to have a say in the governance of the nation so they state their wish to take their seat here. They claim they will take the State to court if they are not allowed to do so. What way would such a decision go in the courts? The Government should have an answer to that, although I am not sure it will be convincing. We need to know what we are doing before we do it. It is the right and obligation of the Opposition to tease out the meaning of these provisions.

Part II of the amendment states that the State may consent to be bound by the British-Irish Agreement and to establish institutions under that Agreement to "exercise the powers and functions thereby conferred on it in respect of all or any part of the island of Ireland notwithstanding any

other provision of this Constitution conferring a like power or function on any person or any organ of State appointed under or created or established by or under this Constitution". The organs of the State include the Judiciary. It seems this constitutional provision could allow the State to confer on an all-Ireland ministerial body powers that are not reviewable by the Irish courts in the sense that this is clearly a right to confer powers and functions "notwithstanding any other provision of this Constitution conferring a like power or function on any person or any organ of State", which could include the Judiciary.

I recognise that the Agreement, as it currently stands, states that the powers that should be conferred on an all-Ireland body are solely confined to executive functions and that they do not extend to judicial functions. However, it is unclear what court would have jurisdiction in determining any issue affecting the conduct of its business by an all-Ireland institution created under the Agreement. If a citizen felt they had been oppressed by an issue decided by this body or that it was not fulfilling its functions adequately and that an order for mandamus should be taken against it to require it to perform a particular function, to what court would the citizen go? Would they go to the Irish or the British courts? It is not clear that any particular court is given jurisdiction over this matter. It is significant that the word "jurisdiction", which is referred to in several places in this constitutional amendment, is not defined. This is of some relevance here.

Two things need to be clarified in Part II. The first is to which court someone would appeal. If a company had two partners, for example, one of whom was living in Northern Ireland and the other in the Republic and they felt they were unfairly treated in an all-Ireland business venture they were undertaking by an all-Ireland body dealing with trade and commerce, would they go to the Irish courts which are working subject to a written Constitution or to the British courts which are not subject to a written Constitution? What would happen if they went to both courts and there was a conflict in the two judgments? If

they went to the Irish court, would its judgment be enforceable in Northern Ireland as regards the activities of the all-Ireland body in Northern Ireland?

This matter needs to be clarified because this is not a theoretical issue but a practical one as the all-Ireland bodies will be exercising powers in terms of giving a grant to one person and denying it to someone else. If a company in Dundalk, for example, was applying for a grant and it was in competition with a company somewhere else in the county, and one felt they were unfairly treated by the other in terms of business they were doing in Newry, would they go to court in Newry or Dundalk? What would happen if the decisions of the two courts were in conflict? This is not an academic matter but a very real one.

Another matter in the provisions of the Agreement in regard to the Constitution relates to the way in which the changes in the Constitution shall be brought into effect. The provision in the Agreement for a declaration which shall trigger changes in the Constitution is something that shall be made by the Government. It states that if the Government declares that the State has become obliged, pursuant to the Agreement, to give effect to the amendment of this Constitution referred to therein then, notwithstanding Article 46 hereof, the Constitution shall be amended as follows. That means that 15 members of the Government, whoever they may be at the time, can make a declaration and the Constitution will be changed consequent to earlier decisions.

The Government will have to decide the State has become obliged, pursuant to the Agreement, to give effect to the amendment. I presume that decision will be justiciable in the sense that any citizen who claims the Government is not obliged to make that order could go to court to prevent the Government making it. Some citizen might consider that some very small part of the Agreement, which was not implemented for purely technical reasons by the Northern Ireland assembly or by the British Government could go to court, and claim the Government is not

obliged to make that declaration and therefore it cannot do so.

We all know the risks involved here. People who would be unjustly suspicious of the Government of the day could claim it had put somebody up to bringing that action because it did not want to make the declaration. We have seen how people have been suspicious of our courts in regard to the decisions they have made. There is the possibility the Government in making this declaration could be open to challenge. Equally, even though the Government had obtained a great deal under the Agreement, it could decide not to make the changes to the Constitution and could make the case it is not obliged to do so because something has not yet been done.

I do not have an answer to this conundrum. This may be a necessary and inevitable difficulty, but there is an argument that it should not be only the Government that makes this declaration. A declaration of this nature should be sanctioned by the Dáil and Seanad. The idea of the Government alone deciding it is satisfied the obligations have been met is more open to challenge on the grounds that it might be accused on acting on the basis of a balance of convenience rather than on a clear constitutional obligation. Given that under other provisions of the Constitution the Government does all its business in private and its declarations are entirely confidential, there would be much more of a tendency to be suspicious that the Government, in any determination it makes as to whether it would or would not make the declaration, was acting for motives that were not the best.

A good way to ensure that charge could not be advanced would be to provide that the Government may make such a declaration, but it would have to be approved by the Dáil and Seanad. In that way there would be a degree of transparency because the Government, having decided to make the declaration, would have to come into the House and explain why it had been made. That explanation, the process of debate, and the ultimate decision by the Dáil and Seanad on it would create a degree of

reassurance and support for the Government in whatever decision it took. That would assist the Government in dealing with any legal challenge that might be made.

We should not underestimate the possibilities of what we might consider in this House to be mischievous legal challenges to anything that the Government may do in this matter. I mean mischievous in the sense that challenges may be made by people who would consider only a very small part of the picture and would not take into account the broader considerations that a Government by its nature has to take into account.

I hesitate to criticise the courts in this forum, but there have been occasions when some of us in this House might have considered the courts took an unduly narrow interpretation of the Constitution, interpreted it very literally in regard to one or two articles and did not take account of the broader considerations of State policy that a Government, mandated by the people indirectly through this House, has to take into account. Therefore, we should be wary of any matter of this nature.

I raise these issues at this stage so that we can anticipate these difficulties as far as possible. I am concerned about what this constitutional provision does and about the right of any person, born anywhere on this island who is living anywhere in the world at present, to vote in a Dáil election. I am also concerned about the possibility that representatives of one, two or three constituencies in Northern Ireland might present themselves at the gate of Dáil Éireann and demand their seats. What would that do in regard to the notion that perhaps we are into creeping repartition and the cantonisation of Northern Ireland where one constituency, for example, West Belfast, would be represented in the Dáil, but North Belfast and East Belfast would have their representatives sitting in Westminster? How would that work? Under British law I know it is impossible for somebody who is elected to

the House of Commons to sit in another jurisdiction. Therefore, anybody who presents themselves here to sit in the Dáil and wins that right could not go to Westminster. They and their constituents would be locked into the Dáil as their place of representation by virtue of that aspect of British law. Under Irish law there is no similar difficulty. A Member of the Dáil could stand and be elected to the House of Commons, but the reverse does not apply. This could create a problem.

Given the last 25 years in Northern Ireland where we have seen that increasingly Catholics and Protestants, Nationalists and Unionists do not live on the same streets, go to the same schools, play on the same playing fields or even meet one another, we should be wary of cantonisation. In this Agreement we are trying to create an inclusive arrangement which brings everyone together. I said yesterday that the Agreement should be the focus of loyalty. It should be seen as an end in itself, not as a stepping stone. However, if we cantonise Northern Ireland on the basis of ultimate aspirations rather than on the basis of making the Agreement work, are we not running the risk that the Agreement could contain the seeds of its own undoing? That is something of which we should be very wary, and that is one of the reasons I raised this here today and elsewhere.

I intended the last remark to be my final one and I appreciate the patience of other Members who are anxious to contribute. I have already referred to the importance of the jurisdiction of the courts with regard to the North-South bodies. I would also like to ask about the jurisdiction of the Comptroller and Auditor General, for whom there is a separate provision under the Constitution. It seems to me it is arguable that the phrase in regard to the institution being conferred with certain functions, notwithstanding the like power or functions of any organ of the State, could exclude the Comptroller and Auditor General from going through the accounts of a North-South institution. It ought to be clarified that the Comptroller and Auditor General has such a power and that arrangements will be made, in conjunction if necessary with his or



her Northern equivalent, for that audit to be done on all the accounts for the whole island, not just on the accounts for one part of its work.

At present we seem to be creating an institution which is not situated within the checks and balances of the rest of the Constitution, in which there is established an independent Judiciary, audit function and so forth. We are creating an institution which one might say is "up there". It is accountable to the Dáil and to the Northern Assembly but not accountable to the courts or to the Comptroller and Auditor General in any specific way.

The Dáil can only function because it has the courts and the Comptroller and Auditor General doing other work. Saying that there is accountability to the Dáil is not sufficient because our demand for accountability only works in the context of the work of other organs of the State.

### **The Taoiseach**

There are a number of detailed points. First, as I did yesterday, I acknowledge the constructive attitude of the Opposition. I note that Deputy Bruton did not necessarily direct his comments to me, but I took an active part in the divorce campaign. I used all our advertising time and all our party political broadcasts with the strongest and best known people in our party to urge a "yes" vote, particularly in the days preceding the poll. I know there were people in all parties who were not directly involved. However, I appreciate the constructive involvement of the Opposition throughout the debate on this particular issue. I want to acknowledge that particularly in the case of Deputy Bruton.

The question arising from Article 1, to which Deputy Bruton referred, is an important matter. Article 1 of the Constitution states: "The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government and to determine its relations with other nations, and to develop its life, political, economic and cultural, in

accordance with its own genius and traditions."

Article 1 is in fact a general statement of the right of the nation to choose its form of Government. It does not refer of course to the right of the citizens to participate in the election of any particular Government; it is a general statement of the right to self-determination.

It seems far more plausible that the argument being put forward by Deputy Bruton as a cause for concern to him could be made by reference to Article 6.1, which states that all powers of government, including the legislative and executive powers, derive, under God, from the people, whose right it is to designate the rulers of the State. However, neither this provision nor Article 1 can be looked at in isolation. Under the principle of harmonious interpretation of the Constitution, it is necessary to look at all the constitutional provisions as a whole. When one looks at other constitutional provisions, the following would appear to be relevant. Under Article 6.2, the powers of government referred to in Article 6.1 "are exercisable only by or on the authority of the organs of State established by this Constitution" and under Article 16.1.2°, the right to vote is conferred on all citizens "without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the elections of members of Dáil Éireann".

There is specific provision in Article 16.1.3° prohibiting the enactment of any law "placing any citizen under disability or incapacity for membership of Dáil Éireann on the ground of sex or disqualifying any citizen from voting at an election for members of Dáil Éireann on that ground", but there is no prohibition on disqualifying a citizen from voting on any other ground. In fact, the electoral laws provide as an essential qualification for voting a residence qualification within the State. The constitutional scheme of election of the Dáil is based on the concept of geographical constituencies. Article 16.2 provides that Dáil Éireann is to be composed of Members who represent constituencies

determined by law, the total number of Members of Dáil Éireann is to be related to the population, and the ratio of Members to population in each constituency shall be the same throughout the country. The references to population must be considered as references to the population of the State. To devise geographical constituencies outside the State would be an extraterritorial exercise of jurisdiction which would be contrary to both the existing and proposed revised formulation of Article 3 of the Constitution unless this were to be done with the consent of the other jurisdiction.

The constitutional provisions relating to the size of constituencies refer to the population and not to the electorate or the number of citizens qualified to vote. This would make it impossible, for example, to devise a special extraterritorial constituency because it would not be done by reference to the same criteria of the constituencies within the State.

Although Article 2 is proposed to be amended to define the nation in terms of the people who live outside the State as well as people who live within it, it is already the case that the nation is not coterminous with the citizens who reside within the State. While the nation is not defined in terms of people under the existing Constitution, it is clear that there are large numbers of people who live within the national territory but outside the area of jurisdiction of the State who are Irish nationals and, thereby, members of the nation, even though this right may derive from the provisions of the Irish Nationality and Citizenship Act, 1956, rather than by virtue of any constitutional right. To date, it has not been suggested that the fact that they are members of the nation entitles them to assert that either Articles 1 or 6 of the Constitution would give them a right to vote.

I cannot of course say that the claim which Deputy Bruton is making could never be raised. However, having regard to the doctrine of harmonious interpretation of the Constitution, such a claim would be inconsistent with the provisions of Articles 3 and 16 of the Constitution,

and for that reason would fail.

### **Mr. J. Bruton**

The harmonies are being changed by this provision. I accept fully that one cannot take any Article of the Constitution in isolation and one must interpret them harmoniously, but we are introducing new matter into the Constitution which strengthens considerably membership of the nation by people who do not live in the jurisdiction. While harmonious interpretation up to now might have allowed laws to be made under Article 16.3 in a particular sense, a new interpretation must now be made in light of the new Articles which are being inserted in the Constitution. The balance is being changed for very good reasons, which I support, but we need to know the implications of this in terms of what will be the new harmonious interpretation of the Constitution in light of the new matter that is being brought in.

### **The Taoiseach**

The change does not affect the fact that Article 16 has precise and specific rules about elections.

### **Mr. J. Bruton**

They are still subject to the Constitution.

### **The Taoiseach**

Article 6 states that the powers of Government derive from the people rather than the nation. Article 46 of the Constitution refers to submitting proposals for amendments to the Constitution to the people rather than to the nation or the citizens. This distinction could be of importance in dealing with arguments made on behalf of citizens who do not reside within the State to be entitled to claim a vote.

### **Mr. J. Bruton**

Who are the people? Are they the people of the nation?

### **An Leas-Cheann Comhairle**

The Taoiseach, without interruption.

### **Mr. J. Bruton**

This is Committee Stage.

### **An Leas-Cheann Comhairle**

The Taoiseach is on his feet.

### **The Taoiseach**

I will answer the questions raised and then I will take more questions. To confer votes on citizens in Northern Ireland it would be necessary to amend Article 16, but that is not proposed. On whether it is constitutional for the electoral laws to exclude non-residents, the answer is yes. That is envisaged by Article 16.2 under the scheme of election through geographical constituencies.

On the point about the Bill — I do not want to get into argument about this — the full text is contained in the multi-party Agreement. There are

time limitations and I appreciate the Opposition is complying with those.

The generally recognised principles of international law have always been in Article 29.3. The point about Sinn Féin members in mid-Ulster has been covered. On the extra-territorial jurisdiction, a generally recognised formula is already used in Article 29. The concept of generally recognised principles is one which may develop in the future in international law and in the Constitution. Both are living organic things and it would be wrong to fossilise the State's ability to legislate without extra-territorial effect to the state of affairs at any time.

In regard to Article 29.7.2, this proposal would enable the jurisdiction of courts to be ousted. That would be done only if an appropriate alternative dispute resolution mechanism was provided. Deputy Bruton raised a number of pertinent and practical questions about the jurisdiction of courts. The legislation or further agreements establishing implementing bodies will have to address those issues. It is not possible to give abstract answers in advance on whether it will be appropriate to set up such dispute resolution mechanisms without looking at the precise functions of each of the implementing bodies. The proposed paragraph is intended to confer the necessary flexibility to decide the issue appropriately.

The court to which a person would appeal will fall to be regulated in any supplementary international agreement or legislation on any implementation body. These matters will have to be dealt with by the Governments pursuant to paragraph 10 of strand two. Article 29.7.2 envisages the possibility of setting up special arrangements for resolution of disputes and would provide constitutional cover for the operation of such arbitrational mechanisms despite the normal jurisdiction and powers of the courts here.

On the Government declaration, that mechanism is intended to create a

precise obligation triggered at a definite point. The obligation arises under the Agreement in Article 4.3 immediately on its entry into force and does not intend to confer discretion on the Government. If the Dáil had a role that would imply discretion. It is important to make the obligation precise to reduce the scope for court challenge. One cannot rule out the possibility that someone will bring an action, one can only reduce the chances of success over time.

Deputy Bruton asked about the Comptroller and Auditor General. The proposed Article 29.7.2 could be used to exclude the Comptroller and Auditor General. This could be done, however, only in the context of an appropriate alternative. This might involve a joint audit by the Comptroller and Auditor General and the Northern Ireland Audit Office. One would have to consider what is appropriate in the detailed legislation on any implementation bodies. In discussions on the Agreement there was a general understanding that the Comptroller and Auditor General and the Northern Ireland Audit Office would have a joint role. I referred to that issue during Question Time some weeks ago.

On the declaration, the obligation on the Government will be virtually automatic. It is clear from the text of the British-Irish Agreement that there is an obligation to make the declaration. The requirements are set out in Article 4 of the British-Irish Agreement.

The forthcoming British legislation will remove the disqualification that created considerable difficulties for Seamus Mallon some years ago when he was a Member of the Seanad. He had to leave because of the challenge that was then taken under British law.

Deputy Bruton said the people are not defined in the Constitution. According to the preamble, the Constitution was adopted by the people of Éire, the people of the Twenty-six Counties. The only sensible interpretation of that is that the people are the citizens within the jurisdiction of the State.

I would like to give a detailed account of the court position and the question raised by Deputy Bruton on how the legislation mechanism will work. Those are important questions and I would like to put the full answers on the record. Subsection (2) is an enabling section to allow the institutions established under the Agreement to function notwithstanding the existing provisions of the Constitution which confer similar functions and powers on existing organs of State. This provision does not go as far as the corresponding constitutional provisions in regard to the European Union institutions, which effectively protected laws enacted, acts done or measures adopted by membership of the European Union from constitutional questioning.

In the case of the British-Irish Agreement, all that is proposed is that the provisions of the Constitution will confer a function on a particular organ of Government and cannot be used to prevent the institutions established under the Agreement from functioning. It must be borne in mind that the North-South Ministerial Council and the implementation bodies will operate in both parts of the island. We in the South will have to accept that those bodies will exercise functions which heretofore would have been reserved for institutions established under the Constitution. In particular, an enabling mechanism is provided to ensure that if any dispute resolution mechanism is established in respect of any of these institutions, that mechanism may function notwithstanding the conferral of exclusive jurisdiction on the courts.

It may be considered apt for some of the implementation bodies to ensure that there are appropriate arbitration mechanisms to resolve disputes without reference to the courts of the two jurisdictions in all



circumstances. It would be undesirable to have a situation where courts on either side of the Border might arrive at different conclusions in respect of a matter which was in dispute. In the context of certain types of dispute, it might be appropriate to provide that an arbitration body should apply the rules common to both jurisdictions. Whether this mechanism will have to be used will depend on the detailed provisions in respect of the bodies involved. However, that matter will be dealt with at a later date.

### **Mr. J. Bruton**

Does the Taoiseach accept there is a right of appeal to the courts against the decision of any arbitration body? That arbitration bodies will be established which will be specially designed to deal with the North-South bodies will not alter the possibility that their decisions might be appealable to the courts in either jurisdiction.

### **The Taoiseach**

The implementation bodies will be obliged to deal with the detail of the legislation. That arbitration bodies will be established does not necessarily mean there will be a right of appeal against their decisions. That is the key point. In considering the details surrounding the implementation bodies, we will be obliged to look at the precise legislative position.

### **Mr. J. Bruton**

I am uncertain about that.

### **The Taoiseach**

There is not necessarily a right of appeal against decisions made by arbitration bodies.

**Mr. Shatter**

Everyone supports what is being attempted in this Bill.

**An Leas-Cheann Comhairle**

I have a difficulty in that a number of Members have indicated a desire to contribute and I am obliged to call them.

**Mr. Shatter**

I do not want to be disruptive, I merely wish to tease out this point.

**An Leas-Cheann Comhairle**

Is the House agreeable to Deputy Shatter's intervention?

**Minister of State at the Department of Enterprise, Trade and Employment (Mr. Treacy)**

On this occasion.

**Mr. Shatter**

This issue represents a lacuna in the new constitutional arrangements being put in place. It may not be possible to address it today but it must be addressed before the end of October. We are putting in place new constitutional arrangements which will affect the entire island. It is inevitable that there will be disputes about the jurisdictional basis of some of these bodies. Individuals will raise issues — if not in the shortterm then in the medium term — which could result in litigation. At

present, that litigation could take place in this State, in Northern Ireland or in the UK.

In a sense we are dealing with communal arrangements in this legislation. When such arrangements were put in place in the context of the European Union, it was recognised that there was a need for a European court to provide for a juridical body which could make ultimate decisions on issues of dispute to avoid conflicting decisions in different jurisdictions. The natural progression and logic of that development, in the context of the Agreement, is that a lacuna exists, namely, a common juridical body has not been put in place to serve as a dispute resolution mechanism to produce judgments on issues, which could be contentious in the legal sphere, arising from the new arrangements. That issue must be addressed. If we cannot address it today, the Government must be put on notice that it must be addressed in the coming months in the context of the further discussions which will take place before the end of October.

### **The Taoiseach**

I accept the Deputy's constructive point that we will have to deal with this issue before the end of October. The purpose of the new Article 29.7.2° will be to ensure that the existing provisions of the Constitution do not form a barrier to development. It may be helpful, in the context of preparations for the establishment of the implementation bodies before the end of October, to resolve the details of these issues. I do not believe this runs contrary to the provisions of Article 29.7.2°.

I will deal with the last major point raised by Deputy Bruton before allowing other Members to make their contributions. The Deputy inquired about the declaration and I will now read the explanation provided in the Explanatory Memorandum in respect of that declaration. Deputy Bruton's question goes to the heart of the matter and I do not anticipate a need for any other Member to raise this issue once I have

replied to it:

9. Subsection 3° provides that if the Government declares that the State has become obliged, pursuant to the Agreement, to give effect to the amendments to Articles 2 and 3 of the Constitution and the insertion of the new section 8 into Article 29, those amendments will thereupon have effect. The text of these proposed provisions is set out.

10. The State's obligation will arise, pursuant to Article 4(3) of the Agreement, immediately on entry into force of the Agreement. At this point, the Government will be obliged to make the declaration referred to in the proposed new Article 29.7.3°. Because of Article 29.3 of the Constitution, that "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States", Ireland will be bound to make the necessary declaration. One of the generally recognised principles of international law is that treaties must be obeyed. Accordingly, this subsection does not leave any discretion to the Government, once the necessary requirements have been fulfilled. The purpose of the subsection is to provide a mechanism whereby the necessary amendment can be made at the appropriate time.

The alternative to providing a mechanism of this sort would have been to make amendments to Articles 2 and 3 of the Constitution immediately, taking it on trust that the other elements of the British-Irish Agreement would be put in place or alternatively to have held a second referendum to do this. Neither of these options would have been appropriate.

This procedure for the automatic insertion of an amendment into the Constitution is novel. It is expressed to be "notwithstanding Article 46" of the Constitution, because otherwise it would be necessary to hold a second referendum under the provisions of that article. In effect, what people are being asked to do is to approve a conditional amendment to the Constitution which will have effect only if certain conditions are met.

However, these conditions are clearly ascertained and the amendments to Articles 2 and 3 will take place virtually automatically when the elements of the British-Irish Agreement are in place.

Subsection 4° has been inserted because, once the amendments to Articles 2 and 3 take place, it would be undesirable for the new Articles 2 and 3 to appear in more than one place in the Constitution, namely, in Article 29 as well as Articles 2 and 3. Accordingly, it is envisaged that once the amendments are made to Articles 2 and 3, subsection 3° of the new Article 29.7 need no longer appear in the text of the Constitution. There is precedent for this in Articles 51 and 52 of the existing Constitution under which the "Transitory Provisions" of the Constitution are omitted from the published texts.

In effect, the new subsections 3°, 4° and 5° of Article 29.7 are transitory provisions. They form the scaffolding surrounding the new Articles 2 and 3 which can be demolished once the building has been completed or if, for some reason, it cannot be completed.

### **Ms McManus**

I want to refer to the first point made by Deputy Bruton because while the Taoiseach has answered, the question of the possible voting rights of people who will, under Article 2, be defined as part of the Irish nation is a little unclear. It has been clearly stated that what we are doing is transferring the definition from territorial terms to terms based on the people in the island. That is a significant change which I warmly welcome but I am concerned that the Taoiseach appeared to present a contradiction in that he said the powers of Government were based on decisions of the people, not citizens.

I ask the Taoiseach to define precisely the term "people" because he said it would be "up to the citizens", which seems to be a contradiction. What do we mean when we talk about people? It appears to me, and I am

sure to anybody reading the proposal in relation to Article 2, that "the people" is every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That would be a legitimate presumption by those who would wish to view it that way.

The Taoiseach must accept that this issue will be tested. It took a long time for the principle of consent to be explored in the courts in relation to the McGimpsey case. The Taoiseach referred to this principle of consent yesterday as being a long-standing one, not necessarily in legislation but in practice. I dispute that. It may have been an action arising from an acceptance that there had to be a principle of consent but it was not common currency until very recently that we would stand by the idea of the consent of Northern people. It is a welcome change in the body politic that that principle is now recognised by all the main parties. The McGimpsey case came as a shock to people because it showed there was an imperative in Articles 2 and 3 that was not generally presumed. That has given us an impetus today to change Articles 2 and 3. That interpretation was extremely significant.

I want to ask the Taoiseach a simple question in relation to this matter. What is the definition of "the people"? That has implications in regard to the point Deputy Bruton raised about the possible expectations people might have in relation to testing this matter in court because they may believe these articles give them certain rights they want to realise.

The additional point raised by Deputy Bruton, which is pertinent to this also, is in relation to a representative elected by people within the Northern state, for example, a Sinn Féin representative or a republican of some type. Currently Sinn Féin Members of Parliament are not locked into Dáil Éireann, as Deputy Bruton has hypothesised, but they are locked out of Westminster because they refuse to take a vote of allegiance. Does the Taoiseach not believe that because this matter was not addressed in the negotiations, it may create pressure from that quarter to have the right to sit in this House in the future? This is a failure

and I find it difficult to understand why this welcome fundamental constitutional change is being debated in this House while there is no fundamental constitutional change being asked of the British Government other than what is ring-fenced within Northern Ireland.

We have a problem. We must recognise that major decisions will continue to be made at Westminster for a large minority of people in Northern Ireland. They will not just be made within Northern Ireland. Devolution is an important element but ultimately decisions will be made at Westminster. There is a block in that regard, not just in terms of the oath although the oath is significant in that it prevents people representing their electorate at Westminster. There are other issues of a sectarian nature, particularly in regard to the House of Lords, but I do not want to go into that issue now.

Constitutional questions arise in relation to Westminster that were not addressed in the negotiations. I am surprised they were not, particularly because Sinn Féin found itself with this difficulty. Many people, and not just Irish people, in Westminster do not agree with the oath of allegiance and believe it is archaic. This matter should have been addressed because it will add to the pressure on people who want to represent their electorate but cannot in good conscience take this oath. They see in the changes being pursued in this Bill that it may be possible for them to represent their people in a way that is appropriate to their republicanism.

I ask the Taoiseach to comment in relation to the issue of Westminster because there has been too much focus by the negotiators on the internal and cross-Border arrangements. In a sense the Irish Government has let the British Government off the hook when it comes to the inevitable relationship the Nationalist minority in the North will have with the seat of Government at Westminster. This is a failure in the negotiations that may come back to haunt us if, as Deputy Bruton said, there is a possibility of a test being taken.

### **Mr. Blaney**

Having studied the document on the Agreement reached in the multi-party talks, I am still rather confused as to its overall implications. It is a lengthy document with much technical language and it is my opinion, and I suspect the opinion of many others, that no matter how well one tries to comprehend its implications, many doubts and much confusion will remain in the minds of the voters.

I am extremely disappointed that the Government decided to hold the referendum on the peace Agreement and the referendum on the Amsterdam Treaty on the same day. It is obvious from recent opinion polls that the great majority of people have little or no knowledge of what the Amsterdam Treaty entails. Having the two referenda on the same day will surely add to further confusion in the minds of the voters. I ask the Government to reconsider this bad decision even at this late stage.

There are pros and cons in the proposed peace Agreement. I welcome some of the points contained in it but I have strong reservations about others. The Agreement seems to have built-in safeguards for Nationalists in the parallel consensus clause which it is proposed to include in the operation of the power-sharing executive, but on the other hand this parallel consensus extends to Unionists and one wonders how this assembly will work. However, it is a slight progression from total Unionist



domination of power.

The North-South council will advance co-operation but only on what one could term the bread and butter issues — animal and plant health having been mentioned. These are important issues but it seems that on constitutional issues this body will have no real executive powers. The Unionists, through the assembly and their Ministers on this council, will have the power to block its development and veto any move towards an all-Ireland council with real teeth.

I welcome the proposals to reform the RUC. The commission to be set up to consider reform of the RUC is to be welcomed if it leads eventually to a police force that has widespread community support, but I have my doubts that this commission will have real power to bring forward any worthwhile radical proposals.

The proposals for the release of political prisoners are certainly to be welcomed. Were it not for the corrupt unjust system which has always prevailed in the Six Counties, these people would not have been in prison in the first place. On the equality agenda, having read through this fairly long section, it seems that the word "may" appears far too often. It sounds like a "wish list" and is very short on real proposals for radical action on equality.

However, it is on constitutional issues that I have my greatest fears and reservations about this Agreement. I particularly dislike clause No. 1 in Annex A which states: "It is hereby declared that Northern Ireland remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for this purpose". This copperfastens the Unionist veto on Irish unity, especially when it is written into new British legislation at Westminster. Does this mean that we are abandoning the Nationalist people of the Six Counties with no comeback, or will the proposed new Articles 2 and 3 compensate for this by referring to the

entitlement and the birthright of every person born on the island of Ireland to be part of the Irish nation?

People will argue about the definition of the word "nation". It refers to a "unity of people" and not "people and territory". A nation that cannot clearly define the limits of its territory is a poor reflection on its Government and on its people. If we agree to amendments to Articles 2 and 3, what we are getting in return is the repeal of the Government of Ireland Act, 1920, and this is meaningless as the British will still remain in occupation of the Six Counties and the Act of Union of 1801 will remain intact.

On the referendum, I strongly urge the Government to put the question of amending Articles 2 and 3 in a separate referendum, not as part of a package of proposals. After all, Articles 2 and 3 were a fundamental part of our 1937 Constitution and amendments to them surely deserve a separate referendum. I have received a huge influx of correspondence from people all over Ireland urging me to use whatever influence I may have to oppose amendments to Articles 2 and 3. I sincerely thank all those people and many others who hold similar views. As many in this House know, my family, through my late father Neil, my late brother Neil T., and now myself, have represented the people of Donegal for almost all of the years since the foundation of this State. We have striven over the years to advance the cause of a united Ireland by peaceful means. My proposed solution to the resolution of the centuries-old strife between our peoples is that the British should make a declaration of intent to withdraw in the future — perhaps 20 years from now.

### **An Leas-Cheann Comhairle**

The Deputy is wandering from Committee Stage.

### **Mr. Blaney**

Britain has never been requested to take this course of action and it is my considered opinion that all parties of a nationalist hue, North and South, should unite in encouraging Britain to make such a declaration. There is little point in our small party alone calling for this course of action, but a united effort by all could yield the desired result. Now more than ever, the vibrant economy which this State is experiencing should be a very positive incentive for the shrewd business-minded people of all denominations in the Six Counties to become involved in progressing this economic growth as we stand on the brink of entry into the fast lane of the new Euro currency, something they will not experience by clinging to a dying empire which finds it difficult to conform to new ideas in the new progressive Europe of the 21st century. There is no doubt that the agricultural sector in the Six Counties is already identifying the opportunities to be gained by linkage to the strong economic base we now have. Should Britain decide on a timed and phased withdrawal, I am convinced that a considerable amount of financial aid would be forthcoming from friendly nations of the world to support our new nation through its early stages. This would also, for the first time, afford an opportunity for the Irish diaspora abroad to play a positive role financially, industrially and otherwise in promoting the development of this new nation. I am confident this would lead to the building of a "module" where all the various sections of our people, North and South, could, for the first time, experience the enormous benefits of living and working together in prosperity, peace and harmony. I would even go so far as to invite our Northern Unionist brethren to seriously consider going down this road along with us and to help us to build a new and better Ireland as has been done in other lands where they settled, such as USA and Canada. This does not mean they should abandon their heritage, culture and tradition, but rather that the combination of our two traditions and cultures would enhance our image as a united people.

Having carefully considered all the aspects of this proposed Agreement, I am still left in a great dilemma. I see good points in it, and I have strong

reservations on other parts, my chief reservations being on the proposed amendments to Articles 2 and 3. Having weighed up the pros and cons, I consider that some slight advance has been made in the Nationalist cause and that perhaps this can be used as a basis for the eventual achievement of my party's goal of a united Ireland. I do not see this Agreement as the ideal solution or in any way a final solution to our problems, but I am prepared to give it a chance while still pressing for what I believe will be the only final solution that will bring a lasting peace to our nation, that is, a declaration of intent by the British to withdraw from this island while, at the same time, recognising that Britain has, in the interim period, a major role to play in assisting us in bringing about reconciliation between our divided people and the reunification of our nation.

As far as the amendments to Articles 2 and 3 are concerned, that the proposed amendments will not take effect until after all the other agreements reached in the all-party talks are put in place does allay to some extent the reservations I have on this matter. In view of this and that we in this House are not taking a decision on the Agreement arrived at in the all-party talks on Good Friday last, but rather that the decision we will take today will be one which will allow the agreement to be put before the people in a referendum on 22 May to decide whether that Agreement should be adopted, rather than deny the electorate that opportunity, I have decided to vote for the proposal before the House. By taking this course our organisation will have played its part in achieving the peace we have all longed for.

### **Mr. J. O'Keefe**

I am at one with Deputy Blaney in supporting the Agreement, but I support it rather more enthusiastically. I heartily endorse the Agreement, and perhaps my comments could be considered in that light.

As somebody who has an interest in matters constitutional, I say that in

dealing with a constitutional issue the ideal would be for the Government of the day to issue a White Paper, for there to be a period following the initiation of a Bill of not less than three months for debate, and thereafter what I would term an information period of at least 60 days for the public to consider the issue. That would be the ideal when dealing with a major constitutional issue, far more so when dealing with an issue of the kind before the House. What is happening is that we are having a debate in the Oireachtas lasting three days in all, between the Dáil and the Seanad and 30 days thereafter for an information campaign. I understand the pressures and the other imperatives, but this is so far from the ideal, particularly on such an important issue, that I felt I should emphasise my unhappiness that we are being forced into this situation.

It is clear from the very serious, technical and complex issues raised by Deputy John Bruton on Committee Stage so far that we could effectively debate these issues not just for hours but for days to properly tease them out. I do not intend to cover the ground which was covered by Deputy Bruton except in relation to the triggering mechanism. I listened to the Taoiseach's response, and I am not sure he covered the point Deputy Bruton made on the possibility of having the Dáil rather than the Government make the declaration. It is clear that the Government, because of the rules of Cabinet confidentiality which we debated not so long ago, is not a transparent body. It conducts its business generally in secret, with the exception of the odd leak here and there. Given the rules of Cabinet confidentiality, there is a case for such a triggering mechanism to be fired, as it were, by the Dáil rather than by the Government.

A couple of other issues concern me. The Bill is necessary to give effect to the agreement between the Government and the British Government made in Belfast on 10 April. Article 46.4 of the Constitution states:

A Bill containing a proposal or proposals for the amendment of this

Constitution shall not contain any other proposal.

Has consideration been given to the implications of this provision? We are dealing with a 35-page agreement and I wonder if it is proper to refer to it in this Bill. Is this a breach of the letter and spirit of Article 46.4? Are we debating a Bill which contains another proposal, contrary to Article 46.4? Perhaps it is a somewhat legalistic issue but I do not want the House to pass a Bill which is contrary to the Constitution.

There are a number of proposals in the Bill. Article 46.5 of the Constitution provides that a Bill containing a proposal shall be dealt with in a certain manner, signed by the President and referred to the people. The use of the words "a proposal" raises the issue of whether it is proper to have a single question put to the people. Again this is a somewhat legalistic question but that is the job of lawyers and it is better to raise the issue here than have it raised subsequently in court. A narrow definition of Article 46 might suggest that every proposal must be put separately to the people.

I hope the Government has considered these matters before deciding on the proposal it wishes to put to the people. I would prefer a single question to be put. I wish to see an extensive reform of the Constitution in the years ahead which might involve omnibus proposals and a series of technical and other amendments. If we were restricted to having to put every issue as a separate proposal it would make that task very difficult. However, we are bound by the Constitution and Article 46.5 refers specifically to a proposal. I am not an expert in the Irish language but I understand the Irish text of the Article is even more specific in referring to the singular. Article 47 of the Constitution lends further credence to the view that there should be a separate proposal put to the people on each issue.

I raise these points in the hope that the Taoiseach is in a position to knock down these arguments. They need to be dealt with.

### **Mr. B. Lenihan**

I did not speak on Second Stage so I take the opportunity to congratulate the Taoiseach and the Government on the successful conclusion of the Agreement and the associated agreement between the two Governments. I also congratulate Deputy Blaney on his contribution. No part of the State has suffered more from partition than east Donegal so it was not an easy contribution for the Deputy to make in weighing up the advantages and disadvantages of the Agreement for his constituency and the country. It is clear that Article 2 of the Constitution will continue to proclaim the existence of a 32 county nation. It has been the historical experience since the partition of Ireland in 1920 that no human hand or legislation can obscure the historic province of Ulster from our consciousness. In discussions such as these it can be dangerous to lay too much emphasis on constitutional definitions rather than the actual experience of people.

With regard to the points made by Deputy Jim O'Keeffe, I understand that the Government has taken advice on them from the Attorney General. I will be interested to hear the Taoiseach's reply. When the Constitution was enacted in 1937 it was enacted as a single document with a wide range of issues, topics and concerns addressed in it.

The point was raised about how many issues could be comprehended in a single constitutional amendment. When it was decided some time ago to amend the Constitution to provide for the dissolution of marriage various conditions were laid down as to when or how the Oireachtas could provide for the dissolution of marriage. There was a question as to whether there should have been two separate plebiscites, one on the principle of whether the dissolution of marriage should be prevented and another on the conditions that should be attached to the

dissolution of marriage.

It seems that it is necessarily implied in any constitutional question that there are a number of issues involved. In the context of this referendum all the issues relate to the Agreement and the relationship between the State and Northern Ireland. Granted this is a broad question but it falls sufficiently within the constitutional amendment to describe all the issues as falling within the remit of one proposal. However, I understand the Government has taken advice from the Attorney General on the matter and I will be interested to hear the Taoiseach's response on it.

Deputy McManus referred to the position of the UK. On the basis of the Multi-Party Agreement and the undertakings on equality, the question of whether an oath of allegiance should be taken by members of parliament from Northern Ireland at Westminster is one which will be examined. As a result of the Agreement it seems to me that the constitutional basis of Northern Ireland remaining in the UK is somewhat different from the other parts of the UK and that, therefore, a separate arrangement could be considered in that regard. Not only is the Government of Ireland Act, 1920, to be repealed but the new British legislation will take effect notwithstanding any other previous enactment. The basis of the incorporation of Northern Ireland in the UK will become the new British legislation which rests the link on the freely given consent of the people of Northern Ireland, rather than on any historical event in the past. This would seem to imply that it would be legitimate under the heading of equality to consider whether a separate oath would be required at Westminster for members from Northern Ireland.

Much concern has been expressed about the question of whether citizens from Northern Ireland would be entitled to vote here in a general election. I cannot understand this point or the point about whether the changes in Articles 2 and 3 would mean that persons who had a mandate from an election in Northern Ireland could turn up at



the Dáil and demand a seat. The constitutional provisions on elections have been described by the Supreme Court as a complete code. The code is clear in its provisions in stating, for example, in Article 16.4.1° that:

Polling at every general election for Dáil Éireann shall as far as practicable take place on the same day throughout the country.

As she raised the issue of "the people", Deputy McManus may ask what "the country" might mean. Incidentally, in relation to "the people", Mr. de Valera said in this House in 1937 that what it was doing was going back to the people, or at least that section of them whom it was in a position to consult on the matter. He was referring to those living in the Twenty-Six Counties. The basis of parliamentary representation here is the population of the State as ascertained at the preceding census. They are the only people with whom we are in a position to consult on the matter of parliamentary representation. It is clear under Article 16 that the basis of our parliamentary representation is territorial, that Deputies represent constituencies and voters vote in the constituencies.

In the context of extending voting rights to emigrants, a question arose about maintaining a link between the emigrant and a particular territorial constituency here, but I do not know how we could establish a parliament under our Constitution other than on the basis of constituencies. The machinery of the census, which is also referred to in the Constitution, operates only within the limits of the jurisdiction of the State. It does not operate in Northern Ireland.

There is confusion between the concept of nationality and citizenship, on the one hand, and voting entitlements, on the other. Under the 1956 Act we confer nationality and citizenship on a vast range of persons. Irish nationality and citizenship is based on descent through two generations and on birth in any part of Ireland. The theory of our nationality law is now being made the constitutional theory of Article 1 of the Constitution. That relates to our nationality law. It does not, as I

understand it, relate to voting entitlements. It may cause certain difficulties regarding our existing statutes on nationality law. They may require revision on the coming into operation of the amended Articles 2 and 3. The position of persons born on ships in transit through Irish waters, for example, is somewhat obscure and may have to be considered. I do not believe there is any connection between voting entitlements and citizenship in the Constitution. The same argument applies to the issue of representation in Dáil Éireann.

This is a fair point for Deputy Bruton to raise because we are changing the theory of fundamental provisions of the Constitution which appear under the heading "THE NATION", but the nation under those provisions is distinguished from the State. Parliament and voting rights are matters which pertain to the State whereas the matters dealt with now under Articles 1 to 3 relate to the nation and the relationship of the State to Northern Ireland.

A question was raised about making the coming into force of the amendments to Articles 2 and 3 at the end of the transitory period contingent on a vote in this or both Houses of the Oireachtas. The State has entered into international obligations here and the Government has to obtain advice as to when it is obliged to implement Articles 2 and 3 in municipal law as part of the Agreement. To make that contingent on a vote in either or both Houses of the Oireachtas would introduce an element of uncertainty into the implementation procedure for the Agreement. There have been a number of votes on the political plane in the past few weeks and there will be one or two more before the referendum takes place. Nevertheless, on the plane with which we are involved today, the Government will have to make a decision in the light of its international obligations on when it is obliged under the Agreement to proceed with Articles 2 and 3. Of course the Agreement would not come into force if the people decided not to approve the constitutional changes, but assuming they do a decision will have to be taken as to whether the various standards laid down in the Agreement

regarding when we amend the Constitution have been met. That is essentially a legal rather than a political question and, therefore, the Government – not the Oireachtas – which, under the Constitution, is charged with the external relations of the State, is in the best position, having taken advice, to arrive at a conclusion on that issue rather than leave it to the vagaries of political debate in one or other of the Houses of the Oireachtas.

I understand the spirit in which Deputy Bruton put forward this proposal, but it conflicts somewhat with the basic presumptions of our constitutional order. In passing I want to tell Deputy Bruton that a conceivable objection to the Agreement was brought to my attention at a party cumann meeting a few nights ago. I was told that if Deputy Bruton was in power making this decision it would be undesirable to leave the Constitution in that state.

### **Mr. J. Bruton**

Fianna Fáil Members are very prescient.

### **Mr. B. Lenihan**

In other words, while they trust Deputy Ahern with the function of making this declaration, they might not trust Deputy Bruton if he reassumed the office of Taoiseach. Whoever has to exercise this function must do so in accordance with an agreement which lays down standards to be observed.

There was discussion earlier about the question of a court. When the European Community was established a court and a court of auditors was established. The question of audit and judicial control was built into the founding treaties of the communities. We have not done that in this arrangement. It has been suggested that this creates a gap. I am not sure it does. In so far as the Agreement contains international provisions,

the normal forms of dispute settlement in public international law apply to the Agreement. If, for example, there was a breach of the Agreement on the part of the United Kingdom, Ireland could seek an international arbitration on that issue in accordance with the normal procedures of public international law. What would happen if a person sues an implementation body in the Circuit Court in Tralee? The legal effects the implementation bodies will have in different jurisdictions are a matter for the courts of the two jurisdictions. In regard to arbitration, it is in rare circumstances the courts interfere with an arbitral award. If the Governments decide the appropriate form of dispute settlement here is arbitration there would be limited circumstances in which the courts would set aside an arbitration.

Another matter of interest relates to the question of Article 29.7.2° and the question of whether the institutions being established under the Agreement can exercise their power in any part of the island of Ireland. I wonder about the islands off the island of Ireland. Is it envisaged the implementation bodies will not be involved there? The article states that " . notwithstanding any other provision of this Constitution conferring a like power or function . " they can exercise that function. That stems from the fact that our Constitution assumes the only bodies entitled to exercise political authority on behalf of the people are the organs established by the Constitution. When we acceded to European Community membership we empowered the Oireachtas to do that and we also gave complete constitutional cover to the operations of all these institutions, notwithstanding the fact that they were exercising powers also being exercised by this House, the Government and the courts. This clause is different. It merely states that the institutions can be set up and they are not unconstitutional because they may be exercising some of the powers of the Government, the Dáil or the courts if that is what the Agreement allows. The clause does not go on to state, however, that the bodies will have complete constitutional protection. If any of them acted in breach of the fundamental rights provisions contained in Articles 40 to 44 of the Constitution, they would be answerable to our courts in

respect of those fundamental rights in our jurisdiction. That point is not addressed in this article. In other words, the institutions established under the Agreement will not have the degree of constitutional protection European institutions have under our system and that is desirable.

**Mr. J. Bruton**

That is precisely the case and it can only be remedied here today.

**Mr. B. Lenihan**

It is addressed in the text before the House. It is clear in the text that the only point being made in that article is that powers and functions can be exercised by these bodies, but they are constitutional and not in derogation of the powers of the Oireachtas, the Government or the courts established by the Constitution. If those powers are exercised they are subject to all other constitutional control. That is my interpretation of the matter.

**Mr. J. Bruton**

It states the opposite.

**Mr. B. Lenihan**

"Notwithstanding any other provision of the Constitution conferring a like power or function on any person or any organ of State."

**Mr. J. Bruton**

That includes the courts.

### **Mr. B. Lenihan**

That includes the courts only in the context of the exclusivity of the judicial power conferred on them under the Constitution. It envisages the only courts permitted being the courts of Ireland. When we joined the European Community we had to provide complete constitutional immunity to give jurisdiction to the European Court of Justice in Luxembourg. Likewise, where a court, arbitration body, or tribunal is established here under the Agreement this Article would provide constitutional cover for the existence of that institution but any decisions it made would have to be subject to the fundamental rights provisions of the Constitution in so far as their legal effect in the jurisdiction. That is my interpretation and I am not speaking for the Government on this provision. It is necessary and is required to provide constitutional cover.

### **Mr. J. Bruton**

More time is needed for this debate. It is not satisfactory.

### **Mr. B. Lenihan**

Deputy Bruton was concerned about the question of the extraterritorial effect.

### **Mr. J. Bruton**

On a point of order, it is important these issues are sorted out. Will the Taoiseach agree to extend the debate until 2.30 p.m.? There is provision for a sos at 1.30 p.m. and for once we might dispense with that and allow the House to sit by agreement until 2.30 p.m. so that these issues can be dealt with.

### **The Taoiseach**

I suggest 2.15 p.m. because I must take Questions at 2.30 p.m.

### **Acting Chairman Mr. Browne**

(Carlow-Kilkenny): Is that agreed? Agreed.

### **Mr. B. Lenihan**

There was a query earlier as to whether the principle of the State having extra-territorial jurisdiction should be subject to the principles of international law. That is a matter any self-respecting state must subject to the principles of public international law. There are states which violate these principles and infringe the territorial sovereignty of other states. They send raiding parties around the world to commit private assassinations in other jurisdictions, which is a breach of the principles.

We are amending our Constitution and to avoid any confusion in Northern Ireland about the precise powers of the state it has been decided it would be more appropriate to relocate the provisions in regard to extraterritorial jurisdiction elsewhere in the Constitution. They are contained in Article 3 currently and will be relocated in Article 29. There is a certain logic in that and one must subject them to the principles of public international law that says to a state it can exercise jurisdiction anywhere in the world over its nationals, comprehensive jurisdiction in its territory and extraterritorial jurisdiction in certain limited instances.

Were we to adopt Deputy Bruton's suggestion of not putting extraterritorial jurisdiction subject to international law, the opponents of the Agreement in Northern Ireland will be able to say—

### **Mr. J. Bruton**

I was not suggesting it cannot be done. I suggested that using the words

"generally recognised" created uncertainty about what the provision meant.

**Mr. B. Lenihan**

Deputy Bruton sees the difficulty I apprehend. If we did not have that in the clause, it could easily be said in Northern Ireland this is a State which claims to exercise extraterritorial jurisdiction on any basis whatsoever and that would include jurisdiction in Northern Ireland whereas by saying it is subject to the recognised principles of international law one is saying this State behaves as other civilised states do in respect of this matter. That is important in terms of the presentation of the Agreement in Northern Ireland.

**Mr. J. Bruton**

Why can we not state what is the generally recognised principle and put it in words?

**Mr. B. Lenihan**

The Deputy knows well that the principles of international law since the time of Hugo Grotius have been open to a great deal of disagreement and they depend on the consensus of jurists.

**Mr. J. Bruton**

Hugo is not around to help us. We must do our best here.

**Acting Chairman**

Deputy Lenihan, without interruption, please.



**Mr. B. Lenihan**

There would not be much difficulty getting to 2.15 p.m. if we decided to discuss them.

**Mr. Shatter**

The Deputy has just presented a tautological argument. He argued in favour of certainty we should stick to uncertainty.

**Acting Chairman**

Deputy Lenihan, without interruption, please.

**Mr. Higgins**

(Dublin West): Acting Chairman, will you remind Members this is not the Four Courts?

**Mr. J. Bruton**

We will end up in the Four Courts if we do not get this right.

**Mr. Currie**

They are not as well paid.

**Acting Chairman**

Deputy Lenihan, without interruption, please.

**Mr. B. Lenihan**

I agree with Deputy Higgins but I am responding to the discussion. I

credit the people with a great deal of intelligence in these matters. They are capable of answering two questions on the one day just as juries are sometimes asked three or four questions. I congratulate the Taoiseach and the Government on the successful outcome of these discussions.

**Mr. J. Bruton**

It would be useful if the provisions in page 11, subsection (7) dealing with Supreme Court jurisdiction in examining the functions of a North-South body were to be preserved and it was made clear that the words "notwithstanding any other provision" did not apply to the provisions of the Supreme Court having the right to interpret the rights of citizens. It might be useful to incorporate in Article 7.1 a reference to the Supreme Court and in particular to Article 34.4.4° of the Constitution. The wording would then read: "that the institutions shall exercise their powers . notwithstanding any other provision of this Constitution conferring a like power or function on any person or any organ of State appointed under or created or established by or under this Constitution save that the powers conferred on the Supreme Court under Article 34.4.4° shall continue to apply." That would be helpful.

I pursued the issue of whether people have an automatic right to demand a vote in a Dáil election under the new constitutional provision and the Taoiseach argued that they do not. He said that an individual born here who has emigrated or one living in Northern Ireland does not have an automatic constitutional right to a vote in a Dáil election notwithstanding the fact that Article 1 of the Constitution states they have a sovereign right to choose their form of Government as members of the nation and Article 6 which gives them a right to designate their rulers, which could include the President. The Taoiseach said that other provisions in the Constitution allow the Government to deny them the right to vote. He relies essentially on Article 16 which states a law may be passed by the Dáil effectively deciding who shall have the right to vote and confining that by law to this jurisdiction — the Twenty-six counties.

Any law passed under Article 16 must comply with the Constitution as a whole and Articles 1 and 6 could be used as a basis for saying that a law that confines the right to vote to people in the Twenty-six counties is unconstitutional on the basis of a harmonious interpretation of all the articles in the Constitution. Articles 1 and 6 supersede and invalidate any right placed in the Dáil to confine the right to vote to people living in the State.

The jurisdiction of the State is not defined in the Constitution and I refer the Taoiseach to the book "The Irish Constitution" which says the physical extent of the State in the sense of the areas to which its law is applied is not defined in the Constitution.

In deciding the extent of Éire in the Constitution, the only reference is to the extent of the Saorstát or the Free State but even the Free State Constitution does not define the extent of the Free State. The Free State was defined in the Government of Ireland Act which decided that the Twenty-six Counties would have one parliament and the Six Counties would have another. The Taoiseach or the Government in relying in any court on the right to deny somebody from Northern Ireland or

somebody living in America the right to vote would be relying on a British Act of Parliament, the Government of Ireland Act. The Irish Constitution— pages 14 and 15, states:

The Constitution of 1922, however, contained no statement of the State's extent, so that the area of its jurisdiction has to be gathered elsewhere as follows: (1) The Government of Ireland Act 1920, provided for Parliaments for both Northern and Southern Ireland ..

A provision of that Act limited jurisdiction to the parliamentary counties of the Six Counties. It refers to the southern parliament that never functioned. The only other place where there is a legal instrument saying that the laws of the Saorstát only apply to Twenty-six Counties is in the Treaty (Confirmation of Amendment Agreement) Act, 1925, which is the boundary commission legislation. It stated that the extent of the State confirmed the existence of Northern Ireland for the purposes of the Government of Ireland Act, 1920 and shall be such as was fixed by subsection (2) of section one of that Act. In other words the definition of the State is in the Government of Ireland Act. We have a difficult situation here. We are saying that we are relying on a constitutional provision, Article 16, which allows the Dáil to make laws which provide that only people who live in this State should have a vote. The definition of the extent of the State is nowhere contained in any legislation passed in this jurisdiction. The only place it is defined is in the Government of Ireland Act passed in Westminster, before the State came into being. We are also saying that the counterpart for our proposed amendment to Articles 2 and 3 shall be an amendment by the British Parliament of that legislation which is the only statutory definition of the extent of our State, namely, the Government of Ireland Act.

We are actually creating a situation where we are asking for something to be changed with one hand while saying that that very Act, the Government of Ireland Act, is the only basis on which we have the right to deny people a vote in an election on the basis of our law. Our law is

confined to the extent of the Saorstát and the Saorstát is determined and defined in its extent by the Government of Ireland Act. There is a real difficulty here which the Taoiseach and the Government have not adequately addressed. I refer them in particular to pages 14 and 15 of The Irish Constitution. It clearly indicates that nowhere in any of our constitutional law is the extent of the State defined and, therefore, the application of its laws and that we are relying for that geographical definition currently solely on the Government of Ireland Act, as referred to in The Irish Constitution by Kelly, Hogan and Whyte. This is an anomalous situation which has its ironies. One of the great demands was for an amendment to the Government of Ireland Act as a counterpart for changing Articles 2 and 3. Yet we are relying on the Government of Ireland Act in another sense to say that people who live anywhere in the world do not necessarily have a vote. What will happen if the Government of Ireland Act is changed in a way we do not like? Will that change the way in which we can rely on Article 16? This is an issue that needs more than superficial examination.

### **Mr. M. Ahern**

I congratulate all those involved in the discussions which led to the Good Friday Agreement. There are many politicians on all sides who have been involved over the years in this process. I congratulate the Taoiseach, the Minister for Foreign Affairs, Deputy Andrews, the Minister of State, Deputy O'Donnell, and the other leaders down through the years such as Charles Haughey, who commenced the process, Albert Reynolds, who drove it forward very strongly and Deputies John Bruton and Spring. We must not forget the civil servants who did the nitty gritty work and who will never get the praise they deserve. I thank them for the efforts, time and energy they have put into this process.

I have no intention of going through the Agreement in detail as there are sufficient lawmen who will parse every word and sentence. That is their area of expertise and I suppose it is necessary. From a layman's

point of view my constituents view this Agreement as an enormous step forward from a practical point of view. It is not the final step that many of us would wish for but it is a step in the right direction.

It acknowledges in principle that in Ireland, North and South, it is the people of the two areas who have the ownership of the territory on which we exist. It has been acknowledged by the British that it is up to us to decide what we wish to do for the future. This acknowledgement is an enormous step forward.

The proposed institutions under Strand Two are practical aspects of how to put into operation the unity of this island. If these institutions work satisfactorily they will push forward the unification of this country as we would wish it to be.

The question has been raised by some people, for the sake of opposition, that the two questions on the Amsterdam Treaty and this Agreement should not be put on the same day because the people would not understand. Every day I listen to people who say we have the most educated and informed nation in the world not to mention in Europe. I believe that is so. I have no doubt the people will understand what will be put before them, provided the information, especially on the Amsterdam Treaty, is provided. I have every confidence in the people to understand what will be put before them and to come to the right decisions. Will the Taoiseach explain the current standing of Article 2 in international law and what will be the standing of the amended Article 2 in international law?

### **Mr. Shatter**

This is the first occasion, other than asking the Taoiseach a question, that I have an opportunity to speak. I join other Members in congratulating the Taoiseach and my constituency colleague and occasional rival, the Minister of State, Deputy O'Donnell, on the very difficult task they

undertook. They deserve the congratulations of this House.

I wish to discuss some of the technical issues which are relevant in the context of what we are doing. I also wish to highlight an issue which has not been mentioned, which requires constitutional change and which it is illogical not to deal with.

I welcome the important changes we are making to Articles 2 and 3, which Fine Gael has advocated for many years. It is a great tragedy that we did not move many years ago from the territorial imperative reflected in those articles. We are now replacing that with a democratic imperative which acknowledges the diversity of origins, symbols, ethos and religious belief for the entire Irish nation. That is an important acknowledgement as the article as originally framed was too narrow.

The Taoiseach, in dealing with queries, referred to the principles the courts have articulated of a harmonious interpretation of the Constitution. It is important this new ethos, which recognises diversity on this island, is reflected throughout the Constitution. I appreciate that the timescale involved in the production of this legislation was extremely limited. The focus has been on the Agreement which was put in place on Good Friday. There was a lost opportunity in the context of the referendum to make one basic amendment to the Constitution which we should make in the future.

I wish to draw the Taoiseach's attention to the preamble to the Constitution and to what the constitutional review committee said about it. It said the current preamble did not commend itself to most members of the review group who felt the language reflecting the ethos of the 1930s is overly Roman Catholic and Nationalist in tone, gender-biased and would be objectionable to many in Ireland today.

In keeping with what we are now doing with Articles 2 and 3, we should also amend the preamble. The review group suggested a number of

approaches which could be adopted. I would like the Taoiseach to indicate whether it is now formal Government policy to amend the preamble and to bring it into line with the modern, enlightened and more sensitised political thinking of the diversities of this island now contained in Articles 2 and particularly in Article 3.

I wish to return to an important issue raised by Deputy John Bruton which has not been given sufficient attention. The difficulty which could arise in this area has not been fully taken on board by the Government or the Taoiseach. When Deputy Lenihan discussed this issue, he did not touch on the point of real concern. A number of issues arise in the context of the making of the declaration to bring into effect these constitutional changes in the hope that they are endorsed by the people in the referendum.

The criteria prescribes that the Government must make the declaration, when, in effect, the various institutional bodies provided for under the Agreement are put in place and particular progress is made. The Taoiseach and Deputy Lenihan said the declaration will be made as a matter of international law and the Taoiseach dealt with some of the technical issues that could arise.

There is one specific problem in this area which could and should have been addressed by the Government, by adding sub-clause 6 in the context of the new provision in Article 29. A provision should have been inserted to the effect that the making of the declaration should be a matter for the judgment of the Government or the introduction of resolutions by the Dáil and the Seanad, but should not be a justiciable issue before the courts. This is not in conflict with the Agreement but is a matter of mechanics and ensuring we comply with our international obligations.

I will explain what I mean in less technical terms. In November 1995, the people made a decision in the divorce referendum. The article voted for



was not included in the Constitution until 17 June 1996, because Senator Hanafin launched a constitutional action to challenge, for a variety of reasons, the outcome of the referendum and the validity of changing Article 41.3 of the Constitution. By bringing those proceedings in High Court and Supreme Court applications, the Senator delayed the amendment of our Constitution by seven months.

If this referendum is passed, two possible situations arise. Someone may challenge its outcome which would obstruct the President signing the Bill necessary to include the clause. This could delay matters but would not be fatal because it would happen within the envisaged 12 month time period which may be necessary before the declaration is made. Whether that difficulty arises or not, we may be 11 months on from the holding of the referendum when someone may object, no matter what the outcome of the referendum is, to the amendments being made to Articles 2 and 3. He or she may decide, before the Government makes a declaration or before this House takes a view on the issue, to initiate litigation in the High Court to seek to prevent the Government from making the declaration. This would be complex litigation which could take some months wending its way through the High Court and Supreme Court. No matter what priority the courts give to it, it could delay the making of a declaration for four to six months.

There is nothing to prevent this type of event occurring. Who could bring that type of action? Perhaps people who felt more prisoners should have been released or they should have been released more speedily would see this as a means of exercising pressure on the Government. Perhaps someone who is ideologically attached to the Continuity IRA would see some value in bringing that type of court case.

I suggest to the Government that, constitutionally, if the people form a view and vote in favour of what we are proposing, and the possibility arises of the declaration being made and these articles becoming effective, it should not be a justiciable issue. The people will have spoken.

An individual representing a small minority should not be in a position to delay the making of a declaration in circumstances where such a delay could be misunderstood in one section of the community in Northern Ireland. It might be exploited by those who wish it to be misunderstood and lives could be placed at risk because symbols on this island have such a powerful effect on everyday life.

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