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An Comhaontú Nua: Cad é atá i gceist?

**Culturlann McAdam Ó Fiach
Céadaoin 22 Eanáir 2020**

Before we consider the potential effect of the draft provisions of the New Decade New Approach deal with regards to meeting expectations in relation to providing legislative protection for the Irish language it bears to reflect on the previous legislative and political matrix and how political agreements were given legislative effect and how they were ultimately interpreted by the courts, hopefully providing a context within which to assess the current proposals.

Administration of Justice (Language) Act (Ireland) 1737

The Administration of Justice (Language) Act (Ireland) 1737 was passed by the Parliament of Ireland in 1737. This Act forbids the use of any language but English in court proceedings. It is still in force in this jurisdiction despite the equivalents of this Act passed for England in 1731 and for Wales in 1733 having been repealed in 1863.

Renowned historian Dr Eamonn Phoenix Dr. Eamon Phoenix, has observed that the law was passed after the Williamite Wars in the middle of the penal law era in Ireland:

“The 1737 Act was passed by the old ascendancy dominated Irish Parliament in Dublin from which Roman Catholics, some 87% of the population of Ireland at the time, were excluded by law. The 1737 Act belongs to the period of the penal laws in Irish history, this refers to a series of laws passed by the Irish Parliament in the period after the Williamite victory at the Boyne. The laws had a dual purpose; to convert as many Catholics of the land owning class to the established church and secondly, to exclude the Catholic masses from all economic, social and political power. As the historian Dr. Malcolmson observed, the laws were designed, not to make Catholics good subjects, but to deprive them of the power to be bad ones.”

He finishes by saying:

“The 1737 Act can be viewed as a piece of discriminatory legislation directed at the mother tongue of the mass of the Irish population at the time. It is therefore the cultural equivalent of a penal law.”

Directors

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An Trucailín Donn McBride .v. McGovern [1906] 2IR 181

Very little consideration was given to the language in legal discourse prior to independence with perhaps the most interesting example of a case with language rights implications being Padraig Pearse's only case as a Barrister, McBride .v. McGovern in 1906¹. Pearse unsuccessfully attempted to overturn a number of convictions under the Summary Jurisdiction (Ireland) Act, 1851 for Irish speakers who had their names and addresses written on their carts in Irish and in the Gaelic font, however the appeal was rejected on the grounds that

Chuir Príomhchonstábla an RIC an dlí ar Niall Mac Giolla Bhríde as Craoslach capall is cairt a bheith ar an mbóthar poiblí aige gan a ainm agus a sheoladh a bheith breactha ar an gcairt i litreacha soléite. Bhí a ainm, a shloinne agus a sheoladh breactha ar an gcairt aige ceart go leor ach iad i nGaeilge agus sa chló gaelach.

Ciontaíodh Mac Giolla Bhríde os comhair Chúirt Ghearr Dhún Fionnachaidh agus nuair a thainig an chá os cobhair an tsean-Ard-Chúirt thug O'Brien LCJ príomhbhreithiúnas na Cúirte sna téarmaí seo a leanas:-

"The characters were not the characters of the language which the Crown and Legislature recognise as the language of the United Kingdom for all legal and official and public purposes. Parliament conducts its debates in English, and legislates in English. The enacting body expresses itself, and the enactment which contains the relevant provision is expressed, in English. English is the language of the Crown; of, as I have said, the Legislature both in debate and enactment; of all the Government administrative and public departments; of the Courts, of the Supreme Court; of the Courts of Summary Jurisdiction, where the very offence under consideration is to be investigated; and, in the eyes of the law, of the Constabulary who, under the 14th Section of the Act, are to take cognisance of the offence."

"An Englishman... if knocked down by an Irish cart in any part of the country, whether Connemara or elsewhere, is entitled to have the name and address of the offender in characters that he can read, if Irish letters are used he may be powerless to identify".

History, however, would not forget these convictions and when De Valera set about dismantling the Office of Governor General of the Irish Free State he appointed Dónal Ua Buachalla, one of the Irish speakers convicted under the Summary Jurisdiction (Ireland) Act, 1851, to be the Governor General, renaming the post 'Seanascal' of the Irish Free State. Ua Buachalla thus became a successor to Mr Tim Healy SC, the original Prosecutor in the cart registration cases and the first Governor General of the Free State.

¹ McBride .v. McGovern [1906] 2IR 181

Re Mac Giolla Cathain's Application [2010] NICA 24

In a judicial review taken in 2009 by Caoimhín Mac Giolla Cathain, he challenged the 1737 Act and its formal banning of the use of Irish in our courts. In his affidavit to the proceedings, Caoimhín averred that his group Bréag had decided to play a concert anseo i gCulturlann Mac Adam Ó Fiaich with a proposed date of 28 June 2008. He stated that the Culturlann is the foremost provider of Irish language events in the Belfast area with Irish being spoken generally by all users of the Culturlann. He stated in paragraph 4 of his affidavit:

"As part of the organisation of the event it was decided to apply for an occasional liquor licence. I was designated to make the application." and he submitted that he sought to present an application to the court for an occasional licence drafted in Irish.

He contended that the 1737 Act was incompatible with the European Charter for Regional and Minorities Language and secondly that the Act contravened his rights as protected under the European Convention on Human Rights, particularly under Article 6 (the right to a fair hearing) and Article 14 (prohibition on discrimination). The State defended the legislation stating that the legislation was originally designed to prevent disadvantage or injustice by protecting members of the public from the use in court of languages with which they were unfamiliar, a submission made with a straight face as this law was passed at a time when almost all of the population of Ireland didn't speak a word of English.

The application was ultimately dismissed by the Court of Appeal, preferring parliamentary sovereignty and statutory certainty over implied political agreement but interestingly the Judge delivering the Judgment², Girvan LJ observed

"The way in which Irish should be recognised and valued in Northern Ireland is a matter of political debate. The Good Friday and St Andrew's Agreements pointed up the issue. How the question should be dealt with is a question of policy not law. The court cannot resolve the issue or contribute to the political debate. It can only determine the present appeal by reference to the correct legal principles applicable under the existing law."

It is therefore appropriate to consider the ever developing patchwork of political agreements which have ultimately led to last week's deal.

² In Re Mac Giolla Cathain's Application [2010] NICA 24

<https://judiciaryni.uk/sites/judiciary/files/decisions/Cathain%20%28Caoimhin%20Mac%20Giolla%29%20v%20The%20Northern%20Ireland%20Court%20Service.pdf>

Duty to promote the Irish language

Duties arise from the British Government's internationally binding commitments, namely Part III of the European Charter for Regional or Minority Languages. In addition, the British Government made a clear commitment in the St Andrews Agreement to *'enhance and protect the development of the Irish language.'*

There is a legitimate expectation that there is an obligation on the Government not only to take positive steps to encourage the development of Irish but also to remove obstacles, arising from:

1. the commitment made in the Good Friday Agreement (in strand three) to

"take resolute action to promote the [Irish] language" and to "recognise the importance of respect, understanding and tolerance in relation to linguistic diversity, including in Northern Ireland, the Irish language, Ulster-Scots and the languages of the various ethnic minority communities, all of which are part of the cultural wealth of the island of Ireland";

The Good Friday Agreement went even further in the **Rights Safeguards and Equality of Opportunity** section accounting for *Economic, Social and Cultural Issues*

4. In the context of active consideration currently being given to the UK signing the Council of Europe Charter for Regional or Minority Languages, the British Government will in particular in relation to the Irish language, where appropriate and where people so desire it:

- *take resolute action to promote the language;*
- *facilitate and encourage the use of the language in speech and writing in public and private life where there is appropriate demand;*
- *seek to remove, where possible, restrictions which would discourage or work against the maintenance or development of the language;*
- *make provision for liaising with the Irish language community, representing their views to public authorities and investigating complaints;*
- *place a statutory duty on the Department of Education to encourage and facilitate Irish medium education in line with current provision for integrated education;*
- *explore urgently with the relevant British authorities, and in co-operation with the Irish broadcasting authorities, the scope for achieving more widespread availability of Teilifis na Gaeilge in Northern Ireland;*

- *seek more effective ways to encourage and provide financial support for Irish language film and television production in Northern Ireland; and*
 - *encourage the parties to secure agreement that this commitment will be sustained by a new Assembly in a way which takes account of the desires and sensitivities of the community."*
2. the commitment made in the St Andrew's Agreement of 2006 that the British government would "*work with the incoming Executive to enhance and protect the development of the Irish language*";
 3. the commitment made in the "*Together: Building a United Community Strategy*" to use "*language*" and other media as a means of improving good relations;
 4. the strong recommendations about the importance of protecting and encouraging the Irish language by international bodies such as the Council of Europe Committee of Ministers and the United Nations Committee on Economic, Social and Cultural Rights.

Notwithstanding the clear context of the above, recourse to our courts was required to defend and promote the interests of Irish speakers. Indeed, with regards to the Building a United Community Strategy, although it recognised Irish as a potential means to promote good relations, in the absence of any legal definition of 'good relations' and the hostile political climate around the language TBUC was often used to restrict the language with it viewed as a 'single identity issue', by those charged with implementing the TBUC programmes.

Re Coláiste Feirste's Application [2011] NIQB 98

In Coláiste Feirste's Application [2011] NIQB 98³, in a case pertaining to access to travel provision for students based in Downpatrick, the Department of Education went so far as submit to the court that the Good Friday Agreement was merely 'aspirational', despite the perceived clarity of the governing legislation, Article 89 of Education (Northern Ireland) Order 1998⁴, as amended (the "1998 Order"), concerns Irish-medium education which states:

"Irish-medium education

89. – (1) It shall be the duty of the Department to encourage and facilitate the development of Irish-medium education.

Treacy J dismissed this submission that the Good Friday Agreement was merely aspirational, finding

[43] Art 89 is the statutory embodiment of the clear commitment enshrined in the Belfast/Good Friday Agreement to place a statutory duty on the respondent to encourage and facilitate Irish medium education in line with the current provision for integrated education.

[44] I do not accept the respondents contention that this duty is merely aspirational. The imposition of the statutory duty has and is intended to have practical consequences and legislative significance.

This specific example of the Irish language community having to seek recourse to the courts for clarity on what was a seemingly crystal clear political agreement AND legislation is intuitive when we come to weigh the benefits of the DNA deal and before we turn to that, I want to briefly consider a more recent judgement wherein Conradh na Gaeilge sought judicial consideration of the devolved executive's legal duty to enhance and protect the development of the Irish language.

³ Coláiste Feirste's Application [2011] NIQB 98

<https://judiciaryni.uk/sites/judiciary/files/decisions/Col%C3%A1iste%20Feirste%E2%80%99s%20Application.pdf>

⁴ Article 89 of Education (Northern Ireland) Order 1998⁴, as amended (the "1998 Order"), concerns Irish-medium education which states:

"Irish-medium education

89. – (1) It shall be the duty of the Department to encourage and facilitate the development of Irish-medium education.

(2) The Department may, subject to such conditions as it thinks fit, pay grants to any body appearing to the Department to have as an objective the encouragement or promotion of Irish-medium education.

(3) The approval of the Department to a proposal under Article 14 of the 1986 Order to establish a new Irish speaking voluntary school may be granted upon such terms and conditions as the Department may determine.

(4) In this Article "Irish-medium education" means education provided in an Irish speaking school.

(5) Article 3(2) of the Education (Northern Ireland) Order 2006 applies for the purposes of this Article as it applies for the purposes of Part II of that Order."

Re Conradh na Gaeilge's Application [2017] NIQB 27⁵

This case is notable both for the Court's willingness to examine the Executive's duties agreed to in the St Andrews Agreement of 2006, and its use of declarative relief as a remedy for failure to fulfil those duties.

Section 28D(1) of the Northern Ireland Act 1998 ("the 1998 Act"), as inserted by the Northern Ireland (St Andrews Agreement) Act 2006, provides that

"The Executive Committee shall adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language".

In the case Conradh na Gaeilge sought a declaration that the Executive Committee had failed to comply with their section 28D(1) duty.

It was common ground

- (i) that section 28D(1) placed a legal obligation on the Executive Committee;
- (ii) that no express time period by which a strategy must be implemented was specified in the Act; and
- (iii) that a proper reading of the provision implied that the obligation was to be performed "within a reasonable period of time" [at paragraph 5].

A strategy drafted by the Department of Culture, Arts and Leisure ("DCAL") had been placed before the Executive Committee in March 2016, after several failed attempts to have it put on the agenda. However, this strategy failed to achieve the concurrent majorities of Ministers designated as Unionist and Nationalist, and so was not adopted. Counsel on behalf of the Executive Office relied on this procedural historiography in arguing that the Executive had not neglected its duty under section 28D(1). Rather, it was argued, it was simply the case that no strategy had yet been able to command the support necessary to enable its adoption [at paragraph 14].

Maguire J disagreed with this assessment, holding that the Executive Committee had failed to comply with its duty under section 28D(1) [at paragraph 17]. While the Court did not elaborate on what might be considered a

⁵ Re Conradh na Gaeilge's Application [2017] NIQB 27

<https://judiciaryni.uk/sites/judiciary/files/decisions/Conradh%20Na%20Gaeilge%27s%20Application%20and%20In%20the%20Matter%20of%20a%20Failure%20by%20the%20Executive%20Committee%20of%20the%20Northern%20Ireland%20As%20sembly%20to%20Comply%20with%20its%20Duty%20Pursuant%20to%20Section%2028D%20of%20the%20Northern%20Ireland%20Act%201998.pdf>

“reasonable period” for the implementation of a strategy, it was considered that ten years – the period since the enactment of the St Andrews Agreement – was well beyond the boundaries of reasonability. Further, the obligation is “an obligation of outcome not means” [at paragraph 18]. That is, demonstrating that efforts had been made to achieve a certain outcome is insufficient to show compliance with section 28D(1).

The Court granted the judicial review and made a declaration that the Executive Committee had failed, in breach of its statutory duty under s.28D(1) of the Northern Ireland Act 1998, to adopt a strategy setting out how it proposes to enhance and protect the development of the Irish language.

This important judgement, an exceptional example of strategic public interest litigation by Conradh na Gaeilge, was delivered on 3rd March 2017 and as with all issues requiring critical analysis, one must consider the context within which the judgement was delivered as this is also intuitive to consider the NDNA deal.

Just 10 weeks prior to the judgment, on 23rd December 2016, a decision was made by DUP Minister for Communities Paul Givan to withdraw the Líofo's Gaeltacht Bursaries Scheme. The scheme provided around £50,000 worth of bursaries to allow 100 persons to attend summer courses in the Donegal Gaeltacht. The decision was communicated in correspondence sent to a number of colleges on 23rd December 2016, which provided as follows:

"Mar gheall ar choigilteas éifeachtúlachta ní bheidh an Roinn ag soláthar Scéim Sparánachtaí Líofo i 2017. Nollaig mhaith agus bliain úr faoi mhaise daoibh." Which translates as: *"Because of efficiency savings, the department will not be providing the Líofo bursary scheme in 2017. Happy Christmas and Happy New Year."*

As we are all aware the public revulsion which followed this petty withdrawal of the microscopic budget led shortly to the resignation of Martin McGuinness as joint First Minister on 9th January 2017.

Matters deteriorated to the extent that Arlene Foster made her crocodile comment on 9th February 2017, at a DUP fundraiser, wherein she also alleged that there were more Polish speakers here and as such there should be a Polish Language Act before there would be an Acht na Gaeilge⁶.

⁶ DUP will never agree to an Irish Language Act, says Foster 6th February 2017 <https://www.bbc.co.uk/news/uk-northern-ireland-38881559>

The result of unionism's inability to share power and ultimately to respect the Irish identity, led to a bruising Assembly election on 2nd March 2017 for unionism with the DUP losing 10 seats and the UUP losing 6 seats in a high turnout election (65%, up 10% from the previous election). The election also witnessed unionism lose its majority for the first time in the history of the State, a trend which has since been continued in European and Westminster elections.

The view of the High Court the day after the election was clear and although the judgment was declaratory in nature, it would have been the court's intention to inspire greater amenability towards the question of the Irish language on behalf of the unionist parties in the Executive. One would have hoped that the event of electoral meltdown and judicial admonishment should have inspired a change in approach in political unionism, however as we know Stormont remained collapsed until last week, and the event of the Deal which we are here to qualitatively assess.

NEW DECADE NEW APPROACH Part 7 of the draft legislation reads⁷

"The purpose of this Part is to provide official recognition of the status of the Irish language in Northern Ireland which is additional to that provided by other statutory provisions such as –

- (a) section 28D of this Act;*
- (b) the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999; and*
- (c) the statutory provisions relating to Irish-medium education."*

"(2) This Part provides that official recognition by making provision –

- (a) for the appointment and functions of an Irish Language Commissioner (see sections 78G and 78H)*
- b) for best practice standards relating to the use of the Irish language in connection with the provision by public authorities of services to the public in Northern Ireland (see sections 78I to 78L).*

⁷https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/857001/Final_Combined_Legislation_for_publication.pdf page 12 78F

section 78 (F)

THE IRISH LANGUAGE

Purpose of this Part: official recognition of the status of the Irish language

- 78F. – (1) The purpose of this Part is to provide official recognition of the status of the Irish language in Northern Ireland which is additional to that provided by other statutory provisions such as –
- (a) section 28D of this Act;
 - (b) the North/South Co-operation (Implementation Bodies) (Northern Ireland) Order 1999; and
 - (c) the statutory provisions relating to Irish-medium education.
- (2) This Part provides that official recognition by making provision –
- (a) for the appointment and functions of an Irish Language Commissioner (see sections 78G and 78H);
 - (b) for best practice standards relating to the use of the Irish language in connection with the provision by public authorities of services to the public in Northern Ireland (see sections 78I to 78L).
- (3) Nothing in this Part affects the status of the English language.

So what does official status mean?

Official Status should have declaratory and legal effect. An Ghaeilge benefits from Constitutional and legislative protection in the south under the Official Languages Act 2003 but constitutionally under Article 8(1) Bunreacht na hÉireann which states;

Article 8:

8.1 The Irish language as the national language is the first official language.

8.2 The English language is recognised as a second official language.

8.3 Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.

For comparison, in Wales, with regards to the official status for the Welsh language:

Official status of the Welsh language (From Welsh Language Commissioners Website)

The Welsh language has official status in Wales. This is set out in the Welsh Language (Wales) Measure 2011. The Measure does not affect the status of the English language in Wales.

In the Welsh language context, official status has a legal effect, and means that the Welsh language should not be treated less favourably than the English language in Wales.

Welsh Language (Wales) Measure 2011

Declaratory: Section 1(1) stating “The Welsh language has official status in Wales”.

Section 1(2) the official status of the Welsh language is given legal effect by the enactments about –

- (a) duties on bodies to use the Welsh language, and the rights which arise from the enforceability of those duties, which enable Welsh speakers to use the language in dealings with those bodies (such as the provision of services by those bodies);
- (b) the treatment of the Welsh language no less favourably than the English language;
- (c) the validity of the use of the Welsh language;
- (d) the promotion and facilitation of the use of the Welsh language;
- (e) the freedom of persons wishing to use the Welsh language to do so with one another;
- (f) the creation of the Welsh Language Commissioner; and
- (g) other matters relating to the Welsh language.

OPINION

The status of the Irish language

1. In relation to the status of Irish language, my view is that Irish language is given official status by s.78F.
2. My view is that the legal effect of that status is limited to the provisions on an Irish Language Commissioner and best practice standards (in addition to the already existing provisions eg s.28D Northern Ireland Act 1998 and Article 89 of Education (Northern Ireland) Order 1998 etc). I do not think that the official status in s.78F provides any legal rights other than those mentioned in s.78F.
3. The Welsh Language Measure is declaratory and unambiguous and indicates (at s.1(2)) that official status is a general principle, but there is no equivalent indication in s.78F.

The Use of Irish in court.

4. In relation to use of Irish in courts, the NDNA draft Bill undertakes to repeal the 1737 Penal Law. As such a court will have a duty is to facilitate the use by a person in proceedings before the court of a language other than English *to the extent necessary in the interests of justice*. It would then be a matter for the Court to make a finding whether use of Irish by a person is necessary in the interests of justice. It may be difficult to overcome this threshold if all participants speak and understand English. I would recommend specific caution to temper optimism in this regard, as all that this secures is confirmation that it is no longer illegal to speak Irish in court!

I would further draw attention to the remarks of Girvan LJ In Re Mac Giolla Cathain's application, as I fear that these will be rehearsed as guidance at the first test of the issue. The Judge stated that "English is not merely the working language of the courts, it is now clearly the working language of nearly the entire population." and went on to state at paragraph 10 and 11;

[10] *Conferring on individual litigants a right at their option to convert court forms from English into a language not understood by the vast majority of intended recipients would frustrate the interests of justice. While it will always be the case that in a pluralist society such as Northern Ireland there will be some people who may not understand English or would prefer to speak another language this cannot entitle them to require prescribed forms and applications to the court intended to inform the court and the other parties to be translated into their own preferred language which is not readily comprehensible to the intended recipients.*

[11] *... it is strictly unnecessary to consider wider questions relating to procedures to be followed in court where a witness who is fluent in English does not wish to speak the working language of the court. At common law English is the working language of the court and this will remain so unless and until the matter is changed by statute.*

An Irish language Commissioner

5. In relation to the Commissioner:
 - a. The Commissioner is appointed by Ministers which clarified to be the First and Deputy First Minister.
(s.78G(2))
 - b. The Commissioner's main function is to protect and enhance the development of the use of the Irish language by public authorities in connection with the provision by those authorities of services to the public in Northern Ireland (s.78H).
 - c. In particular, the Commissioner must prepare best practice standards and support, monitor and investigate in relation to those standards (s.78H(2)).
 - d. The Commissioner must comply with any directions given by the Ministers as to the exercise of the Commissioner's functions (s.78H(4))

- e. The best practice standards are subject to approval by the Ministers (s.78J(1)).
- f. The duty on public authorities is to have "due regard" to the best practice standards, so it is not a duty of outright compliance (s.78I).
- g. There is a large body of case law on the meaning of the duty to have "due regard" because this is the same duty under the public sector equality duty - see e.g. *Bracking v SSWP* [2014] Eq LR 60 at paras 25-27 where McCombe LJ conducts a comprehensive review of the authorities on the duty to have "due regard"
- h. If a person has an issue with a public authority regarding breach of the best practice standards, their remedy is a complaint to the Commissioner. The Commissioner then has power to investigate and send a report of the investigation to the public authority and complainant. The report may make recommendations on action to be taken by the public authority and should be laid before the Assembly.
- i. It is likely that the existence of a complaint mechanism to the Commissioner would be an alternative remedy to Judicial Review, and would therefore have to be exhausted before a Judicial Review challenge is taken against a public authority for breach of the duty to have due regard to the Best Practice Standards. An analogous example would be in circumstances where a complainant considers there to be a breach of s75 of the Northern Ireland Act 1998, judicial review cannot be commenced until such times as the Equality Commission has considered, investigated and determined an outcome.

CONCLUSION

On one view draft Bill it is accurate to conclude that the draft Bill is not a free standing Irish Language Act, official status is official status only insofar as the Commissioner interprets it to be so, a Commissioner whose appointment must be approved by the DUP, and there is zero mention in the draft Bill about public visibility of an Ghaeilge, with no commitments whatsoever on public signage.

Another equally valid analysis is that for the first time in any of our lives, there is statutory recognition of the Irish language on this part of the island, there will be statutory protection through the office of an Irish Language Commissioner and it is fundamentally unequivocal that the Irish language is a much healthier position as a result

of this agreement, than it had been two weeks prior to and following Martin McGuinness's resignation. From a macro political perspective, will unionism critically reflect upon the fact that their majority has gone forever and that genuine respect and tolerance is the only possible hope that remains for the viability of their northern state?

Whereas we look to the Welsh Language Act as the gold standard on these islands in terms of legislative best practice we should further recall and acknowledge that Wales are on their 7th iteration of legislation and have come a long way to benefit from the statutory protections that they presently enjoy.

We have not arrived at the destination at the end of a journey, we have merely attained the tools to build the bus, or *an trucaillín donn*, for the rest of our journey.

Tús maith, leath na hoibre.

NIALL Ó MURCHÚ

22 EANAIR 2020