Seventh Progress Report

Parliament

COISTE UILE-PHÁIRTÍ AN
OIREACHTAIS AR AN mBUNREACHT

THE ALL-PARTY OIREACHTAS
COMMITTEE ON THE CONSTITUTION

Baile Átha Cliath
Arna fhoilsiú ag Oifig an tSoláthair

Le ceannach díreach ón
Oifig Dhíolta Foilseachán Rialtais
Teach Sun Alliance
Sráid Theach Laigean, Baile Átha Cliath 2

nó tríd an bpost ó
Foilseacháin Rialtais, An Rannóg Post-Tráchta
4-5 Bóthar Fhearchair, Baile Átha Cliath 2
(Teil: 01 - 661-3111 – folíne 4040/4045; Fax: 01 - 475 2760)
nó trí aon díoltóir leabhar.

Dublin
Published by the Stationery Office

To be purchased directly from the
Government Publications Sale Office
Sun Alliance House
Molesworth Street, Dublin 2
or by mail order from
Government Publications, Postal Trade Section
4-5 Harcourt Road, Dublin 2
(Tel: 01 - 661-3111 – ext 4040/4045; Fax: 01 - 475 2760)
or through any bookseller.

€10.00

Pn 11281

ISBN 0-7557-1211-0
Printed by ColourBooks, Dublin

The All-Party Oireachtas Committee was established on 16 October 1997. Its terms of reference are:

In order to provide focus to the place and relevance of the Constitution and to establish those areas where Constitutional change may be desirable or necessary, the All-Party Committee will undertake a full review of the Constitution. In undertaking this review, the All-Party Committee will have regard to the following:

a *the Report of the Constitution Review Group*

b *participation in the All-Party Committee would involve no obligation to support any recommendations which might be made, even if made unanimously*

c *members of the All-Party Committee, either as individuals or as Party representatives, would not be regarded as committed in any way to support such recommendations*

d *members of the All-Party Committee shall keep their respective Party Leaders informed from time to time of the progress of the Committee's work*

e *none of the parties, in Government or Opposition, would be precluded from dealing with matters within the All-Party Committee's terms of reference while it is sitting, and*

f *whether there might be a single draft of non-controversial amendments to the Constitution to deal with technical matters.*

The committee comprises eight TDs and four senators:

Brian Lenihan, TD (FF), *chairman*
Jim O'Keeffe, TD (FG), *vice-chairman*
Brendan Daly, TD (FF)
Senator John Dardis (PD)
Thomas Enright, TD (FG)
Séamus Kirk, TD (FF)
Derek McDowell, TD (LAB)
Marian McGennis, TD (FF)
Liz McManus, TD (LAB)
Senator Denis O'Donovan (FF)
Senator Fergus O'Dowd (FG)
Senator Kathleen O'Meara (LAB)

The secretariat is provided by the Institute of Public Administration:

Jim O'Donnell, *secretary*

While no constitutional issue is excluded from consideration by the committee, it is not a body with exclusive concern for constitutional amendments: the Government, as the executive, is free to make constitutional proposals at any time.

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Foreword

This report marks a further stage in the committee's examination of the Constitution, and in particular of Articles dealing with the institutions of state.

The National Parliament is called the Oireachtas in the Constitution and consists of the President and the two Houses, Dáil Éireann and Seanad Éireann.

Our report deals with the two Houses of the Oireachtas. We have already dealt with the office of President in our *Third Progress Report*. This report therefore deals with Articles 15 to 25. We have dealt with Article 26 in the *Fourth Progress Report*: *The Courts and the Judiciary*.

Following the conclusion of the Good Friday Agreement, the Taoiseach asked the committee to examine 'how people living in Northern Ireland might play a more active part in national political life'. The committee considered that this issue and the cognate issue of emigrant participation in our political institutions could be dealt with most effectively in the context of these Articles.

Our first chapter sets out the broad approach we have taken to the role played by Parliament in our national life. Our prime focus is on the Constitution itself. A general point which we seek to underline in this and in other chapters is that in many instances even quite radical reform, if felt desirable, would not require any amendment of the Constitution.

Chapter 2 addresses a number of issues relating to the Dáil, primarily the electoral system. Chapter 3 revisits the committee's *Second Progress Report* of 1997 on the Seanad. Chapter 4 is concerned with the questions of Northern Ireland and emigrant representation.

For ease of presentation, the committee decided to draw a distinction between those issues it regards as likely to be politically sensitive which, as outlined above, are addressed in

chapters 2, 3 and 4, and those of a more technical character, proposals in regard to which are grouped together in chapter 5.

Brian Lenihan TD
Chairman
March 2002

Chapter 1

The role of parliament

Under the Constitution, the National Parliament, or Oireachtas, plays a central role in the governance of the state: it has the sole and exclusive power of making laws. The Taoiseach, Tánaiste and Minister for Finance must be members of the Dáil; all other ministers must be members either of the Dáil or (subject to a maximum of two) the Seanad. The government is accountable to the Dáil.

The main functions of an effective parliament include:

- the making of law
- scrutinising the executive and holding it to account, thereby balancing and checking its influence on citizens
- representing the views and interests of the people in a democratic fashion, and contributing to the formation of public opinion.

If these functions are to be fulfilled

- the structure and procedures of parliament must be such as to enable the scrutiny of proposed legislation to be informed and searching, and to encourage as appropriate the amendment of that legislation to reflect well-grounded concerns and views expressed within parliament
- parliament must enjoy and assert a degree of independence from the executive in order to apply the required level of critical scrutiny to government actions
- parliament must be so constituted and run as to ensure the fair and democratic representation of the people and to facilitate well-informed and wide-ranging debate on matters of public interest and public policy.

The importance of the functions of the two Houses of the Oireachtas is manifest. But there is a widespread and powerful sense that the two Houses are not fulfilling their functions as effectively as they should, and that their standing and relevance are in decline. There is also a view that within the institutions of

the state the role of the legislature has declined vís-a-vís those of both the executive and the judicial branches: some commentators refer to 'the executive state' to describe a system in which the government controls and regulates the life of the people to an excessive and unchecked extent. Moreover, the control of the executive usually extends, including through use of the whip system, to domination of the proceedings of parliament itself.

Additional factors are the growing extent to which real decision-making is perceived to take place away from traditional structures and in direct dialogue with the social partners and other interest groups; the role played by the media in providing a forum for debate, both among politicians and more widely; and, of course, the growing volume of legislation emerging from the institutions of the European Union.

Many of these developments affect the standing and conduct of democratic institutions across the world: the fears that have been expressed about the Dáil and the Seanad have also been expressed about the Houses of Parliament at Westminster, for example. Of course, a balanced view needs to be taken. Pessimism about the present and future can be exaggerated, as can perceptions of the extent to which the past was different. And, even where change is an undisputed reality, it can be positive in its effects; or, even if not positive from a narrow parliamentary perspective, unavoidable and therefore requiring to be worked with, not against.

It is not the task of the All-Party Committee to conduct an exhaustive analysis of the standing and functioning of the Houses of the Oireachtas, although we believe that these questions are important and urgent enough to form the subject of a dedicated comprehensive examination. The great majority of the issues which arise are not in any way dependent on the wording of the Constitution itself: on the contrary, the Constitution is sufficiently broadly-phrased to allow for a wide range of alternative approaches.

Nevertheless, we have tried in this report to take account of the wider picture as described above, and it is hoped that our specific recommendations reflect this.

Chapter 2

Dáil Éireann

Dáil Éireann is self-evidently at the heart of our democratic system, and it is vital that its core representative, legislative and scrutinising functions are discharged in a manner which is both effective and perceived by the public to be so. As we suggest in our introductory chapter, there may well be substantial scope for improvement on both counts. However, the bulk of what might be done to enhance the effectiveness of the Dáil, and to sustain public confidence in it, is not strictly speaking of a constitutional character, but has to do with issues such as the organisation of parliamentary business and the allocation of resources to the Dáil as an institution, to parties and to individual deputies. The Constitution's treatment of the Dáil is, in our view, couched in appropriately general terms, within which there is ample scope for major practical reform without, in most cases, any requirement for constitutional change.

Accordingly, this chapter is primarily concerned with the system of election to the Dáil, though it does also first and briefly address three other issues: qualifying age for membership, number of members, and evenness of representation throughout the state. Other matters of an essentially technical nature are addressed in the concluding chapter of this report.

Article 16.1.1: qualifying age for membership of Dáil Éireann

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

Article 18.2
A person to be eligible for membership of Seanad Éireann must be eligible to become a member of Dáil Éireann.

While the qualifying age for voting is eighteen years, that for membership of the Dáil is twenty-one. The Constitution Review Group recommended against change, on the grounds that persons should have more experience before qualifying for the position of public representative than is necessary to qualify to vote. The committee disagrees. We believe that no obstacle should stand in the way of young people's involvement in politics. The age of eighteen is a watershed in most matters, and there is no compelling reason to treat Dáil membership differently. The practical impact of any change is likely to be minimal: voters are quite capable of making up their own minds on a candidate's suitability. The committee therefore recommends that the qualifying age for membership should be reduced to eighteen.

Recommendation

Amend Article 16.1.1 to read:

Every citizen without distinction of sex who has reached the age of eighteen years, and who is not placed under disability or incapacity by this Constitution or the law, shall be eligible for membership of Dáil Éireann.

By operation of Article 18.2 a reduction in the age qualification for Dáil Éireann also applies to Seanad Éireann.

Article 16.2.2: number of members of Dáil Éireann

Article 16.2.2°
The number of members shall from time to time be fixed by law, but the total number of members of Dáil Éireann shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population.

The Constitution prescribes that, while the number of members shall be fixed by law, there should not be less than one deputy to every 30,000 of the population and not more than one to every 20,000.

The Constitution Review Group argued that the present constitutional provisions allow ample scope for varying the number of members, as required, and concluded that there was no need to change them.

When the Review Group reported in 1996, there was one member of the Dáil for every 21,239 people. The sharp increase in our population in recent years, which appears likely to continue, has the effect of increasing the ratio of population to members, requiring each TD to service a larger number of constituents.

The Review Group observed that

> ... an essential requirement in any democracy, depending on its constitution, its electoral system and its public institutions, is political stability. In Ireland, the high level of representation in the Dáil makes for greater democratic participation at the centre of government, it gives visibility to public representation and makes for a lively political culture, which contributes to that stability.

The committee agrees, and would in addition point out that, as local democracy in Ireland is relatively weak in terms of its powers, it is desirable that the people be well represented at the central level, where the great bulk of power is exercised.

A further key consideration identified by the Review Group is that the Dáil must also provide a sufficient number of competent TDs from whom to select the fifteen members of the government and the (up to) seventeen ministers of state. Given that a Dáil majority is eighty-four, and that all but two members of the government are under the Constitution required to be

members of the Dáil, a Taoiseach usually has a choice of substantially less than one in three of those on his or her side for ministerial office. In terms of government formation, therefore, the current number of one hundred and sixty-six deputies is adequate rather than generous. It could nevertheless be legislatively reduced if so desired.

The growth of the committee system, which at present requires three hundred and eighty-three places in all to be filled by one hundred and ninety-four members of the Dáil and Seanad (ie all members other than ministers and ministers of state), also has obvious implications for the number of TDs.

It is additionally worth noting that the Northern Ireland Assembly, which serves a population less than half that of the state, and which has substantially more limited responsibilities, has one hundred and eight members.

All in all, therefore, while the committee agrees with the Constitution Review Group that any substantial delegation of functions to a regional or local level would require the issue to be re-visited, there should at this time be no change.

The committee did receive submissions calling for a reduction in Dáil membership. It should be noted that there is considerable flexibility in the current constitutional framework. For example on the basis of the population ascertained in the 1996 census it would be possible to reduce the membership of Dáil Éireann to 120 members.

Recommendation

Article 16.2.2

It is not necessary to change the current constitutional ratio of population to members.

Article 16.2.3: evenness of representation throughout the state

Article 16.2.3°
The ratio between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as it is practicable, be the same throughout the country.

This Article provides that the ratio between the number of members for a constituency and the population of that constituency 'shall, so far as it is practicable, be the same throughout the country'.

The Constitution Review Group observed that the words 'as far as practicable' allow for some variation in response to factors such as geographical features and traditional county boundaries. Accepting that these were not irrelevant considerations, it nonetheless felt that disparities between constituencies should be kept to a minimum so as to adhere as closely as possible to the

principle of one person one vote, and recommended no change in the Article. The committee agrees.

Recommendation

Article 16.2.3

No change is proposed.

Articles 16.2.5 and 16.2.6: electoral system

Article 16.2.5°
The members shall be elected on the system of proportional representation by means of the single transferable vote.

Article 16.2.6°
No law shall be enacted whereby the number of members to be returned for any constituency shall be less than three.

Members of the Dáil are elected by the system of 'proportional representation by means of the single transferable vote' (PR-STV), from constituencies which cannot have fewer than three members. This system, which has been employed since the foundation of the state, is also that used for local elections, and has been adopted in Northern Ireland for elections to the Assembly and to local government.

In 1959 and in 1968, attempts to move to single-seat constituencies were defeated in referendums.

Constitution Review Group

The Constitution Review Group discussed the electoral system at some length and had the assistance of papers by Professor Michael Laver and Dr Michael Gallagher of Trinity College, Dublin. It began by arguing that the existing system achieves its primary purpose of allocating seats in broad proportion to votes. While noting the existence of substantial gender and socio-economic imbalances in the make-up of the Dáil, it doubted whether these could be corrected by changes in the electoral system. It recognised, however, that while no major party had formally proposed a change in the voting system, a number of basic criticisms had been voiced about it. In essence, these were that it encouraged a multiplicity of small or fringe parties; that the pressure of constituency work led to undue focus on local issues, as opposed to national and long-term policy issues; and that it encouraged excessive competition between colleagues of the same party.

Drawing on the work of Professor Laver and Dr Gallagher, the Review Group examined a range of possible electoral systems, both PR and non-PR. It assessed each of these against a range of relevant criteria:

- the effect of the system on the maintenance of an effective legislature and on the formation of effective and stable governments

- the representation of parties in proportion to their electoral support
- the social representativeness of those elected
- the level of service offered to individual voters through constituency work
- the reduction of rivalry within parties
- the desirability of some measure of security of tenure for legislators, as against the responsiveness of the system to a public desire for change
- the enhancement of discipline within parties
- continuity: public understanding of and support for the system and its operation.

In its conclusion, the Review Group recognised that no electoral system could achieve all the desiderata of an ideal system, and that 'changing an electoral system to achieve some particular objective typically means sacrificing some other desirable object'. It noted that PR-STV met a large number of criteria, including proportionality, constituency service, and responsiveness to change. Additionally, it allowed voters to cross party lines to support candidates who personally appealed to them and to indicate, through their lower preferences, preferred coalition alignments. Parties were thereby encouraged to consider a wider span of views. 'These are advantages which should not be lightly discarded.'

It also recapitulated the main criticisms of PR-STV: excessive constituency workloads; an absence of encouragement to parties to nominate socially representative slates; internecine local rivalries, leading to a high turnover of deputies and the discouragement of some high quality candidates.

Looking at other systems which might arguably avoid these drawbacks, while retaining some or most of the advantages of PR-STV, the Review Group argued that the two most deserving of consideration were (a) a pure PR-list system (used for example in Austria, Denmark and Finland), in which voters vote for a party, with seats allocated from party lists in proportion to the votes gained; and (b) the Additional Member System (used in Germany and New Zealand), in which roughly half of the representatives are returned from single-seat constituencies, with the balance being drawn from party lists in such a way as to make the overall outcome proportional to the votes cast for each party.

The Review Group recommended:

> that consideration of any proposal to change the electoral system should be guided by the following principles:
>
> 1 the present PR-STV system has had popular support and should not be changed without careful advance assessment of the possible effects
>
> 2 if there were to be change, the introduction of a PR-list or AMS system would satisfy more of the relevant criteria than a move to a non-PR system.

The objective of introducing a common method across Europe for election to the European Parliament is proceeding towards realisation – and some form of PR-list system continues to be the likely common choice. Consideration might be given to using a change in the Irish electoral system for such elections as a way of testing some of the effects of a PR-list system in the Irish context.

Consideration by the committee

The committee has had the benefit of a further study by Professor Michael Laver, *A New Electoral System for Ireland?* (1998). It has received submissions from a number of members of the public and from some members of the Oireachtas. In 1999, it conducted a survey of opinion among deputies and senators. In February 2000, it met with Noel Dempsey TD, the Minister for the Environment and Local Government, with Deputies Seán Fleming and Eamon Gilmore, and with the former Taoiseach, Dr Garret FitzGerald. The different stages of the committee's examination are outlined as follows.

a) Professor Laver's paper argues that the Alternative Member System, as outlined above, is the 'front-running alternative' to PR-STV, in that it

   - would reduce constituency pressures on deputies, and inter-party competition, through the use of single-seat constituencies, while delivering a proportional result overall
   - has been the system of choice for electoral reformers internationally over the past half-century
   - avoids the main drawbacks of other alternatives, such as highly disproportional results (as with the Westminster system) or very large constituencies (PR-list)
   - has received public support from some senior Irish political figures.

On the basis of the 1997 election results it analyses the likely practical impact of AMS, on the assumption that constituency seats are determined on the first-past-the- post system (as in Germany) and looking at list 'top-ups' both on a national and a Euro-constituency basis. A key question would be whether to introduce a threshold for party support in the PR-list aspect of the election. A 5 per cent threshold, as in Germany and New Zealand, would probably 'manufacture'an overall Fianna Fáil majority, while boosting both Fine Gael and Labour representation, at the expense of smaller parties and independents. A 2 per cent threshold might lead to a result broadly similar to that achieved by the present system, save for a reduction in the opportunities for independents.

One major innovation would be the creation of two classes of deputy. Those returned from constituencies might be more independent of their parties, by virtue of a local electoral base, and would have unambiguous electoral responsibility for constituency work. Those returned from a party list, on the other hand, would be more dependent on their party organisation, and in most cases would have little reason to do constituency work.

Professor Laver goes on to argue that, on almost any assumption about the precise location of constituency boundaries and the role of tactical voting by supporters of minority parties, 'it seems likely that Fianna Fáil would win almost all of the constituency seats, with the other parties winning most or all of their seats from the list-PR element of the election'. This in turn would mean that Fianna Fáil deputies would bear the brunt of constituency work, and save for a small number of Fine Gael deputies, 'almost all other TDs ... will be freed from electoral pressure to engage in heavy constituency workloads'.

In conclusion, he suggests that a switch to AMS with a 2 per cent threshold would probably leave the broad party balance much as it would be under PR-STV (though with fewer if any independents being elected), while creating two classes of deputy, those from constituencies being mainly Fianna Fáil and those from party lists being from other parties.

It should be noted that, as was pointed out by Dr Garret FitzGerald in a newspaper article discussing Professor Laver's study, the constituency returns in an AMS election might be somewhat different if the Alternative Vote (AV, the system used in our presidential and by-election votes) were used rather than First-Past-The-Post (FPP). Certainly the front-runner, usually Fianna Fáil, might not always win, although whether general election voter behaviour in such a system would actually follow the current by-election pattern is highly unclear. In any event, it might well be that more

constituency representatives would be non-FF than envisaged by Professor Laver, thereby reducing the starkness of the difference between the two categories of deputy.

b) In July 1999, the committee asked sitting deputies and senators their views on the reform of the electoral system, attaching the conclusions of Professor Laver's paper. Eighty-five (38 per cent) replied. While four offered no opinion, fifty-nine wanted no change in the current system, while twenty-two were in favour.

The following were some of the points made by the fifty-nine who supported PR-STV:

- it has overall worked well: 'if it ain't broke don't fix it'
- it is perceived as being fair, and has been supported by the public in two referendums
- a core element of our system is that all members are responsible to the citizens in their constituencies who elect them
- it is fairer to non-party candidates
- it offers the individual voter more choice and more influence over the outcome
- it tends to support and encourage consensus politics, which has been good for our economy and society
- politicians need to maintain a sense of what is really important through their work on the ground
- the list system would be controlled by small handfuls of people in party leaderships, and would thus be undemocratic
- the operation of the single-seat system is very unpredictable, and it might have the effect of eliminating the representation of parties in regions where they retain a reasonable degree of support, as in the UK
- the personal convenience of deputies is less important than the needs of the public.

Of the twenty-two who supported change, several favoured a move not to AMS but to a simple single-seat system, either on the basis of AV or, in one case, FPP. Two favoured PR-STV but on the basis of exclusively three-seat constituencies.

Among the points made were:

- deputies would have more time to legislate and to involve themselves in national issues
- there is an ever-growing emphasis on clientelism and intense, even 'vicious' intra-party competition, which is wasteful of resources and leads to a culture of 'gombeenism'
- AMS delivers proportionality while eliminating the excessive focus on local issues
- the list element could attract into politics people of ability who are discouraged by the present system
- there would be a clearer differentiation between local and national politics, and a chance to reform the former.

c) No clear pattern emerged from the written submissions received from members of the public, which largely reiterated, with a range of emphases, the points set out above. The Director of the de Borda Institute, Peter Emerson of Belfast, set out what he perceived to be the main flaws of the PR-STV system:

- the candidate who is the first preference of no-one but the second preference of everyone, will get a first round score of zero and may well be eliminated
- like many another electoral system, PR-STV is adversarial. Representation shared by some rather than hogged by one is, of course, better; but just as in majority voting the winner can ignore the views of the minority, so too in PR-STV successful candidates require the support of only a quota
- PR-STV favours the bigger parties because the constituencies are smaller than those used in other PR systems, and the percentage of the vote which guarantees a seat, the 'threshold', is therefore higher
- the count takes all the first preferences cast into account, but only some of the subsequent preferences.

In considering the possible adoption of a more equitable system Mr Emerson wrote:

> One obvious improvement would be a Maltese-style regional or national top-up. If a party gets, say, 10% of all the first preference votes but no constituency success, it could be awarded a number of non-constituency seats to ensure overall fair representation. Such a top-up

> would tend to iron out any discrepancies ... Another possibility is the Quota Borda System (QBS) which combines the PR-STV quota with the Borda preferendum.

Further details of the Quota Borda System and the Borda preferendum can be found in Peter Emerson's publications *The Politics of Consensus* (1994) and *Beyond the Tyranny of the Majority* (1998).

Deputy Michael O'Kennedy wrote to the committee in March 2000 outlining what he saw as some of the principal flaws in the present PR-STV system, and advocating a single-seat Alternative Vote system, arguing that: the system tends to deliver a clear result nationally and stable government; electors are already familiar with the system through voting at by-elections and they retain choices in relation to their scale of preferences; the distractions and conflicts arising from the present system would disappear; electors desirous of a change of government could bring this about quite effectively under such a system.

d) In addition to the survey of members of the Oireachtas and the written submissions received, the committee invited a number of people with special knowledge of and interest in the subject to meet with its members in session to discuss electoral systems.

Noel Dempsey TD, Minister for the Environment and Local Government, met with the committee on 9 February 2000 and argued in support of the AMS system. He spoke of the difficulties in government formation under the present system and the ever-increasing emphasis on clientelism and intra-party competition. He felt that the AMS system offered the best alternative to PR-STV. It had the capacity to remove a number of the main flaws in the current system while still delivering proportional representation:

> We constantly declare that Ireland elects people to legislate, to provide rigorous opposition to the legislators of the time, and yet shrug off the fact that the overwhelming majority of those elected spend vast amounts of time as inefficient messenger boys.

He suggested that there were too many TDs, and that if local councillors were to embrace the local ombudsman role there would be no need for what he regarded as the disproportionately high ratio of TDs to voters. The minister concluded by setting out what he expected the proposed new system to deliver: absolute proportionality; a more representative Dáil; better scrutiny of government actions; more productive use of legislators' time; stronger non-clientelist links between TDs and their constituents.

Dr Garret FitzGerald also met with the committee on 9 February 2000. In his written submission Dr FitzGerald explored how the AMS system might work in practice. Looking at the balance to be struck between constituency and list, or compensating, seats, he argued that:

> … subject to further more detailed scrutiny of this issue I take the view that, for a mixed electoral system to be acceptable, it would be necessary for not less than 40% of the seats to be filled by a compensating system.

Dr FitzGerald then considered whether the number of TDs ought to be reduced. He was opposed to this on the grounds that such a reduction in numbers would unduly reduce the choice of personnel for ministerial office and for other positions. He went on:

> It may, of course, be argued that the proposed change in the electoral system will increase the number of Dáil members with the capacity to fill such positions effectively. But, in the first place, this is an untried assumption. And secondly, even if this proved to be the case, it would be invidious, and politically unsustainable, to draw in a completely disproportionate manner upon those elected by the second method for ministerial personnel. Moreover, if, as I believe to be the case, at least 40% of the deputies would need to be elected by a second method in a Dáil reduced in size by one-third, there would remain only sixty-five constituency TDs. Such a small number of single-seat constituencies would leave room for the possibility of a disproportionate number of aberrant results, a few of which occur at every election under the present system and that could conceivably render inadequate even a 40% ratio for the second electoral method. Moreover, even if due allowance is made for a reduction in the burden of constituency work as a result of the reduction in competition through the introduction of single-seat constituencies, it may be doubted whether sixty-five TDs, each with sole responsibility for an area only one-third smaller than the average size of the existing constituencies, would be sufficient to handle the work that would still need to be done at that level. Finally, the combination of a drastic reduction in the number of constituency TDs and a new electoral system which must hive off two-fifths of the reduced number of seats to another electoral system, thus leaving only 65 single-seat constituencies, would be most unlikely to commend itself to a majority of the existing membership of the Dáil.

In the third part of his written submission Dr FitzGerald considered what method of election might be used to select

non-constituency TDs. He considered the likely outcome of using a national or regional list system and, while believing that Professor Laver might have exaggerated somewhat the extent of likely Fianna Fáil domination of the constituency seats, saw two possible disadvantages:

> … whereas 90% of Fianna Fáil TDs would have been elected by constituencies, this would be true of barely half of Fine Gael TDs, only two-fifths of Labour TDs, barely a quarter of Democratic Left TDs and none at all in the case of the other parties. The longer-term impact of reduced or nil constituency representation upon the votes and constituency organisations of parties other than Fianna Fáil could make those parties very reluctant to go along with such a reform. Secondly, even if no reduction in the size of the Dáil were proposed, many TDs might be reluctant to contemplate a 40% reduction in the number of constituency seats which would inevitably leave many of them dependent on their placing upon party lists, a process over which they would not have any control.

On Wednesday 23 February 2000 the committee met with Sean Fleming TD and Eamon Gilmore TD, both of whom favoured the existing PR-STV system.

In his submission Deputy Fleming suggested that the flaws in the present electoral system are caused by human failures rather than systems failures and strongly opposed the possibility of the list system being introduced in Ireland:

> The list system is not appropriate for Ireland. It is intrinsically undemocratic and is designed to eliminate the people's right to elect or not to elect specific individuals to the National Parliament.

Deputy Fleming suggested that the list system would institutionalise the party system and give inordinate power to party leaders:

> A list system could lead to a presidential style of government as opposed to a cabinet approach to government because the party leader would not only be picking the ministers but he or she could also be deciding on who are the members of the parliament in the first instance. In this situation ministers would have very little independence from their party leader.

Most proposals involving a list system require that a party receives a certain percentage of the overall vote before it is entitled to any seat off the list. Deputy Fleming suggested that such a requirement would lead to independent candidates creating artificial umbrella groups to meet this requirement.

Deputy Fleming then turned his attention to the issue of single-seat constituencies. His contention was that such constituencies would weaken the democratic process by greatly limiting the choice of the public in regard to who represents them, thereby alienating significant numbers of constituents from their members of parliament:

> To say to the public in any given constituency that it should have only one member in the national parliament is similar to saying to people that there should only be one supermarket in each town, there should only be one chemist in each town or that there should only be one doctor, solicitor etc in each area.

With regard to the existing duplication of work by constituency rivals Deputy Fleming considered this to be a small price to pay in ensuring that every constituent could have recourse to the public representative of his or her choice.

Deputy Fleming then considered the combination of list and single-seat constituencies:

> The combination of a list system and single-seat constituencies is not suitable for Ireland and it would not work well in practice. This type of system only works well in countries with much larger populations, where there are several hundred members in the national parliament. You need a very large number of seats in parliament to ensure there is proportionality between votes and seats when using a combination of two systems because each system in its own right has drawbacks.

A combination of the list system and single-seat constituencies would result in two classes of TD, one directly elected at constituency level and the other indirectly elected from the list. Deputy Fleming believed that this could result in a government no member of which was directly elected by the people.

Deputy Fleming, who made a number of recommendations for electoral reform, including the introduction of Friday and Saturday voting, concluded that:

> The list system on its own, is wrong for Ireland. The single-seat constituency system, on its own, is wrong for Ireland. A combination of two wrong systems does not make one right system. There is wisdom in the old phrase 'two wrongs do not make a right'. The list system and the single-seat constituency system are both fundamentally flawed. Trying to combine both systems would be a dangerous strategy. It may result in a new

> arrangement combining the best aspects of both systems; but equally we might end up with a new arrangement which includes the worst aspects of both systems. We should be doing all in our power to deal with and prevent the human failures in the political system. The main problems are not caused by the electoral system itself. I believe the multi-seat constituency system with proportional representation by means of a single transferable vote has a good track record over many elections in Ireland and should be retained in its current form.

Deputy Eamon Gilmore also disagreed with Minister Dempsey's proposed reforms to the electoral system. He felt that the introduction of single-seat constituencies would change the nature of political competition and could lead to more single-issue candidates being elected. He argued that the list system tended to shift authority from the people to the political parties and to reduce the contact between the people and their public representatives. People should not be denied access to those who represent them. The well connected would always be able to meet their politicians in the golf club or elsewhere, irrespective of the electoral system, but those less well connected needed a system which readily provided access to their representatives.

Deputy Gilmore suggested that instead of looking to smaller constituencies we should, if anything, look the other way towards larger constituencies, because this would give the overall result greater proportionality. He suggested that Minister Dempsey had diagnosed an illness in our political system but had got the prescription wrong. His view was that central administration should let go some of its powers and allow local government to exercise them in an expanded role.

Views of committee

In its discussions, the committee has been guided by a number of principles. First of all, we acknowledge the truth of the Constitution Review Group's observation that no electoral system is, or can be, ideal. Different desiderata can be in conflict with one another: the achievement of absolute proportionality may, for example, make it harder in some circumstances to form a stable government. The weight to be ascribed to the various criteria depends on context and on perspective: for instance, is the relationship between individual representatives and their constituents more or less important than maximising the pool of talent from which ministers are to be drawn? Moreover, what many view as a negative may be seen by others as a positive: for example, while the vulnerability of sitting deputies is seen as a weakness of our system, critics of the US Congress often point to the relative security of incumbents as a flaw.

Secondly, we recognise that the analysis of electoral systems is not an exact science. What appear to be technical weaknesses in an existing system may in fact result from deeper political or sociological characteristics, or from distinct cultural preferences. Moreover, as the Constitution Review Group observed in 1996, the effects of introducing a new electoral system in a particular country are unpredictable, being the product of a complex interaction of electoral law and political culture in the country concerned:

> … while changing the electoral system may seem on the face of things to be an attractive cure for some malaise in the political system, such change may well not have the predicted effect. The ingenuity of political parties and the subtlety of voters allow systems to be worked in unforeseen ways. Several salutary examples of a change of the electoral system can be found in modern Europe. The most recent is in Italy, where much was hoped for from a change in the electoral system but where, despite radical electoral reform, the same problems remain and reform of the reformed electoral system is now high on the agenda.

Thirdly, again as the Constitution Review Group recognised, continuity is an important virtue of any electoral system. It can be argued that electorates trust what is familiar, and, as has certainly been the case in Ireland, understand how to make effective use of their system's various features. The burden of proof must therefore fall on those advocating change (a) to demonstrate the seriousness of the present system's flaws and (b) to show how a new system would address those flaws without creating new difficulties of equal magnitude.

Despite the continuing attachment of a number of deputies to a straightforward system of single-seat constituencies using the alternative vote – the introduction of which was rejected by a large margin in 1968 – the committee believes that the only serious alternative to the present system is the Additional Member System (AMS), which combines local representation through single-seat constituencies with the achievement of overall proportionality through an accompanying list system whether regional or national.

The merits of the two systems can be considered independently from the question of the overall number of deputies – as we explained earlier in the chapter, we do not favour any change in the current constitutional provision relating to the ratio of deputies to population.

Undoubtedly, PR-STV promotes rivalry between party colleagues in the same constituency, to an extent which can become unhealthy and damaging. Equally, the need constantly to sustain and reinforce a constituency base can lead to an obsessive focus

on local issues, at the expense of broader legislative and policy questions, and to activity which is by any yardstick trivial or superfluous. This may indeed have the potential to weaken the overall quality of the Dáil's scrutinising and legislative performance. The relatively insecure nature of a deputy's tenure – compared to that of colleagues in other legislatures – and the nature of much of the work he or she may feel obliged to perform when elected may well deter a number of very able potential candidates from going forward.

While to date PR-STV may on the whole have succeeded in delivering reasonably stable and effective governments, there is, clearly, at least the prospect that it, more than other systems, could at some future point produce a much larger number of successful independent or single-issue candidates, which would have a negative effect on the formation or stability of government.

From a different perspective, the outcome of the last general election, in which the two biggest parties both secured more seats (in the case of Fianna Fáil, considerably more) than their share of the vote would have suggested was fair, may cast doubts on the absolute proportionality of the system.

At the same time, these criticisms can be qualified. Rivalry between colleagues, and a certain level of turnover, can create openings for new talent: it is worth recalling that three Taoisigh – Jack Lynch, Charles Haughey and John Bruton – unseated party colleagues when first elected.

Competition in serving the needs of constituents may result in the multiplication of representations to government departments, local authorities and other public bodies. But it means that public servants as well as TDs are highly sensitised to the concerns of the public, and are more likely to be responsive. In a broader sense, anything that promotes the links between TDs and their constituents acts as a corrective to the overall trend towards the concentration of power in the executive and the public sense of remoteness from the democratic process, which we considered earlier in this report.

As for the impact of the localism and clientelism on the calibre of deputies, there are many TDs with impressive records at constituency level who are excellent national politicians. While this is inevitably a subjective judgment, there is no compelling proof that the overall quality of our public representatives, or of ministers, has deteriorated over recent years. And many of the perceived disincentives to entering public life – such as intrusive media attention, reasonably modest pay, the attractions of other professions, long hours – have little or nothing to do with the electoral system, and have been observed across widely differing

democracies. Likewise, as we have said earlier, many other factors are at play in Ireland and elsewhere in threatening the status of legislatures.

Moreover, as Dr Michael Gallagher pointed out in his paper for the Constitution Review Group, in modern democracies, irrespective of the electoral system used, public representatives are finding they have an increasing workload created by constituents either as individuals or as members of the burgeoning range of special interest groups.

The presence of independents in the Dáil may inconvenience the political parties, and might potentially create difficulties in maintaining or establishing a stable government. But their election is the result of voter choice, and any significant increase in their number might well be construed as the result of a degree of public hostility to the party political system, and thus as a legitimate reflection of a real issue.

As to the contrary charge that PR-STV can be less than fully proportional, and can favour the big battalions, it is arguable that a modest bias towards the largest parties actually promotes stability without destroying the concept of proportionality.

In regard to PR-STV, therefore, while there are undoubtedly legitimate criticisms to be made of its actual and potential effects, the impact even of its negative aspects may be less clearcut or complete than is sometimes suggested. In our view, they do not outweigh its manifest and well-recognised virtues, including proportionality, responsiveness to public choice, and continuity, which together have garnered for it substantial and enduring popular support.

Turning to the AMS option, it must in turn be admitted that it has some merits. Depending on the details of the system, it delivers more or less perfect proportionality between votes and seats. It maintains the territorial link between the electorate and some, at least, of its representatives. The addition of a list element can permit parties to identify and promote talented candidates who might not otherwise be likely to gain election, and whose potential contributions as legislators or ministers might thereby be lost. It should have the effect of reducing the extent of competition between candidates of the same party, at least at local level, and should therefore result in a reduction in some of the excesses brought about by such competition.

Nevertheless, and while the advantages of AMS are undeniable, it throws up some insurmountable difficulties. While the level of competition between sitting TDs would diminish very considerably, this would not mean that intra-party competition would cease altogether. Apart from the prospect that, as can already happen, a newcomer might seek to overthrow a sitting TD

at the local constituency selection stage, there would inevitably be fierce jostling between candidates seeking places on their party lists. The overall level, duration and intensity of such competition might be less than at present, but it would remain an unavoidable reality.

Linked to this, and a major effect of AMS as a whole, as of any list system, is that significant elements of power and choice are removed from the voters in constituencies, and transferred to party leaders and managers, whose determination of the ordering of lists would normally be crucial. This could of course be done more democratically within parties – in which case the perceived advantage of being able to place new personality or technocratic candidates high on the list would disappear. In any event, it seems highly unlikely that a change of this nature, which would be seen as advantaging parties and disadvantaging the individual voter, would be well received by the public.

A defining and unavoidable aspect of AMS is the resultant division of parliamentary representatives into two classes: constituency and list. This would mark a major change in our political culture, a defining characteristic of which is that all deputies, no matter how high the government office they might hold, have strong local connections and are therefore equal in at least that dimension of their standing. The negative effects of creating two categories of deputy would be several. As Professor Laver points out, there would be little incentive for most non-constituency deputies to engage in constituency work. The entire burden of that work would then fall on those elected for constituencies, whose number would be smaller – perhaps a half of what it is now – and thus would find themselves having to do substantially more than now. Inevitably a constituency deputy with the desire or capacity to make a major contribution to national issues would find it harder to do so, both in relative and absolute terms, than is now the case. By the same token, those deputies taken from a list could lose both the benefit and the discipline of keeping in regular touch with the views and concerns of actual voters.

Moreover, far more voters in each constituency would find themselves unrepresented by a candidate for whom they had expressed a preference, which would have negative effects on the sense of public connection with the democratic system which helps to maintain its legitimacy.

Professor Laver has suggested that a possible outcome of an election on the basis of AMS would be that one party, Fianna Fáil, would win the great majority of the constituency seats, with the other parties drawing most or in some cases all their deputies from the list or lists. It is not clear to what extent such a skew would in fact occur in practice, but any serious imbalance between parties, in terms of the electoral basis on which their

deputies were returned to the Dáil, would create undesirable distinctions between them in terms of public perception and credibility. At the local level, there would be a risk that, as is often the case in first-past-the-post systems, the organisations of smaller parties would atrophy over time, thus eliminating any chance of eventual local success and, as a possible knock-on effect, weakening popular support at the national or regional level also.

Conclusion

The committee has carefully considered the case for a change from the existing PR-STV system to the Additional Member System. It recognises that both systems share many positive aspects, and that there are good arguments both against elements of the current system and in favour of the alternative. But it is not convinced that the weaknesses of PR-STV are as considerable as might be claimed, or, put otherwise, that PR-STV is itself responsible for all of the failings which have been laid at its door. Equally, it believes that a change to AMS would not necessarily achieve all of the potential benefits which have been claimed for it. AMS would bring about a radical transformation in a key element of our political system and culture, through effectively creating two classes of representative, and we believe that some of the consequences of that transformation would be negative and unwelcome. Finally, and decisively, there is no evidence of serious or widespread public discontent with the existing system: on the contrary, there is in our view a strong and enduring attachment to it. The fundamental and insurmountable argument against change is that the current Irish electoral system provides the greatest degree of voter choice of any available option. A switch to any other system would reduce the power of the individual voter. For all of these reasons, we recommend against any change in this aspect of the Constitution.

Recommendation

No change to the provisions regarding Dáil elections is necessary or desirable.

Chapter 3

Seanad Éireann

Article 18
18.1 Seanad Éireann shall be composed of sixty members, of whom eleven shall be nominated members and forty-nine shall be elected members.

18.2 A person to be eligible for membership of Seanad Éireann must be eligible to become a member of Dáil Éireann.

18.3 The nominated members of Seanad Éireann shall be nominated, with their prior consent, by the Taoiseach who is appointed next after the re-assembly of Dáil Éireann following the dissolution thereof which occasions the nomination of the said members.

18.4.1° The elected members of Seanad Éireann shall be elected as follows:-

i. Three shall be elected by the National University of Ireland.

ii. Three shall be elected by the University of Dublin.

iii. Forty-three shall be elected from panels of candidates constituted as hereinafter provided.

18.4.2° Provision may be made by law for the election, on a franchise and in the manner to be provided by law, by one or more of the following institutions, namely:

i. the universities mentioned in subsection 1° of this section,

ii. any other institutions of higher education in the State,

of so many members of Seanad Éireann as may be fixed by law in substitution for an equal number of the members to be elected pursuant to paragraphs i and ii of the said subsection 1°.

The committee was of the view that, while in its *Second Progress Report* (prepared when it was chaired by Deputy Jim O'Keeffe and published in April 1997) it has already considered the role of the Seanad, it would nevertheless be worth revisiting the matter, in view of the issues relating to Northern Ireland and emigrant participation in national life.

Background

The Constitution Review Group 1995-96 considered that the time available to it did not allow it to carry out a thorough analysis of the Seanad. It recommended therefore that 'a separate comprehensive independent examination of all issues relating to Seanad Éireann' should be carried out.

Report of O'Keeffe committee

The All-Party Oireachtas Committee on the Constitution 1996-97 (the O'Keeffe committee) decided to get this task under way quickly. It commissioned a report, *Options for the Future of Seanad Éireann,* from John Coakley, Department of Political Science, University College Dublin and Professor Michael Laver, Department of Political Science, Trinity College Dublin, which the authors presented to the committee on 5 December 1996. The committee also invited submissions from serving senators and a number of distinguished former senators. On 30 January 1997, the chairman, Jim O'Keeffe TD, opened a debate in the Seanad extending over two days on the composition and role of the Seanad. In addition, the committee received a number of submissions on the Seanad from the public.

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The O'Keeffe committee was persuaded by the argument in Coakley/Laver that the Seanad does make a useful contribution to the democratic life of the state. The direct savings achieved if it were abolished – it was estimated that it then cost about £2.8 million per annum to run – could be illusory because some of the functions it carried out would need to be reallocated to other parts of the political system. Furthermore, there would be a serious loss to the Dáil because the disappearance of senators would make the task of manning the committee system extremely

A member or members of Seanad Éireann may be elected under this subsection by institutions grouped together or by a single institution.

18.4.3° Nothing in this Article shall be invoked to prohibit the dissolution by law of a university mentioned in subsection 1° of this section.

18.5 Every election of the elected members of Seanad Éireann shall be held on the system of proportional representation by means of the single transferable vote, and by secret postal ballot.

18.6 The members of Seanad Éireann to be elected by the Universities shall be elected on a franchise and in the manner to be provided by law.

18.7.1° Before each general election of the members of Seanad Éireann to be elected from panels of candidates, five panels of candidates shall be formed in the manner provided by law containing respectively the names of persons having knowledge and practical experience of the following interests and services, namely:-

i. National Language and Culture, Literature, Art, Education and such professional interests as may be defined by law for the purpose of this panel;

ii. Agriculture and allied interests, and Fisheries;

iii. Labour, whether organised or unorganised;

iv. Industry and Commerce, including banking, finance, accountancy, engineering and architecture;

v. Public Administration and social services, including voluntary social activities.

18.7.2° Not more than eleven and, subject to the provisions of Article 19 hereof, not less than five members of Seanad Éireann shall be elected from any one panel.

difficult. The committee also agreed with Coakley/Laver that the Seanad was a resource that could be deployed to far greater effect if it were reformed.

In its analysis of the relationship between the Dáil and the Seanad, the O'Keeffe committee concluded that the traditional view of the Seanad as providing a check on the legislative impetuosity of the people's representatives in the Dáil no longer represented the reality of power. Legislative proposals were now drawn up and shaped within government departments; consultations with interest groups and experts made for a high degree of consensus before they reached the Dáil. Consequently it was the Dáil which now provides the check on the main promoters of legislation – the government. As the O'Keeffe committee pointed out:

> In the Dáil the government's proposals are paraded in public and they must win approval as being in the public interest. This means that the government's supporters in the House must feel that the proposals can be credibly presented to their constituents as being socially beneficial and that any serious criticisms made by the opposition have been either rebutted or taken into account by amendments. If a government were simply to rely on its arithmetical superiority and party discipline to impose its will brutally on the Dáil, it would run the risk of winning legislative battles but losing the political war that follows the dissolution of the Dáil and ends in the formation of a new government. This reality means that as much resources as possible must be placed at the service of the Dáil.

The O'Keeffe committee concluded:

> Seanad Éireann should be a consultative body where people with knowledge, experience and judgment over the whole spectrum of public affairs should be available in a broadly non-partisan way to help the Dáil to carry out its function more effectively and more efficiently.

The O'Keeffe committee then looked at what the Seanad should do and how it should be composed.

Functions

The O'Keeffe committee discerned two political systems failures that the Seanad should address. One is the need to develop and sustain medium and long-term perspectives across the spectrum of government policy areas so as to provide the proper critical context for legislative discussion. The second is to promote gender balance in Irish politics by ensuring greater numbers of women senators.

18.8 A general election for Seanad Éireann shall take place not later than ninety days after a dissolution of Dáil Éireann, and the first meeting of Seanad Éireann after the general election shall take place on a day to be fixed by the President on the advice of the Taoiseach.

18.9 Every member of Seanad Éireann shall, unless he previously dies, resigns, or becomes disqualified, continue to hold office until the day before the polling day of the general election for Seanad Éireann next held after his election or nomination.

18.10.1° Subject to the foregoing provisions of this Article elections of the elected members of Seanad Éireann shall be regulated by law.

18.10.2° Casual vacancies in the number of the nominated members of Seanad Éireann shall be filled by nomination by the Taoiseach with the prior consent of persons so nominated.

18.10.3° Casual vacancies in the number of the elected members of Seanad Éireann shall be filled in the manner provided by law

Article 19
Provision may be made by law for the direct election by any functional or vocational group or association or council of so many members of Seanad Éireann as may be fixed by such law in substitution for an equal number of the members to be elected from the corresponding panels of candidates constituted under Article 18 of this Constitution.

The specific ways in which the O'Keeffe committee considered that the Seanad could complement the Dáil were as follows:

Legislation

Irish legislation The legislative function of the Dáil could be greatly improved if legislation were either:

- introduced in the Seanad, brought through its first three stages, sent to the Dáil with the Seanad's observations and taken from a third stage in the Dáil to final decision

  or

- having been introduced in the Dáil and taken to its third stage there, sent to the Seanad for its observations, returned to the Dáil, and brought to decision there.

EU legislation There is a huge volume of EU regulations, directives, decisions, recommendations and opinions. While it is clear that careful checks should be carried out by the Oireachtas, owing to the heavy calls upon their time Dáil deputies find themselves unable to do this effectively. The O'Keeffe committee believed that the Seanad could play a major role in ensuring that this important task is carried out. Provision could be made to have MEPs take part in debates in the house, although without voting rights. Relevant EU commissioners and senior EU Commission officials could be invited to the House for discussions on the EU's legislative programme and the Seanad could monitor EU regulations and directives and produce reports for the Dáil on the impact of, and trends in, the legislation.

The idea of giving a major role to the Seanad in monitoring EU legislation has been endorsed by the former Attorney General, John Rogers SC. When speaking recently about the adoption of a Council Framework Decision on the European Arrest Warrant he went so far as to suggest:

> Even without a constitutional amendment it would be possible to devise legislation which would allow for the election by universal suffrage of, say, a minimum of four and perhaps as many as six members of each of the constitutionally designated panels of the Seanad. Such legislation might impose on this sub-panel a specific role in relation to the monitoring of upcoming Commission proposals and Council decisions. Indeed there is no reason why the Seanad as a whole should not have a role in this process with a view to making recommendations to the Dáil whereby it might mandate ministers in accordance with its constitutionally given role of supervising the executive.

Statutory instruments These are specific regulations made by ministers under general powers granted to them by an Act. They

have the effect of laws and the Oireachtas should keep a check on them. Again Dáil deputies, owing to the heavy calls upon their time, find themselves unable to do this effectively. The O'Keeffe committee believed that the Seanad could carry out this important task by drawing up reports on statutory instruments for the Dáil.

Review

Government activities The public service is an immense, variegated and traditionally secretive cluster of organisations which the Dáil can only partially review through parliamentary questions to individual ministers and through committee investigations. The Seanad helps in this work through participation by senators in joint committees. The O'Keeffe committee believed that the Seanad could help the Dáil further by carrying out special reviews of government programmes assigned to it by the Dáil.

Policy reports Major policy reports on their publication excite short-term interest in the media. Such reports should be debated by the Seanad in such a way that medium and long-term perspectives are developed and sustained which would provide the proper intellectual context for the critical appraisal by the Dáil of the policies contained in Bills.

Northern Ireland The O'Keeffe committee felt that there was a need to maintain a focus on relationships with Northern Ireland. The committee believed that the presence in the Seanad of members from Northern Ireland would enhance the quality of communication and understanding. As with its treatment of EU legislation, the Seanad might usefully hear representatives of relevant interest groups from both north and south.

Composition

The O'Keeffe committee proposed that, in view of the need to fill the Seanad with men and women in broadly equal numbers who could develop middle and long-term perspectives while carrying out the specific functions outlined above, the sixty members of the Seanad should be elected and selected as follows.

- *Directly elected members (15)*

  The O'Keeffe committee felt that elections based on the European Parliament constituencies would encourage candidates with broad regional and national perspectives.

- *Indirectly elected members (28)*

  Fourteen of these would be elected by the incoming Dáil and fourteen would be elected by the members of the county

councils and county borough councils, on the basis of two sub-panels, one for men and one for women, with an equal number elected from each.

- *University/third-level representation (6)*

  University members would be returned by six single-member constituencies each centred on a major third-level institution.

- *Taoiseach's nominees (11)*

  Three of these should be representatives of the various traditions in the North.

Views of senators

The Seanad held a major debate on its role on 30 January 1997, during the preparation of the O'Keeffe committee report. It returned to the subject on 5 February 1997, 24 June 1998 and 3 December 1999.

Broadly speaking, senators favoured the continued existence of the Seanad. They felt that, despite media indifference and a lack of public awareness, it did a useful job: at the same time, improvements could undoubtedly be made in its operation.

Senators largely valued the comparatively non-partisan nature of debate in their House, and felt that this stimulated a positive and constructive approach to legislation in particular. They believed that a wider range of issues was ventilated in the Seanad than in the Dáil, and also that a wider range of perspectives tended to be expressed.

In identifying areas of business in which the Seanad might take a more active role, senators highlighted

- the scrutiny of EU legislation
- the scrutiny of statutory instruments
- the investigation of the operation of the public service.

Senators also felt that more time could be allowed for debate on legislation, and that more legislation might be initiated in the Seanad; in the most recent debate, that of December 1999, widespread satisfaction was expressed that an increased volume of legislation was being initiated in the Seanad and with the fact that the Taoiseach and ministers were tending to appear more frequently in the Seanad.

There was a widespread, but not universal, view among senators that the present system of election to the Seanad was unsatisfactory, but no apparent consensus on how it might be reformed. It was agreed that the Seanad was not in any meaningful way vocational in its composition: but while some

spoke in favour of a reformed vocational system, with a modernised list of panels and greater real involvement for the various groupings involved, others felt that the social partners and interest groups already have more than ample representation in other fora and processes, and emphasised the reality of the Seanad's role as a political institution representative of all citizens. While some strongly favoured the continued participation of local representatives in the electoral process, others were opposed.

Most supported the continued existence of the university seats, but felt that all third-level graduates should be equally represented. Likewise, most of those who addressed the issue appeared to accept the political necessity, from the point of view of government effectiveness and the primacy of the Dáil, of a continued power of nomination for the Taoiseach.

Views of committee

The committee, in reconsidering the issues faced by the O'Keeffe committee, finds itself broadly in agreement with its predecessor. It agrees that the Seanad has played a useful role in our national political life. It has a number of distinctive characteristics, including its relatively non-partisan atmosphere and its capacity to take a relatively long-term view, which make it, as a second chamber, complementary to the Dáil, the primacy of which is not contested. Individual senators, both within their own House and in joint committees, play a valuable role in extending the range of views and deepening the pool of talent and experience brought to bear on national issues.

The Seanad's key role, as prescribed in the Constitution, will and should remain the processing of legislation. The greater use being made of the Seanad in relation to the initiation of legislation, and the willingness of government to take on board substantial amendments proposed in the Seanad, are both trends which we strongly endorse, and would hope to see gain further momentum.

On balance we favour the strengthening of the Seanad's own standing orders to ensure full debate on Bills rather than confining the Seanad's role in the legislative process in the manner suggested in the *Second Progress Report*.

At the same time, we also share the view that the Seanad could play a more effective role than heretofore through the development of a range of additional functions. The exercise of these functions does not in general require constitutional definition, but an overall re-organisation of the work of both Houses of the Oireachtas. We would endorse the O'Keeffe committee's recommendations in relation to

- the scrutiny of EU legislation, or, more broadly, of EU business generally
- the scrutiny of secondary legislation through statutory instruments
- detailed consideration of policy reports by commissions, expert groups etc, in particular those with a medium-to-long-term focus.

The Seanad might also develop a particular interest in relation to developments in Northern Ireland and in the North/South and British-Irish institutions established by the Good Friday Agreement – this would be particularly appropriate if the committee's recommendations in regard to enhanced Northern participation in the Seanad were accepted.

Another possible role which has been mooted for the Seanad is the review of aspects of government activity. The O'Keeffe committee suggested that it could carry out special reviews of government programmes assigned to it by the Dáil. Other proposals have included the scrutiny of proposed appointments to certain public offices, and annual reviews of the performance of government departments. The committee sees potential merit in some initiative or initiatives along these lines. A more practical point is that, to respect the primary line of accountability, from government to Dáil, the main focus of reform should be on the Dáil's own procedures (for instance, in relation to question time and the order of business) and on the role, powers, and resourcing of committees. The Seanad's role in holding the government to account is necessarily secondary to that of the Dáil, and, while use should be made of its potential in this area, this should take account of what is happening elsewhere in the Oireachtas.

Composition

The committee recognises the difficulties inherent in any scheme for reforming the composition of the Seanad. A fundamental problem is that there is a tension between enhancing the public credibility and democratic legitimacy of the Seanad and maintaining the primacy of the Dáil as the principal legislative chamber and main assembly of the people's representatives. There is also a tension between the value attached to the Seanad's role as a more reflective and less politically partisan complement to the Dáil and the necessity, nonetheless, for the government of the day to be able to carry on its business in line with its Dáil mandate.

The committee believes that the O'Keeffe committee's proposals, as summarised above, represent one possible approach to reform. But we believe that there could be value in considering another, and perhaps more radical, way forward.

We share the view that the vocational element of the present arrangements has in practice become quite meaningless. Moreover, we would not support any attempt to revive it in a modernised form. Interest groups already have ample opportunity to make their views known in other fora and in direct dialogue with the government. Furthermore, the virtual impossibility of defining fair and objective criteria for the selection, and the relative weighting, of those groups and organisations which might be entitled to nominate representatives to an elected second chamber, is apparent.

We also believe that the current electoral system for the Seanad, quite apart from the well-recognised practical demands it makes on candidates, makes the institution more remote from the public and weakens the overall sense of its democratic legitimacy. Local representatives already play a key role in the overall governance of the state, the significance of which has recently been enshrined in the Constitution, and we see no basis for their exercising this additional function.

The question of university representation is difficult. On the one hand, the committee fully shares the general view that the university senators have played, and continue to play, a distinctive and valuable role in the work of the Seanad, and that many have also made an important contribution to broader national life. That in itself is, in classic conservative terms, a powerful argument for a continuation of the practice. But from any rational perspective it is an anomaly and an anachronism. As is widely recognised, a primary reason for the maintenance of the university seats in the 1937 Constitution was a desire to ensure that the protestant minority had a voice in national affairs through the Dublin University senators. But it also reflected contemporary practice in Great Britain (where the universities of Oxford and Cambridge elected MPs) and in Northern Ireland. These factors no longer apply. Experience shows that members of religious minorities have had considerable success in gaining election to the Dáil as members of mainstream parties. Trinity College is no longer in any sense a protestant institution. Universities elsewhere in these islands no longer return parliamentary representatives.

It has been proposed, including by the O'Keeffe committee, that university representation be reformed to allow graduates of all third-level institutions in the state to vote. The Constitution has already been amended to allow for this possibility. This would undoubtedly be fairer to graduates of the newer institutions (although citizens who have graduated from universities outside the state, including in Northern Ireland, would still be excluded). But broader considerations of equity call into question why university graduates as a class should have an entitlement denied to other citizens. University graduates are disproportionately young (given the continuing increase in third-level participation) and drawn from the higher socio-economic classes. But even if

this were not the case, there is no reason why the possession of a given qualification should entitle some citizens to a privileged role in the selection of members of our core democratic institutions. In the final analysis, therefore, while the committee would not support the abolition of university representation in isolation from the broader reform of the Seanad, we think that it should not be retained, even on a reformed basis, as part of such a broader reform.

Finally, in relation to the Taoiseach's nomination of a number of senators, we recognise that this might appear to run contrary to the concept of democratic legitimacy. More fundamentally, however, we believe that the key test of a government ought to be, as it is now, whether it can command a majority in the primary elected House, the Dáil. It is therefore reasonable, in our view, that the government should in normal circumstances, where it retains the support of its own party members in the Dáil, be able to rely on a majority in the Seanad also. Taoisigh have been able to make use of this mechanism to appoint a range of diverse individuals, by no means all of them party supporters, to the Seanad. And some element of nomination is quite common elsewhere.

Taking all of these elements into consideration, the alternative we propose is that

a) forty-eight of the sixty senators be elected, on the same day as the election to the Dáil, by proportional representation on a national list system

b) eight be nominated by the Taoiseach

c) a further four also be nominated by the Taoiseach, in accordance with a procedure specified by law, to represent citizens resident in Northern Ireland (the issues involved are discussed in Chapter 4 of this report, on Northern Ireland and emigrant representation).

The election of the bulk of senators on a national list system would give them the direct electoral mandate and democratic legitimacy which they currently lack. At the same time, the system would be sufficiently different from that used for the Dáil (PR-STV which, as we have argued in the previous chapter, enjoys strong public support, and maintains the powerful local connection between representatives and the electorate which is a notable characteristic of our political culture) to make clear that the two Houses are complementary and so reduce the risk of conflict between them. The Taoiseach's continued right to nominate eleven senators should ensure an overall government majority in the Seanad.

A national list system would be more or less perfectly proportional, so that any grouping capable of gaining more than 2% of the overall national vote would secure representation. Moreover, parties could if they wished use the list system

creatively to ensure the election of candidates with special experience or expertise who might not have a strong local base but who could make a significant contribution to national debate. This would to some extent balance the kind of candidate that emerges from the highly competitive multi-seat constituency system used in elections to the Dáil. The current roles of the Seanad as a proving ground for up-and-coming young politicians, and as a means of ensuring the continued participation of senior politicians who might be in danger of losing their Dáil seats, might also continue, depending on the parties' ordering of their lists (candidates for the Dáil might also appear on a Seanad list). A feature of the proposal would be that any person or organisation, including an independent or group of independents, could put forward a list.

Furthermore, as we shall suggest in Chapter 4, consideration could be given to enabling citizens resident in Northern Ireland, and qualified emigrants, to take part, most probably through postal voting, in elections to the Seanad on the same basis as those resident in the state: they could choose whether or not to support specifically Northern or emigrant parties or groups which had put forward lists.

Given our view that Seanad Éireann should have an enlarged role in the scrutiny of EU business Seanad Éireann could consider taking the necessary procedural steps to allow MEPs elected in the state and Northern Ireland to speak in periodic debates on EU matters.

Chapter 4

Northern Ireland and emigrant participation in national political life

Introduction

Immediately after the conclusion of the Good Friday Agreement, the Taoiseach requested the All-Party Committee to consider the question of the participation of people from Northern Ireland in national political life. The committee has taken the view that the issues involved cannot be considered fully and satisfactorily in isolation from its wider remit, and accordingly has decided to approach them in the context of its examination of the Constitution's provisions on the National Parliament. It seems logical, however, to consider all matters relating to Northern Ireland participation together, and therefore the committee briefly considers whether citizens resident in Northern Ireland should be entitled to vote in presidential elections and in referendums.

By the same token, many, though not all, of the issues which arise relative to Northern Ireland participation also arise when the question of a role for emigrants in our political life is considered, and therefore the committee has decided to deal with that question here.

Northern Ireland participation: role of committee

As indicated above, on 11 April 1998 – the day after the Good Friday Agreement was reached – the Taoiseach wrote to the committee's chairman to enquire whether the committee might examine:

> how people living in Northern Ireland might play a more active part in national political life, to the extent that they so desire and in a spirit consistent with the principles underlying the peace settlement.

The committee agreed to undertake such a review, in the context of its wider review of the institutions of the state, and on 14 May 1998 issued a press release inviting public submissions. On 15 May 1998 the chairman of the committee wrote to the leaders of the pro-Agreement political parties in Northern Ireland apprising them of the review and advising them that they were free to make submissions to the committee.

The committee has received submissions from the SDLP, Sinn Féin, and a number of other organisations and individuals. On 25 March 1999 the committee held separate discussions with an SDLP delegation (Seán Farren MLA, Denis Haughey MLA, Alban Maginness MLA and Bríd Rodgers MLA) and with a Sinn Féin delegation (Gerry Adams MP MLA, Mitchel McLaughlin MLA and Caoimhghín Ó Caoláin TD). Members of the committee have also had the benefit of informal discussion with a number of figures representative of unionism.

Background

The first Dáil, elected in 1918 on the basis of Westminster constituencies, sat as an all-island body (though without unionist participation), as did the second Dáil. However, following the adoption of the Constitution of the Irish Free State in 1922, TDs were no longer returned from Northern Ireland constituencies, and this has remained the case.

The question of whether Northern Ireland MPs might be admitted to the Oireachtas was raised from time to time, but never received significant support either from the government of the day or in the Oireachtas. In 1933, shortly after the formation of his first administration, Éamon de Valera rejected an appeal from leading Northern nationalists, and in 1936 he prevented the adoption of a motion at the Fianna Fáil Árd Fheis urging the inclusion of a right to Northern representation in the new Constitution.

While, during the election campaign of 1948, one of the planks of Clann na Poblachta's platform was the admission of Northern MPs to the Oireachtas, this was subsequently scaled back by Sean MacBride to involve a right of audience in the Dáil, and nomination to the Seanad. In March 1949, after the formation of the first inter-party government, the then Attorney General prepared a memorandum on Northern Ireland representation in the Oireachtas. While he concluded that it was 'natural and proper that all Ireland should be represented in parliament', he considered that the provisions of the Constitution regarding the delimitation of constituencies and the relationship between the population and the number of members returned made it impossible to admit persons representing constituencies in Northern Ireland to membership of Dáil Éireann. However, he did believe that it was possible in regard to the Seanad for the Taoiseach to use the power of nomination to secure Northern representation; and that there was no constitutional bar to a right of audience, either general or restricted, in either House of the Oireachtas, possibly under rules of procedure but certainly by legislation. No action was taken on the Clann na Poblachta proposal.

When the matter was debated shortly after de Valera's return to office in 1951, he argued that 'a gesture of this sort' would be of

no value in helping to bring about an end to partition. It would, wrongly, imply a capacity to exercise *de facto* jurisdiction over Northern Ireland. Northern MPs would be able to vote on issues which did not affect their own constituents, and they would be likely to take sides within the Dáil in a manner which could create antagonisms and difficulties. The proposal was defeated by 82 votes to 42, with leading members of the opposition, including John A Costello, voting with the government.

A proposal to grant a right of audience in the Dáil or Seanad was debated in the Dáil on 28 October 1954, and defeated by 100 votes to 21. Costello, as Taoiseach, pointed out that Unionists would not avail themselves of the right; he felt that other Northern representatives would press for full membership and that if this were granted it would be contended that the Dublin parliament should seek to exercise control over the whole thirty-two counties, making conflict inevitable. De Valera endorsed this approach.

During the 1960s, and for the duration of the subsequent violent conflict in Northern Ireland, the attention of constitutional nationalists in Northern Ireland, and of Southern governments and parties, was focused on the achievement of civil rights, equality and parity of esteem, and the creation of a political process leading to the establishment on a partnership basis of political institutions within Northern Ireland and linking North and South. The question of Northern Ireland representation in the Oireachtas, insofar as it was considered at all, would presumably have been seen as very much secondary to, and conceivably as a distraction from, these objectives. Republicans sought the early establishment of a new thirty-two county state, and until the mid-1980s pursued a policy of abstention from the Dáil, and so the matter was of little interest to them either.

However, several Taoisigh have in fact made use of their power of nomination to the Seanad to offer a platform for Northern views. The Northern protestant, Denis Ireland, became a senator in 1948. More recently, from the 1980s onwards, the practice has become common, to the undoubted benefit of the Oireachtas. Distinguished individuals drawn from both communities have been nominated: these include Séamus Mallon, Brid Rodgers, John Robb, Gordon Wilson, Sam McAughtry, Stephen McGonagle, Maurice Hayes and Edward Haughey. It is widely recognised that many of these senators have made an outstanding contribution to national debate, primarily on Northern Ireland issues but not exclusively so.

Furthermore, the New Ireland Forum and the Forum for Peace and Reconciliation also broke suggestive new ground. While they were set up as platforms for consideration of issues arising out of the Northern Ireland conflict, and not to examine a wider range of public policy matters, and while they were appointed, not elected, they did nonetheless bring public representatives from throughout

the island together in a structured fashion, and facilitated serious and constructive debate.

Submissions to committee

The SDLP, in its written submission to the committee, the thrust of which was echoed in subsequent oral discussion, argued that the 'broadest possible interpretation' should be taken of the question put to the committee, and emphasised that 'national political life' should not, particularly in the context of the new beginning brought about by the Good Friday Agreement, be defined purely as occurring within Southern institutions.

It pointed out that 'that part of Irish national life which persists in Northern Ireland and over which the Assembly and its Executive will exercise devolved powers will be the responsibility of representatives from both ... traditions'.

Secondly, 'involvement in the wider national political life will be made a reality through the North/South Ministerial Council'. The SDLP also underscored the potential value of two other possible institutions to which the Agreement requires that consideration be given: a joint North/South parliamentary forum – which would involve members of the Oireachtas and members of the Assembly – and an independent consultative forum 'representative of civil society, comprising the social partners and other members with expertise in social, cultural, economic and other issues'.

The SDLP, noting the distinction with which two of its members, Séamus Mallon and Bríd Rodgers, have served in the Seanad, also suggested that consideration be given to 'extending the electorate to the Seanad to include local councillors in Northern Ireland; making a fixed provision for the nomination of a number of senators from the North; providing a "right of hearing" in the Oireachtas, including before its committees, to members of the Northern Ireland Assembly on appropriate occasions'.

Sinn Féin's submission begins by arguing that it is the right of Irish citizens resident in Northern Ireland, by virtue of their entitlement and birthright under Article 2 of the Constitution, as amended, to be part of the Irish nation, to send representatives to the Irish legislature. Making the case for such representation, it contends that:

- on partition the Northern nationalist population was effectively disenfranchised: 'not allowed participation in the political institutions of the Southern state, they were gerrymandered into insignificance in the Northern state, and totally isolated and swamped at Westminster, even if they were prepared to swear a repugnant oath'

- tens of thousands of people 'elect their parliamentary representatives in the Six Counties as Irish legislators, rather than as oath-bound participants in the Westminster parliament ...'

- while the institutions of the Agreement will improve matters, they still fall well short of nationalist objectives, leaving a 'democratic representational and consultative deficit'.

Sinn Féin suggests that Northern representation could be organised in a number of ways:

a) the existing 18 Westminster MPs could be automatically accorded membership of the Dáil, either with full voting entitlement or at a more restricted consultative and speaking level

b) a determined number of seats could be allocated to Northern parties in proportion to their electoral representation in the Northern Assembly

c) elections could be organised in the North at the same time as Dáil general elections.

Admitting that unionists would be unlikely to participate in any such arrangements, Sinn Féin felt that this should nonetheless not prevent the facilitation of participation by others. The door could be kept open to future unionist involvement, including by leaving vacant seats.

At a minimum, Sinn Féin argues that either Westminster MPs or Assembly members – perhaps the former, for logistical reasons – should have the right to attend in the Dáil chamber, without participating in votes.

In conclusion, Sinn Féin proposes:

> a right to attend and speak as a consultative member of the Dáil for all six-county Westminster MPs pending the right of all representatives to full voting rights
>
> full voting rights for citizens registered on the election lists in the six counties in referendums and presidential elections.

A number of submissions made to the committee by members of the public essentially make the same points.

The committee has also noted a number of recent comments on the matter by senior Sinn Féin figures, including newspaper articles by the Northern Ireland Minister for Education, Martin McGuinness MP MLA (*Irish News,* 19 July 2000, and *Irish Examiner,* 10 August 2000). Mr McGuinness suggests that 'the

matter might be specifically approached in terms of what requires a constitutional amendment and what does not'.

In relation to the latter category – possibilities not requiring a constitutional amendment – he suggests that 'the minimum that could be expected is that the standing orders of the Dáil be altered by that body to allow Northern Westminster MPs (18 in all) to attend and speak at certain debates ... Debates on the work of the North/South Ministerial Council and the all-Ireland implementation bodies would be obvious examples ...', as would debates on international issues.

He goes on to propose that 'the existing Northern presence in the Seanad should be provided for as of right and through some mechanism of electoral choice', with 'a more realistic number' of representatives. He notes that Northern senators could participate in Oireachtas joint committees and joint sessions of both Houses.

Mr McGuinness also advocates that citizens in the North should have the right to vote in certain referendums, though he admits that 'in the jurisdictional circumstances which prevail at present, it is understandable that such a right should be confined to issues which affect all citizens on the island ... it is accepted ... that Irish citizens in the North could not reasonably anticipate having a vote on something which would exclusively impact upon those living in the twenty-six counties, eg an item to do with taxation ...'.

Mr McGuinness believes that 'a constitutional amendment to allow for votes in presidential elections would be more straightforward. But the same urgency does not attach to this because there is not likely to be another election until 2004, if even then.' He adds that 'constitutional moves may also be required to take involvement in the Dáil to the voting stage or to have northern deputies directly elected to it, depending on the exact proposals; changes in electoral law would undoubtedly be necessary'.

General approach of committee

The committee recognises the sensitivity and complexity of the issues raised by the question of enhanced Northern Ireland participation in the institutions of the state. They have to do with the fundamental character of those institutions; with the relationship between the state and the Irish nation; with the nature and objectives of the Northern Ireland peace process, and with the Good Friday Agreement and the institutions established under it. Accordingly, the committee is acutely aware of the need for it to pay due regard to the full range of factors involved. It recognises the legitimacy of a number of potentially quite different perspectives, and thus of a number of possible approaches. Its discussion of the issues, and its recommendations, are inevitably, therefore, somewhat tentative.

As has been widely recognised, the Constitution's treatment of the concepts of 'nation' and 'state' is not wholly unambiguous. There is, perhaps inevitably, a substantial overlap between the two. The first three Articles of the Constitution are grouped under the heading 'The Nation', while the next eight fall under the heading of 'The State'. But Article 7 speaks of the 'national flag', while Article 9.2 stipulates that 'Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens'. More fundamentally, while no other approach might have been practicable, there is, to put it no more strongly, a certain awkwardness about the fact that the provisions of the Constitution regarding the nation were both originally adopted and amended, not by the vote of all those who might be regarded as forming part of the nation, but by majorities of voters within the (twenty-six county) state alone.

The revised Article 2 makes it clear, however, that nation and state are not coterminous: 'It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland.' Membership of the nation, therefore, derives primarily from birth on the island of Ireland, but is also wider in its catchment.

While the extent of the state is nowhere defined in the Constitution, the acknowledgement in the revised Article 3.1 of the existence of two 'jurisdictions' on the island, coupled with the provisions of the British-Irish Agreement, 1998, which include an acknowledgment 'that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish', could be said formally to confirm the long-standing practical reality that the jurisdiction of the state does not extend beyond the twenty-six counties. Article 3.1 states that until a united Ireland is brought about 'the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution' (ie, the Parliament of the Irish Free State).

Many members of the nation, therefore, live outside the state: and, of course, not all who live within the state are members of the nation, or citizens.

While the Constitution's treatment of the Irish nation is extremely significant, its primary focus is on the state and on its institutions and laws. In turn, the reality is that, first and foremost, those

institutions govern, and those laws apply to, the people of the state. It is they who pay the taxes and receive the social welfare benefits voted by the Dáil or determined by the government, and it is they who are far and away most affected by the government's policies and actions on the full range of public policy issues, whether health, education, transport, industrial development, environment and so on. It is not denied that the actions of the government can affect citizens other than those resident within the state. Clearly, policy on Northern Ireland has a direct bearing on those living there. The success or failure of economic policies has had, and continues to have, a major impact on patterns of emigration and, indeed, of return and of immigration.

But a fundamental starting point for the committee is its conviction that the overwhelming democratic imperative is that the institutions of the state should represent and serve the people of the state. As we will argue, this need not preclude all participation by other citizens or their representatives in those institutions. But in our view, the principal focus must continue to be on the rights and interests of those within the state. This perspective applies particularly to the composition of the Dáil, which, as we note elsewhere in this report, has the predominant role in the enactment of legislation, and is the source from which all but two members of the government must be drawn, and to which the government is accountable under the Constitution. Furthermore, as we set out in the chapter on the Dáil, the Constitution reflects our political culture in providing for and indeed reinforcing a strong connection between deputies and the specific localities from which they are elected and which they represent.

As we argue in Chapter 3, the Seanad's role can and should be somewhat different from that of the Dáil. Because it is not the decisive voice in the enactment of legislation or in the formation or survival of the government, it can afford to, and should be encouraged to, develop medium and long-term perspectives, and to approach issues in a less partisan fashion. It can also serve as a vehicle to ensure that interests and concerns not directly represented in the Dáil can be expressed.

A second fundamental objective of the committee is to ensure that nothing it proposes is at variance with the provisions of the Good Friday Agreement, or could in any way potentially threaten the stability of the Agreement or the success of the institutions established under it, including the Northern Ireland Assembly and the North/South Ministerial Council. The Agreement is a subtle, complex, and carefully-balanced political and legal construct, the implementation of which is still continuing. The success of its long-term objectives of lasting peace, partnership and reconciliation depends on the sustained support of both communities in Northern Ireland.

There is overwhelming support within the state, and among nationalists in Northern Ireland, for the Agreement. A key aspect of the Agreement is the way in which it sets out a balanced and agreed basis for approaching the issue of the status of Northern Ireland. It recognises the continuing legitimacy of the nationalist aspiration to a united Ireland achieved by peaceful and democratic means, on the basis of the principle of consent, but also recognises the legitimacy of the unionist aspiration and acknowledges the current status of Northern Ireland. While setting out the ground rules for future change, if consent to that change is forthcoming, the Agreement also provides for the establishment of a number of interlocking political institutions, reflecting the principal political relationships within Northern Ireland, within the island of Ireland, and within these islands. These institutions are to proceed on the basis of what is defined as the parallel consent of unionists and nationalists – in the case of the Northern Ireland Assembly – and of agreement between the members, in the cases of the North/South Ministerial Council and the British-Irish Council.

As the Sinn Féin submission makes clear, most Northern nationalists after partition felt a continuing alienation from the institutions of Northern Ireland, and from the institutions of the British state. At present, some nationalist MPs opt to take up their seats at Westminster, while others abstain. It is a truism that nationalists would, by definition, prefer to find themselves in circumstances where they were called upon to elect members of an all-island parliament. The current situation, even after the Good Friday Agreement, does not represent nationalists' preferred option. The committee is mindful of the force of those arguments.

However, as the extent of nationalist support for the Agreement demonstrates, it is generally believed to have the potential very substantially to improve the situation of nationalists in Northern Ireland, while also providing for concrete recognition of the all-island dimension of their identity. Nationalist representatives are now participating in the government of Northern Ireland on a basis of equality and partnership, and the North/South institutions of the Agreement have also begun to operate: while these are intended to achieve mutual benefit across a range of practical issues, they also have an important symbolic dimension. And, of course, the government is also involved in the North/South Ministerial Council and the British-Irish Council, while it is hoped that the North/South joint parliamentary forum and independent consultative forum mentioned in the Agreement will also be established. The SDLP's submission to the committee is in our view correct in cautioning against any Southern assumption that 'national political life' is confined to the institutions of the state alone, and in emphasising the substantial intrinsic merit of the new institutions brought into being by the Good Friday Agreement.

For unionists, on the other hand, a key aspect of the Agreement is its approach to the implications of the principle of consent, and in particular its acknowledgment that Northern Ireland's status as part of the United Kingdom reflects and relies upon the present wish of a majority of its people.

A further aspect of the Agreement which is particularly relevant in this context is its recognition of 'the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose ...', which clearly links into the statement in Article 2 of the Constitution that 'it is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation'. The committee recognises that, as discussed above, nation and state are overlapping but distinct concepts. It also appreciates that the implementation of these principles of the Agreement is not straightforward. There is an active debate in Northern Ireland on how 'Irishness' and indeed 'Britishness' should or can in practice be expressed, and how the expression of one can be balanced against the expression of the other and the needs of the community as a whole. However, the committee believes that every effort should be made to give these principles of the Agreement concrete effect.

Finally, given that the Northern Ireland situation has such a central place in the political business of the state there is a good practical case, strengthened by experience of the performance of Northern Ireland participants in the Seanad, for ensuring the continuation of an informed and representative Northern voice in the body politic, and thereby assisting the quality of debate on this crucial issue.

Conclusions

North/South joint parliamentary forum and independent consultative forum

The committee strongly endorses the proposal in paragraph 18 of Strand Two of the Good Friday Agreement that the Northern Ireland Assembly and the Oireachtas should 'consider developing a joint parliamentary forum, bringing together equal numbers from both institutions for discussion of matters of mutual interest and concern'. We also support the establishment of an independent consultative forum 'representative of civil society, comprising the social partners and other members with expertise in social, cultural, economic and other issues', as mooted in paragraph 19. Both could make a major contribution to dialogue and mutual understanding between North and South.

Dáil

The committee does not favour the direct election of Northern Ireland representatives to the Dáil, or the participation as full members of those elected for Westminster constituencies. It believes, first, that this would be at odds with the function of the Dáil as the primary gathering-place of the representatives of the people of this state, who are bound by the laws enacted by the Oireachtas and who are served by a government drawn primarily from the Dáil and accountable to it. Those citizens resident in Northern Ireland are not affected to anything like the same degree by the actions of the Dáil as are those within the state: and indeed would continue to operate under laws enacted at Westminster or in the Assembly.

Secondly, the committee fears that the inclusion on equal terms of Northern representatives in the Dáil could be interpreted as a refusal on our part to accept the implications of the careful balance on constitutional issues achieved in the Good Friday Agreement. This would damage the prospect of durable cross-community support for the Agreement, and put at risk the enormous gains made in the Agreement. If the highest current national priority in relation to Northern Ireland remains the successful implementation and operation of the Agreement, as we believe it should, then it would be imprudent to contemplate such a step.

Thirdly, the committee believes that a constitutional amendment would be required to confer an unlimited right of audience on any person who is not elected to Dáil Éireann.

Recommendation

There should be no change in the franchise for Dáil elections.

The committee acknowledges that the immediate emphasis of the Sinn Féin submission, in particular, is on the possibility that Northern Ireland Westminster MPs might have a limited right of audience within the Dáil. This would not require a constitutional amendment, and might technically be effected through the Dáil periodically forming itself into a Committee of the Whole House for the purposes of selected debates, most obviously for instance on Northern Ireland matters and on the operation of the Good Friday Agreement. The frequency and organisation of such debates could easily be altered – as no constitutional amendment is required – over time, in the light of experience.

We accept that any addition to the Dáil of participants, even if temporary and non-voting, other than those elected from

constituencies within this state, could be held to be inconsistent with the thrust of our approach. We also accept that any participation in the Dáil by Northern representatives might potentially run the risk of opening up basic constitutional issues settled in the Good Friday Agreement. However, we think that in this case those risks are relatively mild and should be kept in perspective. The expertise and experience upon which Northern MPs could draw could certainly enhance the quality of certain important Dáil debates. Such an initiative would be strongly welcomed by certain Northern representatives and their supporters, and would address the continuing desire of many nationalists for further concrete expression of their Irish identity and their membership of the wider national family. The Dáil could consider taking the necessary procedural steps to allow MPs elected for Northern Ireland constituencies to speak in periodic debates on Northern Ireland matters and on the operation of the Good Friday Agreement. The committee is of the view that any such participation should take place on a cross-community basis with parity of esteem for the different communities in Northern Ireland.

An alternative which is worth considering is that ministers in the Northern Ireland Executive, and perhaps also members of the Assembly, might be invited instead of or as well as Westminster MPs. However, on reflection this is a more problematic option. The numbers involved might be much greater, which would cause practical difficulties. More particularly, drawing upon those serving in institutions established by the Agreement, and especially ministers, might be held more directly to cut across the balance within the Agreement, and lines of accountability and reporting, above all in relation to the North/South institutions. For that reason we would prefer the involvement of MPs from Westminster, which is also a sister sovereign legislature.

Seanad

The committee sees a particular role for the Seanad in the representation of views and interests which might not be directly represented within the Dáil, and as a forum for debate in a longer-term perspective than may be possible for the Dáil. This orientation, together with the valuable precedent established by the contributions of present and past Northern Ireland senators, persuades us that it would be valuable to extend and formalise existing practice, and to provide for the presence of Northern Ireland members in the Seanad.

The precise means by which the selection of those members would take place is bound up with our more general consideration of the composition and election of the Seanad, as set out in Chapter 3. In summary terms, we are proposing in that chapter that forty-eight members be directly elected (on the basis of a

national list system), with twelve being nominated by the Taoiseach.

In that context, the following options might be considered. As will be seen, some of them could proceed even in the absence of other changes to the Seanad, or if other aspects of our proposals in regard to the Seanad were modified:

a) there might be a political understanding between all parties that a given number – say four or five – of the Taoiseach's nominees would be drawn from Northern Ireland and on the basis of cross-community representation

b) alternatively, a revised constitutional provision governing the Taoiseach's power of nomination might stipulate that, in addition to a given number, say eleven, selected at large, there would also be a given number of nominees from Northern Ireland, their selection to be conducted in a manner prescribed by law. Legislation might require the Taoiseach to take into account factors such as the desirability of community balance and the relative strengths of political parties within the Assembly and at Westminster, and the views of party leaders, from whom proposals could be sought

c) a number of seats could be filled by direct election from a Northern Ireland constituency.

The committee acknowledges that the nomination of Northern Ireland senators by the Taoiseach would in terms of democratic principle be less satisfactory than direct election. However, it has the merits of building on the present system, and therefore being less potentially contentious in political terms; of being simpler and more flexible; and of facilitating the participation in the Senate of members of both traditions, on the assumption that in any direct election too few unionists would vote to return a representative. A provision that the selection process be in accordance with law could ensure that certain broad requirements, including reference to the political parties in the North, be met, without making the process too cumbersome.

The direct involvement of voters within Northern Ireland through their inclusion in the overall roll for the election of senators on a national list system would have obvious appeal to the nationalist community, and deserves consideration. In such an election electors could vote either for one of the mainstream party lists, or could support a distinct Northern list or lists.

There are three main possible difficulties: the presumably greater negative impact on unionist opinion than would be caused by a system of nomination; the likely absence of serious unionist participation in such a poll; and the practical difficulties involved.

In terms of practical issues, it would have to be decided whether the existing Northern Ireland Register of Electors could be used, or whether a separate register would have to be compiled. The distribution and validation of applications for registration would require careful organisation.

The exercise of the franchise in Northern Ireland would require a postal ballot. However, the Supreme Court, in its judgment in the case of *Draper v Attorney General* (1984) observed that 'postal voting may, without extraordinary and complex safeguards, be open to abuse'. In this regard, we note that concerns have been expressed, including by the Chief Electoral Officer for Northern Ireland and by the Northern Ireland Affairs Committee of the House of Commons, about the operation of the absentee voting system in elections in Northern Ireland. The Report of the Elections Review conducted by the Northern Ireland Office (October 1998) expressed the belief that 'these concerns are well founded'. It acknowledged that in some cases malpractice can be benign in intent (where the known wishes of a given voter are being acted on), but also argued that there is evidence of malicious abuse. We note, however, that the scale of any such abuse has not been established, and also that there have been no prosecutions. Nevertheless, the possibility of abuse is a reason for caution. Moreover, it would also serve to weaken public confidence in the integrity of the system. A further consideration would be the difficulty of prosecuting those living outside the jurisdiction for electoral fraud. These practical difficulties are all very real, and they would require the very careful regulation of the registration and voting systems. Nonetheless, in our view, they should not necessarily be held to be decisive.

However, what is for now decisive, in our view, is the risk that introducing such a system now would be politically divisive within Northern Ireland and might damage the stability of the institutions established under the Agreement.

All in all, the committee would favour the appointment of a number of Northern Ireland members to the Seanad in accordance with broad principles established in legislation. The number would have to be sufficiently large to represent a range of viewpoints within Northern Ireland, but not so large as to counteract the principal purpose of nomination by the Taoiseach, which is the maintenance within the Seanad of a government majority. Whether this might in due course be supplemented by extending to citizens resident in Northern Ireland the right to participate in the election of the Seanad on the basis of a national list system could be considered further once the institutions of the Good Friday Agreement have been securely bedded down.

Presidential elections

The issues which arise in consideration of whether citizens resident in Northern Ireland should be entitled to vote in presidential elections are essentially the same as those considered above in our discussion of the Dáil and Seanad. In favour of Northern participation would be the fact that the presidency has, particularly over the past decade, acquired a distinctive role in reinforcing the connection between the state and the wider Irish family beyond its boundaries. While the President has particular duties in regard to the operation of the institutions of the state, his or her function is largely symbolic or ceremonial, and therefore the involvement of those outside the state in an election would be unlikely in any practical way to conflict with the needs and priorities of those within it. And, for those living in Northern Ireland who wished to do so, playing a part in electing a President would be a concrete expression of their Irish identity.

The counter-arguments include the fact that, while holders of the office may have, very properly and very effectively, used it to reach out to the wider Irish family, the President nonetheless remains, in formal terms, the head of the state as it now is. To extend the franchise beyond the state might, if perhaps in a less controversial way than would be the case in Dáil elections, again be held to blur the distinctions accepted in the Good Friday Agreement, and to call into question the sincerity of our commitment to it. The possible practical difficulties and drawbacks in preparing for and conducting the ballot would also arise.

While a case can be made for the extension of voting rights in presidential elections to citizens living in Northern Ireland, we believe that any decision should be deferred until the Good Friday Agreement has become more solidly entrenched, and until the experience of Northern participation in the Seanad can be assessed.

Referendums

Sinn Féin's submission to the committee proposes that citizens resident in Northern Ireland should be entitled to vote in referendums on certain Articles of the Constitution, but accepts that this entitlement should not extend to Articles which are of concern only to those within the state.

The committee believes that on principle the Constitution must be treated as a single document, and that all Articles of it must be regarded as having equal legitimacy and the same basis in public endorsement. We do not think that this is consistent with a system whereby the definition of those entitled to vote on specific amendments would vary.

Moreover, the committee does not believe that a distinction of the sort proposed – between Articles relevant only to the state, and others – would be easily defined or managed in practice. The implications and effects of the great bulk of the Articles of the Constitution do in fact primarily or exclusively concern citizens within the state. Those Articles which have a wider application – primarily those initial three Articles grouped together under the heading 'The Nation' – bear mainly on Northern Ireland and on the relationship between the two parts of the island. It is difficult to imagine that they would be amended in future other than as the outcome of a further process of negotiation in which citizens in Northern Ireland would already be actively involved through their political representatives and possibly through a referendum within Northern Ireland. The prospect would arise, therefore, of citizens in Northern Ireland being able to participate in parallel processes both North and South, and of the double-counting of their preferences.

The committee does not, therefore, support the extension of voting rights in referendums to citizens in Northern Ireland.

Emigrant participation

Submission to committee In March 1999, the committee received a submission from the Irish Emigrant Vote Campaign (IEVC). Observing that the question of emigrant voting rights has been discussed for over a decade but that, despite a number of commitments to address the issue, the situation has remained unchanged, the IEVC continues to seek the full extension of the franchise – for Dáil elections, and hence also for presidential elections and referendums – to all Irish-born citizens abroad. It contends that this is a basic entitlement of citizenship.

However, as a first step the IEVC proposes a more limited initiative. Noting that those abroad intending to return home within eighteen months are under the Electoral Act as it stands deemed not to have given up their 'ordinary residence' in the state, and are thus eligible to vote, it proposes a substantial extension of the eighteen month period to address what it regards as the realities of current-day emigration. The IEVC suggests that use of this device would permit all relatively recent emigrants to vote. It notes that voting rights have in recent years been extended to diplomats and their spouses, and to defence forces and garda personnel, serving abroad, and, of course, that university graduates living abroad can participate in Seanad elections. It recommends that emigrant voters abroad use the same postal ballot procedure as diplomats and their spouses, whereby an authorised person appointed by the secretary-general of the Department of Foreign Affairs verifies the identity of the voter and the correctness of documentation.

As the eligibility of citizens to vote is currently regulated by law, the IEVC is opposed to any limiting constitutional amendment which would introduce distinctions between different categories of citizen.

While recognising that there may be some merits in direct emigrant representation in the Seanad, as was proposed by the last government in a 1996 discussion paper, the IEVC says that this proposal misses the point of their basic argument, which is that emigrants should enjoy the same rights as other citizens, and should not be placed in a separate category.

Addressing the various arguments which have been advanced against the emigrant vote, the IEVC counters that:

- emigrants have been affected by the policies, and by the successes and failures, of Irish governments, and, inasmuch as many hope to return home, have a continuing interest in their performance; moreover, they often make an economic contribution to Ireland, whether through remittances, visits home, or investment

- the number of emigrants over the past twenty years or so who would be eligible to vote is to be numbered not in millions, but at most in hundreds of thousands; and many emigrants have been returning home in recent years. On the basis of other countries' experience, the proportion actually voting would be small

- Article 16.2.2 of the Constitution defines the ratio between the number of deputies and the population of a constituency, but does not establish any equivalent linkage with the number of electors: therefore emigrant voters could be added to the rolls of their old constituencies without fear of altering the balance between constituencies in terms of deputies returned

- there is no reason to believe that those emigrants who voted would be as a group less well informed than resident voters, or that they would vote as a bloc in any particular way, such as to influence unduly the outcome of an election in any given constituency or overall

- logistics and costs should not be decisive factors in regard to what is a matter of principle, but elements of the necessary infrastructure (such as diplomatic missions abroad) are in place, and other countries have proved able to bear the costs involved

- a refusal in principle to extend the vote is contrary to the practice of all of our EU partners, each of which makes provision for emigrants to vote, whether through postal

voting, proxy voting, return home or voting in diplomatic missions.

Conclusions of committee

The committee unanimously agrees that the history of the state's relationship with emigrants from it leaves ample cause for regret, despite a number of positive initiatives in recent years. While the emigrant experience has been very diverse, many emigrants have had good reason to feel neglected and embittered. Likewise, the state has not benefited as much as it might from the huge resource represented by the experience and potential good will of emigrants, although in this area too there have been a number of recent improvements.

This is, however, an argument in favour of a thorough examination of the ways generally in which links between Ireland and the Irish abroad, including emigrants, might be enhanced, and not necessarily an argument in favour of direct emigrant participation in the central institutions of the state.

The committee nevertheless recognises the strength of much of the IEVC's case. There exist ample precedents elsewhere for the conferral of the vote upon emigrants, whether for a limited period after departure or indefinitely. The nature of emigration itself has changed substantially in recent years, with much greater fluidity of movement into and out of Ireland. Modern communications make it much easier for emigrants to keep in touch with events in Ireland. The extension of voting rights to them would serve to underpin their connections with Ireland. While no firm figures are available, the number of emigrants eligible to vote, under whatever criteria were chosen, is likely to be somewhat less than it would have been in the past – though by European standards the ratio of potential emigrant voters to resident voters is still likely to be high, with emigrants being likely at least in theory to have a substantial impact on the outcome of the vote in individual constituencies and overall. The logistics would be complex, and the cost not negligible – it would not be easy even for our larger diplomatic missions to supervise polling in centres like London and New York without substantial assistance. But in our view the IEVC is right to say that these should neither be insuperable nor decisive arguments.

Other aspects of the IEVC's argument are less convincing, in our view. It makes much of the indivisibility of citizenship, and argues that the entitlement to vote should be treated as an essential aspect of citizenship. But the IEVC itself draws a distinction between Irish-born citizens and others. It is not clear to us, on the basis of the IEVC's logic, why in principle someone who left Ireland at the age of two should be entitled to vote whereas the child of an emigrant should not. Even the IEVC's maximalist proposal would exclude the majority of Irish citizens

abroad from voting. This is reasonable, in our view – but it makes the point that pragmatic considerations have to enter into the equation.

The IEVC's argument that a constitutional amendment would not be necessary to extend Dáil votes to emigrants, on the basis that the number of deputies is determined with reference to the population, and not to the number of voters – and that therefore the number of voters on the roll in any given constituency is immaterial in framing constituency boundaries – is certainly sustainable on a straightforward reading of the text. In our view, however, the alternative interpretation is also possible, in that one could argue that the maintenance of constituencies with substantially differing ratios of electors to deputies would run contrary to the intent of the framers of the Constitution and to the strongly territorial basis of our electoral system.

Even if the matter could be addressed by legislation alone, however, the committee does not think that the IEVC's suggested solution, of enlarging the current legislation's definition of 'ordinary residence' in a constituency, is tenable: to define someone who had left the country say fifteen years previously, and who might have only a general aspiration to return, as 'ordinarily resident' would stretch the meaning of language beyond the reasonable. Those limited categories currently allowed to vote while abroad are different in that they have been sent overseas, normally on state service, for a limited and normally a defined period, with the clear expectation of return (and diplomats, for instance, continue to be treated as resident for tax purposes). If it were felt desirable, the legislation in our view would need to be amended to include emigrants as a distinct category.

A further consideration of significance to the committee is the desirability of the treatment of citizens overseas proceeding in broad step with the treatment of citizens in Northern Ireland.

As argued above in our discussion of Northern Ireland representation, the committee holds to the view that the right to vote in Dáil elections should remain confined to citizens ordinarily resident in the state, and to such other classes of resident as are determined by law. To repeat, our fundamental point is that it is those within the state who are primarily and directly affected by the actions of the Dáil and of the government formed from and accountable to it. In our view, this is in itself sufficient reason to maintain the status quo. A further consideration is that the likely scale of the emigrant vote, and how it might be mobilised and directed, cannot be known for certain. Emigrant votes could, especially in a system as responsive as ours to minor variations, play a major and even decisive role in returning deputies and thus, perhaps, in forming governments. Of course emigrant voters would be entitled to vote however they wished. It is not a question of trying to exclude or

confine any given strand of opinion. But it is not unreasonable to be cautious about the likely practical effects of a change in the system.

On the other hand, our conception of the Seanad, as previously explained, is that one of its functions should be to complement the Dáil, in part through the presence of interests who might not find election to the Dáil. However, in regard to emigrant participation in the Seanad or in elections to it, we note the IEVC's comparative uninterest in the proposal that there be a panel of senators elected directly by emigrants, as was mooted at one point by the last government and has been mentioned in a number of debates on the Seanad. We feel that emigrants are, both in terms of their geographic distribution and in terms of their concerns and interests, a much less distinct or cohesive group than are citizens resident in Northern Ireland. The case for giving them special representation in the Seanad is therefore weaker. However, we would recommend that the Taoiseach, in nominating senators, should where possible seek to include among his or her nominees a person or persons with an awareness of emigrant issues.

The other option in regard to the Seanad, which we also canvassed in our discussion of Northern Ireland representation, would be eligibility to vote in direct elections to it on the basis of a list system. Emigrants – perhaps defined as those who were entered on the electoral register before leaving Ireland – could, along with citizens resident in Northern Ireland, be given a vote in such elections. They could either vote for one of the 'domestic' lists contesting the election, or for a specially-formed emigrant list. This would come closer to what the IEVC is looking for in respect of the Dáil.

Conclusion

1 The right to vote in Dáil elections should remain confined to citizens ordinarily resident in the state, and to such other classes of resident as are determined by law.

2 The Taoiseach, in nominating senators, should include among his or her nominees a person or persons with an awareness of emigrant issues.

3 For reasons similar to those set out in our discussion of Northern Ireland representation, the committee believes that the right to vote in presidential elections should not be extended to emigrants at the present time, nor should the right to vote in referendums be granted to emigrants.

Chapter 5

Technical Proposals

As indicated in the foreword, the purpose of this chapter is to examine and, as appropriate, to make specific proposals for the amendment of those aspects of the Articles of the Constitution relative to Parliament which are in our view questions of detail and should be politically non-contentious.

Article 15.2.1°: 'sole and exclusive power' and secondary legislation

15.2.1°
The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

The most important form of secondary legislation is the statutory instrument. Statutory instruments are detailed regulations made by ministers or subordinate bodies on the basis of and as provided for in a parent Act passed by the Oireachtas. They are a particularly useful element in the process of government. They also carry dangers in that the Houses of the Oireachtas have no effective opportunity to carry out scrutiny of them.

The Constitution Review Group examined the question of how much latitude a minister should have in making regulations. It cited the *Cityview Press Ltd v An Chomhairle Oiliúna* (1980) in which the courts produced a test: if the regulations are merely giving effect to the principles and policies which are contained in the statute itself, then they are authorised. However, the Constitution Review Group observed that this test begs the question of what is meant by 'principles and policies': subsequent cases have adopted both a broad and a narrow approach. The effect of the test may make it difficult in many cases to use secondary legislation to fill gaps left by an Act or to deal with specific details which may not have been anticipated when the Act was passed. This problem may be of particular relevance, for example to legislation dealing with matters such as rapidly developing technology or issues of detail affecting areas in different ways.

It went on to explore whether, in addition to subordinate legislation being permissible where it passes the *Cityview* test, it ought to be permissible for the Oireachtas to authorise subordinate bodies to make statutory instruments with legislative effect in any other circumstances. The Constitution Review Group observed:

It is common practice that subordinate legislation must be laid before one or both Houses of the Oireachtas, which may annul it within a specified period. In other cases a positive resolution of one or both Houses of the Oireachtas is required within a specified period, or even before the subordinate legislation has effect. It was suggested that in some or all of these circumstances the approval of the Houses of the Oireachtas ought to be regarded as sufficient to cure any failure to meet the *Cityview* test. There is some support for such an approach in the *Cityview* case itself.

It concluded that a change of this sort would have to be approached with great caution.

The committee, when it came to consider the issue, decided that in view of the essential role of the Oireachtas as the elected law-making power in the state, no further dilution should be made. It recommends, therefore, that no change should be made to Article 15.2.1º in respect of subordinate legislation.

The committee views with concern, however, the lack of any real facility to scrutinise statutory instruments, similar to the former Seanad Select Committee on Statutory Instruments.

Recommendation

Article 15.2.1

No change is proposed. However we recommend that Seanad Éireann should put in place an effective review system for statutory instruments.

Article 15.2.2: subordinate legislatures

15.2.2°
Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures.

Provision may be made by law under this Article for the creation and recognition of subordinate legislatures. As the Constitution Review Group points out, the Article appears to provide authority for the delegation of limited law-making powers to local authorities.

The committee agrees with the Constitution Review Group that no change is necessary.

Recommendation

Article 15.2.2°

No change is proposed.

Article 15.3.1°-2°: functional or vocational councils

15.3.1°
The Oireachtas may provide for the establishment or recognition of functional or vocational councils representing branches of the social and economic life of the people.

15.3.2°
A law establishing or recognising any such council shall determine its rights, powers and duties, and its relation to the Oireachtas and to the Government.

The Constitution Review Group concluded that this Article should be amended to allow for the establishment and recognition of voluntary and community councils in social and economic development. However the committee considers that the political rationale for this provision has long since ceased to obtain. In any event the Oireachtas would have power to establish such councils under Article 15.2.1°. We therefore recommend the deletion of 15.3 and renumbering of 15.2.2° as 15.3 (15.2.1° being renumbered 15.2).

Recommendation

Delete Article 15.3 and re-number 15.2.2° as 15.3. Re-number 15.2.1° as 15.2.

Article 15.5: ban on retrospective legislation

15.5
The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.

The committee agrees with the Constitution Review Group's recommendation that this Article should be amended to reflect Article 7 of the European Convention on Human Rights so as to ensure that no heavier penalties are imposed for offences committed than were applicable at the time of the offence. The wording of this provision should reflect the fact that the existing provision applies to both civil and criminal matters.

The committee also considers that a provision along the lines of Article 7.2 of the European Convention should be inserted. However in the constitutional context we feel that this exception should be limited to the situations of crimes against humanity, torture and war crimes.

Recommendation

Amend Article 15.5 to read:

1° The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission. Nor in the case of a criminal offence, should a heavier penalty be imposed than was the one applicable at the time of the infringement.

2° This section shall not prejudice the trial and punishment of any person for an act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations, by reason of such act or omission being a crime against humanity, a crime of torture, or a violation of the laws and customs of war.

Article 15.7: one 'session' of 'the Oireachtas'

15.7
The Oireachtas shall hold at least one session every year.

The object of this provision is to prevent government by the executive without reference at regular intervals to the Houses of the Oireachtas.

The wording of this Article follows the language of Article 24 of the Irish Free State Constitution 1922 which in turn echoed the British parliamentary model of 'sessions'. In Westminster, a session of parliament lasts from mid-autumn to mid-summer of the following year, punctuated by terms. The word 'session' however in this state does not in any present-day parliamentary usage have any official meaning (although the Houses sit for three terms each year punctuated by Christmas, Easter and summer recesses). The Westminster concept of a legislative session does not apply in Ireland and the corresponding period is the combined lifetime of a Dáil and the corresponding Seanad (i.e. from election to election). This is evidenced by the fact that, by convention and as expressed in Dáil and Seanad Standing Orders concerning the restoration of lapsed Bills, Bills only lapse at the end of the Dáil or Seanad in which they were initiated. However in Article 15.7 the term 'session' appears to mean 'sitting' and this is evidenced by the Irish text ('suí'). No change is therefore necessary.

The committee considered that the present wording is however inapt for a different reason. The 'Oireachtas' consists of the President and the two Houses and it is inappropriate to include the President in this context.

Recommendation

Amend Article 15.7 to read:

> Each House of the Oireachtas shall hold at least one session each year.

Proposed Article 15.9.3°: nomination of chair and deputy chair

The primary task of any new Dáil is to nominate a Taoiseach. It must first elect a chair to oversee that nomination.

The failure on the part of the Constitution to deal expressly with the position of the outgoing chair of Dáil Éireann (the Ceann Comhairle) has given rise to difficulties in the past. It is not clear, for example, whether the outgoing Ceann Comhairle can participate in such constitutional and statutory bodies as the Presidential Commission, Public Office Commission, the Dáil Electoral Appeal Board, the Civil Service Commission (and other bodies, such as the Council of State to which he or she may be appointed as an ex officio member) during periods when the House stands dissolved for a general election. The participation of the Ceann Comhairle in a Dáil Electoral Appeal Board at a time when the Dáil stood dissolved arose in the judgment of the Supreme Court of 11 May 1978 in the matter of *Loftus v The Attorney General and Others*. O'Higgins CJ reviewed the implications of Article 14 and concluded:

> … for constitutional purposes, when the Dáil has been dissolved and the new Dáil has not yet met, the Chairman of Dáil Éireann means the Chairman of the dissolved Dáil.

However, the Supreme Court did not go so far as to say that the person holding the office of Ceann Comhairle in the preceding Dáil continued in office 'into the next Dáil' and 'until a successor was elected' as is the position as set out in Standing Order (S.O.) 14. Similar doubt could be raised in the future in relation to the performance during such a period of any of the other expanding statutory functions of the Ceann Comhairle. The committee considers that it would be best to place the matter beyond doubt by amending Article 15.9 to confirm his or her continuance in office during the dissolution of the Dáil. The committee considers that the Article should be further amended to clarify that the outgoing Ceann Comhairle still holds office only until the new Dáil assembles. S.O.14, which states that the holder stays in office until his successor is elected, is not satisfactory because the house, for various reasons, may be tempted to delay the election of the new Ceann Comhairle. This should concentrate the mind of members on electing a new Ceann Comhairle.

Similar concerns would apply to the deputy chair of the Dáil (the Leas-Cheann Comhairle), the chair of the Seanad (the Cathaoirleach) and the deputy chair (the Leas-Chathaoirleach) and should be addressed also.

Recommendation

Add a new Article 15.9.3° as follows:

> The Cathaoirleach and leas-Chathaoirleach of each House in office, in the case of Dáil Éireann at the date of a dissolution of that House and, in the case of Seanad Éireann at the date of a general election for that House, shall continue to hold office up to the day before the date of the next meeting of that House following such dissolution or general election, as the case may be.

Article 15.10: parliamentary privilege

15.10
Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.

The purpose of the privilege conferred by these sub-sections is to ensure 'legislators are free to represent the interests of their constituents without fear that they will later be called to task in the courts for that representation' (Geoghegan J in *Attorney General v Hamilton (No 2*) [1993] 3 IR 227). The Constitution Review Group considered the situation in which the privilege conflicts with Article 40.3.2° which provides that the state shall 'by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen'.

The committee agrees with the Constitution Review Group that the need to protect the freedom of debate in parliament is paramount, and that the Article should not be amended so as to curtail debate.

A person who believes his or her good name has been damaged in debate has redress to the Ceann Comhairle and/or the Committee on Procedure and Privileges, under an amendment of standing orders, effective from 31 May 1995, which provides certain penalties for a member making an utterance in the House 'in the nature of being defamatory'. A person referred to by name in the House may, under the amendment, within two weeks make a submission in writing to the Ceann Comhairle requesting the incorporation of an appropriate response in the parliamentary record. The committee agrees with the Constitution Review Group that it is for the Oireachtas itself to provide and regulate procedures and remedies in this regard.

It is not clear from the existing wording whether 'private papers' includes unofficial papers which arise in respect of a member's duties as a public representative. However this can be dealt with in standing orders if thought necessary.

Recommendation

Article 15.10

No change is proposed.

Article 15.10: discipline

The Committee on the Constitution (1967) concluded that Article 15.10 ought to be regarded as empowering the Houses of the Oireachtas to deal with internal matters of procedure and discipline only, and to punish its own members for breach of its rules. The Constitution Review Group observed:

> … it should, of course, also be open to each House to withdraw any privilege from persons who transgress any regulations of the House. In addition, each house should have power to deal effectively with persons who endeavour to disrupt its proceedings. These are matters best regulated by the Houses themselves under their powers to regulate their own proceedings.

The committee agrees with this conclusion.

Recommendation

Article 15.10

No further change is proposed.

Article 15.12: parliamentary privilege of committees of the Oireachtas

15.12
All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.

The 1968 Attorney General's Committee was of the view that Article 15.12 also applies to committees. It thought that the matter should be put beyond doubt. The committee agrees with this.

Recommendation

Amend Article 15.12 to read:

> All official reports and publications of the Oireachtas or of either House thereof, or of a committee established by either or both such Houses, and utterances made in either House or in a committee appointed by either or both Houses wherever published shall be privileged. The members of each House shall not, in respect of any utterance in either House or in a committee appointed

by either or both Houses be amenable to any court or any authority other than the House of which the person concerned is a member.

Persons appearing before committees

The Constitution Review Group noted that the position of persons appearing before committees was to be dealt with by law which would provide powers of compellability in respect of witnesses and both written and oral evidence. Witnesses would be afforded the same level of privilege as is enjoyed by a witness appearing before the High Court. The Constitution Review Group saw no reason to recommend constitutional change. The committee agrees with this.

The Houses of the Oireachtas (Compellability, Privilege and Immunity of Witnesses) Act 1997 has since come into operation.

Recommendation

Article 15.12

No further change is proposed.

Article 15.13: felony or breach of the peace

15.13
The members of each House of the Oireachtas shall, except in case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself.

Felony has been abolished for all practical purposes and the reference in the Constitution is now obsolete. It should be replaced by the phrase 'or any other serious offence prescribed by law for the purpose of this Article'.

Recommendation

Article 15.13

Replace the phrase 'felony or breach of the peace' with the phrase 'or any other serious offence prescribed by law for the purpose of this Article'.

Article 16.2.4°-16.2.6°: revision of constituencies, proportional representation and size of constituencies

16.2.4°
The Oireachtas shall revise the constituencies at least once in every twelve years, with due regard to changes in distribution of the population, but alterations in the constituencies shall not take effect during the life of Dáil Éireann sitting when such revision is made.

This Article stipulates that constituencies must be revised once every twelve years to reflect changes and movements in the population. As the Constitution Review Group noted, 'the courts have interpreted this provision to mean that there is a constitutional obligation to carry out this revision when a census

return discloses major changes in the distribution of the population'.

16.2.5°
The members shall be elected on the system of proportional representation by means of the single transferable vote.

The Constitution Review Group considered that no change in these provisions is necessary. The revision of constituencies is carried out on the basis of a report from the Constituency Commission, headed by a senior judicial figure. This commission was given a statutory basis under the Electoral Act 1997. While the Constitution Review Group considered that the Commission might appropriately be given constitutional recognition at a later date, the committee believes the statutory basis is satisfactory.

16.2.6°
No law shall be enacted whereby the number of members to be returned for any constituency shall be less than three.

Recommendation

Article 16.2.4°- 16.2.6°

No change is proposed.

Article 16.3.1°: dissolution of Dáil Éireann

16.3.1°
Dáil Éireann shall be summoned and dissolved as provided by section 2 of Article 13 of this Constitution.

The committee agrees with the Constitution Review Group that this subsection replicates Article 13.2.1° and should be deleted.

Recommendation

Article 16.3.1°

Delete Article 16.3.1°. Renumber 16.3.2° as 16.3.

Article 16.4.1: polling

16.4.1°
Polling at every general election for Dáil Éireann shall as far as practicable take place on the same day throughout the country.

There is no pressing reason why polling should be constitutionally confined to a single day. There may be merit in permitting, for example, polling on two consecutive days if to do so would encourage a higher turnout.

Recommendation

Article 16.4.1°

Insert after 'day' 'or days'.

Article 16.7: time-limit on holding by-elections

16.7
Subject to the foregoing provisions of this Article, elections for membership of Dáil Éireann, including the filling of casual vacancies, shall be regulated in accordance with law.

This Article includes a reference to 'casual vacancies' which can be filled in accordance with law. The Constitution Review Group recommended that a time-limit of ninety days should be imposed on the holding of by-elections. The committee agrees with the imposition of a time-limit in principle but considers that one hundred and twenty days would more aptly meet all the foreseeable contingencies. The wording should reflect the fact that an election is not mandatory.

Recommendation

Add a new sentence to the end of Article 16.7 as follows:

> The filling of a casual vacancy shall as far as practicable be effected no later than 120 days following the occurrence of the vacancy.

Article 17.1.2°: effect of financial resolutions

17.1.2°
Save in so far as may be provided by specific enactment in each case, the legislation required to give effect to the Financial Resolutions of each year shall be enacted within that year.

Financial resolutions are in principle a departure from the normal rule that only legislation can alter the existing statute law. If thought desirable there is no reason why a Bill containing immediate changes to tax law could not pass all stages in both Houses on budget day itself.

Financial resolutions do however enjoy a limited measure of constitutional recognition. As observed by the Constitution Review Group, this Article requires the Dáil to consider the Estimates of Receipts and Expenditure 'as soon as possible after (their) presentation to Dáil Éireann under Article 28 of the Constitution'.

28.4.4°
The Government shall prepare Estimates of the Receipts and Estimates of the Expenditure of the State for each financial year, and shall present them to Dáil Éireann for consideration.

Article 28.4.4° requires the government to prepare Estimates of Receipts and Expenditure of the state for each financial year and to present them to Dáil Éireann for consideration. The Constitution Review Group took the view that these requirements are regarded as being formally met by the government's presentation to the Dáil, in advance of the budget, of the White Paper on Receipts and Expenditure and the consideration then given to the budget. The so-called Estimates Volume, which relates to voted (or supply) services (and does not cover Central Fund services) provides detailed information to assist the Dáil in its consideration of the individual estimates for these services before it votes supply. In advance, however, of the approving vote, namely the grant of supply, the government is allowed by the Central Fund (Permanent Provisions) Act 1965, to spend, within set limits, on supply services. Grants of supply receive the

formal statutory authority of the Oireachtas through the annual Appropriation Act.

Questions relating to the Provisional Collection of Taxes Act 1927 and the Financial Resolutions are discussed in Kelly, *The Irish Constitution,* third edition, 1994, pp 173-174: The wording of the sub-section ('… legislation required *to give effect* to the Financial Resolutions of each year shall be enacted within that year') of itself suggests that the Resolutions of themselves cannot impose the tax and that legislation is required to give effect to them. As against this, it might be said that Article 17.1.2° was drafted with the 1913 and 1927 legislation in mind and that the sub-section provides tacit constitutional justification for the provisional collection of taxes system which had by then become an established feature of the state's budgetary and fiscal arrangements.

The Constitution Review Group concluded that it was the intention of the framers of the Constitution that Article 17.1.2° would consolidate the position under the 1927 legislation. It recommended amending the Article by replacing the word 'effect' with the words 'permanent effect' or 'continuing effect' because it would express this intent more clearly.

The All-Party Oireachtas Committee on the Constitution 1996 - 1997 (the O'Keeffe Committee) also considered the arguments and recommended that the matter should be put beyond doubt by the following explicit statement:

> Save in so far as may be provided by specific resolution in each case, the Financial Resolution of each year passed by Dáil Éireann shall have immediate effect and full force of law provided that legislation confirming any such resolution is enacted within a year.

The present committee, when it considered the matter, concluded that there was no real problem and that no change was necessary.

Recommendation

Article 17.1.2°

No change is proposed.

17.2
Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach.

Article 17.2: appropriation

This provision is relied on, perhaps unjustifiably, to support standing orders which prohibit the taking of amendments by the opposition which include even an incidental charge on public funds, or the publication of private members' Bills including

anything more than an incidental charge. Such Bills cannot be taken beyond second stage without a government message.

The provision should be modified to refer only to the final stage, thus allowing a free input into legislation by the opposition.

Recommendation

Article 17.2

After 'pass' insert 'the final stage of'.

Article 18.5: election to Seanad Éireann

18.5
Every election of the elected members of Seanad Éireann shall be held on the system of proportional representation by means of the single transferable vote, and by secret postal ballot.

'Postal' should be deleted because it makes the process specifically dependent on the postal services.

Recommendation

Article 18.5

Delete the word 'postal'.

Article 18.9: polling day

18.9
Every member of Seanad Éireann shall, unless he previously dies, resigns, or becomes disqualified, continue to hold office until the day before the polling day of the general election for Seanad Éireann next held after his election or nomination.

Define the polling day as the latest day upon which an elector can vote.

Recommendation

Article 18.9

Add:

The latest date upon which an elector can vote shall be regarded as the polling day.

Article 19: redundant

Article 19
Provision may be made by law for the direct election by any functional or vocational group or association or council of so many members of Seanad Éireann as may be fixed by such law in substitution for an equal number of the members to be elected from the corresponding panels of candidates constituted under Article 18 of this Constitution.

This provision has never been used and in view of the committee's other proposals it is redundant.

Recommendation

Article 19

Delete Article 19.

Article 28A: local government

Relocate this Article here as a new Article 19.

Recommendation

Article 19

Change '28A' to '19'.

Article 20: differences of opinion between Houses of the Oireachtas in respect of legislation

23.1.2°
The stated period is the period of ninety days commencing on the day on which the Bill is first sent by Dáil Éireann to Seanad Éireann or any longer period agreed upon in respect of the Bill by both Houses of the Oireachtas.

24.1
If and whenever on the passage by Dáil Éireann of any Bill, other than a Bill expressed to be a Bill containing a proposal to amend the Constitution, the Taoiseach certifies by messages in writing addressed to the President and to the Chairman of each House of the Oireachtas that, in the opinion of the Government, the Bill is urgent and immediately necessary for the preservation of the public peace and security, or by reason of the existence of a public emergency, whether domestic or international, the time for the consideration of such Bill by Seanad Éireann shall, if Dáil Éireann so resolves and if the President, after consultation with the Council of State, concurs, be abridged to such period as shall be specified in the resolution.

We considered a proposal which suggested there exists no definitive method of resolving disputes arising between the Houses as regards amendments to a Dáil Bill made by the Seanad to which the Dáil does not agree (other than by awaiting the lapse of the ninety-day period prescribed in Article 23 or, if appropriate, by invoking the shorter period envisaged in Article 24).

In the past, a conference composed of representatives of each House was established to resolve one such impasse but this informal process cannot supplant a substantive and final decision in such matters or a clear provision for arriving at it within a reasonable time-frame.

The committee considered a proposal to amend the Article by adding a subsection which envisages the Dáil having the ultimate authority to agree, disagree or amend amendments proposed by the Seanad to one of its Bills in the manner currently provided for in Dáil Standing Orders but also gives it the discretion to refer the matter back to the Seanad in pursuit of agreement before taking its final decision. However we consider that such an amendment is unnecessary and undesirable. The ninety-day clause is sufficient to resolve the problem.

Recommendation

Article 20.1

No change is proposed.

Article 20
20.1
Every Bill initiated in and passed by Dáil Éireann shall be sent to Seanad Éireann and may, unless it be a Money Bill, be amended in Seanad Éireann and Dáil Éireann shall consider any such amendment.
20.2.1°
A Bill other than a Money Bill may be initiated in Seanad Éireann, and if passed by Seanad Éireann, shall be introduced in Dáil Éireann.
20.2.2°
A Bill initiated in Seanad Éireann if amended in Dáil Éireann shall be considered as a Bill initiated in Dáil Éireann.
20.3
A Bill passed by either House and accepted by the other House shall be deemed to have been passed by both Houses.

Article 21
21.1.1°
Money Bills shall be initiated in Dáil Éireann only.
21.1.2°
Every Money Bill passed by Dáil Éireann shall be sent to Seanad Éireann for its recommendations.
21.2.1°
Every Money Bill sent to Seanad Éireann for its recommendations shall, at the expiration of a period not longer than twenty-one days after it shall have been sent to Seanad Éireann, be returned to Dáil Éireann, which may accept or reject all or any of the recommendations of Seanad Éireann.
21.2.2°
If such Money Bill is not returned by Seanad Éireann to Dáil Éireann within such twenty-one days or is returned within such twenty-one days with recommendations which Dáil Éireann does not accept, it shall be deemed to have been passed by both Houses at the expiration of the said twenty-one days.

Article 20: Bills 'deemed' to have been passed by both Houses of the Oireachtas

Under Article 21 (Money Bills), and Articles 23 and 24 (Time for Consideration of Bills), a Bill initiated in Dáil Éireann and sent to Seanad Éireann may be 'deemed' to have been passed by both Houses after a specified period of time even if the agreement of the Seanad thereto has not been obtained.

It is clear, therefore, from these Articles that the 'deeming' of Bills to be passed by both houses is an exceptional measure to be availed of in circumstances where the full and formal agreement of the Seanad is either withheld or not given within the period of time specified in the Constitution.

The same term is used in Article 20.3 to describe other Bills which appear to fall into a different category, namely, in the case of Seanad Éireann, Money Bills which are (by reason of the constitutional circumscription of the powers of the Seanad in relation thereto) incapable of being effectively 'passed' but to which the Seanad does not object. Thus, in accordance with the Article, Money Bills accepted by the Seanad within the specified period bear the endorsement 'Deemed to have been passed by both Houses of the Oireachtas' possibly giving the mistaken impression that the rights of the Seanad have been delimited in the manner set out in Articles 21 or 24.

The word 'accepted' is in fact used by the Seanad in transmitting its decision on Money Bills to the Dáil while the word 'passed' is used in relation to other Bills.

The committee considered a suggestion for the use of the term 'considered' instead of 'deemed' in order to distinguish Bills which have been passed in circumstances where the agreement of the second House is not withheld but is, rather, incapable of being given, as in the case of Money Bills. However, the existing provision works in practice and no change is necessary or desirable.

Recommendation

Article 20

No change is proposed.

Article 23.1.2°
The stated period is the period of ninety days commencing on the day on which the Bill is first sent by Dáil Éireann to Seanad Éireann or any longer period agreed upon in respect of the Bill by both Houses of the Oireachtas.

Article 23.1.2°: resolution passed by the Dáil

The 1967 Committee on the Constitution drew attention to the need for a technical amendment to this Article to avoid a certain ambiguity. It argued as follows:

> Article 23.1 enables the Dáil to limit to ninety days the amount of time available to the Seanad for consideration of ordinary Bills. After this period has expired (or an agreed extension thereof) the Dáil may resolve that the Bill is deemed to have been passed by both Houses; such a resolution must, however, be passed within 180 days of the expiry of the initial or extended period. The expression 'stated period' is used in the Article to cover both the initial ninety-day period or any extended period agreed upon between the Houses.
>
> It seems clear enough to us from the wording of the provision that any proceedings in the Seanad are valid until the Dáil moves its resolution, even if the stated period has passed. The view has, however, been expressed that the intention of the Article was that where the stated period was in danger of being exceeded the Seanad would take the initiative for an agreed extension under Article 23.1.1°. We feel that there is no point in arguing about the proper interpretation of these provisions and that if there is any doubt about the Seanad's powers the matter should now be clarified by amendment. This could be done by declaring that the Seanad can continue with its consideration of a Bill, after the expiry of the stated period, until the Dáil passes its resolution. Such a procedure can be defended on the ground that where the Dáil has not seen fit to assert its supremacy at the end of the ninety days, then it must be assumed that there is agreement between the two Houses for an undefined (but not unlimited) extension.
>
> Whatever may be said about the stated period, it is not clear to us what form of the Bill 'is deemed to have been passed' when the Dáil passes its resolution. The list of amendments made by the Seanad may include ministerial amendments which the Dáil is most anxious to accept and others which it wants to reject. Among other questions, it may be asked whether, in the event that the Houses are unable to agree, the Dáil can pass a resolution deeming a Bill to be passed with certain Seanad amendments only.
>
> It would, in our view, be desirable to amplify Article 23 so as to provide that the resolution passed by the Dáil may specify the amendments passed by the Seanad which are to be made in the Bill and that the Bill as so amended shall, subject to any further Dáil amendments arising out

> of the Seanad amendments, be the one which is deemed to have been passed by both Houses.

The present committee agrees with this.

Recommendation

Change Article 23.1.2° as follows:

> The stated period is the period commencing on the day on which the Bill is first sent by Dáil Éireann to Seanad Éireann and ending on such day (being not less than 90 days later) as may be determined by Dáil Éireann in respect of the Bill.

Article 25: citation of Acts passed in one year but not signed until a later year

25.1
As soon as any Bill, other than a Bill expressed to be a Bill containing a proposal for the amendment of this Constitution, shall have been passed or deemed to have been passed by both Houses of the Oireachtas, the Taoiseach shall present it to the President for his signature and for promulgation by him as a law in accordance with the provisions of this Article.

In all cases, when a Bill of whatever kind is passed by both Houses, the text as passed is sent out of the Houses of the Oireachtas to the Department of the Taoiseach (the Taoiseach being the appointed conduit between the Houses of the Oireachtas and the President under Article 25.1) and, since neither House stands seized of the Bill, there is no means by which further change can be effected to the text. Under the Standing Order of each house, the Clerk of each house is only empowered to make corrections 'during the progress of a Bill'.

Thus, there exists no means for effecting a 'late amendment' to the short title and citation section of a Bill which, having been passed by both Houses and presented by the Taoiseach to the President for signature in one year, is not signed by the President until a later year, having been referred in the meantime to either the Supreme Court or the people (or, in the case of a Bill to amend the Constitution, having been held by the Taoiseach pending the outcome of the referendum).

25.2.1° Save as otherwise provided by this Constitution, every Bill so presented to the President for his signature and for promulgation by him as a law shall be signed by the President not earlier than the fifth and not later than the seventh day after the date on which the Bill shall have been presented to him.

Although less likely to occur, a Bill may be passed in the final days of one year and not be capable of being signed until the early days of the following year or, if the fifth, sixth or seventh days (Article 25.2.1°) straddle the new year, a Bill might be cited as an Act of one year or the other but it would not be proper to anticipate the exercise of the prerogative of the President to sign on one day or another.

Examples of where this has occurred are:

> Fourth Amendment of the Constitution Act 1972, passed by both Houses on 13 July 1972 and signed by the President on 5 January 1973 (referendum not held until 7 December 1972)
>
> Fifteenth Amendment of the Constitution Act 1995, passed by both Houses on 18 October 1995 and signed by the President on 17 June 1996 (conduct of referendum petitioned).

Both of these Acts, although effective from the date of signature in the later year, are cited as Acts of the previous year because of the lacuna highlighted.

A similar difficulty has arisen in relation to the citation of the Acts to amend the Constitution. Three Bills entitled 'Twelfth', 'Thirteenth' and 'Fourteenth' Amendment of the Constitution were referred to the people in 1992 but only the 'Thirteenth' and 'Fourteenth' were approved. Being thus identified in the referendum, the number by which they would be cited could not be changed. Consequently, there is no Twelfth Amendment Act. The following amendment was cited as the Fifteenth. A similar situation applied when the Twenty-Second Amendment of the Constitution Bill (relating to judicial conduct) was withdrawn by the government shortly before it was due to be voted on by referendum in a package which also included the Twenty-First, Twenty-Third and Twenty-Fourth Amendment Bills. Up to the present, therefore, twenty-one amendments to the Constitution have been effected but the most recent Act is cited as the Twenty-Third Amendment of the Constitution Act.

The committee considered a proposal to address these issues by way of an amendment. However the problems are of minimal importance and no change is necessary.

Recommendation

Article 25

No change is proposed.

Article 25.4.6° and Article 25.5.4°: authoritative texts

25.4.6°
In case of conflict between the texts of a law enrolled under this section in both the official languages, the text in the national language shall prevail.

25.5.4°
In case of conflict between the texts of any copy of this Constitution enrolled under this section, the text in the national language shall prevail.

At present, where a Bill has been enacted in both Irish and English, the former text prevails. Very few laws – eg Acts to amend the Constitution – are so enrolled. Likewise, at present, the Irish language text of the Constitution prevails in case of conflict. With a few exceptions there are no clear conflicts, but only differences in nuance.

At present, the priority of the Irish text is a mechanism for resolving any ambiguity. In practice the courts seek to harmonise the texts rather than to identify ambiguity.

Recommendation

No change is proposed.