Preamble

In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,

We, the people of Éire,

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,

Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,

And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,

Do hereby adopt, enact, and give to ourselves this Constitution

Introduction

A Preamble is not an essential element of a constitution. Some constitutions do not have any. Only the enactment phrase – *We, the people, enact this Constitution* – has formal significance. Any normative elements in a Preamble are likely to be expressly provided for in the Constitution. The Saorstát Constitution had no Preamble but the opening words of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922, to which it was a schedule, read:

> *Dáil Éireann sitting as a Constituent Assembly in this Provisional Parliament, acknowledging that all lawful authority comes from God to the people and in the confidence that the National life and unity of Ireland shall thus be restored, hereby proclaims the establishment of the Irish Free State (otherwise called Saorstát Éireann) and in the exercise of undoubted right, decrees and enacts as follows ...*

If a Preamble is not necessary, what purpose does it serve? From the terms of the Preamble to our own Constitution, and by reference to other Preambles, it may be deduced that a Preamble is intended to express a sense of national identity and destiny and to include invocational, commemorative, exhortatory and aspirational elements. The Preamble to the 1937 Constitution, as is usual in constitutions with a Preamble, reflects the historical context – religious, social, economic, political – in which it was enacted. There has been great change in most of those areas over the past sixty years, yet it might be thought preferable that a new or revised Preamble should be contemplated only in a substantially different and inspirational political context – such as might be created by new North-South relations.

Issues

1 whether it is possible to amend the present Preamble

The Review Group considered whether the Preamble was open to amendment, as provided in Article 46, even though the words of enactment occur only in the last line. The Attorney General's Committee on the Constitution (1968) noted that the Preamble itself uses the phrase 'this Constitution' and that the title 'Bunreacht na hÉireann' precedes the Preamble, both of which suggest that the Preamble is part of the Constitution and can be amended as such. Moreover, because the people adopted the Preamble together with the rest of the Constitution, it would seem unreal to suggest that the people do not have power to amend it. The fact that it has been cited in cases and invoked in judicial decisions (see below) also seems to confirm that it is part of the Constitution and thus subject to amendment as provided in Article 46.

2 whether the Preamble has legal effect

As indicated above, the Preamble has been cited in legal cases and has been taken into account in judicial decisions, for example, *McGee v Attorney General* [1974] IR 284, *The State (Healy) v Donoghue* [1976] IR 325, *King v Attorney General* [1981] IR 233, *Norris v Attorney General* [1984] IR 36 and *Attorney General v X* [1992] 1 IR 1. For this reason and others mentioned in the immediately preceding paragraph it seems that it does have legal effect.

The Review Group adverted to the relevance of the Preamble to the question of the role of natural law in the Constitution, and decided that this issue was most appropriately considered under Articles 40-44, which deal with Fundamental Rights.

3 whether the Preamble should continue to have legal effect

It is arguable that, in principle, it is neither necessary nor appropriate for the courts to invoke the Preamble. The Preamble is unlike the long title of a Bill in that its manifold purposes and its literary style give it much less precision of meaning. Moreover, headings and marginal notes in a Bill, as distinct from the long title, are not cognisable by the courts. It is questionable whether an essentially rhetorical, as distinct from legal, text could properly be treated as a source of fresh enlightenment or significant guidance as to the meaning or intent of specific constitutional provisions. On this view, it would be more realistic not to accord it any legal significance.

A contrary view is that what the Preamble expresses should be available, when appropriate, as an aid to interpretation of the Articles, though not as a source of substantive law.

4 whether the Preamble should be amended

The Review Group considered four possible approaches:

i) leave the Preamble as it is

   This did not commend itself to most members of the Review Group who felt that the language, reflecting the ethos of the 1930s, is overly Roman Catholic and nationalist in tone, is gender-biased, and would be objectionable to many in Ireland today.

ii) insert an explicit provision in the Constitution declaring the Preamble to be the historical introduction in 1937 to the Constitution, with the corollary that it would also be declared no longer cognisable by the courts

   This tacitly recognises the majority view noted under i) and would simply enshrine the Preamble as a historical entity.

iii) while adopting i) or ii), leave amendment of the terms of the Preamble to a future inspirational political context

   While such a context would provide the ideal occasion for rewriting the Preamble, most members of the Review

Group would prefer that it be amended in any event in the near future. This, in fact, is the fourth option.

iv) amend the Preamble

This is the preferred option of a majority of the Review Group who feel that the Preamble as it stands is inappropriate.

If it is decided to amend the Preamble, there are two possibilities:

a) confine the Preamble to the words of enactment 'by the people of Ireland'

This is the course favoured by a majority of the Review Group who are influenced by the fact that substantive elements in a Preamble tend to be expressly provided for in the various Articles.

Thus, the desire that 'the dignity and freedom of the individual may be assured' is provided for in Articles 40-44, the aspiration that 'true social order [be] attained' is expressly recognised in Article 45, the aspiration that 'the unity of our country [be] restored' is reflected in Articles 2 and 3, the desire that 'concord [be] established with other nations' is provided for in Article 29. The recitation of such desiderata in the Preamble tends to be both selective and superfluous (and would be so even should Article 45 be deleted).

b) if, nevertheless, it is felt that a revised version of the Preamble should be prepared, the essentially political nature of a Preamble should be kept in mind and care taken to avoid divisiveness and to recognise, instead, diversity of traditions, ideals and aspirations. Consideration might be given to the following points:

1) the words of enactment should be in the name of the 'people of Ireland' (see amendment of Article 4 as proposed by the Review Group)

2) the Preamble should be declared not to be cognisable by the courts

3) the diversity of belief in present-day Ireland raises the question whether any wording corresponding to the present first and third paragraphs is now appropriate. It is noteworthy that the 1972 Irish Theological Association working party unanimously agreed that 'no one should be required, as a condition of citizenship, to endorse a basic belief or tradition which he does not share' and was not satisfied that a religious strand was necessary or desirable in a Preamble

4) there should be recognition of the diverse origins and traditions, ethnic, historical, political and spiritual, of the people, their varying social and cultural heritages, and the sacrifices and sufferings as well as the achievements of the people's forebears

5) it should be affirmed that the aspiration to unity of many in Ireland will be sought peacefully and through reconciliation and consent

6) more general aspirations could be included on the lines of the existing penultimate paragraph but

- including peace, reconciliation, justice, freedom and economic, social and cultural progress, together with the common good and concord and co-operation with other nations, as aims to be promoted
- indicating that these will be pursued on the basis of the inherent dignity of the individual and the equality of all.

Having regard to commitments made in both the Downing Street Declaration and the Framework Document, it might well be that progress in negotiations for an 'agreed Ireland' would provide further considerations for such a revision of the Preamble.

Recommendation

A majority of the Review Group favours the replacement of the present Preamble by the basic formula of enactment of the Constitution by the people of Ireland. If, however, a more extensive, revised Preamble is preferred, guidelines are suggested.

National Right to Self-Determination

Article 1

The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions.

Article 1 sets out the national right to self-government and other related rights. This affirmation is of universal validity. The scope of the term 'The Irish Nation' has been questioned but the Review Group does not see any reason for proposing an amendment of the Article.

Recommendation

No change is proposed.

National Territory

Article 2

The national territory consists of the whole island of Ireland, its islands and the territorial seas.

Article 3

Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra-territorial effect.

The Review Group is excused by its terms of reference from considering Articles 2 and 3. Because these Articles are central to the resolution of political relationships in Ireland, and between Ireland and Great Britain, the Review Group concludes that it should not offer any comment.

Name of State

Article 4

The name of the State is Éire, or in the English language, Ireland

Article 4 sets out the name of the State. The Review Group considers that the provision is unnecessarily complicated and that it should be simplified to indicate, in each language version, the name of the State in that language.

The Review Group also considered whether the Article should be amended to include 'Republic of' in the name of the State. It is satisfied that the legislative provision (section 2 of the Republic of Ireland Act 1948), which declared the description of the State to be 'the Republic of Ireland', is sufficient.

Recommendation

The Article should be amended to read:

> Éire is ainm don Stát.
> The name of the State is Ireland.

Nature of the State

Article 5

Ireland is a sovereign, independent, democratic state.

Article 5 sets out the nature of the State as sovereign, independent and democratic. The Review Group considered whether the term 'republic' should be substituted for 'state' and does not favour any change.

Recommendation

No change is proposed.

Powers of Government

Article 6

6.1 *All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.*

6.2 *These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.*

Article 6 states the people's right to decide by whom and how they are ruled and reserves the power of government to the organs of State established by the Constitution.

Conclusion

Some members of the Review Group see no need to change the text of this Article, considering that the words 'under God' are widely acceptable. Others prefer that religious references generally should be reviewed by the Oireachtas in the context of amendment of the Preamble and other relevant parts of the Constitution.

National Flag

Article 7

The national flag is the tricolour of green, white and orange.

Article 7 prescribes the national flag. The Review Group is of the view that the provision might need reconsideration in the context of an overall settlement of political relations in Ireland but not otherwise.

Recommendation

No change is proposed.

Language

Article 8

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

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

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

Discussion

Article 8 establishes the two official languages of the State. It accords primacy to the Irish language which is described both as *the* national language and the *first* official language. The English language is *recognised* as a *second* official language. This wording is unrealistic, given that English is the language currently spoken as their vernacular by 98% of the population of the State.

The designation of Irish as the 'national' and the 'first official' language is of little practical significance. The intention to give special recognition to the Irish language is understood and respected but it is arguable that this might be better achieved, while allowing both languages equal status as official languages, by including a positive provision in the Constitution to the effect that the State shall care for, and endeavour to promote, the Irish language as a unique expression of Irish tradition and culture.

The Review Group considers that there is an implicit right to conduct official business in either official language and that the implementation of this right is a matter for legislation and/or administrative measures rather than constitutional provision.

The word 'Béarla' is now commonly used in Irish to denote the English language and should supersede the expression 'Sacs-Bhéarla'.

Recommendation

The first and second sections of Article 8 should be replaced by English and Irish versions on the following lines:

1 The Irish language and the English language are the two official languages.

2 Because the Irish language is a unique expression of Irish tradition and culture, the State shall take special care to nurture the language and to increase its use.

1 Is iad an Ghaeilge agus an Béarla an dá theanga oifigiúla.

2 Ós í an Ghaeilge an chuid is dúchasaí de thraidisúin agus de chultúr na hÉireann, beidh sé de chúram ar an Stát an teanga a chaomhnadh agus a h-úsáid a leathnú.

Nationality and Citizenship

Article 9

9.1.1° *On the coming into operation of this Constitution any person who was a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a citizen of Ireland.*

9.1.2° *The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law.*

9.1.3° *No person may be excluded from Irish nationality and citizenship by reason of the sex of such person.*

9.2 *Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.*

Introduction

Article 9 deals with nationality and citizenship. It confers citizenship on all who, immediately prior to entry into force of the new Constitution, were citizens of Saorstát Éireann (Article 9.1.1°), anticipates legislation to make further provision for acquisition and loss of citizenship (Article 9.1.2°) and prohibits exclusion from citizenship on grounds of sex (Article 9.1.3°). Article 9.2 imposes on citizens the duty of fidelity to the nation and loyalty to the State. The subsequently enacted legislation, that is, the Irish Nationality and Citizenship Acts 1956–1994, makes further provision in regard to citizenship.

Issues

1 whether Article 9.1.1° should be deleted on the grounds that it is spent

The Review Group noted that this issue was addressed by the Attorney General's Committee on the Constitution (1968) which indicated in its report that the subsection will continue to have effect as long as anyone who was a citizen of Saorstát Éireann in 1937 is still living and, after that, while claims to citizenship by descent from such persons may arise. The Review Group agrees with this view and concludes that the subsection is not spent.

Recommendation

No change is proposed.

2 whether Article 9.1.1° should be deleted on the grounds that the matter could be adequately dealt with by ordinary legislation

The Review Group considers that the subsection is a fundamental and uncomplicated provision guaranteeing Irish citizenship to all persons who were citizens of Saorstát Éireann immediately prior to entry into force of the new Constitution, and as such is appropriate for inclusion in the Constitution. It concludes accordingly that it should not be deleted.

Recommendation

No change is proposed.

3 whether a provision on citizenship by birth should be inserted in the Article

The Review Group notes that sections 6 and 7 of the Irish Nationality and Citizenship Act 1956 provide, *inter alia*, for citizenship by birth. These provisions are not lacking in complexity. They confer entitlement to citizenship on all persons born anywhere in Ireland, except children of aliens entitled to diplomatic immunity in the State at the time of birth. However, in the case of a person born in Northern Ireland after December 1922 (and not a citizen by descent), realisation of that entitlement is subject to the making of a declaration by or on behalf of that person that he or she is an Irish citizen. This latter proviso is presumably for the purpose of avoiding the conferring of Irish citizenship by birth in Northern Ireland on unwilling recipients and it seems unlikely that it will be amended in the near future. (It should be noted that most persons born in Northern Ireland after December 1922 are entitled to citizenship by descent, without requirement of any declaration).

Conclusion

The Review Group, recognising that a provision on citizenship by birth necessarily includes exceptions and conditions and is correspondingly complex, is of the view that the subject is more appropriately dealt with in ordinary legislation. It concludes that a provision on the subject should not be inserted in the Article.

4 whether reference to both nationality and citizenship in Article 9.1.2°-3° should be retained

The use of both 'nationality' and 'citizenship' is probably attributable to a continuation of a British Commonwealth usage. It does not seem that the two terms have different legal meanings. Article 9.1.2° anticipated legislation in regard to both citizenship and nationality, now comprised in the Irish Nationality and Citizenship Acts which do not purport to give the two terms different meanings. The Attorney General's Committee on the Constitution (1968) concluded that the term 'nationality' was probably obsolete in Irish law but that in popular usage it implied inclusion of all those of the Irish race. Nevertheless, the term 'nationality' is included in the citizenship legislation (the Irish Nationality and Citizenship Acts); the term 'national' is used in section 6 of the Transfer of Sentenced Persons Act 1995; and Article 8 of the EU Treaty, as inserted by the Maastricht Treaty, refers to 'nationals' of member states. In these circumstances retention of the term 'nationality' in the Article would appear to be justified.

Recommendation

No change is proposed.

5 whether a provision to limit the basis on which citizenship by naturalisation may be granted should be inserted in Article 9

Section 14 of the Irish Nationality and Citizenship Act 1956 provides for conferring of Irish citizenship by means of the grant

of a certificate of naturalisation. Section 15 sets out conditions to be complied with if the certificate is to be granted. Section 16 permits these conditions to be waived in certain specified circumstances.

Recommendation

No change is proposed.

The Review Group is aware that unease has been expressed in regard to the waiver of conditions in some cases in recent years. It is of the view that, in so far as there might be a problem in this respect, it would not be appropriate to seek to deal with it by constitutional provision. It would be open to the Oireachtas to provide in legislation, more specifically than in section 16 of the Act, for the circumstances in which the conditions under section 15 might be waived, and/or for subjecting waiver decisions to closer scrutiny by the Dáil.

6 whether a provision to limit the basis on which legislation might provide for loss of citizenship should be inserted in the Article

The Review Group noted that the provisions for deprivation of validly acquired citizenship in the Irish Nationality and Citizenship Acts are confined to citizenship by naturalisation. Even in that limited field, the grounds for deprivation of citizenship are relatively narrow. It does not appear necessary to impose any restriction on the legislative activity of the Oireachtas in this respect.

Recommendation

No change is proposed.

7 whether the prohibition in Article 9.1.3° of exclusion from citizenship by reason of sex should be extended to other grounds for exclusion

Citizenship is an essential feature and a defining element of a state. Hence it is not surprising that states usually guard jealously their right to confer or withhold citizenship according to national interests and concerns. Thus, prohibition of discrimination in granting citizenship on some grounds might not be appropriate, although discrimination on the same grounds in the general human rights field would be unacceptable. Accordingly the Review Group hesitates to recommend an extension of the prohibition which might unjustifiably restrict the freedom of the Oireachtas to be selective in its legislation on the conferring of Irish citizenship.

Recommendation

No change is proposed.

8 whether any amendment of Article 9.1 is required in the light of the Maastricht Treaty provisions on EU citizenship

Article 8 of the EU Treaty (as inserted by the Maastricht Treaty) establishes citizenship of the EU and confers that citizenship on every national of a member state. The following Articles 8a to 8d (similarly inserted by the Maastricht Treaty) set out the rights of citizens, including freedom of movement and residence in any member state; the right to vote and be a candidate in the European Parliament and certain national elections in any member state; the right to avail oneself of the authorities of another member state for diplomatic or consular protection in a third country in which one's own state is not represented; the right to petition the European Parliament and to apply to the EU Ombudsman.

The EU Treaty provision leaves it to national laws of the member states to determine their respective citizenships and does not seek to confer Irish citizenship on any persons. Ireland, unlike some other member states, does not differentiate between categories of its citizens for purposes associated with EU citizenship. The Review Group considers that amendment of the section in the light of the EU provisions is not required.

Recommendation

No change is proposed.

Article X

Natural Resources

Article 10

10.1 *All natural resources, including the air and all forms of potential energy, within the jurisdiction of the Parliament and Government established by this Constitution and all royalties and franchises within that jurisdiction belong to the State subject to all estates and interests therein for the time being lawfully vested in any person or body.*

10.2 *All land and all mines, minerals and waters which belonged to Saorstát Éireann immediately before the coming into operation of this Constitution belong to the State to the same extent as they then belonged to Saorstát Éireann.*

10.3 *Provision may be made by law for the management of the property which belongs to the State by virtue of this Article and for the control of the alienation, whether temporary or permanent, of that property.*

10.4 *Provision may also be made by law for the management of land, mines, minerals and waters acquired by the State after the coming into operation of this Constitution and for the control of the alienation, whether temporary or permanent, of the land, mines, minerals and waters so acquired*

Introduction

The Review Group considered Article 10 which vests in the State all natural resources, royalties etc situate within its jurisdiction (section 1), and all land, mines, waters etc previously owned by Saorstát Éireann (section 2), subject, in each case, to other ownership rights in them. It further enables legislation providing for the management and alienation of these assets (section 3) and of other assets acquired subsequently by the State (section 4).

Issues

1 placement of the Article

The Review Group considers that aspects of the Article, particularly section 2, might well have been placed originally in the Transitory Provisions. Nevertheless, it concludes that this consideration is not of such significance as to justify a proposal for change of placement.

2 continental shelf resources

The Review Group notes that developments in international law allow Ireland to exercise jurisdiction in respect of the natural resources of the continental shelf (outside territorial waters). It considered in this context whether section 1, which covers only natural resources within the jurisdiction as established by the Constitution, should be amended to include the natural resources of the shelf. The Review Group noted the conclusion of the Attorney General's Committee on the Constitution (1968) that there were no significant limitations, other than those imposed by international law, on the power of the State to enact legislation having extra-territorial effect, including legislation covering the natural resources of the continental shelf. The Review Group agrees that no amendment of the Article in that respect is required. Moreover, these resources appear to come within section 4, which envisaged legislation providing for management etc of subsequently acquired resources.

Recommendation

No change is proposed.

Article XI

Revenues of the State – Central Fund

Article 11

All revenues of the State from whatever source arising shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes and in the manner and subject to the charges and liabilities determined and imposed by law.

This Article provides for a central fund into which all State revenues, other than those specifically excepted by law, must be paid. This provision is essential to the proper control and management of the public finances and is linked with Dáil supervision of the receipts and expenditure of the State under Article 17 and the control and audit functions of the Comptroller and Auditor General under Article 33.

Recommendation

No change is proposed.

The President

Article 12

12.1 *There shall be a President of Ireland (Uachtarán na hÉireann), hereinafter called the President, who shall take precedence over all other persons in the State and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law.*

12.2.1° *The President shall be elected by direct vote of the people.*

12.2.2° *Every citizen who has the right to vote at an election for members of Dáil Éireann shall have the right to vote at an election for President.*

12.2.3° *The voting shall be by secret ballot and on the system of proportional representation by means of the single transferable vote.*

12.3.1° *The President shall hold office for seven years from the date upon which he enters upon his office, unless before the expiration of that period he dies, or resigns, or is removed from office, or becomes permanently incapacitated, such incapacity being established to the satisfaction of the Supreme Court consisting of not less than five judges.*

12.3.2° *A person who holds, or who has held, office as President, shall be eligible for re-election to that office, but only once.*

12.3.3° *An election for the office of President shall be held not later than, and not earlier than the sixtieth day before, the date of the expiration of the term of office of every President, but in the event of the removal from office of the President or of his death, resignation, or permanent incapacity established as aforesaid (whether occurring before or after he enters upon his office), an election for the office of President shall be held within sixty days after such event*

Introduction

Broadly speaking, democratic governments are of two kinds – presidential and cabinet. In a presidential government the President is both Head of State and Head of Government, that is, chief executive of the State. In a cabinet government the President, or a constitutional monarch, is Head of State and a Prime Minister, at the head of a group of ministers called the cabinet, is Head of Government.

In the Constitution, Ireland has chosen for itself the cabinet kind of government. The cabinet, led by the Taoiseach, exercises the executive power of the State, in accordance with the Constitution, and is accountable to the people through the people's representatives in the Dáil. The President has no executive powers apart from some discretionary ones that make the President the guardian of the Constitution. The President carries out the functions the Government wish him or her to perform on behalf of the State. The Constitution obliges the Taoiseach to keep the President generally informed on domestic and international policy.

The President signs and promulgates legislation, accredits Irish diplomatic representatives abroad and receives foreign ambassadors to Ireland, represents Ireland on State visits abroad, and acts in manifold other ways to strengthen the cultural and social ties binding the people of Ireland to one another and the people of Ireland to other peoples throughout the world.

On the ten occasions for which there has been an election to the presidency, it has not been necessary to proceed to a ballot on five occasions because only one candidate was nominated.

The President, freed from executive functions – and the divisiveness which political activity would necessarily entail – serves as a personification of the State. From the President the people seek a reflection of their highest values and aspirations. In return, the President takes precedence over all other persons in the State and is honoured in a style concordant with the republican character of the State and the social genius of its citizens.

The Review Group noted two features of the office of President which are important in defining its nature. The first is that, in being elected by direct vote of the people, in taking precedence over other persons and, in effect, discharging the functions of a Head of State, the President, in performing official duties, does not and cannot represent any particular group or interest but must represent all the people. The second is that, in providing that the President shall not be answerable to either House of the Oireachtas or to any court for the exercise and performance of the powers and functions of the office, the Constitution underlines the non-political, non-partisan nature of the office.

12.4.1° *Every citizen who has reached his thirty-fifth year of age is eligible for election to the office of President.*

12.4.2° *Every candidate for election, not a former or retiring President, must be nominated either by:*

i. not less than twenty persons, each of whom is at the time a member of one of the Houses of the Oireachtas, or

ii. by the Councils of not less than four administrative Counties (including County Boroughs) as defined by law.

12.4.3° *No person and no such Council shall be entitled to subscribe to the nomination of more than one candidate in respect of the same election.*

12.4.4° *Former or retiring Presidents may become candidates on their own nomination.*

12.4.5° *Where only one candidate is nominated for the office of President it shall not be necessary to proceed to a ballot for his election.*

12.5 *Subject to the provisions of this Article, elections for the office of President shall be regulated by law.*

12.6.1° *The President shall not be a member of either House of the Oireachtas.*

12.6.2° *If a member of either House of the Oireachtas be elected President, he shall be deemed to have vacated his seat in that House.*

12.6.3° *The President shall not hold any other office or position of emolument.*

12.7 *The first President shall enter upon his office as soon as may be after his election, and every subsequent President shall enter upon his office on the day following the expiration of the term of office of his predecessor or as soon as may be thereafter or, in the event of his predecessor's removal from office, death, resignation, or permanent incapacity established as provided by section 3 hereof,*

The functions of the President

The President appoints the Taoiseach on the nomination of Dáil Éireann and the other members of the Government on the nomination of the Taoiseach with the previous approval of Dáil Éireann. The President's other functions are of two kinds – those the President performs at the instance or with the approval of the Government and those rarer ones which the President performs at his or her own discretion.

Article 13.9 makes it clear that the powers and functions conferred on the President by the Constitution are to be exercised and performed, in nearly all instances, on the advice of the Government. Article 13.10 allows legislation that confers additional powers and functions on the President – it is under this Article that the President has been given functions in foreign affairs – but Article 13.11 provides that any such additional powers and functions can be exercised and performed only on the advice of the Government.

Apart from the appointment of the Taoiseach and the other members of the Government, the President performs the following functions in relation to the appointment of constitutional officers:

1 the President appoints the Attorney General on the nomination of the Taoiseach (Article 30.2)

2 the President in his or her absolute discretion may appoint up to seven people to serve on the Council of State (Article 31.3)

3 the President appoints the Comptroller and Auditor General on the nomination of Dáil Éireann (Article 33.2)

4 the President appoints the judges of the Supreme Court, the High Court and all other courts established pursuant to Article 34 (Article 35.1).

(The President makes various other appointments in accordance with statutory provisions.)

The President performs the following functions in relation to the Oireachtas:

1 The President on the nomination of Dáil Éireann appoints the Taoiseach (13.1.1°)

2 The President on the nomination of the Taoiseach with the previous approval of Dáil Éireann appoints the other members of Government (Article 13.1.2°)

3 the President on the advice of the Taoiseach accepts the resignation or terminates the appointment of any member of the Government (Article 13.1.3°)

4 the President summons and dissolves Dáil Éireann on the advice of the Taoiseach (Article 13.2.1°) but may in his or her absolute discretion refuse a dissolution if the Taoiseach ceases to retain a majority in Dáil Éireann (Article 13.2.2°)

as soon as may be after the election.

12.8 *The President shall enter upon his office by taking and subscribing publicly, in the presence of members of both Houses of the Oireachtas, of Judges of the Supreme Court and of the High Court, and other public personages, the following declaration:-*

In the presence of Almighty God 'I , do solemnly and sincerely promise and declare that I will maintain the Constitution of Ireland and uphold its laws, that I will fulfil my duties faithfully and conscientiously in accordance with the Constitution and the law, and that I will dedicate my abilities to the service and welfare of the people of Ireland. May God direct and sustain me.'

12.9 *The President shall not leave the State during his term of office save with the consent of the Government.*

12.10.1° *The President may be impeached for stated misbehaviour.*

12.10.2° *The charge shall be preferred by either of the Houses of the Oireachtas, subject to and in accordance with the provisions of this section.*

12.10.3° *A proposal to either House of the Oireachtas to prefer a charge against the President under this section shall not be entertained unless upon a notice of motion in writing signed by not less than thirty members of that House.*

12.10.4° *No such proposal shall be adopted by either of the Houses of the Oireachtas save upon a resolution of that House supported by not less than two-thirds of the total membership thereof.*

12.10.5° *When a charge has been preferred by either House of the Oireachtas, the other House shall investigate the charge, or cause the charge to be investigated.*

5 the President may at any time, after consultation with the Council of State, convene a meeting of either or both of the Houses of the Oireachtas (Article 13.2.3°)

6 the President may, after consultation with the Council of State, communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance (Article 13.7.1°) and address a message to the nation at any time on any such matter (Article 13.7.2°) provided the Government approves (Article 13.7.3°).

The President performs the following functions in relation to legislation:

1 every Bill passed or deemed to have been passed by both Houses of the Oireachtas requires the signature of the President for its enactment into law (Article 13.3.1°), but the President, after consultation with the Council of State, may refer any Bill (other than a Money Bill, a Bill to amend the Constitution, or, under Article 24, a Bill to preserve public peace and security or deal with a public emergency) to the Supreme Court for a decision as to whether the Bill is, or parts of it are, repugnant to the Constitution, and sign it into law only if it is declared not to be so repugnant (Article 26); the President, after consultation with the Council of State, may accede to a request from the Seanad to appoint a Committee of Privileges to determine whether a particular Bill is or is not a Money Bill (Article 22.2.3°); moreover, where a majority of the members of the Seanad and not less than a third of the members of the Dáil petition the President to decline to sign a Bill because it contains a proposal of such national importance that the will of the people thereon ought to be ascertained, the President, also after consultation with the Council of State, may decline to sign the Bill until it has been approved either by the people in a referendum or by a resolution of the Dáil following a dissolution and re-assembly (Article 27)

2 the President promulgates every law made by the Oireachtas (Article 13.3.2°). Promulgation – the public proclamation of a law – is an essential characteristic of law and is formally achieved by publication of a notice in *Iris Oifigiúil,* the official gazette.

The President has the following functions in relation to defence:

1 the supreme command of the Defence Forces is vested in the President (Article 13.4), but its exercise is regulated by law (Article 13.5.1°)

2 all commissioned officers of the Defence Forces hold their commissions from the President (Article 13.5.2°).

12.10.6° *The President shall have the right to appear and to be represented at the investigation of the charge.*

12.10.7° *If, as a result of the investigation, a resolution be passed supported by not less than two-thirds of the total membership of the House of the Oireachtas by which the charge was investigated, or caused to be investigated, declaring that the charge preferred against the President has been sustained and that the misbehaviour, the subject of the charge, was such as to render him unfit to continue in office, such resolution shall operate to remove the President from his office.*

12.11.1° *The President shall have an official residence in or near the City of Dublin.*

12.11.2° *The President shall receive such emoluments and allowances as may be determined by law.*

12.11.3° *The emoluments and allowances of the President shall not be diminished during his term of office.*

Article 13 – The President

13.1.1° *The President shall, on the nomination of Dáil Éireann, appoint the Taoiseach, that is, the head of the Government or Prime Minister.*

13.1.2° *The President shall, on the nomination of the Taoiseach with the previous approval of Dáil Éireann, appoint the other members of the Government.*

13.1.3° *The President shall, on the advice of the Taoiseach, accept the resignation or terminate the appointment of any member of the Government.*

The President has the following function in relation to criminal punishment:

> the right to pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are vested in the President (though not necessarily exclusively so) (Article 13.6).

The Review Group discussed two of the President's discretionary powers: that relating to the dissolution of the Dáil is discussed below and that relating to referral of Bills to the Supreme Court is discussed separately in chapter 4 – section entitled 'Constitutionality of Bills and Laws'.

Issues

1 whether the office of President should exist

The Committee on the Constitution (1967) was divided on the question. Those who would abolish it argued that the powers of the President were those of a figure-head, that the President's formal duties as Head of State could be performed by the Taoiseach, and that abolition would create savings. Those who wished to retain the office argued that the Taoiseach could not realistically perform the President's function of guardian of the Constitution, in particular that of assisting in ensuring that legislation repugnant to the Constitution does not become law, that the duties of the two offices would impose a severe burden on any single individual, and that the performance of the formal duties of Head of State necessarily involved costs, so that abolition would result in little or no savings.

The Review Group considers there is no public demand or good reason for abolition of the office. A State requires a Head of State; the President's function as guardian of the Constitution requires that the office be separate from the executive.

The Review Group notes that the Constitution does not describe the President as Head of State. The need for this reticence disappeared with the coming into force of the Republic of Ireland Act 1948 and the removal from the British monarch of all functions in relation to external affairs and their assignment to the President. The Review Group considers that Article 12.1, therefore, should be amended to describe the President as Head of State.

Recommendation

Amend Article 12.1 to describe the President as Head of State.

13.2.1° *Dáil Éireann shall be summoned and dissolved by the President on the advice of the Taoiseach.*

13.2.2° *The President may in his absolute discretion refuse to dissolve Dáil Éireann on the advice of a Taoiseach who has ceased to retain the support of a majority in Dáil Éireann.*

13.2.3° *The President may at any time, after consultation with the Council of State, convene a meeting of either or both of the Houses of the Oireachtas.*

13.3.1° *Every Bill passed or deemed to have been passed by both Houses of the Oireachtas shall require the signature of the President for its enactment into law.*

13.3.2° *The President shall promulgate every law made by the Oireachtas.*

13.4 *The supreme command of the Defence Forces is hereby vested in the President.*

13.5.1° *The exercise of the supreme command of the Defence Forces shall be regulated by law.*

13.5.2° *All commissioned officers of the Defence Forces shall hold their commissions from the President.*

13.6 *The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may, except in capital cases, also be conferred by law on other authorities.*

2 whether there should be direct elections for the Presidency

Ireland is rare in electing its Head of State directly. Direct election gives the President two unique features: he or she is the only constitutional officer directly elected to an office and no other officer is elected by a majority of the national electorate. The mandate the President receives from the electorate is to carry out the constitutional duties of the presidency. These cannot be altered or added to via the election campaign.

The invocation by a President of a presumed mandate for a particular policy, for example one concerning the interests of a particular grouping in the community (which could not under the Constitution be questioned in Parliament or in the courts), could create tensions between the President, Parliament and Government. Indirect election of the President, by a majority in Parliament or a special electoral college, would obviate this danger. Thus in Australia, the proposed office of President is likely to be filled by a qualified majority of Parliament.

The 1967 Committee was divided on the issue.

The Review Group notes that there is no public demand for change and that it may be inferred that the people wish to retain their right to vote directly for a President.

The Review Group notes, too, that, if the President continues to be directly elected, the text of Article 12.2.3° would need to be amended. It describes the method of election as 'proportional representation by means of the single transferable vote'. The term 'proportional representation' denotes the filling of a number of seats by different parties in proportion to the votes they receive. It cannot refer to the filling of a single seat. See the Review Group's discussion of the electoral system in chapter 4 – section entitled 'Elections to Dáil Éireann'.

Recommendation

Delete the words 'and on the system of proportional representation' from Article 12.2.3°.

3 whether the procedure for nominating a presidential candidate is too restrictive

Recommendation

The Review Group considers that the constitutional requirements for nominating a presidential candidate are too restrictive and in need of democratisation. In some countries a popular element is secured by providing that a certain number of registered voters may conjoin to nominate a candidate. The Review Group feels that validation of such nominators would be difficult. However, some alternative mechanism, based on a specified number of voters, ought to be explored. Another method that might loosen the nomination procedure would be to reduce the number of members of either House required for nomination.

13.7.1° *The President may, after consultation with the Council of State, communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance.*

13.7.2° *The President may, after consultation with the Council of State, address a message to the Nation at any time on any such matter.*

13.7.3° *Every such message or address must, however, have received the approval of the Government.*

13.8.1° *The President shall not be answerable to either House of the Oireachtas or to any court for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions.*

13.8.2° *The behaviour of the President may, however, be brought under review in either of the Houses of the Oireachtas for the purposes of section 10 of Article 12 of this Constitution, or by any court, tribunal or body appointed or designated by either of the Houses of the Oireachtas for the investigation of a charge under section 10 of the said Article.*

13.9 *The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body.*

4 whether the powers of the President should be expanded

A total re-structuring of our governmental structure so that it becomes a presidential rather than a cabinet kind would result in a major expansion of the President's powers.

The Review Group notes that there is no demand for such a radical change.

It is sometimes suggested that the discretionary powers of the President should be expanded to embrace certain executive functions such as the selection of judges (at present the President has no choice but to appoint those candidates proposed by the Government) or the appointment of the chairman and members of the Constituency Commission.

Conclusion

The Review Group considers that to extend the powers of the President to allow him or her to act in the area of the executive would have two serious effects:

i) it would involve the President in party politics. Thus if the President had the power to select judges, the appointment of judges could become a contentious political issue in presidential elections

ii) it would reduce accountability. Whereas the Government are accountable to the Houses of the Oireachtas and the courts, the President is not so answerable.

The Review Group considers that the executive functions of government should be carried out by or on the authority of the Government, the democratically elected body whose actions are subject to continuous, public review.

In relation to the appointment of members of the Constituency Commission, the Review Group notes that this is in course of being determined by law and that therefore there is no need to recommend change. Indeed it feels that ordinary legislation should be capable of providing such transparency as is required in any area in which the executive operates.

5 the minimum age of eligibility for election to the office of President

Countries that set an age limit for their President differ on the age specified. Some set thirty-five years, as we do, others set forty. Italy requires its President to be over fifty.

It was observed that no upper age limit is prescribed. On the question of the minimum age limit, opinion in the Review Group is divided. Some members see no sufficient reason to differentiate in this respect between eligibility for Dáil membership (and consequently for ministerial office) and for the presidency, and were prepared to rely on the judgment of the electorate to make a proper choice between candidates. Other members consider that the presidency calls for special qualities which are more likely to accrue and mature over a longer span of

13.10 *Subject to this Constitution, additional powers and functions may be conferred on the President by law.*

13.11 *No power or function conferred on the President by law shall be exercisable or performable by him save only on the advice of the Government.*

Article 14 – The Presidential Commission

14.1 *In the event of the absence of the President, or his temporary incapacity, or his permanent incapacity established as provided by section 3 of Article 12 hereof, or in the event of his death, resignation, removal from office, or failure to exercise and perform the powers and functions of his office or any of them, or at any time at which the office of President may be vacant, the powers and functions conferred on the President by or under this Constitution shall be exercised and performed by a Commission constituted as provided in section 2 of this Article.*

14.2.1° *The Commission shall consist of the following persons, namely, the Chief Justice, the Chairman of Dáil Éireann (An Ceann Comhairle), and the Chairman of Seanad Éireann.*

14.2.2° *The President of the High Court shall act as a member of the Commission in the place of the Chief Justice on any occasion on which the office of Chief Justice is vacant or on which the Chief Justice is unable to act.*

14.2.3° *The Deputy Chairman of Dáil Éireann shall act as a member of the Commission in the place of the Chairman of Dáil Éireann on any occasion on which the office of Chairman of Dáil Éireann is vacant or on which the said Chairman is unable to act.*

years than the twenty-one, possibly falling to eighteen, which makes candidates eligible for membership of the Dáil.

Conclusion

The majority of members favours no change, or only a minor reduction, in the age limit.

There is an apparent discrepancy between the English and Irish versions. The Irish version has 'ag a bhfuil cúig bliana tríochad slán' (that is, has completed thirty-five years), whereas the English version is 'who has reached his thirty-fifth year of age', which could mean has entered rather than completed that year.

Recommendation

This discrepancy should be removed by substituting the word 'completed' for 'reached' in the English version.

6 whether the President should have discretion to refuse a dissolution of Dáil Éireann

Article 13.2.2° states that the President may in his absolute discretion refuse to dissolve Dáil Éireann on the advice of a Taoiseach who has ceased to retain the support of a majority in Dáil Éireann. Ambiguity arises over how a President may determine whether or not the Taoiseach has lost the support of the Dáil. Is a Dáil vote necessary? Or is a public announcement of withdrawal of support by a crucial number of deputies sufficient? If a Taoiseach sought to pre-empt the President's exercise of discretion by advice to dissolve the Dáil in advance of a Dáil vote, might not the President be able somehow to satisfy himself or herself that the Taoiseach had lost the support of the Dáil and therefore refuse a dissolution? No President has exercised this important power.

To remove the constitutional ambiguity there are the following possibilities:

i) delete the latter half of Article 13.2.2° so that it reads, 'The President may in the President's absolute discretion refuse to dissolve Dáil Éireann.'

This would remove the Taoiseach's power to dissolve the Dáil at will when he or she has a majority and seeks an opportunity to enhance the Government's Dáil support. It would politicise the presidency by making the President a factor in the strategy of political parties. It might be argued that the President as Head of State should not be put in a politically divisive position, especially if the President's actions are to be exempt from debate in the Dáil.

ii) delete Article 13.2.2° in its entirety and in effect allow the Taoiseach to have power under Article 13.2.1° to dissolve Dáil Éireann whenever he or she so wishes.

14.2.4° *The Deputy Chairman of Seanad Éireann shall act as a member of the Commission in the place of the Chairman of Seanad Éireann on any occasion on which the office of Chairman of Seanad Éireann is vacant or on which the said Chairman is unable to act.*

14.3 *The Commission may act by any two of their number and may act notwithstanding a vacancy in their membership.*

14.4 *The Council of State may by a majority of its members make such provision as to them may seem meet for the exercise and performance of the powers and functions conferred on the President by or under this Constitution in any contingency which is not provided for by the foregoing provisions of this Article.*

14.5.1° *The provisions of this Constitution which relate to the exercise and performance by the President of the powers and functions conferred on him by or under this Constitution shall subject to the subsequent provisions of this section apply to the exercise and performance of the said powers and functions under this Article.*

14.5.2° *In the event of the failure of the President to exercise or perform any power or function which the President is by or under this Constitution required to exercise or perform within a specified time, the said power or function shall be exercised or performed under this Article, as soon as may be after the expiration of the time so specified.*

It is arguably undemocratic for a Taoiseach to be able to call an election whenever he or she wishes. It might be argued that the checks the Dáil has on the Government are limited and would be strengthened by denying to the Taoiseach the initiative to dissolve the Dáil.

On the other hand, the power of dissolution is an invaluable aid to a Taoiseach in maintaining party and ministerial discipline and so sustaining government, the executive power of the State (as defined by the Constitution), while leaving the final decision, democratically, with the electorate. It can exercise a stabilising influence conducive to economic and social well-being.

iii) let the Constitution define the circumstances in which the President might exercise absolute discretion, namely,

a) following the loss of a vote of confidence

b) following the rejection of a budget.

This would leave the initiative with the Taoiseach to seek a dissolution before either condition obtains. It would also politicise the President if he or she does exercise absolute discretion and refuses a dissolution.

Conclusion

The Review Group would prefer that the involvement of the President in party political issues should, if possible, be avoided and, for that reason, has given consideration to other methods of dealing with the dissolution problem, principally the prescription of a fixed term for Dáil Éireann and provision for a constructive vote of no confidence. These are discussed in the context of Article 28; to give them effect, amendments would be required in Article 13.2.

7 whether the President should have a role in the formation of a new Government

Articles 13.1.1° and 13.1.2° give the President no discretion in the selection and appointment of a new Taoiseach and Government. This is quite unusual in parliamentary government systems, and underscores a desire to maintain a position for the President impeccably remote from party politics. However, two problems may present themselves:

i) where a new Dáil assembles and no party or group of parties has an overall majority

Recent Irish experience suggests that the parties in such circumstances feel obliged by the electorate to construct a stable Government based on an agreed programme. It is not clear that the intervention of the President in these circumstances would secure such a Government more quickly.

The Review Group considers that the President should not be given any role in this circumstance.

ii) where a Government resigns voluntarily or on foot of a vote of no confidence, or the threat of one

A problem can arise where the Dáil cannot agree quickly on a nominee for Taoiseach and a defeated Government may be faced with a protracted term in office on an acting basis. In many other parliamentary government systems this problem is addressed in one of two ways:

i) the Head of State is given a role in the process of identifying a new Prime Minister. The Head of State's intervention provides an alternative in what otherwise might be a chaotic, protracted process, but does not in all cases avoid the problem

ii) a constructive vote of no confidence is used to force the legislature to nominate a new Prime Minister when voting no confidence in the old one.

Conclusion

On balance, the Review Group feels once more that the proposal to introduce a constructive vote of no confidence is preferable to increasing the powers of the President in the government formation process.

8 declaration

The Review Group notes the UN Human Rights Committee's concern, in their report on Ireland of August 1993, about the religious aspects of the President's declaration under Article 12.8.

Recommendation

Provision should be made for the President to make either a declaration or an affirmation.

The question has been raised whether the presidential declaration should be amended to incorporate the values a President should uphold in discharging official functions, for example, human rights. The promise to maintain the Constitution is, however, comprehensive in scope.

9 period of office

Is there a case for a shorter period? Since the President is elected by the people, the people should be able to make the President accountable to them reasonably frequently through elections. As guardian of the Constitution, in respect of any doubtful use of their legislative powers by either the Houses of the Oireachtas or the Government, the President should have a longer term than that of the Dáil or Seanad. If the Houses of the Oireachtas are given a fixed term (as discussed in the section on Dáil Éireann) of four years or less, the President's term might be set at five years. The issue has significance, too, for the type of people that might be attracted to the office. Thus a young President, who does not wish to have a second term of office because of a wish to pursue other interests or career options after having held the presidency, might be inhibited in going forward by the length of the period

and the pressure that might arise to serve a second term on the completion of the first.

On the other hand, there are now direct elections for the European Parliament, Dáil Éireann, local authorities as well as for the presidency, and the suggestion of a yet more frequent presidential election could, if implemented, lead to even greater electoral fatigue. A shorter term than seven years could tend to associate the presidency more with party political change. Moreover, the relative infrequency of a seven-year term contributes to the sense of the presidency's being removed from the rough and tumble of party politics. A seven-year term could also be seen to be more in keeping with the approbation uniquely signalled by a direct vote of the people. There are also those who would argue that for many presidential candidates the prospect of a seven-year term would be more attractive than a five-year one.

Recommendation

The seven-year term should be retained.

10 messages or addresses to the nation

Article 13.7 formally accords to the President, after consultation with the Council of State, the right to 'communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance' and 'to address a message to the nation at any time on any such matter'. It is provided, however, that 'every such message or address must have received the approval of the Government' – an express reminder of the exclusive responsibility of the Government for policy statements and decisions. The Constitution is silent about other forms of communication by the President and this, it is understood, has given rise to some legal debate.

Conclusion

The Review Group sees no need to enter such a debate, being in no doubt that what the President does must at all times be consistent with his or her role under the Constitution and involve no intrusion on the executive functions which the Constitution reserves to the Government. From the beginning the President, in a simple phrase, has been described as being 'above politics', in the sense of abstaining from any public statement or intervention which could be judged to be politically partisan or inconsistent with the fundamental principle that there can be only one executive authority. This has been well recognised and the Review Group does not recommend the insertion of any more explicit wording in the Constitution. Matters of this kind are best left to the wisdom and sense of propriety of those entrusted with high public office.

11 the Presidential Commission

The Commission acts when the President is absent, temporarily incapacitated, or permanently incapacitated, or dies, resigns, is removed from office, or fails to exercise and perform the functions of the office. The Commission is a common

constitutional mechanism and its composition is broadly similar to such institutions elsewhere.

Recommendation

No change is proposed.

The National Parliament

Article 15 – Constitution and Powers

15.1.1° *The National Parliament shall be called and known, and is in this Constitution generally referred to, as the Oireachtas.*

15.1.2° *The Oireachtas shall consist of the President and two Houses, viz.: a House of Representatives to be called Dáil Éireann and a Senate to be called Seanad Éireann.*

15.1.3° *The Houses of the Oireachtas shall sit in or near the City of Dublin or in such other place as they may from time to time determine.*

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.*

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.*

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.*

15.4.1° *The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof.*

15.4.2° *Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid.*

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

Introduction

Under Articles 15-27, the legislature consists of the President, the directly elected Dáil, and the Seanad. The Dáil is the paramount body under the Constitution in relation to proposals for legislation, public expenditure and taxation; the Seanad has specified delaying and deliberative functions. The President may, after consultation with the Council of State, refer any Bill passed by the two Houses (other than a Money Bill, a Bill to amend the Constitution or a Bill the time for the consideration of which by the Seanad has been abridged under Article 24) to the Supreme Court for a decision as to the constitutionality of the proposals.

Ireland's membership of the European Union (EU) has fundamentally altered the legislative authority of the Oireachtas, to the extent indicated, for example, by the following quotation from a judgment by the European Court of Justice in *Simmenthal v Ministero della Sanità* (Case 106/77) [1978] ECR 629:

> ... every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior to or subsequent to the Community rule.

Purpose of Articles

The purpose of Articles 15-27 is to:

i) enable the Dáil, representing the people, to hold the Government to account and, if necessary, dismiss it

ii) provide a mechanism for the democratic enactment of legislation

iii) assure the legitimacy of the public expenditure and taxation proposals of the Government (on the principle that there should be no taxation without representation).

Unlike the systems in some other democratic countries such as France and the United States, our system provides for common membership of the legislature and the executive. In fact, under the Constitution, the Government must consist wholly of members of the legislature. The Government is, in this sense, a committee of the Houses. But since the Constitution vests the executive power of the State in the Government, it differentiates it fundamentally from other committees of the Houses, which must, of their nature, be legislative, supervisory or advisory rather than executive, in purpose and operation. The fact that members of the executive must be members of the legislature keeps government in touch with the disposition of the legislature, in a practical way, and the legislature in touch with the realities of government; it also promotes cohesiveness of Irish policy in the European Union, where the legislative function is shared between the Commission, the Council of Ministers, and the European Parliament.

15.6.1° *The right to raise and maintain military or armed forces is vested exclusively in the Oireachtas.*

15.6.2° *No military or armed force, other than a military or armed force raised and maintained by the Oireachtas, shall be raised or maintained for any purpose whatsoever.*

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

15.8.1° *Sittings of each House of the Oireachtas shall be public.*

15.8.2° *In cases of special emergency, however, either House may hold a private sitting with the assent of two-thirds of the members present.*

15.9.1° *Each House of the Oireachtas shall elect from its members its own Chairman and Deputy Chairman, and shall prescribe their powers and duties.*

15.9.2° *The remuneration of the Chairman and Deputy Chairman of each House shall be determined by law.*

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.*

15.11.1° *All questions in each House shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present and voting other than the Chairman or presiding member.*

15.11.2° *The Chairman or presiding member shall have and exercise a casting vote in the case of an equality of votes.*

15.11.3° *The number of members necessary to constitute a meeting of either House for the exercise of its powers shall be determined by its standing orders.*

Conclusion

The Review Group does not recommend any change in the present constitutional arrangements governing relations between President, Dáil and Seanad or between legislature and government although such change might become necessary in the light of the comprehensive review of Seanad Éireann that the Review Group recommends.

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.*

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.*

15.14 *No person may be at the same time a member of both Houses of the Oireachtas, and, if any person who is already a member of either House becomes a member of the other House, he shall forthwith be deemed to have vacated his first seat.*

15.15 *The Oireachtas may make provision by law for the payment of allowances to the members of each House thereof in respect of their duties as public representatives and for the grant to them of free travelling and such other facilities (if any) in connection with those duties as the Oireachtas may determine.*

Articles 16, 17 – Dáil Éireann

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.*

16.1.2°

i. *All citizens, and*

ii. *such other persons in the State as may be determined by law,*

without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dáil Éireann, shall have the right to vote at an election for members of Dáil Éireann.

Article 15.2.1°

Article 15.2.1° vests the 'sole and exclusive' power of making laws in the Oireachtas and provides that no other legislative authority has power to make laws for the State. This provision has been interpreted to restrict severely the power of Ministers and other authorities to make statutory instruments or subordinate legislation. In *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] IR 381 the Supreme Court held that the test

> is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits – if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body – there is no unauthorised delegation of power.

The test, described above, begs the question of what is meant by 'principles and policies' and subsequent cases have adopted both a broad and 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.

The court in the *Cityview Press* case recognised this difficulty when it spoke of the attractions of subordinate legislation 'in view of the complex, intricate and ever-changing situations which confront both the legislature and the executive in a modern state.'

The court referred to the practice of making secondary legislation subject to annulment by either House of Parliament, but pointed out that, while this was a measure of control and a safeguard, the two Houses of the Oireachtas are not the Oireachtas as such.

The Review Group considered 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. 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.

16.1.3° *No law shall be enacted placing any citizen under disability or incapacity for membership of Dáil Éireann on the ground of sex or disqualifying any citizen or other person from voting at an election for members of Dáil Éireann on that ground.*

16.1.4° *No voter may exercise more than one vote at an election for Dáil Éireann, and the voting shall be by secret ballot.*

16.2.1° *Dáil Éireann shall be composed of members who represent constituencies determined by law.*

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.*

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.*

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 any alterations in the constituencies shall not take effect during the life of Dáil Éireann sitting when such revision is made.*

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

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

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

The Review Group felt that a change of this sort would have to be approached with great caution. Should a change be confined to subordinate legislation made by the Government or by Ministers, or should it extend to all subordinate legislation? Should the tacit approval of one or both Houses suffice, or should a positive resolution be required? Could the use of such a procedure undermine the power of the President to refer legislation under Article 26?

Recommendation

Consideration should be given to an amendment to Article 15.2.1° whereby in addition to subordinate legislation which is already permissible within the limits of the *Cityview Press* test, the Oireachtas should have power to authorise by law the delegation of power to either the Government or a Minister (but no other body) to legislate, using the mechanism of a statutory instrument, in relation to the substance of the parent legislation (thereby exceeding the present limits of the *Cityview Press* test). However, if such a change were to be made, it should be accompanied by necessary safeguards to ensure that the legislative supremacy of the Oireachtas was not thereby undermined. These safeguards would have to include, at a minimum, a requirement that any legislation pursuant to this power could not enter into law until it had been the subject of a positive resolution of both Houses of the Oireachtas.

Subsection 15.2.1° is also affected by Ireland's membership of the European Union. Article 189 of the Treaty of Rome leaves the 'choice and form of methods' of implementing Community law to the member states. Parliament enacted the European Communities Act 1972 for this purpose. Section 3(2) of that Act provides that:

> Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the Regulations to be necessary for the purposes of the Regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act).

Section 3 provides that regulations under the Act shall have statutory effect and unless they are confirmed by Act of the Oireachtas within six months they cease to have statutory effect, but without prejudice to the validity of anything done under the regulations. There is also provision for further parliamentary review of the regulations.

In the year to June 1995, more than seventy statutory instruments were made by Ministers under the 1972 Act, applying Community or Union law to Ireland.

A further point considered by the Review Group is the so-called 'democratic deficit', resulting from the fact that laws can be made under the EU Treaties without reference to the Dáil or Seanad. There are, in fact, more than twenty-one different procedures for making decisions with legislative effect (other than budgetary decisions to which still other procedures apply) in the European Union. Some of these laws are directly applicable in Ireland,

16.3.2° *A general election for members of Dáil Éireann shall take place not later than thirty days after a dissolution of Dáil Éireann.*

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.*

16.4.2° *Dáil Éireann shall meet within thirty days from that polling day.*

16.5 *The same Dáil Éireann shall not continue for a longer period than seven years from the date of its first meeting: a shorter period may be fixed by law.*

16.6 *Provision shall be made by law to enable the member of Dáil Éireann who is the Chairman immediately before a dissolution of Dáil Éireann to be deemed without any actual election to be elected a member of Dáil Éireann at the ensuing general election.*

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.*

Article 17

17.1.1° *As soon as possible after the presentation to Dáil Éireann under Article 28 of this Constitution of the Estimates of receipts and the Estimates of expenditure of the State for any financial year, Dáil Éireann shall consider such Estimates.*

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.*

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.*

others are not. All must go through procedures laid down in the Treaties. A state may be exposed to an action for substantial damages if it legislates in breach of EU law or fails to implement an EU directive by the specified date: see Cases C-6/90 and C-9/90 *Francovich v Italian Republic* [1991] ECR I-5357 and Case C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany; R v Transport Secretary, ex parte Factortame Ltd* (1996).

Some of the procedures involve consultation with the European Parliament, some do not. Some require unanimity in the Council of Ministers, others do not. Some decisions are made by common agreement of the governments of the members states, some are made on the proposal of member states, and others on a proposal from the Commission. Consultation with other institutions or bodies of the Union (Court of Auditors, Economic and Social Committee, Committee of the Regions, European Central Bank, Monetary Committee, European Monetary Institute, Political Committee and Article K4 Committee) is provided for on either a mandatory or optional basis. The point is that a considerable part of the law-making process of the State now takes place outside the formal procedures of the Oireachtas under the provisions of Article 29.4, in particular subsection 5:

> No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.

The European Union Treaties provide the framework for consultation and decision-making for much of our law and it is these procedures which each member state must use, as it sees fit, to deal with its input, whether democratic, diplomatic or administrative, to the working of the Union. There is further discussion of this point set out in the Review Group's comments on Article 29.4.

The Review Group notes that the recently formed Joint Committee on European Affairs has among its terms of reference 'matters arising from Ireland's membership of the EU' and, in particular, 'such programmes and guidelines prepared by the Commission of the European Communities as a basis for possible legislative action and such drafts of regulations, directives, decisions, recommendations and opinions of the Council of Ministers proposed by the Commission' etc. These terms of reference enable Parliament to form a view on Union legislation – and debate it if it so wishes – before it is enacted. Such domestic procedures can be useful in providing a democratic input into Community legislation. The reports submitted to Parliament, under statute, by the Minister for Foreign Affairs every six months on developments in the European Union, listing the statutory instruments made under the European Communities Act 1972, also provide an opportunity for consideration of Union affairs in either or both Houses.

Articles 18, 19 – Seanad Éireann

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°.

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

These ways of dealing with EU business are governed by either the Union Treaties or the procedures of the Houses themselves, and the Review Group does not consider that any constitutional change affecting them is called for. The Review Group does, however, consider it desirable to recognise the extent to which Article 15.2.1° is modified by our Treaty obligations. If it is considered that the Treaties require alteration, the relevant arguments could be put to the Inter-Governmental Conference on the future of the Union.

Article 15.2.2°

This subsection may enlarge the capacity of the Constitution to accommodate an 'agreed Ireland'. It appears also to provide authority for delegation to local authorities of certain limited rule- or law-making powers.

Recommendation

No change is proposed.

Article 15.3.1°-2°

More integrated and participatory forms of planning and organising have been initiated at national, regional and local levels in Ireland in recent years. In particular, there has been a deliberate attempt to seek the active participation of the community and voluntary sectors as partners with Government organisations, departmental committees and Government-supported organisations.

Perhaps the best known of the bodies created is the National Economic and Social Forum (NESF), where a wide range of interest groups participate in policy development, including members of the Oireachtas, employers, trade unionists and representatives of the community and voluntary sectors. The community sector has also been included in Area Development Management (ADM), the intermediate structure set up to administer the Local Development Programme, and in the Regional Committees which will monitor structural funds' spending. Area-based Management Partnerships, LEADER Initiatives, County Enterprise Boards and Regional Development Companies are further examples of initiatives involving community organisations and groups in a collaborative effort with established social partners in responding to local and regional development needs.

The purpose of these initiatives has been to expand and improve the system of democratic participation, particularly for those segments of society which are distanced from effective involvement in the traditional systems of representative democracy, including working-class communities, women's groups, travellers and disabled people.

The fact that so many new participatory structures have been established is itself an indication of the weaknesses of the existing systems of representation and the lack of flexibility within them to allow for change.

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.*

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.*

Given recent trends within Ireland, and the interest within the European Union in improving and developing systems of participative democracy, it would seem desirable that the Constitution should recognise and facilitate such movements.

Recommendation

The Review Group suggests that subsection 15.3.1° might be amended to incorporate a reference to community and voluntary groups as follows:

> The Oireachtas may provide for the establishment or recognition of advisory or consultative bodies representing branches of the social, community, voluntary and economic life of the people, with a view to improving participation in, and the efficiency of, the democratic process.

A consequential change would be necessary in subsection 15.3.2°.

Article 15.4.2°

Recommendation

This subsection may require amendment to clarify the time from which the invalidity of a law dates, in the light of the recommendations under Article 34 (see chapter 4, section on ‘Constitutionality of Bills and Laws’, and chapter 10 – ‘The Courts’ pages 162-170).

Article 15.5

Recommendation

The Review Group recommends that this section should be extended on the lines of Article 7 of the European Convention on Human Rights so as to provide that a heavier penalty shall not be imposed than was applicable at the time the offence was committed.

Article 15.7

The Irish version ‘suí’ appears to favour the interpretation of ‘session’ in the English version as ‘sitting’ but this hypothesis is negatived by the differential use of the form ‘sittings’ in section 8. If a consecutive series of individual sittings is intended by the use of the word ‘session’, the Irish version should be amended as follows:

> Ní foláir do Thithe an Oireachtais suí tréimhse amháin sa bhliain ar a laghad.

‘Oireachtas’ should be replaced by ‘The Houses of the Oireachtas’ in the English version.

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.

Article 20 – Legislation

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.*

Recommendation

Change as above to clarify this section.

Articles 15.9.1°, 15.11.1°-2°

The Review Group notes a suggestion that the Chair might be appointed from outside the Dáil and have no casting vote. It would be anomalous for the chair of an elected house of representatives to be held by a person who is not elected.

Recommendation

The Review Group suggests, however, that the terms 'Chair' and 'Deputy Chair' should be substituted for 'Chairman' and 'Deputy Chairman'. There is no need to change the Irish versions. Alternatively, as with Taoiseach and Tánaiste, the Irish versions alone could be used. Corresponding changes would be desirable in Articles 15.11.1°-2°.

continuity between outgoing and incoming Dála

The primary task of an incoming Dáil is to nominate a Taoiseach, as the first move in the formation of a new government. As a preliminary, it must elect a Chair to do this in an orderly way. In these proceedings, the Ceann Comhairle formally continues as Ceann Comhairle until the election of his or her successor. However, in practice, it is the Clerk of the Dáil who accepts nominations for a new Ceann Comhairle and who conducts the election.

The Review Group considers that it should not be prescriptive in regard to matters proper to the House, which is itself best suited to propose constitutional change on matters coming within its own direct experience.

Recommendation

No change is proposed.

Article 15.10-13

1 parliamentary privilege

The purpose of the privilege conferred by these subsections 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). Other cases have tended to support the absolute and far-reaching nature of this privilege which is vital to enable legislators to raise matters of grave public concern freely.

The Review Group is, however, conscious of 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'.

20.3 *A Bill passed by either House and accepted by the other House shall be deemed to have been passed by both Houses.*

Articles 21, 22 – Money Bills

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 22

22.1.1° *A Money Bill means a Bill which contains only provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration, or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; matters subordinate and incidental to these matters or any of them.*

22.1.2° *In this definition the expressions "taxation", "public money" and "loan" respectively do not include any taxation, money or loan raised by local authorities or bodies for local purposes.*

Under the provisions of Article 15 it is possible for the good name of a person to be severely damaged. Redress is 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.

In view of the overwhelming need to protect the freedom of debate in the legislature, the Review Group does not recommend any change in the constitutional provisions on parliamentary privilege. It considers that it is for Parliament itself to provide and regulate procedures and remedies in this regard.

Recommendation

No change is proposed.

2 persons appearing before committees

There is a general tendency for members to carry out investigations into policy issues through the use of specialised committees of the House. The position of persons appearing before the committees is to be dealt with in the Committees of the Houses of the Oireachtas (Compellability, Privilege and Immunity of Witnesses) Bill 1995, which would provide powers of compellability in respect of witnesses and both written and oral evidence. Witnesses would be accorded the same level of privilege as is enjoyed by a witness appearing before the High Court.

The Review Group sees no reason to recommend constitutional change in this area.

Recommendation

No change is proposed.

3 discipline

The Review Group notes the conclusions of the Committee on the Constitution (1967) 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 breaches of its rules. 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.

Recommendation

No change is proposed.

22.2.1° *The Chairman of Dáil Éireann shall certify any Bill which, in his opinion, is a Money Bill to be a Money Bill, and his certificate shall, subject to the subsequent provisions of this section, be final and conclusive.*

22.2.2° *Seanad Éireann, by a resolution, passed at a sitting at which not less than thirty members are present, may request the President to refer the question whether the Bill is or is not a Money Bill to a Committee of Privileges.*

22.2.3° *If the President after consultation with the Council of State decides to accede to the request he shall appoint a Committee of Privileges consisting of an equal number of members of Dáil Éireann and of Seanad Éireann and a Chairman who shall be a Judge of the Supreme Court: these appointments shall be made after consultation with the Council of State. In the case of an equality of votes but not otherwise the Chairman shall be entitled to vote.*

22.2.4° *The President shall refer the question to the Committee of Privileges so appointed and the Committee shall report its decision thereon to the President within twenty-one days after the day on which the Bill was sent to Seanad Éireann.*

22.2.5° *The decision of the Committee shall be final and conclusive.*

22.2.6° *If the President after consultation with the Council of State decides not to accede to the request of Seanad Éireann, or if the Committee of Privileges fails to report within the time hereinbefore specified the certificate of the Chairman of Dáil Éireann shall stand confirmed.*

4 felony or breach of the peace

The distinction between ‘felony’ and ‘misdemeanour’ is anachronistic and does not serve any useful purpose. The Review Group considers that an appropriate reference, for example, to ‘serious criminal offence’ should be inserted in Article 15.13.

Recommendation

A suitable amendment should be made in Article 15.13.

Article 15.15

Recommendation

In order to clarify that this section relates not simply to expenses but to the total emolument of Deputies, the Review Group recommends the deletion of the second word ‘the’ in line 1 and the words ‘of allowances’ in line 2 in the official printed text.

Dáil Éireann

Articles 23, 24 – Time for Consideration of Bills

23.1 *This Article applies to every Bill passed by Dáil Éireann and sent to Seanad Éireann other than a Money Bill or a Bill the time for the consideration of which by Seanad Éireann shall have been abridged under Article 24 of this Constitution.*

23.1.1° *Whenever a Bill to which this Article applies is within the stated period defined in the next following sub-section either rejected by Seanad Éireann or passed by Seanad Éireann with amendments to which Dáil Éireann does not agree or is neither passed (with or without amendment) nor rejected by Seanad Éireann within the stated period, the Bill shall, if Dáil Éireann so resolves within one hundred and eighty days after the expiration of the stated period be deemed to have been passed by both House of the Oireachtas on the day on which the resolution is passed.*

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.*

23.2.1° *The preceding section of this Article shall apply to a Bill which is initiated in and passed by Seanad Éireann, amended by Dáil Éireann, and accordingly deemed to have been initiated in Dáil Éireann.*

23.2.2° *For the purpose of this application the stated period shall in relation to such a Bill commence on the day on which the Bill is first sent to Seanad Éireann after having been amended by Dáil Éireann.*

Article 16.1.1°

qualifying age for membership of Dáil Éireann

The Review Group considered the question whether the minimum qualifying age for membership of the Dáil (that is, twenty-one years) should not be the same as the qualifying age for voting (that is, eighteen years) but decided to recommend no 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 .

Recommendation

No change is proposed.

Article 16.1.2°

the right to vote

The Review Group is divided on the question of continuing the constitutional power to legislate to exclude certain classes or conditions of people from the right to vote. This right is conferred at present on persons registered in a constituency who have reached the age of eighteen years and who were on the qualifying date citizens of Ireland and ordinarily resident on that date in the constituency. British citizens and nationals of certain other EU states can also be registered. It was observed that the European trend is to be inclusive, with any exceptions being listed in the Constitution itself. On the other hand, some members of the Review Group believed that the discretion should be left to the legislature, as at present, on the grounds that public pressures would ensure that the legislature's legitimate interest in the issue was expressed in such terms as would be acceptable to the people.

The Review Group discussed the question of postal voting but considered that any change thought necessary in the current provisions could best be achieved by legislation.

Recommendation

No change is proposed.

Article 16.2.2°

whether the number of members in Dáil Éireann should be increased or decreased

At present there is one member for every 21,239 of the population. In addition there are almost 1,500 members of local authorities, sixty members of the Seanad, and fifteen members of the European Parliament, all concerned with different aspects of public administration.

In 'Elections to Dáil Éireann' (following section) the Review Group considers the argument against a decrease in Dáil membership. Effective representation requires that the constituencies be small enough to ensure adequate contact

Article 24

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.*

24.2 *Where a Bill, the time for the consideration of which by Seanad Éireann has been abridged under this Article,*

(a) *is, in the case of a Bill which is not a Money Bill, rejected by Seanad Éireann or passed by Seanad Éireann with amendments to which Dáil Éireann does not agree or neither passed nor rejected by Seanad Éireann, or*

(b) *is, in the case of a Money Bill, either returned by Seanad Éireann to Dáil Éireann with recommendations which Dáil Éireann does not accept or is not returned by Seanad Éireann to Dáil Éireann,*

within the period specified in the resolution, the Bill shall be deemed to have been passed by both Houses of the Oireachtas at the expiration of that period.

24.3 *When a Bill the time for the consideration of which by Seanad Éireann has been abridged under this Article becomes law it shall remain in force for a period of ninety days from the date of its enactment and no longer unless, before the expiration of that period, both Houses shall have agreed that such law shall*

between the representatives and the constituents. To meet this requirement states with a low density of population tend to have the smallest numbers of constituents to representatives. Thus, Ireland and Finland, the two states with the lowest population densities in the EU, have the lowest such ratios.

The Committee on the Constitution (1967) remarked on the likelihood of opposition on the part of the public to any increase in the number of Dáil members. As regards the burden of work on Deputies, they noted the various alternative remedies such as the provision of secretarial services, the revision of the electoral system, with perhaps the introduction of single-seat constituencies, and improvement in the remuneration of Deputies. They noted that the burden on city Deputies, who now form a higher proportion of the total Dáil membership than in 1967, was not less than that which rural Deputies have to bear.

There is now considerably more secretarial assistance for Deputies than was available in 1967. In relation to Dáil membership generally, the Review Group agrees 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 Review Group considers that the present constitutional limits of not more than one deputy to every 20,000 and not less than one deputy to every 30,000 of the population allow ample scope for varying numbers. It does not, therefore, recommend any change in the present constitutional provisions dealing with Dáil membership – though the application of those provisions would obviously require attention in the event of the Seanad being found simply to replicate the Dáil and a decision being taken for its abolition, or if the administration of large blocks of work at present supervised by the Dáil were to be transferred to local government in any fundamental reorganisation of relations between central and local government. The abolition of the Seanad could require an increase in Dáil membership; the transfer of substantial powers to local authorities a decrease.

Recommendation

No change is proposed.

Article 16.2.3°

Article 16.2.3° underpins the one person one vote principle and aims at fairness of representation. The words ‘as far as practicable’ acknowledge that for reasons such as sparsity of population, geographical features and the administrative convenience of traditional county boundaries, exact parity is not achievable and a certain tolerance must be allowed. The tolerance of about 8% suggested by the first Dáil Constituency Commission in 1988 is, however, high by international standards.

The Review Group is of the view that continuity and administrative boundaries are not irrelevant considerations but

remain in force for a longer period and the longer period so agreed upon shall have been specified in resolutions passed by both Houses.

Article 25 – Signing and Promulgation of Laws

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.*

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.*

25.2.2° *At the request of the Government, with the prior concurrence of Seanad Éireann, the President may sign any Bill the subject of such request on a date which is earlier than the fifth day after such date as aforesaid.*

25.3 *Every Bill the time for the consideration of which by Seanad Éireann shall have been abridged under Article 24 of this Constitution shall be signed by the President on the day on which such Bill is presented to him for signature and promulgation as a law.*

25.4.1° *Every Bill shall become and be law as on and from the day on which it is signed by the President under this Constitution, and shall, unless the contrary intention appears, come into operation on that day.*

they must be subordinated to the need to keep disparities between constituencies to a minimum so as to adhere as closely as possible to the principle of one person one vote.

Recommendation

No change is proposed.

Article 16.2.4°

revision of constituencies

This subsection requires the Oireachtas to revise the constituencies at least once in every twelve years. As interpreted by the courts, there is a constitutional obligation to carry out this revision when a census return discloses major changes in the distribution of the population (*O'Malley v An Taoiseach* [1990] ILRM 461). The Review Group sees no reason to suggest change in these provisions.

The revision of constituencies is carried out on the basis of a report from the Dáil Constituency Commission headed by a senior judicial figure. This commission may be given a statutory basis by the Electoral Bill 1994.

Conclusion

In view of the value of this procedure for revising constituencies, the Review Group considers it may be appropriate later to give constitutional status to the Constituency Commission as a permanent element in the electoral system.

Article 16.3.1°

Recommendation

Delete this subsection because it is the same as Article 13.2.1°.

Article 16.7

Recommendation

Provide for a limit on the time within which a bye-election should be held. The Review Group proposes ninety days.

Article 17

This Article requires the Dáil to consider the Estimates of Receipts and the Estimates of Expenditure 'as soon as possible after (their) presentation to Dáil Éireann under Article 28 of the Constitution'. Article 28.4.3 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 Review Group understands that these requirements are regarded as being formally met by the Government presentation to the Dáil, in advance of the budget, of

25.4.2° *Every Bill signed by the President under this Constitution shall be promulgated by him as a law by the publication by his direction of a notice in the Iris Oifigiúil stating that the Bill has become law.*

25.4.3° *Every Bill shall be signed by the President in the text in which it was passed or deemed to have been passed by both Houses of the Oireachtas, and if a Bill is so passed or deemed to have been passed in both the official languages, the President shall sign the text of the Bill in each of those languages.*

25.4.4° *Where the President signs the text of a Bill in one only of the official languages, an official translation shall be issued in the other official language.*

25.4.5° *As soon as may be after the signature and promulgation of a Bill as a law, the text of such law which was signed by the President or, where the President has signed the text of such law in each of the official languages, both the signed texts shall be enrolled for record in the office of the Registrar of the Supreme Court, and the text, or both the texts, so enrolled shall be conclusive evidence of the provisions of such law.*

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.*

25.5.1° *It shall be lawful for the Taoiseach, from time to time as occasion appears to him to require, to cause to be prepared under his supervision a text (in both the official languages) of this Constitution as then in force embodying all amendments theretofore made therein.*

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. It seems clear that it was the intention of the framers of the Constitution that Article 17.1.2° would consolidate the position under the 1927 legislation. Article 17.1.2° would express this intent more clearly if it referred to 'permanent effect' or 'continuing effect' rather than 'effect'.

Recommendation

Amend Article 17.1.2° to qualify 'effect' by 'permanent' or 'continuing'

Elections to Dáil Éireann

25.5.2° *A copy of every text so prepared, when authenticated by the signatures of the Taoiseach and the Chief Justice, shall be signed by the President and shall be enrolled for record in the office of the Registrar of the Supreme Court.*

25.5.3° *The copy so signed and enrolled which is for the time being the latest text so prepared shall, upon such enrolment, be conclusive evidence of this Constitution as at the date of such enrolment and shall for that purpose supersede all texts of this Constitution of which copies were previously so enrolled.*

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.*

Article 26

This Article applies to any Bill passed or deemed to have been passed by both Houses of the Oireachtas other than a Money Bill, or a Bill expressed to be a Bill containing a proposal to amend the Constitution, or a Bill the time for the consideration of which by Seanad Éireann shall have been abridged under Article 24 of this Constitution.

26.1.1° *The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.*

26.1.2° *Every such reference shall be made not later than the seventh day after the date on which such Bill shall have been presented by the Taoiseach to the President for his signature.*

Size of Dáil Éireann

Under Article 16, the number of members of Dáil Éireann cannot be more than one for every 20,000 of the population, or less than one for every 30,000. Within these limits the ratio of population to members must be the same 'so far as it is practicable' throughout the country. At present there are 166 members – one member for every 21,239 of the population.

Constituencies must be revised at least once in every twelve years, with due regard to changes in the distribution of the population.

The high ratio of Deputies to population, which offers the possibility of a high level of proportionality, has been justified by reference to the need for a sufficient pool of talent and expertise from which to form a Government and appoint Ministers of State, given the requirement in Ireland that all Government Ministers, except two, be members of the Dáil. This argument is strengthened by the development of the Oireachtas committee system which makes further calls on the time and energy of Deputies and by the interaction of 'local' and 'central' government functions, complicated now by European Union and other external obligations. In a small country, this interaction adds to the coherence and stability of public policy both domestically and internationally.

Recommendation

There is no reason to suggest a change in the current ratio of population to members.

System of election

The electoral system prescribed by the Constitution for the election of members of the Dáil is voting by secret ballot on the system of 'proportional representation by means of the single transferable vote' (PR-STV).

Electoral systems generally tend to be very stable and resistant to change. Obviously, there can be no change unless a majority of current Dáil members so desire and the people give effect to that desire in a referendum. In Ireland, proportional representation is entrenched as the preferred voting system after the two failed attempts to change it by referendums in 1959 and 1968. Proportional representation is seen as a valuable protection for minorities, both in the State and in Northern Ireland, and could well be an essential element in an 'agreed Ireland'. Such a radically different, and far less representative, system as the British 'first-past-the-post' would have little popular support.

26.1.3° *The President shall not sign any Bill the subject of a reference to the Supreme Court under this Article pending the pronouncement of the decision of the Court.*

26.2.1° *The Supreme Court consisting of not less than five judges shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.*

26.2.2° *The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.*

26.3.1° *In every case in which the Supreme Court decides that any provision of a Bill the subject of a reference to the Supreme Court under this Article is repugnant to this Constitution or to any provision thereof, the President shall decline to sign such Bill.*

26.3.2° *If, in the case of a Bill to which Article 27 of this Constitution applies, a petition has been addressed to the President under that Article, that Article shall be complied with.*

26.3.3° *In every other case the President shall sign the Bill as soon as may be after the date on which the decision of the Supreme Court shall have been pronounced.*

The Irish system certainly achieves its primary purpose of proportionality in party terms. For example, Fianna Fáil with 39.1% of the votes in 1992 obtained 41% of the seats; Fine Gael with 24.5% of the votes obtained 27.1% of the seats; Labour with 19.3% of the
votes obtained 19.9% of the seats; for smaller parties the outcome was also roughly proportional to their popularity.

The achievement of a high correspondence between party support and representation is not, however, the only desideratum. The kind of parliamentary representation provided by the system may be distinctly unbalanced in terms of gender, occupation, social status or otherwise. In fact, the system has in Ireland predominantly favoured men and, in particular, men in the professions (teaching, the law, accountancy, medicine) and in self-employment, such as farmers, auctioneers, businessmen. Moreover, one quarter of the current and former Dáil members are closely related to previous or present members. There have been very few women in the Dáil – at best 12% in the present Dáil as against 51% in the population. There have also been very few members who have been lower-paid employees or unemployed. Amongst the reasons may be the expense to lower income groups and women of engaging in politics, the degree of organisation necessary to run a campaign, the unavailability of leave of absence for most employees who might get elected, the disadvantages many people suffer in terms of experience, the party nomination system for election, etc.

Tables are appended which show the occupational profile, the gender profile, the relationship to former members of the Oireachtas, the age profile, the level of education of members of Dáil Éireann in 1973, 1982, 1989 and 1992, and the socio-economic composition of the present Dáil compared to that of the population as a whole. Table 2 is particularly noteworthy in showing how much more strongly represented in the Dáil than in the adult population generally are professional workers, employers, managers and salaried employees (76% as against 19%).

Imbalance of this kind and degree cannot be corrected merely by a change in the electoral system: more far-reaching, progressive reforms are necessary, backed strongly by public opinion and by serious and sustained commitment from political parties. As things stand, it may not be practical or appropriate to resort to legislative prescription or constitutional directive, and in any event these could not of themselves correct the imbalance. Favourable influences would be exerted by a greater public commitment to representative and participatory democracy, more comprehensive arrangements for leave of absence for persons elected as Deputies, and by greater resources being at the disposal of political parties to support Deputies in the discharge of their functions. Change in the latter direction is reflected in legislation recently introduced.

None of the major political parties has in recent times formally proposed a change in the present voting system. Concerns have, however, been voiced and there have been calls for radical review. In the major parties there has been criticism of the present system as encouraging a multiplicity of small or fringe parties and unstable government unduly open to influence from

[*Related Article – Article 34*

34.3.3° *No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26.*

34.4.5° *The decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed.***]**

Article 27 – Reference of Bills to the People

27 *This Article applies to any Bill, other than a Bill expressed to be a Bill containing a proposal for the amendment of this Constitution, which shall have been deemed, by virtue of Article 23 hereof, to have been passed by both Houses of the Oireachtas.*

27.1 *A majority of the members of Seanad Éireann and not less than one-third of the members of Dáil Éireann may by a joint petition addressed to the President by them under this Article request the President to decline to sign and promulgate as a law any Bill to which this Article applies on the ground that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained.*

pressure groups. Between 1923 and 1995 the average interval between elections has been two years and ten months and in the last fourteen years, for example, there have been eight changes of Government. Since most changes in public policy require a minimum of two years to produce tangible results, this rapid change-over of Ministers and Governments has meant, in effect, that implementation of policy lacks continuity.

More generally, concerns with the present system relate to excessive pressure of constituency work, and the narrow range and rapid turnover of Dáil membership. The system of its nature may tend to encourage Deputies, and therefore Ministers and Governments, to concern themselves too much with local issues and not enough, at times, with national or long-term policy issues. There is also a feeling that there is too much competition for the loyalty of constituents between Deputies from the same party. The experience is quoted that in recent elections two-thirds of Fianna Fáil losses and one-third of Fine Gael losses were to party colleagues in the same constituency.

It would, of course, be going too far to ascribe all these defects, and the imbalance noted earlier, to a particular electoral system but, if alternative systems are being assessed, their contribution, if any, to remedying that situation must be taken into account. No single voting system can deliver all desiderata. Insecurity of tenure, for instance, is inseparable from dependence on popular support and is the inevitable lot of politicians; it would, however, be reduced by a change to a fixed-term Dáil.

The Review Group sought an assessment of the advantages and disadvantages of the various voting systems, in present-day Irish conditions, from an international expert in this field, Dr Michael Gallagher of the Department of Political Science, Trinity College Dublin. A written memorandum was also provided by Professor Michael Laver, a member of the Review Group and Professor of Political Science in Trinity College Dublin. Both documents expand upon the discussion that follows: see Appendices 2 and 4. This discussion considers, first, the different types of voting system available; second, what might be desired of a voting system in Ireland; third, the extent to which a change in the Irish voting system might address problems that have been aired, without incurring unacceptable new costs.

Types of electoral system

Electoral systems can be categorised into those which are designed to achieve proportional representation (PR systems) and those that are not (non-PR systems). Within these types, electoral systems can be classified as follows:

1 non-PR systems

i) *first-past-the-post* and *double ballot.* The only two European examples are Britain and France. The British first-past-the-post system is well known. Under the French double ballot system, voters go to the polls on successive Sundays. If no candidate wins a majority on the first round, then candidates with the support of at

27.2 *Every such petition shall be in writing and shall be signed by the petitioners whose signatures shall be verified in the manner prescribed by law.*

27.3 *Every such petition shall contain a statement of the particular ground or grounds on which the request is based, and shall be presented to the President not later than four days after the date on which the Bill shall have been deemed to have been passed by both Houses of the Oireachtas.*

27.4.1° *Upon receipt of a petition addressed to him under this Article, the President shall forthwith consider such petition and shall, after consultation with the Council of State, pronounce his decision thereon not later than ten days after the date on which the Bill to which such petition relates shall have been deemed to have been passed by both Houses of the Oireachtas.*

27.4.2° *If the Bill or any provision thereof is or has been referred to the Supreme Court under Article 26 of this Constitution, it shall not be obligatory on the President to consider the petition unless or until the Supreme Court has pronounced a decision on such reference to the effect that the said Bill or the said provision thereof is not repugnant to this Constitution or to any provision thereof, and, if a decision to that effect is pronounced by the Supreme Court, it shall not be obligatory on the President to pronounce his decision on the petition before the expiration of six days after the day on which the decision of the Supreme Court to the effect aforesaid is pronounced.*

least an eighth of the electorate go on to the second round, in which the candidate winning the most votes is elected

ii) *alternative vote.* This system uses the single transferable vote in single-member constituencies. Since it is based on single-member constituencies, it does not produce proportional results. This can be seen in Australia, the only country to use this system to elect its national parliament, where election results have been very disproportional.

2 PR systems

i) n*on-preferential list system.* Voters choose between various lists of candidates put forward by officially recognised parties. (It is effectively impossible for independents to contest elections in a list system.) Seats are allocated between parties in proportion to their votes. Which candidates receive these seats is determined by candidate selectors in each party, who decide the order in which candidates appear on the list. Examples of countries which use such systems are Belgium, the Netherlands, Norway, Portugal, Spain, Sweden

ii) *preferential list system.* Voters choose one of a number of party lists as above, but they can (or must) also express support for one or more candidates on the list. Under these systems, the voters, not the candidate selectors, decide who their parliamentary representatives should be. Examples of countries using such systems are Austria, Denmark, Finland, Greece, Italy (before 1994), Luxembourg, Switzerland

iii) *additional member system (AMS).* This is a hybrid used in Germany and, since 1994, in Italy. It has also recently been adopted by New Zealand (after a popular referendum) and Japan, although neither of these countries has yet had an election under the new rules. In countries using the system, seats are divided into constituency seats, filled using first-past-the-post rules in single-member constituencies, and 'additional' seats filled using non-preferential list rules. The voter has two votes, one for each kind of seat. The additional seat element contributes to the national proportionality of election results. There is no reason, in theory, why constituency seats could not be filled by some other method appropriate to single-seat constituencies, for example the alternative vote, although the Review Group is aware of no country in which this is in practice the case

iv) *single transferable vote (PR-STV).* This system is well-known in the Irish context and need not be elaborated here.

An additional feature available in PR list systems is the setting of an explicit *threshold,* a minimum vote share below which representation is not provided by the system. In Germany, for example, this threshold is 5% of votes. Parties winning less than

27.5.1° *In every case in which the President decides that a Bill the subject of a petition under this Article contains a proposal of such national importance that the will of the people thereon ought to be ascertained, he shall inform the Taoiseach and the Chairman of each House of the Oireachtas accordingly in writing under his hand and Seal and shall decline to sign and promulgate such Bill as a law unless and until the proposal shall have been approved either*

i. *by the people at a Referendum in accordance with the provisions of section 2 of Article 47 of this Constitution within a period of eighteen months from the date of the President's decision, or*

ii. *by a resolution of Dáil Éireann passed within the said period after a dissolution and re-assembly of Dáil Éireann.*

27.5.2° *Whenever a proposal contained in a Bill the subject of a petition under this Article shall have been approved either by the people or by a resolution of Dáil Éireann in accordance with the foregoing provisions of this section, such Bill shall as soon as may be after such approval be presented to the President for his signature and promulgation by him as a law and the President shall thereupon sign the Bill and duly promulgate it as a law.*

5% of votes are not allocated list seats (and in practice almost never win constituency seats either). Akin to the issue of the threshold for list systems is the matter of the *number of seats per constituency*. Obviously, proportional representation can only be guaranteed in a system with multi-seat constituencies. An election to a single-seat constituency can never be proportional. In practice electoral systems relying solely on single-seat constituencies – first-past-the-post, double ballot and alternative vote systems – typically produce grossly disproportional election results, especially when more than two parties contest the election. For PR electoral systems, whether these be based on PR-STV or on party lists, all research shows that the proportionality of the election result depends closely upon the average number of seats per constituency. The larger the number of seats, the more proportional the result. Irish three-seat constituencies are the smallest encountered in PR electoral systems, meaning that only parties passing 25% of the vote in the constituency at some stage in the count can be elected. The largest number of seats per constituency is found in the Netherlands, where the whole country is one constituency comprising 150 seats. This allows the representation in the legislature of very small parties. For the first triennial election to the Irish Free State Senate in 1925 the constituency consisted of all qualified electors in the State. Nineteen seats were to be filled from a ballot paper containing seventy-six names. This system was never used again.

Desiderata for electoral systems

1 legislature and government formation

A major purpose of an electoral system is to provide a legislature that can legislate and supervise the Government and a Government that can govern. These objectives can best be obtained if both legislature and Government are reasonably representative of the people as a whole. However, both objectives come into question when change is so frequent that continuity of administration becomes difficult or impossible. Here, as indicated, there have been frequent changes of Government and legislature since the State was founded but particularly over the last fourteen years. Although, in a time of considerable stress, arising in part from the Northern Ireland situation, these changes have not affected the fundamental political stability of the State, they must also, inevitably, raise the question of the extent to which the quality of government would have been better if the changes had been less frequent. The Review Group deals with the question of a fixed-term Dáil in chapter 5 – 'The Government'. Here the Review Group simply raises the relevance of the Dáil electoral system to these issues.

Recent difficulties in this respect have tended to be associated with election results in which no party or likely coalition of parties has had a decisive majority in the legislature, a product of the pivotal position of a small number of Deputies not affiliated to any of the major parties. Electoral systems facilitating the election of independents, therefore, may allow such periods to arise if voters choose to support independent candidates in

27.6 *In every case in which the President decides that a Bill the subject of a petition under this Article does not contain a proposal of such national importance that the will of the people thereon ought to be ascertained, he shall inform the Taoiseach and the Chairman of each House of the Oireachtas accordingly in writing under his hand and Seal, and such Bill shall be signed by the President not later than eleven days after the date on which the Bill shall have been deemed to have been passed by both Houses of the Oireachtas and shall be duly promulgated by him as a law.*

knife-edge elections with one Deputy, or a few Deputies, in a position to prevent the formation of a Government unless their demands are conceded. This situation cannot arise under list systems, which leave no role for independents.

2 representation in the legislature of groups contesting an election

This can be judged by the extent to which the proportion of seats won by groups contesting the election, typically but not necessarily political parties, matches the proportion of votes cast for them.

The evidence on this criterion is clear-cut, as Gallagher shows. PR systems typically do well at the job for which they were designed. Non-PR systems are typically very bad indeed at this and are often not only disproportional but perverse, being liable to give more seats to parties with fewer votes than their rivals, thereby generating election results of doubtful legitimacy.

3 representation in the legislature of social groups not contesting an election

Many important social groups do not contest elections, yet strong arguments can be made that the social composition of legislatures should reflect society as a whole. Such groups might be based, among other things, upon ethnic, religious, or linguistic background; gender or age; physical, social or economic disadvantages. It is extremely unusual for such groups to contest elections in their own right. If they are to be represented in the legislature, this must be achieved as an outcome of party competition. The method of election to the Seanad could also be used to create a more representative legislature.

A move towards such representation would depend on parties having a policy of presenting a socially representative slate of candidates and, in electoral systems giving voters a choice of candidates, on voters themselves voting in a way that ensured effective social representation.

All non-PR systems, as well as PR-STV systems with small constituency sizes, do badly on this criterion. Candidates tend to be nominated on the basis of their local electability rather than the need for a national social mix of candidates. It should be noted, however, that PR-STV does offer the possibility for voters to cross party lines if a representative list of candidates is nominated and support, for example, women candidates, or young candidates, if these characteristics are what is important to them. In non-preferential list systems with large constituencies, each party list is at least able to present a more representative social mix of candidates if it chooses to do so.

4 representing individual voters via constituency work

Elected representatives also have a responsibility for the well-being of the people they represent. This may result in a conflict of interest between voters, whom all Irish surveys show to value time-consuming constituency work from their public representatives, and public representatives, for whom

constituency service cuts into the time and energy available to fulfil other important aspects of their job.

Gallagher shows convincingly that constituency work is a major and increasing load on public representatives, regardless of electoral system. Single-member constituencies forge the closest link between public representatives and constituents, making constituency work hardest to avoid. PR-STV and preferential list systems pit candidates of the same party against each other, creating incentives to compete on constituency service. This means that in Ireland constituents tend to make representations to more than one member – indeed in a five-member constituency they may approach all five. The burden of constituency work entailed both for deputies and for the Departments and agencies to which they convey the representations is thereby multiplied. Unless there is a widespread change in how the public assesses the most effective way of making representations, Deputies cannot count on a significant relief from their constituency work. The only type of system that tends to reduce legislators' incentives to respond to constituency demands is a non-preferential list system with large constituency sizes.

5 less rivalry within parties

One common criticism of the working of the PR-STV system in Ireland is that legislators are hampered in their jobs by internal party rivalries caused by the need to compete at elections with rival candidates from the same party. However, there will always be more party hopefuls than can be elected to the legislature (indeed if there were not, this would be a serious situation for democracy). Gallagher argues convincingly that this means that intra-party rivalries will not be eradicated by changing the electoral system but will rather be transferred to some other arena at which the choice between party hopefuls is made, probably the candidate selection process. Thus, systems involving small, including single-seat, constituencies tend to generate intra-party rivalry at local level, as is currently the case in Ireland. This rivalry is likely to be shifted to a more regional or national level, if the size of constituencies is greater as is typically the case with list systems. In such systems, internecine rivalry concerns the choice and ranking of party candidates on the list, a matter that is potentially highly divisive. But it is focused on a relatively small number of nominators at the nomination stage and therefore does not involve the extensive, continual and exhausting competition which is required when nomination is effectively determined by service in the constituency.

6 security of tenure versus responsiveness

It has been argued that the range and calibre of legislators attracted into politics would be improved if the risk of being unseated (whether by party rivals or by opposition candidates) was reduced. A counter-argument is that a legislature should have a regular turnover of members if it is to respond to social change or provide incentives for legislators to perform effectively. The criteria of security of tenure and turnover of the legislature thus pull in opposite directions. Once more there is a conflict of interest between incumbent legislators who want as much

security and as little turnover as possible, and voters who want legislators to be as responsive as possible, and have only the threat of unseating them to ensure this.

In general, local nomination and election procedures mean that security of tenure and legislative turnover are the direct outcome of local party politics in non-PR systems; they tend to be influenced by voters in PR-STV and preferential list systems; and they tend to be orchestrated by party leaderships in non-preferential list systems.

7 party discipline and the stability of government

A standard critique of PR electoral systems used to be that they produced multi-party legislatures, which in turn produced coalition Governments which were unstable and thus undesirable. Since the strongest and most stable political systems at the heart of modern Europe have for the entire post-war period all been governed by coalitions generated by PR list systems, this argument no longer holds water. Effective coalition Government can be attributed to a high degree of party discipline that allows the leaders of Government parties to deliver their parties' vote in support of the Government in the legislature. Where party discipline has been low, as in the French Fourth Republic or Italy, Government stability has suffered.

Broadly speaking, electoral systems supporting local candidate nomination and hence local power bases do not encourage party discipline. This applies to all non-PR systems and in theory to PR-STV. It should be noted, however, that Irish parties are in practice very disciplined, so this objection is not telling in the Irish context. The discipline is strengthened by the electoral law itself which entitles candidates selected by a party to include the name of the party beside their own name on the ballot paper. A candidate expelled from or outside a party cannot do this. In contrast, PR list systems typically involve far larger constituencies and therefore more centralised recognition of party candidates, and thus make party discipline easier to enforce.

8 continuity

A final vital matter is that an electoral system should only be changed if this is absolutely necessary, and then only after very careful consideration by public representatives and voters. The effects of introducing a new electoral system in a particular country are unpredictable, being a complex interaction of electoral law and political culture in the country concerned. This means that, 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.

One of the most fundamental features of any democracy is that voters have some sense of the likely effects of their votes. They can develop this over time for a given electoral system. When a new system is introduced, however, it inevitably takes time for voters to learn about its workings and for political parties to adapt their strategies to it. During this period, the precise implications of voting in a particular way may not be clear, obviously an undesirable situation leading in a sense to the partial disenfranchisement of voters. This is of course not an argument against any electoral reform if the need for it is overwhelming. But it is a major cost of electoral reform, a benefit of retaining the status quo, and implies that changing the electoral system should be undertaken only with a clear probability of significant benefits.

Conclusion

No electoral system can deliver all desiderata. This means that changing an electoral system to achieve some particular objective typically means sacrificing some other desirable aspect. Table 1 in the Appendix summarises the discussion in Professor Laver's paper. Since people will weigh the desiderata in different ways, it is certainly not appropriate to 'score' electoral systems using this table. Its purpose is to allow people to explore the relative merits of different methods of counting votes by applying their own priorities to these in a systematic manner.

Table 1 shows that the current system used in Ireland, PR-STV, has many of the desiderata of an electoral system. It is proportional in party terms; it allows voters to cross party lines to support social groups important to them provided the parties nominate candidates from those groups; it encourages constituency service; and it promotes responsiveness of the legislature to change. It allows the voters to choose between candidates of the same party just as a preferential list system does but, in addition, it allows the voters, in indicating their lower preferences, to express a preferred coalition alignment. Indeed the provision for expressing preferences other than a first choice has some cohesive effect through its encouragement to parties to consider views other than those of their own supporters. These are advantages which should not be lightly discarded.

Critics of PR-STV object inter alia to what they see as the excessive constituency workloads that it generates and, therefore, to excessive concerns on the part of Ministers and Governments with sectional as distinct from national issues, to the fact that it provides few direct incentives for parties to nominate socially representative slates of candidates, to the local intra-party rivalries that it is seen to foster, and to the resulting problem that some high quality candidates may be deterred from taking up a political career.

If these objections are seen as sufficiently weighty to justify considering a change from PR-STV to a new electoral system, a shift to a non-PR voting system (first-past-the-post, double ballot, alternative vote) is not advisable. Such systems may not reduce constituency workloads or internecine rivalries, while at the same time they lack most of the other desiderata of an electoral system.

Changing to a preferential list system would not address the main objections to PR-STV, since the new system would still involve

intra-party candidate choice by voters. This creates the same incentives for local candidates, in terms of internecine rivalry and constituency work, as they have under PR-STV.

This leaves two types of system for consideration as alternatives to PR-STV in Ireland. The first is the pure non-preferential list system. The second is the additional member system. In each case, as the table shows, the use of party lists that give voters no choice of candidate might possibly reduce the incentives towards local internecine rivalries and high constituency workloads that are complained about under PR-STV. In each case, if the attempt to reduce incentives towards constituency service was effective, then the cost of the new system would be borne by voters, in the sense that they could lose some elements of the local representation that they currently enjoy under PR-STV (although constituency representatives in the additional member system might continue to provide this) but could also, of course, gain the more pervasive benefits of a stable legislature and Government.

The achievement of a socially representative mix of candidates would depend, whatever electoral system is used, on other factors, but especially on the acceptance by political parties of this principle in their nomination procedure as is generally the case in the Scandinavian countries.

Recommendation

The foregoing analysis presents the advantages and disadvantages of various electoral systems. The Review Group recommends 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.

If 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.

Tables

1: Relative performance of electoral systems

SYSTEM CRITERION	*First-past-the-post / two ballot*	*Alternative vote*	*Preferential list*	*Non-preferential list*	*AMS*	*PR-STV*
Representation of groups contesting election	–	–	+	+	+	+
Representation of groups not contesting election in their own right	–	–	+	+	+	+
Representation of the interests of individual voters	+	+	– [1]	– [1]	+ [1]	+ [1]
Government formation	–	–	+	+	+	–
Reduction of constituency work and internecine rivalry	– [2]	– [2]	–	+	–	– [2]
Increase in security of tenure	+	+	–	+	+	–
Responsiveness of legislature to change	– [3]	– [3]	+	–	–	+
Continuity	–	–	–	–	–	+
Reinforcement of party discipline	–	–	+	+	+	– [4]

1 This can only happen if parties nominate candidates from such groups in the appropriate numbers

2 Insofar as these systems allow for the representation of independent and small party candidates able to concentrate support in local areas they may impede government formation. If candidates do not concentrate support in this way, this issue does not arise

3 While evidence from other jurisdictions suggests that both high constituency workloads and local internecine rivalry exist under these electoral systems, there may be less multiplication of constituency work in systems with single-seat constituencies

4 While in theory STV does not encourage party discipline, in practice party discipline in Ireland is high

2: Socioeconomic (SES) composition – the Dáil compared with the population

	SES of Population 1986 census age 21-70	SES of the 27th Dáil 1992	
	%	No	%
Farmers	12	20	12
Agricultural workers	3	0	0
Higher professionals	4	40	24
Lower professionals	6	46	28
Employers/managers	7	28	17
Salaried employees	2	12	7
Intermediate non-manual workers	14	6	3
Other non-manual	11	3	2
Skilled manual	19	3	2
Semi-skilled manual	6	0	0
Unskilled manual	7	0	0
Unknown	9		
Full-time public representatives		8	5
Total	**100**	**166**	**100**

Note: The unemployed are not included as a separate category because they are counted in this table on the basis of their last employment in the data provided. The serious difficulties which this poses for accurately identifying their real economic position should be noted

3: Occupations of Dáil members

	20th Dáil N=144	1973	24th Dáil N=166	1982	26th Dáil N=166	1989	27th Dáil N=166	1992
	N	%	N	%	N	%	N	%
Teachers and lecturers	19	13	33	20	34	21	37	22
Farmers	24	16	29	17	20	12	20	12
Auctioneers and accountants	14	10	14	8	11	7	10	6
Solicitors, barristers	13	9	18	11	14	8	16	10
Other professionals	0	0	11	7	22	13	21	13
Business interests	26	18	9	5	4	2	4	2
Managers/executives/ administrators	14	10	13	8	23	14	23	14
Clerical/technical/sales workers/healthcare	17	12	15	9	23	14	20	12
Tradespeople (manual workers)	7	5	0	0	5	3	2	1
Trade union officials	7	5	6	4	4	2	5	3
Full-time public representatives					6	4	8	5
Other	3	2	0	0	0	0	0	0
Missing information			18	11				
TOTALS	**144**	**100**	**166**	**100**	**166**	**100**	**166**	**100**

4: Gender of Dáil members

	20th Dáil N=144 N	1973 %	24th Dáil N=166 N	1982 %	26th Dáil N=166 N	1989 %	27th Dáil N=166 N	1992 %
Women	4	3	14	8	12	8	20	12
Men	140	97	152	91	154	92	146	88
TOTALS	**144**	**100**	**166**	**100**	**166**	**100**	**166**	**100**

5: Relationship to former members of the Oireachtas

	20th Dáil N=144 N	1973 %	24th Dáil N=166 N	1982 %	26th Dáil N=166 N	1989 %	27th Dáil N=166 N	1992 %
Sons	31	22	23	14	25	15	20	12
Daughters	1	1	3	2	4	2	4	2
Widow/nephew/ niece/son/ daughter-in-law	11	8	8	5	7	4	9	5
Grandson/ daughter/nephew/ niece							8	5
TOTALS	**43**	**30**	**34**	**20**	**36**	**22**	**41**	**25**

6: Age profile of Dáil Deputies versus age profile of population

Age	Census 1986 %	26th Dáil n	1989 %	27th Dáil n	1992 %
21-26	8	1	1	0	0
26-30	7	9	5	4	2
31-35	7	10	6	9	5
36-40	6	25	15	28	17
41-45	5	30	18	33	20
46-50	5	27	16	35	21
51-55	4	35	21	19	11
56-60	4	15	9	25	15
61-65	4	9	5	11	7
66-70	4	4	2	1	1
71-75	3	1	1	1	1
Total		**166**	**100**	**166**	**100**

7: Level of education of Dáil members

	20th Dáil N=144	1973	24th Dáil N=166	1982	26th Dáil N=166	1989	27th Dáil N=166	1992
	N	%	N	%	N	%	N	%
Primary	12	8	6	4	4	2	4	2
Second level	62	43	68	41	49	30	42	25
Third level	69	48	92	55	95	57	98	59
Third level postgraduate	n/a		n/a		18	11	22	13
Not known	1	1						
TOTALS	**144**	**100**	**166**	**100**	**166**	**100**	**166**	**100**

Source: Nealon's Guides to the Dáil and Seanad (for Tables 2-7)

Seanad Éireann

Introduction

Historically, parliament in Europe was a construct whereby, through negotiation, a king or queen shared the powers of state with those who could supply resources – with, at first, the big landowners (seigneurs or local lords and the Church represented by bishops and abbots) and subsequently with strong farmers and wealthy merchants (the commoners) too. Thus in Britain parliament evolved as a two-house (bicameral) assembly (a House of Lords and a House of Commons). In France it evolved as a three-house (tricameral) assembly – for aristocrats, clerics and the enfranchised common people respectively –until the French Revolution made France temporarily a unicameral state.

Broadly speaking, in Britain, during the course of the nineteenth century and early twentieth century, the process of democratisation resulted in the transfer of the control of the executive powers of the state from the monarch to the Houses of Parliament, and in time mainly to the directly elected House of Commons.

In the United States of America a federal (rather than a unitary) form of government was established with substantive powers being shared between a House of Representatives (a body directly elected by the people, with each state returning a number of representatives broadly proportional to its population) and a Senate which represented the interests of the states and comprised two representatives from each state. The name Senate, with its connotations of age and experience, derives from the name of the ruling body of the ancient Roman Republic from which the American and French revolutionaries drew inspiration.

While all federal states have two houses, this is not true of all unitary states. For instance, in Europe, Ireland, Britain, France, Italy, the Czech Republic, Poland, Romania, Slovenia and Spain have upper houses but Bulgaria, Denmark, Estonia, Finland, Hungary, Iceland, Portugal, Norway, Latvia, Lithuania, the Slovak Republic and Sweden do not. However, where there is no second house there is normally provision for a second review of legislation before enactment. Thus, Luxembourg has a Council of State that fulfils some of the functions of an upper house. In Finland and Portugal, the house has a large and important committee that functions in some respects as a second chamber.

The national assembly which met in the Mansion House in January 1919 was a unicameral body – Dáil Éireann. The 1922 Saorstát Éireann Constitution provided for a Senate. Half of the members of that body were nominated by the head of government, half were elected by the Dáil. The nomination procedure was intended to ensure representation for the Unionist minority. A change in 1928 resulted in Senators being elected by the Oireachtas from a panel nominated by them. In time, the balance of political representation in the Dáil and Senate diverged

and conflict between the Senate and the Government led to the abolition of the Senate in 1936.

In June 1936 the Second House of the Oireachtas Commission was appointed under the chairmanship of Chief Justice Aodh Ó Cinnéidigh. The commission's report indicated an extraordinary diversity of opinion on such questions as the composition and functions of a possible Seanad, and the most suitable electorate.

The publication of the Seanad Electoral (Parliamentary Members) Bill 1937, to implement the constitutional provision on the new Seanad, was referred to a special committee of fifteen deputies. After some inconclusive discussion of different methods of election for the Seanad, the committee decided that no useful purpose would be served by prolonging their deliberation and reported accordingly.

The 1937 Constitution also provided for two houses but represented a new approach. Seanad Éireann is now composed of sixty members, of whom eleven are nominated by the Taoiseach, six are elected by the graduates of two universities, and the remaining forty-three are elected from five panels representing aspects of national life (National Language and Culture, Agriculture, Labour, Industry and Commerce and Public Administration). Thus, the Constitution provides for the panel, or type of organisation, from which candidates are nominated. The method of constituting the panels, and the system of election, are governed by legislation. For the panel election, the electorate is very limited, consisting of Dáil Deputies, the outgoing Senators and members of county councils and county boroughs – a total of 965 in the 1993 election.

Apart from prescribing PR-STV as the voting process, the Constitution requires (Article 18.7) that there be five panels and that 'no more than eleven and ... not less than five members of Seanad Éireann shall be elected from any one panel'. The method of establishing the candidate list is otherwise left to statute. It follows that certain aspects of both panels and electorate could be changed by legislation without amendment of the Constitution.

Under Article 28.4.1° the Government is responsible to Dáil Éireann. The Seanad is a deliberative body with limited powers of initiation and review of legislation but with the capacity to initiate discussions on matters of public interest. A Money Bill may not be initiated in the Seanad, nor may the Seanad hold such a Bill for longer than twenty-one days before returning it to the Dáil, which can reject recommendations of the Seanad regarding such a Bill, as it can amendments proposed by the Seanad to ordinary Bills. Under Article 15, Senators have the same privileges and immunities as members of the Dáil. The Seanad also has power under Article 27, in combination with not less than one-third of the members of the Dáil, to request the President not to sign a Bill 'on the ground that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained'. This power has never been used.

The rationale for having two houses of parliament in a unitary state is based on two important features of any mature democracy. The first is the need to take account of political

interests that may not be adequately represented in the main house; the second is the need for some final review of legislative proposals before they become binding on all. The so-called lower house is the primary legislature, representing the people generally and making or breaking governments. The primary purpose of an upper house is to provide a system of checks and balances on the legislative process. This can be done with more assurance if the composition of the upper house does not simply mirror that of the lower house.

The role and functions of the Seanad must be considered in relation to Ireland's cabinet system of government, which gives executive power to a Government appointed almost exclusively from members of Dáil Éireann and accountable to the people through their representatives in that house. This position is reflected in constitutional provisions which set out a system of governance that gives primacy to the relationship between the Government and the Dáil. At the same time, the Seanad tends to have the advantage over the Dáil of being a less hurried forum for discussion of the issues facing Irish society and the implications of legislative proposals. Members of the Seanad can bring their experience, knowledge and skills to bear on such matters with beneficial effect.

Disquiet has been expressed from time to time about the composition and functioning of the Seanad. In 1958, a Seanad Electoral Law Commission, chaired by Circuit Court Judge Joseph McCarthy, with nineteen other members, considered whether these shortcomings could be remedied within the terms of Articles 18 and 19, but came to no firm conclusions after deliberations lasting nine months. The deliberations of this commission covered the question of direct elections to the Seanad under Article 19. It received representations from more than thirty different trade or vocational organisations. The subject of whether or not a second house was necessary and, if so, how it should be constituted, was also considered inconclusively by the Committee on the Constitution (1967) (Report, paras 64-86). More recently, criticisms of the Seanad have centred on the duplication of representation as between the Dáil and the Seanad as well as on the question of its relevance to the modern political system. Few items of legislation originate there, although recently the percentage of more technical legislation originating with the Seanad has increased. Senators have been appointed as members of the Government on only two occasions. Senators cannot raise parliamentary questions and sittings of the Seanad are determined largely by the need to consider Bills passed by the Dáil. The electorate – members of the Oireachtas and councillors – means that party politics affect both the nomination of candidates and their election.

Discussion

1 the primary issue

The primary issue, of course, is whether Seanad Éireann should continue to exist in any form, an issue which, as already noted, has been discussed inconclusively in the past. It is also considered in Appendix 7 – 'Notes On A New Irish Senate' by

Professor Michael Laver. The need for a system of checks and balances on the legislative process and the need to bring as wide as possible a cross-section of society into the representative system suggest that the Seanad should be retained. An affirmative answer, also, is implied by the decision of the Government to give representation to emigrants in that House, a matter the Review Group has been expressly excused from attending to.

It must be acknowledged, however, that the Seanad in its current form has come in for criticism from different quarters, often accompanied by demands for its abolition. Particular criticism has been directed at the Seanad's arcane nomination and electoral procedure, and its almost total domination by the Dáil and the Government. In a modern state where efficient executive or legislative action, without undue complexity or confrontation, can be vital, this domination may be inescapable. As previous experience with investigatory committees and commissions indicates, these are difficult issues which the Review Group could not address in a satisfactory manner in the time available to it. A separate, comprehensive, independent review is necessary.

If the two main criteria for retention of the Seanad – the desirability of a system of checks and balances and of representation of as wide a cross-section of society as possible – cannot be satisfied by suitable reforms, then the case for a Seanad would fail and it should be abolished. In this event, it would be necessary to have its functions of representation and review performed by some other means, perhaps through reform of the legislative and representative role of the Dáil, for example by way of a suitably designed extension of Dáil membership, which could be considered in connection with reform of the Dáil electoral system.

2 functions

The system whereby a Seanad election automatically follows any Dáil election may make the two houses insufficiently distinct from one another. Consideration might therefore be given to decoupling Dáil and Seanad elections. It should be borne in mind, of course, that the conflict between the Senate and the Dáil in the 1930s led to the abolition of the Senate. Under the Constitution the Seanad is part of the institutional arrangement for legislating in the State and as such cannot be removed from party politics and cannot, in practice, differ too fundamentally in its basic political philosophy from the directly elected Dáil.

The system whereby the Taoiseach nominates a significant proportion of Senators identifies the Seanad very closely with the Government, while potentially undermining public perceptions of the representative role of the Seanad. Given a legislative process that in practice allows the Seanad little opportunity to obstruct the Government, nominations by the Taoiseach to strengthen the representation of Government parties in that house should not be a predominant concern. If the discretion is retained, it is desirable that more use should be made of it to allow entry to the Seanad of persons with special experience or qualifications, irrespective of political party allegiance.

Consideration might also be given to the possibility of finding new tasks for the Seanad that are not currently assigned within the political system.

3 composition

A fundamental justification for the existence of a second house is that it differs from the main house in its representative character. In a unitary state, this difference could be achieved by giving a voice to vocational, regional or other groupings of the various elements in society, including particularly those (for example women, the unemployed, lower socio-economic groups) not adequately represented at present in Dáil Éireann (see the tables appended to the previous section 'Elections to Dáil Eireann'). As things stand, the candidature produced by the panel nomination procedure and by the nature of the electorate results not in a vocational Seanad, as originally envisaged, but in one not markedly different from Dáil Éireann. The panel system is clearly a reflection of the corporativist ideas which prevailed in the 1930s when the Constitution was enacted. The Seanad thus fails to satisfy the fundamental criterion specified above.

Alternative methods of providing a Seanad have been looked at by the Review Group – see the personal suggestions in papers by two members of the Review Group, Dr Kathleen Lynch (Appendix 6 – 'Seanad Éireann') and Professor Michael Laver (Appendix 7 – 'Notes on a new Irish Senate'). The Taoiseach's nominees have already been mentioned.

Another obvious issue in relation to the current composition of the Seanad concerns university representation. The choice appears to lie between extending the franchise to graduates of all third-level institutions or abolishing such representation altogether. The undoubted quality of many of the university representatives and the value of the contribution they can make may no longer outweigh the case against reserving for any category of citizens a special political constituency. On the other hand, the proposed reservation of seats for emigrants, and reform of the Seanad generally, may involve a general move towards group representation.

4 functional and vocational representation

Functional and vocational representation in general presents issues that are both intriguing and complex. The current system of Seanad representation is in theory vocational but, as we have argued, in practice is not. A working system of functional and vocational representation could, however, provide a Seanad that did more than merely mirror the composition of the Dáil: it could make possible the representation of a wider cross-section of groups in society. It would, of course, be necessary to settle upon a set of groups to be represented that would meet with broad public support, and to devise a method of ensuring that such representation actually worked in practice, while preserving the necessary balance with the political system to ensure that government and legislature actually work. These are not easy issues to resolve, but are clearly ones that merit serious and careful thought.

5 MEPs and Northern Ireland representation

Other matters discussed in the appended working papers include: the representation or right of audience of members of the European Parliament; the position of Northern Ireland representatives.

Conclusion

The composition of the Seanad in itself is evidently too wide and complex an issue for effective examination within the time-limit set for completion of the Review Group's task. It should, therefore, be part of the recommended separate, comprehensive, independent review. To facilitate such a review the Review Group arranged for the updating of the tables at Annexes 21-23 of the Report of the Committee on the Constitution (1967) – see Appendix 8.

Other issues

1 participation of Ministers in Seanad debates

There is some concern that it is usually Ministers of State rather than Cabinet Ministers who take part in Seanad debates. Given the Government, Dáil and European Union responsibilities of Ministers, a requirement that they must also attend the Seanad could be unrealistic.

2 parliamentary questions

While parliamentary questions can be a powerful lever for eliciting information from the Government, the Review Group considers, for reasons given in the preceding paragraph, that the privilege of asking such questions should continue to be reserved to members of Dáil Éireann, the house to which the Government is answerable under the Constitution.

3 citizenship

Article 18.2 requires that a member of Seanad Éireann must be a citizen. The Taoiseach's power to nominate has been used in recent times to provide Senators from Northern Ireland. Current provisions regarding citizenship would mean that increasingly fewer people from Northern Ireland would be eligible, as citizens, for such nomination. This might be considered in any review of the role of the Seanad.

4 resignation

When a Taoiseach resigns Ministers also resign. If the provision (Article 18.3) for nomination of Senators by the Taoiseach is retained, the question will arise as to whether, in those circumstances, the Senators nominated by the Taoiseach should also resign. This would also need to be considered in a general review.

5 postal ballot

Article 18.5 provides for secret postal ballot.

Recommendation

Delete the word ‘postal’ because it makes the process specifically dependent on the postal services.

6 general election

Article 18.8 does not envisage the possibility that a second general election might be called before the ninety days within which the Constitution provides that a Seanad election will take place, a possibility which would create a situation where a second Seanad election would have to be called before the first one was completed.

Recommendation

If the current sequence of Dáil and Seanad elections is retained, the Article should be amended to provide that the originally occasioned Seanad election should be aborted, and that an election related to the second Dáil dissolution should be held instead.

7 polling day

Article 18.9 does not define the polling day.

Recommendation

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

8 a redundant Article?

Article 19 has not been used and consideration of it would fall within the recommended separate, comprehensive, independent review.

Conclusion

As constituted, the Seanad does not appear to satisfy the criteria for a relevant, effective and representative second house. There are fundamental political problems to be answered before a solution can be prescribed for the problem presented by the Seanad; moreover, there is a wide range of solutions that might be prescribed. Given the time, and the resources available, the Review Group cannot undertake a comprehensive and authoritative investigation of the Seanad’s composition and role – such as that conducted by the previous commissions set up and organised specifically to consider these questions.

Recommendation

The Review Group recommends a separate, comprehensive, independent examination of all issues relating to Seanad Éireann. For this reason, no list of other recommendations, whether relating to substantive or technical issues, is provided, although some matters are suggested above for consideration in such a review. If such a review does not resolve the issue of representation and other substantive issues in a satisfactory manner, serious consideration will need to be given to the abolition of the Seanad and the transfer of its role and functions to other parts of the political system, as indicated above by the Review Group.

Legislation

Articles 20-25

These Articles deal with types of legislation and the powers and procedures of the Houses for its passage.

Recommendations

Articles 23, 24 and 27 require attention in any review of the composition, powers and functions of the Seanad. Regardless of the outcome of this review, a technical amendment is necessary in subsection 23.2.1° as to Bills deemed to have been passed.

In Article 25.4.6° the Review Group considers that the English and Irish versions of the texts of a law enrolled in both languages should both be authoritative, in conformity with its recommendation on
Article 8.

The Review Group does not recommend any other changes in these Articles.

Article 27

Under Article 27, a majority of Senators and not less than one third of Dáil Deputies may petition the President not to sign a Bill on the ground that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained. The President (after consulting with the Council of State) must consider forthwith whether the 'will of the people thereon ought to be ascertained' but retains absolute discretion in the matter. It may, of course, be open to the Government to pre-empt this procedure by seeking a dissolution of the Dáil.

If the Article were invoked and a referendum were to follow, it would be subject to Article 47.2. Such a referendum would be different from other referendums in that it would be an instance of a popular veto, because it provides for the negativing rather than the approving of the proposal submitted to the people. The proposed Bill would become law unless the number of voters voting against the proposal was not only a majority of those who voted but was also not less than one third of the registered voters: see Article 47.2. This principle is unique to Article 27 referendums. It does not apply to referendums to amend the Constitution. There was a similar provision in the 1922 Constitution which was removed by the Constitution (Amendment No 10) Act 1928.

The procedure envisaged by the Article has never been used. The Review Group notes, however, that the potential for its use may be greater when there is a Government minority in the Seanad.

Conclusion

This provision should appropriately be considered in the recommended independent review of the general powers of the Seanad.

Constitutionality of Bills and Laws

Introduction

Issues as to the constitutional validity of legislation may come before the Supreme Court in either of two ways:

(i) where a Bill is referred by the President under Article 26

(ii) where the constitutionality of a law is questioned in accordance with Article 34.

This review is concerned almost entirely with category (i), but the one-judgment rule is considered in both contexts.

The President, under Article 26, may, after consultation with the Council of State, refer any Bill to which the Article applies to the Supreme Court for a decision as to whether the Bill or any specified provision or provisions of the Bill is or are repugnant to the Constitution or to any provision thereof.

This power of referral does not apply to a Money Bill or to a Bill expressed to be a Bill containing a proposal to amend the Constitution, or to a Bill the time for consideration of which has been abridged under Article 24.

The Article 26 reference procedure is as follows:

i) after consulting with the Council of State, the President refers the Bill to the Supreme Court within seven days after the Taoiseach has presented it to the President for signature (Article 26.1.1°-2°)

ii) the Supreme Court, consisting of not less than five judges, hears the arguments for the proposed Bill presented by the Attorney General, and the arguments against it presented by counsel appointed by the court (Article 26.2.1°)

iii) the Supreme Court gives its decision not later than sixty days after the date of reference by the President (Article 26.2.1°)

iv) the Supreme Court hands down a single judgment on constitutionality (as it does on the constitutionality of a law under Article 34.4.5°)

v) if the Supreme Court declares a Bill to be constitutional, the President signs the Bill into law as soon as may be (Article 26.3.3°)

vi) such an Act cannot thereafter be challenged in the courts (Article 34.3.3°).

The procedure is used infrequently. In the past fifty-five years, during which over 1,900 Bills were enacted, it has been used ten times (see Appendix 14). Five of those referrals occurred in the past fourteen years. This indicates a trend of increasing, though still rare, use of the procedure

Issues

The Review Group identified the following options:

i) abolish Article 26
ii) leave it as it is
iii) retain and modify Article 34.3.3° so that it does not provide for unchallengeability
iv) retain and modify Article 34.3.3° so that it provides for unchallengeability for a limited period only (with perhaps different periods of unchallengeability for different types of cases)
v) modify Article 34.3.3° so that it excludes certain types of cases in addition to those already excluded
vi) modify Article 34.3.3° so that Bills are referred to the Supreme Court for an opinion rather than a judgment on their constitutionality. (This would leave laws open to challenge as in iii) but the courts would be able to respond more flexibly because an opinion is less constraining than a judgment.)

1 whether the reference procedure should be retained

The question addressed here is the net one of whether the procedure should continue, leaving aside for later discussion whether, as is at present the position, no challenge should be admitted to the constitutionality of an Act the Bill for which had been referred to the Supreme Court under Article 26 and had received an affirmative judgment. The possibility of referring a Bill, before it becomes law, for a decision by the Supreme Court on its constitutionality is a valuable democratic safeguard. It prevents an unconstitutional law being in force until successfully challenged, a situation which could have consequences difficult ever to put right. On the other hand, a decision confirming the constitutionality of a Bill gives it an initial stamp of validity of which, even if it were open to challenge later, it could be deprived only on strong and persuasive considerations.

Each of the ten Bills referred to date related to important issues. If Article 26 had not existed, the resulting uncertainty as to the constitutionality of the Bills could have caused serious difficulties such, for example, as electoral procedures being invalidated, adoptions lacking permanence, property rights being invaded.

Other arguments for the reference procedure, as such, tend to balance out. For instance, the contention that the procedure makes for better development of constitutional law and the promotion of progressive social legislation is opposed by the consideration that Supreme Court decisions arrived at in the abstract may unintentionally deny a justifiable redress in cases of which the particular circumstances could not be, or were not, foreseen.

Generally, it appears desirable to be able to test the constitutionality of legislation before it comes into force where there is a serious body of legal opinion that a proposed Bill is open to constitutional doubt, the proposed legislation affects in an

important way the rights of individuals or the institutions of the State, and a finding of unconstitutionality after people had acted in reliance on the law would have serious consequences.

Conclusion

The Review Group favours the retention of the reference procedure of Article 26 but will discuss later whether unchallengeability and other related provisions should be retained, qualified or dropped.

2 whether the discretion to refer a Bill should be that of the President only

The President, being an elected Head of State, removed from party politics and, as it were, the apex of the Oireachtas, is the obvious person to have the responsibility and discretion of referring a Bill under Article 26.

The Review Group considered whether the Government should have an express power to ask the President to refer a Bill in order to establish its constitutional validity – indeed, whether such an initiative should be open to others. It was pointed out that the German and French constitutions provide that a particular number of members of parliament may conjoin to request the referral of a Bill. The Review Group preferred that the discretion should reside solely with the President. This arrangement has worked satisfactorily. If the Government asked for a referral and the President refused, a crisis could ensue in which the President's independence or impartiality might be impugned, to the detriment of the office.

Recommendation

The President is the appropriate constitutional officer to make the decision about referring Bills.

No change is proposed.

3 whether a decision in an Article 26 reference by the Supreme Court should be immutable

Article 34.3.3°, which confers immunity from legal challenge, was inserted into the Constitution by the Second Amendment of the Constitution Act 1941 during the transitional period when that Constitution could be amended by ordinary legislation. At that stage, only one Article 26 reference had taken place and a majority of the Supreme Court had upheld the validity of the internment provisions of the Offences Against the State (Amendment) Act 1940. Similar legislation had previously been invalidated by the High Court in December 1939. The language of Article 34.3.3° 'shall have been referred ...' suggests the drafters wished to ensure that the internment provisions of the 1940 Act should enjoy a permanent immunity from constitutional attack.

Despite the care taken in preparing a Bill, doubt may arise as to its constitutionality. Some Bills concern fundamental issues on

which doubt cannot be allowed, indeed where it is desirable that there should be certainty extending indefinitely, or at least over a long period. In relation to adoption, for instance, certainty for a period of over fifty years, that is to say, over about two generations, would seem desirable. On the constitutionality of elections to the Dáil an even longer period could be essential.

The certainty provided by the Article prevails indefinitely unless terminated by a referendum. However, with the efflux of time, changed circumstances and attitudes may bring about a situation where a referred Bill that has been enacted may operate harshly and unfairly, denying justifiable redress in a context not originally foreseen.
The question to be addressed is whether the desirability of a measure of stability is reconcilable with an openness to challenge where reason and justice so demand.

The arguments for retaining and for relaxing the present unchallengeability rule may be summarised as follows:

Arguments for the retention of Article 34.3.3° in its present form

1 the object of the Article 26 procedure might be undermined if a Bill which had been upheld by the Supreme Court could be open to later challenge. In this regard, certainty and finality might be said to be a seamless web: once the possibility of later challenge was admitted, the entire fabric unravels and the object of the procedure is defeated

2 even if the rule were to be relaxed and a limited period of immunity (of, say, seven years) were to be put in its stead, such a period would be essentially arbitrary. It might also have undesirable consequences in that as the end of the seven-year period approached a degree of uncertainty might be engendered, with the threat of fresh litigation.

Arguments for relaxing the present unchallengeability rule

1 while the need for some stability is recognised, the absolute nature of the present Article 34.3.3° is open to objection. As the number of Article 26 references increases and with on-going constitutional development, there is a real risk that this rule will operate to protect the validity of law in circumstances where, if the Supreme Court could later consider the matter afresh in the light of new circumstances, it would probably take a different view. The law should never be frozen. It should be free to flow with the needs of the people

2 a substantial degree of certainty is accorded by an affirmative decision on a reference to the Supreme Court. Such a decision would not be easy to dislodge, though it would not, of course, be immutable

3 at the time Article 34.3.3° was enacted (1941), it was assumed that the Supreme Court was strictly bound by its own previous decisions and could not overrule them (by reason of the doctrine of *stare decisis*). Now that this doctrine has been itself relaxed (in that the Supreme Court will over-rule previous decisions which have been shown to

be clearly wrong), the retention of Article 34.3.3° is anomalous.

Arguments in favour of deleting Article 34.3.3°

1 the rule is inflexible and risks denying justifiable redress in circumstances not envisaged in the arguments on the Article 26 reference

2 if it appears likely that the reasoning underlying a judgment upholding the constitutionality of a law is defective and would not now be supported or endorsed by the Supreme Court, would it not be unsatisfactory if litigants or other persons affected by the law were to be required to wait for the expiration of some essentially arbitrary period (for example seven years) before being allowed to challenge the law in question?

3 the rule is apt to create anomalies such as the situation which would arise where, after the decision of the Supreme Court upholding the validity of the Bill, the Article or Articles upon which it based the decision is or are amended by referendum

4 furthermore, any immunity conferred by Article 34.3.3° could, of necessity, apply only to a challenge based on domestic constitutional law. It does not – and could not – immunise such a law against a challenge based on supposed incompatibility with European Union law

5 the unchallengeability feature of Article 34.3.3° may tend to inhibit the President from invoking his or her powers under Article 26. If the immunity were removed, the potentially useful reference procedure might be invoked more often

6 a further consequence of Article 34.3.3° is that the Supreme Court may be more prepared (especially, perhaps, where the arguments for and against the constitutionality of the Bill are finely balanced or where the practical consequences of the measure might be difficult to foresee) to strike down a Bill as unconstitutional, rather than to risk upholding the Bill in such circumstances.

Possible compromises

The Committee on the Constitution (1967) suggested that the immunity from legal challenge in Article 34.3.3° should be retained but limited to seven years. The Review Group reconsidered this solution as it has the benefit of appearing to give certainty, albeit for a limited period, whilst not calcifying the law for all time. However, the Review Group rejects this solution primarily for the following reasons:

a) the Supreme Court in *Murphy v Attorney General* [1982] IR 241 decided that a declaration that a post-1937 law is repugnant to the Constitution means that it is invalid from the date of its enactment. Without amendment of the present wording of Article 15.4, the same invalidity *ab initio* would probably apply to an Act for which the Bill had been referred to the Supreme Court if that Act were declared unconstitutional on a challenge after the seven-year period.

The certainty contemplated by the seven-year stay could thus prove to be illusory, with undesired consequences, for example an obligation to compensate numerous claimants for loss or damage during the seven years. The desirability of amended provisions as to the date from which the invalidity of an Act declared unconstitutional takes effect, particularly where there has been an Article 26 reference, is discussed later

b) where the Supreme Court has given a favourable decision on an Article 26 reference it can be assumed that a subsequent successful challenge to the Act could only be brought by a person prejudicially affected in a manner not envisaged at the time of the reference or because of some other significant change of circumstances. It appears undesirable that anyone so affected should be delayed from challenging the constitutionality of the Act for a seven-year period

c) any period specified would of necessity be arbitrary and different time limits might be appropriate to different types of legislation. Such detailed selective provision would not be appropriate to the Constitution.

Two further suggestions were considered by the Review Group but did not receive general approbation:

a) that, on an Article 26 reference, the Supreme Court be asked to give an opinion rather than a decision on the constitutionality of the Bill. The majority of the Review Group are of the view that the role of the Supreme Court and separation of powers provided for in the Constitution make it preferable that the Supreme Court should give a decision rather than an opinion

b) that Article 34.3.3° be replaced by a provision which would require a person seeking to challenge the constitutionality of an Act, the Bill for which had been the subject of an Article 26 reference, to obtain leave from the court upon showing that a *prima facie* case existed. The majority of the Review Group considered that such a provision was not appropriate to the Constitution and would not be preferable to the simple deletion of Article 34.3.3°.

Some current difficulties

Attention should be drawn to some potentially anomalous features of Article 34.3.3°:

i) where an Act of the Oireachtas (the constitutionality of which while in Bill form has been upheld by the Supreme Court under an Article 26 reference) is subsequently amended by later legislation, perhaps in a radical fashion, may it be presumed that Article 34.3.3° does not also apply to the amendments? Would there come a point when the cachet of Article 34.3.3° could cease to apply, not only to the amendments, but perhaps also to the original Act following these radical amendments?

ii) where the Constitution was amended following the Supreme Court's decision upholding the constitutionality of a

particular Bill, would Article 34.3.3° continue to apply? Although this question has not been authoritatively determined by the courts, the answer would appear to be that it would not.

Recommendations

On balance, Article 34.3.3° should be deleted in its entirety. Such a deletion would impact only marginally upon legal certainty, inasmuch as a decision of the Supreme Court upholding the constitutionality of the Bill would still be an authoritative ruling on the Bill which would bind all the lower courts and be difficult to dislodge. It is to be expected that the Supreme Court would not, save in exceptional circumstances, readily depart from its earlier decision to uphold the constitutionality of the Bill. Such exceptional circumstances might be found to exist where the Constitution had been later amended in a manner material to the law in question, or where the operation of the law in practice had produced an injustice which had not been apparent at the time of the Article 26 reference, or possibly where constitutional thinking had significantly changed.

4 whether the one-judgment rule should be retained where the validity of laws is in question

This rule applies to constitutional decisions of the Supreme Court on the validity of post-1937 laws, not just to those arising from Article 26 references.

Article 34.4.5° was inserted into the Constitution by the Second Amendment of the Constitution Act 1941 during the transitional period when the Constitution could be amended by ordinary legislation. It parallels Article 26.2.2° (the italicised portions of which were also inserted by the Second Amendment) which provides:

> The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court *and shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed*.

Both provisions seem to have been inserted as a direct result of the decision of the Supreme Court in *In re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470. In this very sensitive case, the Supreme Court upheld the constitutionality of the Offences Against the State (Amendment) Act 1940 (which provided for internment) a few months after the High Court had pronounced that similar legislation was unconstitutional. Chief Justice Sullivan commenced the judgment of the court by announcing that it was the 'decision of the majority of the judges' and as Chief Justice Finlay was later to state in *Attorney General v Hamilton (No 1)* [1993] 2 IR 250:

> This was apparently seen to indicate a dissenting opinion which, it was felt, could greatly reduce the authority of the

> decision of the court and, we are informed, and it is commonly believed, led directly to the additional clauses by the Act of 1941 in both Article 26 and Article 34.

This is borne out by Mr de Valera's comments in the Dáil during the debate on the Second Amendment of the Constitution Bill (82 *Dáil Debates* 1857-9):

> From an educational point of view, the proposal [for separate judgments] would, no doubt, be valuable, but, after all, what do we want? We want to get a decision ... The more definite the position is the better, and, from the point of view of definitiveness, it is desirable that only one judgment be pronounced ... [and] that it should not be bandied about from mouth to mouth that, in fact, the decision was only come to by a majority of the Supreme Court. Then you have added on, perhaps, the number of judges who dealt with the matter in the High Court before it came to the Supreme Court, as might happen in some cases. You would then have an adding up of judges, and people saying: 'They were five on this side and three on the other, and therefore the law is the other way.'

What is important is legal certainty as to the judgment, which may affect fundamental issues. It was also suggested that the one-judgment rule allows the Supreme Court to provide the legislature with certainty without any of its members becoming the subject of political criticism and, possibly, pressure. Moreover, certainty would not be provided by a three-to-two judgment where at any time in the future a judge might change his mind on a fundamental issue.

It was argued, on the contrary, that a diversity of judgments would reflect society's diversity on issues, would provide the losing side with the comfort that its views had been taken into consideration, and, as a result, society's satisfaction with the court would be increased. A variety of judgments would enrich the development of jurisprudence. Moreover, the judgments of the individual judges would be formulated in a manner designed to convince reasonable people.

The 'one-judgment rule' operates in the case of the Court of Criminal Appeal (see s 28 of the Courts of Justice Act 1924) and the Special Criminal Court (see s 40 of the Offences Against the State Act 1939). It may be noted that in *The State (Littlejohn) v Governor of Mountjoy Prison* (1976) the Supreme Court appeared to accept that this statutory 'one-judgment' rule was designed to protect individual members of the three-member Special Criminal Court from untoward pressures. A similar rule applies in the case of the European Court of Justice (although not in the European Court of Human Rights). Here again the 'one-judgment' rule is thought to protect individual members of that court, as otherwise in sensitive cases affecting the vital interests of one state the judges of that particular nationality might be expected to pronounce in favour of that state.

Proposals for change

The Review Group considered the following:

i) delete Article 34.4.5°

ii) delete Article 26.2.2°

iii) retain Article 26.2.2° but delete Article 34.4.5°.

Arguments for deletion of Article 34.4.5°

1 a) the rule does not apply to pre-1937 legislation and multiple judgments have been delivered in important cases such as the *Norris* case which examined the constitutionality of such pre-1937 laws. The courts also have had difficulty in determining whether the rule applies to 'mixed' cases where pre-1937 laws have been subsequently amended by post-1937 laws

b) the rule does not apply where a Divisional High Court (that is, where the High Court sits as a court of three) pronounces on the validity of a post-1937 law. Such a court may deliver several judgments. In *In re Haughey* [1971] IR 217 several judgments were delivered by the High Court, yet the Supreme Court was bound by the one-judgment rule as far as the constitutionality of the law was concerned

c) the rule obliges the Supreme Court to engage in an often artificial division between the constitutionality of the law and the other related constitutional issues raised by a case. This point was adverted to by Blayney J in *Meagher v Minister for Agriculture and Food* [1994] 1 IR 239, a case where one judgment was delivered on the validity of the law, yet several judgments were delivered on the validity of statutory instruments promulgated pursuant to that law, even though the court plainly found it difficult to separate the issues in that case. In this respect, *Meagher* is not an isolated case, as 'split' Supreme Court judgments (that is, where one judgment is given on the issue of the validity of the law, with several judgments given on the subsidiary issues arising) have been delivered in upwards of twenty cases

d) as *Meagher* confirms, the one-judgment rule does not apply to statutory instruments made pursuant to a post-1937 law

e) the rule does not apply to constitutional cases (for example the *X* case) which do not concern the validity of a law

2 the rule may give rise – and possibly it already has done so – to serious practical difficulties in its application. Suppose that two judges are in favour of invalidating the law on ground A, but reject ground B, whereas another two are in favour of invalidating the law on ground B, but reject ground A. The fifth member of the court is in favour of invalidating the law on ground C, while rejecting grounds A and B. How is the judgment of the court to be delivered? Or is the court merely to state that the law is invalid?

3 the rule is itself completely out of harmony with the common law tradition which has always permitted individual judgments. Moreover, even in some civil law jurisdictions where the 'one-judgment' rule is the norm, it has been considered desirable to abandon the rule in the Constitutional Court. This has already happened in Germany and Spain

4 empirical evidence – admittedly impressionistic – suggests that the one-judgment rule affects the quality of the judgment, since dissent is artificially suppressed and the court strives for the lowest common denominator so that a majority of the court can endorse the judgment. It certainly inhibits the development and clarification of the law in the manner envisaged in the common law case by case system which is of the essence of our legal system. As the Attorney General's Committee on the Constitution (1968) noted:

> A single majority judgment may be a compromise and so less precise in its reasoning than an individual judgment .... Concurring and dissenting judgments will help to clarify the law for the authorities in implementing a Bill held valid under Article 26 and in drafting similar legislation, and may express a view which later on may obtain public support. Where the majority decision declares an Act or Bill invalid, separate judgments might be useful in indicating what alternative legislation would be permissible ... If the majority judges disagreed on their reasons for the decision, the majority judgment might give quite a misleading impression of the weight of authority for a particular view. The possibility of separate judgments should help to ensure clarification of the thinking of the majority who will be compelled to answer criticisms of their views more explicitly than they otherwise would. There might be a chance that a judge who knew he was in a minority might fail to write a judgment which, if fully reasoned and written, would have changed his colleagues' minds

5 the rationale for the rule was that the authority of the court's judgment might be undermined if dissents were to be published.

This contention remains to be established. Several judgments have been delivered in many of the key constitutional cases: see, for example, *The People (Director of Public Prosecutions) v O'Shea* [1982] IR 384, *Norris v Attorney General* [1984] IR 36*, Crotty v An Taoiseach* [1987] IR 713*, Attorney General v X* [1992] 1 IR 1, *Attorney General v Hamilton (No 1)* [1993] 2 IR 250 (the *Cabinet Confidentiality* case) and *In the matter of a Ward of Court* [1995] 2 ILRM 401. The authority of these decisions has not been shaken by the presence of minority judgments. As the Attorney General's Committee on the Constitution (1968) added:

> The 'uncertainty' resulting from public knowledge of the existence of dissenting or concurring judgments, which will be primarily of interest to lawyers, is probably unlikely to be a serious problem.

The presence of dissents in each of the above cases has added to the richness of our constitutional law

6 as the former US Supreme Court judge, Holmes J put it, a dissent in a constitutional case is essentially an appeal to a later generation of judges and lawyers. His dissents in a series of free speech cases in the 1920s are perhaps the most famous judgments in the entirety of US constitutional law and led the US Supreme Court later to accept them as good law and to the over-turning of the majority judgments. In this jurisdiction, dissents have sometimes later proved the basis for the over-ruling of the first decision: see, for example, the Supreme Court's acceptance in *The State (Browne) v Feran* [1967] IR 147 of the correctness of Johnston J's dissent in *The State (Burke) v Lennon* [1940] IR 136

7 even if the presence of minority judgments tended to encourage political dissent, such a consequence is not, as the Attorney General's Committee (1968) observed, 'necessarily undesirable' in a democratic society. Indeed, it supported the principle of freedom of expression. The one-judgment rule requires the judges to form a consensus. A consensus is usually based on either the lowest common level of agreement, or neutral grounds. In neither instance would one expect to find the soil most suitable for the development of jurisprudence. If each judge could make a judgment, the quality of judgments would tend to rise as each judge would articulate a position which must necessarily engage reasonable people. Moreover, the public would see the expert weighing of arguments for and against; they would appreciate that their views, even if they were on the losing side, were properly taken into account; the public's appreciation of the whole process would be enhanced because it would fairly reflect the diverse opinions within society. Furthermore, the procedure would sharpen people's perception of the independence of each judge.

Arguments for retaining Article 34.4.5°

1 it is the decision of the majority of the Supreme Court which really counts and only uncertainty is created by allowing the publication of dissenting opinions

2 the publication of dissenting opinions serves only to weaken the authority of the court's pronouncement and impair its persuasiveness.

Arguments for deleting Article 26.2.2°

1 the arguments already set out above apply with equal force to Article 26.2.2°

2 while it is admitted that an Article 26 reference is a special, unique procedure, in essence it is simply another mechanism by which the Supreme Court adjudicates on the validity of a parliamentary measure. On this view, there is no reason why the one-judgment rule should apply to Article 26 references

3 even if one rationale of the one-judgment rule was to emphasise the collective nature of the Supreme Court's pronouncement and thereby to protect individual judges from untoward pressure in sensitive cases, this still does not justify retaining the rule for Article 26 references. While it is admitted that the majority of Article 26 references have involved matters of fundamental constitutional importance (although some have not), there have been many cases of fundamental importance (for example the *X* case and the *Cabinet Confidentiality* case) where the one-judgment rule did not apply and multiple judgments were delivered. The fact that multiple judgments were delivered does not appear to have compromised the stance of any individual judge.

Arguments for retaining Article 26.2.2° while deleting Article 34.4.5°

1 the special character of the Article 26 procedure justifies the retention of the 'one-judgment' rule. Here it is not a case of private litigants seeking a reasoned judgment but rather of one organ of the State requiring a straight, unqualified answer from another organ of the State on the constitutionality of proposed legislation. The certainty needed on such an important matter justifies the retention for Article 26 references of the one-judgment rule. Article 26 involves the Supreme Court in giving a decision of a binding nature and it may be contended that the President, Government, Oireachtas and the wider public are entitled to have that advice tendered with one voice. In this regard, it may be noted that on the one occasion when the Supreme Court dealt with an Article 26 reference prior to the adoption of the one-judgment rule – namely, the Offences Against the State (Amendment) Bill 1940 – the Chief Justice merely announced that the decision was that of the majority, even though no dissenting opinions were delivered. It was evidently felt that, even in the absence of a formal one-judgment rule, it would have been inappropriate to permit the delivery of dissenting opinions in an Article 26 reference

2 many of the Bills referred to the Supreme Court under the Article 26 procedure involve sensitive and fundamental issues. In such circumstances, it is appropriate that the court should speak collectively and with one voice. This shields individual judges from improper influence or pressure.

Recommendation

On the whole, Article 34.4.5° should be deleted. The rule is unsatisfactory in its operation and is apt to create anomalies. There is not, however, a consensus that Article 26.2.2° should be deleted, some members of the Review Group being of the view that the special character of the Article 26 reference procedure justifies the retention of Article 26.2.2°.

5 whether the time limit of sixty days within which the Supreme Court must deliver its judgment is too short

There have been representations that the time limit may be too short in certain circumstances. It is accepted that Bills subject to

reference require urgent attention. The rule may, however, result in a situation where counsel appointed by the Supreme Court to put the arguments against the Bill have too little time. The Government side is far better placed in this regard because it will have been dealing with the Bill before it has been referred. If the presentation of evidence were to be included in the process, the shortage of time would become grievous. The question of the admissibility of evidence, as distinct from arguments, is reviewed in Appendix 10 by Gerard Hogan whose conclusion, with which the Review Group agrees, is against such a change.

If a point of European Union Law arises, and there is need for a reference to the European Court of Justice, the present time limit would be unworkable.

A question was raised as to the time limit within which the Council of State must meet, but the system works and no change need be proposed.

Recommendation

The period should be extended to ninety days, with the possibility of further extension to accommodate a reference to the European Court of Justice where this is necessary.

6 whether there should be five judges

The Review Group is of the view that there should be at least five judges. This ensures a large judicial input into these important decisions. Five represents more than half the total proposed Supreme Court membership and allows the court to deliver a judgment even if a number of judges cannot sit for such reasons as illness or absence abroad. If immunity from challenge is removed, the case for retaining the five-judge minimum would be all the stronger.

Recommendation

No change is proposed.

7 whether the entire Bill should fall

At present the President may, under Article 26.1.1°, refer to the Supreme Court either a Bill or any specified provision or provisions of a Bill. Even if only one section of a Bill is found by the Supreme Court to be unconstitutional, the President is precluded by Article 26.3.1° from signing the Bill. The Review Group considers that this provision should be maintained. Even if only one section of a Bill were to be deleted, this may change the balance of the legislation. The nexus between sections of a Bill may well be such that the removal of a part of the Bill would deprive it of coherence. Legislation is a matter primarily for the Dáil and Seanad and, therefore, it is considered proper that the President should decline to sign the amended Bill and that the Government, Dáil and Seanad should have to consider new legislation taking account of the decision of the Supreme Court.

Recommendation

No change is proposed.

8 whether Money Bills should continue to be excluded from the Article 26 reference procedure

The Review Group considers that the exclusion should remain. The Government needs a steady stream of tax income to enable it to govern. The processes involved follow a tight schedule. Any disruption such as might be caused by a referral could cripple the public finances. Moreover Money Bills are extremely complex and this would mean that referral would involve not merely a delay, but a long delay. Exclusion from the referral procedure, of course, leaves them open to challenge in the normal way.

Recommendation

No change is proposed.

effects of decision of unconstitutionality

The wording of Article 15.4.2° and the Supreme Court ruling in the *Murphy* case have already been referred to. The principle of invalidity *ab initio* when an Act is declared unconstitutional raises issues concerning the effects of prior reliance on presumed constitutionality which require consideration, particularly where constitutionality had been originally affirmed by a Supreme Court judgment on an Article 26 reference. See memoranda by Mary Finlay SC (Appendix 12 – 'The effects of a decision of unconstitutionality') and David Byrne SC (Appendix 13 – 'The constitutionality of Bills and laws').

On certain public policy grounds, and by such doctrines as estoppel, waiver, laches, res judicata, the courts have shown a willingness to protect persons against actions brought against them for things done in reliance on an Act before it was declared invalid and, on the other hand, to limit redress for loss and damage which the declaration of invalidity *ab initio* would otherwise open up.

It may well, however, be thought desirable that discretion should be given to the courts as to the date from which invalidity might take effect. In relation to Article 26 reference cases, in particular, where the Supreme Court will have already ruled in favour of constitutionality, there seems to be a case for not allowing a subsequent judgment of invalidity to have full automatic retrospectivity but rather to take effect from a recent, current or prospective date, as the court might judge proper. However, this is a complex issue to which the Review Group will give further consideration in its review of Article 34 (see chapter 10 – 'The Courts').

The Government

28.1 *The Government shall consist of not less than seven and not more than fifteen members who shall be appointed by the President in accordance with the provisions of this Constitution.*

28.2 *The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.*

28.3.1° *War shall not be declared and the State shall not participate in any war save with the assent of Dáil Éireann.*

28.3.2° *In the case of actual invasion, however, the Government may take whatever steps they may consider necessary for the protection of the State, and Dáil Éireann if not sitting shall be summoned to meet at the earliest practicable date.*

28.3.3° *Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law. In this subsection 'time of war' includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State and 'time of war or armed rebellion' includes such time after the termination of any war, or of any such armed conflict as aforesaid, or of an armed rebellion, as may elapse until each of the*

Introduction

This Article is based on the principle that the executive power of the State – itself derived from the people – is exercised by or on the authority of the Government. The Government is constrained in the exercise of its power by the terms of the Constitution under which the Government is answerable to Dáil Éireann. The courts provide protection against the misuse of executive power. The Article is concerned, on the one hand, to confer powers and, on the other, to place democratic checks on their use.

The exercise of executive power has everywhere become increasingly subject to other limiting forces. Financial markets soon punish monetary or financial indiscretions of Government, multi-national corporations with resources many times the budget of a State such as Ireland make investment decisions with little reference to national boundaries. International treaties also bind Governments – they include in Ireland's case those of the European Union – affecting economic and budgetary policy, trade, agricultural and industrial policy, the environment, standards etc.

At the same time, the development of communications has made for a more informed and engaged public to which Governments must display the rationale of their policies and actions. The realities of power now require Governments to react to issues immediately. If they fail to do so, the movement of opinion quickly gains a momentum against undefended positions, particularly if supported by strong and vocal special interest groups. As a result, democratic Governments everywhere must often decide or react at a faster pace than that conducive to full reflection and deliberation.

Against this background the Review Group considers that concern to ensure constitutional authority for, and checks on, Government action should not fetter the ability of Government to decide and act in the public interest and should, if possible, enhance that capacity, subject to full democratic check.

This is of particular importance considering the high degree of State intervention in the life of the citizen, as measured, for example, by the level of public expenditure, or by the number and range of functions of State authorities and agencies.

Issues

1 composition of the Government

The Review Group considered whether the limit of fifteen members in a Cabinet should be retained. The core concerns of Government are focused on security, monetary stability, economic development, the rights and welfare of the individual and society, and infrastructural and environmental matters. There is no need for a large number of Ministers to look after these

Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist.

28.4.1° *The Government shall be responsible to Dáil Éireann.*

28.4.2° *The Government shall meet and act as a collective authority, and shall be collectively responsible for the Departments of State administered by the members of the Government.*

28.4.3° *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.*

28.5.1° *The head of the Government, or Prime Minister, shall be called, and is in this Constitution referred to as, the Taoiseach.*

28.5.2° *The Taoiseach shall keep the President generally informed on matters of domestic and international policy.*

28.6.1° *The Taoiseach shall nominate a member of the Government to be the Tánaiste.*

28.6.2° *The Tánaiste shall act for all purposes in the place of the Taoiseach if the Taoiseach should die, or become permanently incapacitated, until a new Taoiseach shall have been appointed.*

28.6.3° *The Tánaiste shall also act for or in the place of the Taoiseach during the temporary absence of the Taoiseach.*

28.7.1° *The Taoiseach, the Tánaiste and the member of the Government who is in charge of the Department of Finance must be members of Dáil Éireann.*

concerns – in fact, increasing numbers could make for a less co-ordinated and, therefore, less efficient administration. Conceivably, unless a limit were specified, the number of Cabinet posts might rise to gratify the wishes of the large number seeking such positions, without any real improvement in management.

Recommendation

The limit of fifteen members in a Cabinet should be retained and no change should be made in Article 28.1.

The Taoiseach, Tánaiste and Minister for Finance must be members of Dáil Éireann. Other Ministers must be members of the Dáil or the Seanad but not more than two may be members of the Seanad. The power to appoint Senators as Ministers has been very sparingly used and never to the extent of having two Senators as Ministers in the same Government. This discretion does, however, enable the Taoiseach to bring into Government persons with special qualities or experience who may not have been through the electoral process and the Review Group assumes it will continue to be available to the Taoiseach.

The Review Group also considered whether persons who are not members of either the Dáil or the Seanad might be appointed to the Government. Governments in some countries contain 'executive experts'. It is argued that, since executive capacity is not invariably a concomitant of electoral popularity, the facility to draw on experts who are not elected would be useful. Against that, it is argued that democracy is best served by a situation where the people control the Oireachtas and through the Oireachtas the Government.

Conclusion

The present system, which offers the possibility of appointing a maximum of two Ministers who have been nominated rather than elected to the Seanad but which ensures, that while members of the Government, they are also members of the Oireachtas, represents a reasonable balance between these arguments. The Review Group does not recommend any provision for non-elected members of Government beyond that already available through the Taoiseach's discretion to appoint members whom he has nominated as Senators.

Another matter relating to the composition of the Government has been considered by the Review Group. It is associated with the transition here from single-party to coalition government. So long as the major traditional parties prefer to remain apart and to oppose one another, small parties may be able, through the coalition formation process, to achieve an influence in Government, particularly if their representatives become Ministers, much greater proportionately than their electoral or Dáil strength. This apparent democratic anomaly does not, however, need to be addressed in the Constitution: it can be solved on the political plane. If undue influence on policy is being exerted by any small element in a coalition, so that the supposed will of a majority of the people is being frustrated or distorted, this should put pressure on the major parties to concert corrective action by entering into coalition or otherwise. It appears, in any event, unlikely that a coalition would not be

28.7.2° *The other members of the Government must be members of Dáil Éireann or Seanad Éireann, but not more than two may be members of Seanad Éireann.*

28.8 *Every member of the Government shall have the right to attend and be heard in each House of the Oireachtas.*

28.9.1° *The Taoiseach may resign from office at any time by placing his resignation in the hands of the President.*

28.9.2° *Any other member of the Government may resign from office by placing his resignation in the hands of the Taoiseach for submission to the President.*

28.9.3° *The President shall accept the resignation of a member of the Government, other than the Taoiseach, if so advised by the Taoiseach.*

28.9.4° *The Taoiseach may at any time, for reasons which to him seem sufficient, request a member of the Government to resign; should the member concerned fail to comply with the request, his appointment shall be terminated by the President if the Taoiseach so advises.*

28.10 *The Taoiseach shall resign from office upon his ceasing to retain the support of a majority in Dáil Éireann unless on his advice the President dissolves Dáil Éireann and on the reassembly of Dáil Éireann after the dissolution the Taoiseach secures the support of a majority in Dáil Éireann.*

28.11.1° *If the Taoiseach at any time resigns from office the other members of the Government shall be deemed also to have resigned from office, but the Taoiseach and the other members of the Government shall continue to carry on their duties until their successors shall have been appointed.*

concerned to follow policies that commanded widespread popular assent and thus advance their prospects of voting support at the next general election.

2 whether Article 28.3 should bind the State to a policy of neutrality

Neutrality has been for many years a feature of central importance in our external relations. It is not for the Review Group to discuss its origins or rationale or its different connotations in differing circumstances; the Review Group is concerned not with the policy as such, which it takes as established, but rather with the question whether it should be enshrined in the Constitution and, if so, how it could be defined to cover all contingencies.

Article 29 commits the State to the ideal of peace and friendly co-operation amongst nations and to the principle of the pacific settlement of international disputes.

Article 28.3.1° provides that 'War shall not be declared and the State shall not participate in any war save with the assent of Dáil Éireann'.

Conclusion

Declaring war has become virtually an outmoded formality. Because 'war' may still be understood in this restricted sense, the Review Group recommends that the second and subsequent references to 'war' in Article 28.3 be extended to include 'or other armed conflict', so that the Government would be prevented from participating in an external armed conflict without the authorisation of Dáil Éireann. This would be an ultimate safeguard.

The other relevant constitutional provision is Article 29.4.1° which provides that the executive power of the State in its external relations shall be exercised by or on the authority of the Government. The Constitution was enacted in 1937 and the Article was retained unaltered during World War II even though that was a period in the course of which, under the terms of the Constitution, the Constitution could be altered by ordinary legislation. Neutrality was not written into the Constitution then. This position did not change when the State joined the European Community in 1973 or following any of the changes since then in the original Accession Treaty.

Conclusion

The Review Group considers that, in constitutional terms, the Articles cited above, besides committing the State to peaceful resolution of conflict, establish a proper balance between Dáil control over the State's involvement in armed conflict and freedom for the Government to conduct external relations in the national interest. Neutrality in Ireland has always been a policy as distinct from a fundamental law or principle and the Review Group sees no adequate reason to propose a change in this position.

28.11.2° *The members of the Government in office at the date of a dissolution of Dáil Éireann shall continue to hold office until their successors shall have been appointed.*

28.12 *The following matters shall be regulated in accordance with law, namely, the organisation of, and distribution of business amongst, Departments of State, the designation of members of the Government to be the Ministers in charge of the said Departments, the discharge of the functions of the office of a member of the Government during his temporary absence or incapacity, and the remuneration of the members of the Government.*

3 whether Article 28.3 should be amended to provide for a limit on the period during which a law enacting a state of emergency continues to have effect and for preserving certain rights during that period

One of the greatest challenges facing democracy in time of war or armed conflict is the attainment of a balance between the ability of Government to take effective action and the need to protect basic human rights. Some constitutions make specific provision for such a balance – the German and Portuguese constitutions, for example. The European Convention on Human Rights and the International Covenant on Civil and Political Rights, both of which recognise that, in time of war or other public emergency, states may take measures derogating from their obligations, provide that certain rights are regarded as so fundamental that they may not be derogated from. These include the right to life, the right not to be tortured or subjected to inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude, the prohibition on retrospective penal sanctions, the right not to be imprisoned on the ground of inability to fulfil a contractual obligation, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion. In line with the State's international obligations – it is a party to both instruments – the Constitution should make it clear that these particular rights may not be derogated from in any circumstances.

The Review Group notes that the current provision for the Oireachtas to declare a state of emergency has no limit and that therefore the powers available under a state of emergency continue indefinitely. There should be a limit on the period for which the legislation can continue without parliamentary review. There could be apprehension that the unlimited powers given to the Government under the Article might lead to the suspension of human rights.

Recommendation

Amend Article 28.3.3° to include a limit of not more than three years, as recommended by the Committee on the Constitution (1967), with annual review thereafter. Also, the fundamental rights and liberties retained during a state of emergency should be specified in the Constitution because they are in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights.

4 whether the doctrines of collective responsibility and cabinet confidentiality should be constitutionally defined

The Review Group is excused by its terms of reference from considering the issue of cabinet confidentiality. However, it notes that such confidentiality is an almost universal feature of government and the essential underpinning for the doctrine of collective responsibility enshrined in Article 28.4.2°. Collective responsibility is, in turn, essential to a Government's ability to plan and act cohesively. The possibility that cabinet confidentiality might in some circumstances be lifted could in itself, obviously, inhibit discussion and therefore the effectiveness of government.

In *Attorney General v Hamilton (No 1)* [1993] 2 IR 250 a majority of the Supreme Court upheld the principle of absolute confidentiality of Government discussions. This case arose following a decision of a Tribunal of Inquiry to seek such information, but the court reserved the question whether a similar principle would apply without qualification in the context of the administration of justice.

Cabinet confidentiality, by allowing the Government to discuss its business free from external pressures and scrutiny, enables it to draw fully on the political skills, knowledge and experience of its members. It is in the Dáil, where debate can take place in public, where mechanisms for formal recording of views exist, and where rules of debate apply, that a Minister, while still observing cabinet confidentiality and the principle of collective responsibility, most appropriately explains the reasons for, and the background to, Government decisions.

An absolute requirement of confidentiality might lead to unintended results, such as where a resigning Minister was not allowed to give a full explanation for his decision where this had resulted from a proposal made at the Cabinet table.

Conclusion

There are strong grounds for extreme caution in any approach to relaxation of the rule. Two approaches were considered by the Review Group:

1 any relaxation should be subject to the most stringent test of public interest, as judged by the High Court or Supreme Court, and should be confined to the context of a criminal prosecution against a member, or former member, of the Government (as is the case in the United States and Australia)

2 the context, specified at 1, could be unduly restrictive and it might be better to express any constitutional relaxation in less specific terms while still applying the test of overriding public interest as determined by the High Court or Supreme Court.

It should be understood that the rule of cabinet confidentiality does not apply to Government decisions which are formally recorded. Their communication to those concerned establishes them as items of public knowledge.

5 whether Article 28.6.2°-3° should clarify what should happen if both the Taoiseach and the Tánaiste are unable to act

The Taoiseach is the central figure who initiates certain key actions such as the appointment of Ministers and the dissolution of the Dáil. Article 28.6.2°-3° provides for the Tánaiste to act for the Taoiseach in certain circumstances but makes no disposition as to what should happen if both the Taoiseach and the Tánaiste are unable to act in an emergency. The point arose in the recent High Court action – *Riordan v Spring* (1995) where 'absence' was taken to mean 'being temporarily unable to fulfil his

functions either through illness, incapacity or being incommunicado whether at home or abroad' – the last an unlikely contingency with modern means of communication. Despite the fact that the problem has been largely obviated by the purposive judicial construction of the subsection in this judgment, the Review Group considers that an express provision would be desirable.

Recommendation

An express constitutional provision should be made for the nomination of a senior Minister in the event of a situation arising in which neither the Taoiseach nor the Tánaiste was available to act.

6 dissolution of the Government

Article 28.9.1° provides that the Taoiseach may resign from office at any time by placing his or her resignation in the hands of the President.

Article 28.11.1° provides that if the Taoiseach resigns from office, the other members of the Government shall be deemed to have resigned from office also.

Article 28.10 provides that the Taoiseach shall resign from office upon his or her ceasing to retain the support of a majority in Dáil Éireann, unless on his or her advice the President dissolves Dáil Éireann, and on the re-assembly of Dáil Éireann, after the dissolution, the Taoiseach secures the support of a majority in Dáil Éireann.

Article 13.2.2° provides that the President may in his or her absolute discretion refuse to dissolve Dáil Éireann on the advice of a Taoiseach who has ceased to retain the support of a majority in Dáil Éireann.

While these constitutional procedures have worked, they are open to the risks (a) of Government formation being deadlocked or (b) of an early election being called simply to capitalise on favourable opinion poll ratings. Whether Article 13.2.2° can properly or effectively be invoked to lessen these risks is discussed in chapter 3 – 'The President'. Two other approaches are discussed below. Risk (b) need not be regarded as serious; the 'snap' election has been a rarity and seems destined to be rarer still as coalitions rather than single-party governments become the norm. While the average life of a Dáil has been relatively short – two years and ten months – this is attributable much more to the voting system producing a precarious balance of political representation than to resort to 'snap' elections. In any case, the result achieved by such elections could scarcely be described as undemocratic. Risk (a) is the more serious, and the possibility of its being lessened by introducing the procedure of a constructive vote of no confidence deserves prior examination. A fixed-term Dáil, the second possibility to be discussed, is concerned with the stability of parliament and government rather than avoidance of deadlock in the formation of government.

No country has both a fixed-term parliament and a provision for a constructive vote of no confidence.

a) constructive vote of no confidence

Difficulty in forming a government (without going back to the people by way of a general election) can arise *either* when a Dáil reassembles after a general election and no candidate for Taoiseach can obtain a majority *or* if the Government loses its control of the Dáil during a Dáil term. That can arise as the result of the break-up of a coalition or through deaths, resignations, bye-election defeats, or defections. In any of these events the replacement of a defeated Government may pose difficulty.

A constructive vote of no confidence, first introduced in Germany, and subsequently elsewhere, forces the legislature to agree upon a viable alternative before it can defeat the Government. This can be achieved by amending Article 28.10 by deleting the text after 'Éireann' and replacing this by 'demonstrated by the loss of a motion of no confidence which at the same time nominates an alternative Taoiseach.' Only if an alternative Taoiseach were simultaneously agreed could the incumbent Government be defeated.

A constructive vote of no confidence is an efficient response to the potential for deadlock that can arise if a Government is defeated in a critical vote which establishes that it has ceased to retain majority support yet the legislature cannot agree upon a replacement. It provides a means of determining whether an alternative Taoiseach is acceptable to a majority of the Dáil without the need for a general election to follow every government defeat.

Another advantage of this procedure is that it excludes the possibility of the President being drawn into party politics.

However, consideration also needs to be given to the situation in which a Taoiseach resigns *in anticipation* of losing a constructive vote of no confidence. This eventuality could be dealt with in the Constitution (Dáil standing orders might not be enough) by precluding a Government resignation once a constructive motion of no confidence had been tabled. While this might encourage the opposition to table such motions at the first whiff of a resignation, it may address adequately what is likely to be a rare contingency.

b) a fixed-term Dáil

To give effect to a fixed-term Dáil, Articles 13.2.1°, 13.2.2°, 16.3.1°, and the text after 'unless' in Article 28.10 would all need to be deleted. The timetable for elections could then be set by law, as provided for in Article 16.5. With all provisions for dissolving the Dáil deleted from the Constitution, it would effectively have a fixed term. It might be felt to be more secure to provide over and above this for a fixed term in the Constitution, with an Article replacing Article 16.5 that would take the form: 'Elections to Dáil

Éireann will take place every four years, according to a schedule regulated by law'.

A fixed-term Dáil need not involve any departure from the present procedure for filling vacancies by bye-elections. Its introduction would remove the possibility of a Government calling a general election while still undefeated in the hope of strengthening its position. A fixed-term Dáil would also eliminate the uncertainty which tends to prevail in the final twelve to eighteen months of a Dáil term because the incumbent Government is under strong inducement to choose the most propitious occasion to dissolve the legislature and 'go to the country'.

As against its contribution to stability, the main disadvantage of a fixed-term Dáil is that it is less democratic as it involves less consultation with the electorate. Moreover, a political deadlock might arise which would make it impossible to form a new Government from the existing legislature. This could arise if an incumbent Government were defeated but no alternative government was acceptable to a legislative majority. It would be necessary to install a way of breaking such a deadlock by providing for a dissolution of the Dáil, after a Government resignation or defeat, if no Taoiseach had been elected after, say, sixty days. Provision would also need to be made for early dissolution in the event of an emergency or crisis. One possibility would be to allow this on passage of a resolution by a qualified majority (for example sixty-six or seventy-five per cent) of the Dáil.

Fixed-term parliaments are a rarity. The nearest geographical example is Norway where parliament sits for four years and can be dissolved before this term has expired only in extraordinary circumstances. A government that falls during this term must be replaced by the sitting legislature. Norwegian experience is not persuasive as to the superior merits of a fixed-term system.

Recommendation

There is no sufficient reason to advocate a fixed-term Dáil. A constructive vote of no confidence would reduce substantially the deadlock difficulty discussed above and a majority of the Review Group considers that the introduction of this procedure merits serious consideration. It could be achieved by amending Article 28.10 by deleting the text after 'Éireann' and replacing this with 'demonstrated by the loss of a motion of no confidence which at the same time nominates an alternative Taoiseach.' Article 13.2.2° would then become redundant.

7. **whether the President should have a role in the formation of a new Government**

Conclusion

This was discussed in the chapter on the President. Having considered the question in the light of the foregoing discussion, the Review Group is, on balance, of the opinion that the introduction of a constructive vote of no confidence would be preferable to the involvement of the President in the Government-formation process.

General observation

In the course of its consideration of the issues surrounding a change of Government, the Review Group has come to the view that, as a matter of good government, during the period before a new Government emerges, an outgoing Government should carry on the essential business of the State strictly on a care and good management basis. A Government whose democratic mandate has been withdrawn by the legislature should in practice function to take care of absolutely essential business only (refraining, for example, from making any non-essential appointments, and not deviating from the status quo in relation to policy in any significant way). However, the Review Group does not consider it desirable that any constitutional limitation should be placed on such a Government as it could give rise to uncertainty as to the validity of actions taken during such a period and to legal challenges against such actions.

International Relations

29.1 *Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.*

29.2 *Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.*

29.3 *Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.*

Article 29.4.1° *The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.*

29.4.2° *For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.*

Article 29.4.3° *The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). The State may ratify the Single*

Introduction

The conduct by a State of its international relations is an attribute of its sovereignty. Indeed, the defining characteristics of a modern State 'as a person of international law', which are set forth in the Montevideo Convention of 1933 held under the aegis of the League of Nations, are: a permanent population, a defined territory, a Government, and a capacity to enter into relations with other States.

In its relations with other States Ireland is subject to the rules and principles of public international law. This law takes two principal forms: the international agreements entered into by the State and customary international law. Article 29 recognises both forms but provides that international agreements shall only take effect in domestic law to the extent that the Oireachtas so determines (Article 29.6). In contrast, the effect to be given in domestic law to customary international law is much less clear (see the extensive discussion of Article 29.3 below).

The Constitution assigns to the Government the role of formulating Ireland's foreign policy and conducting Ireland's foreign relations. The Constitution, however, does not give a completely free hand to the Government in this field. It places limitations on what the Government may do, including the extent to which the Government may bind the State internationally.

The Constitution specifies that the Government, for the purpose of international co-operation, may avail itself of any mechanism that a group of nations may establish for the achievement of common objectives. Under this provision, the State, as a member of the then British Commonwealth, availed itself of the head of that group of nations – the British monarch – for the accreditation of Irish representatives abroad and the reception of foreign representatives to Ireland during the period 1937 to 1948. The Republic of Ireland Act 1948 assigned those functions to the President. Apart from representation, international relations are also developed through membership of international organisations. Thus in 1955 Ireland became a member of the United Nations and in 1973 a member of the European Communities. International co-operation is also realised through international agreements.

In the Constitution, Ireland pledges itself to the pursuit of peace and friendly co-operation among nations based on international justice and morality.

European Act (signed on behalf of the Member States of the Communities at Luxembourg on the 17th day of February, 1986, and at the Hague on the 28th day of February, 1986).

29.4.4° *The State may ratify the Treaty on European Union signed at Maastricht on the 7th day of February, 1992, and may become a member of that Union.*

29.4.5° *No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.*

29.4.6° *The State may ratify the Agreement relating to Community Patents drawn up between the Member States of the Communities and done at Luxembourg on the 15th day of December, 1989.*

Article 29.5.1° *Every international agreement to which the State becomes a party shall be laid before Dáil Éireann.*

29.5 2° *The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.*

29.5.3° *This section shall not apply to agreements or conventions of a technical or administrative character.*

29.6 *No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.*

Issues

1 whether any changes are needed in Article 29, sections 1 and 2

These sections have given rise to little commentary and seem to be uncontroversial. Aside from proceedings under the European Convention on Human Rights the State has not been involved in international arbitration or judicial determination, or indeed in other means of resolving international disputes such as mediation. The only judicial reference to these provisions is found in *McGimpsey v Ireland* [1990] 1 IR 110, where the constitutionality of the Anglo-Irish Agreement was upheld. The court rejected the argument that because the Agreement recognised the *de facto* (but not *de jure*) status of Northern Ireland it was in violation of Articles 2 and 3 of the Constitution:

> ... [insofar as the provisions of the Agreement] accept the concept of change in the *de facto* status of Northern Ireland as being something that would require the consent of the majority of the people of Northern Ireland, these articles of the Agreement seem to be compatible with the obligations undertaken by the State in Article 29, ss 1 and 2 of the Constitution, whereby Ireland affirms its devotion to the ideal of peace and friendly co-operation and its adherence to the principles of the pacific settlement of international disputes.

Recommendation

No change is proposed.

2 whether Article 29.3 should be amended

The object of Article 29.3 appears to be to commit the State to following the generally recognised principles of international law in its international relations. This was undoubtedly a progressive and forward-thinking provision, having regard to the failures of international diplomacy in the Europe of the 1930s.

Article 29.3 has, however, given rise to the following problems of interpretation:

i) how does one determine whether a particular principle *is* a 'generally recognised principle of international law'?

ii) the phrase 'rule of conduct' is somewhat awkward in a legal context. Does it imply that the State is absolutely bound by these principles, so that the Oireachtas is precluded from legislating otherwise than in accordance with the principles of international law? The Irish wording ('le bheith in a dtreoir...') suggests that the principles of international law are simply a guide and do not bind the State

iii) the words 'in its relations with other States' might imply that if the State is bound, it is bound only at the international level, and consequently the principles enjoying general recognition do not bind the State at domestic law level. A private litigant, on this view,

could not rely on the generally recognised principles of international law in order to challenge the constitutionality of a Government decision or an Act of the Oireachtas

iv) whether the generally recognised principles of international law refer to the principles of public international law or whether they also embrace those of private international law.

These issues surfaced in the debate on extradition in the mid-1970s, when the question arose as to whether Article 29.3 prevented the Oireachtas from enacting legislation which would have restricted the scope of the internationally accepted 'political offence' exception. The Irish and British governments established the Law Enforcement Commission, consisting of senior judges and jurists from both jurisdictions, to advise them. The commission divided on the issue. The British side concluded that the 'political offence exception rule' was not a generally recognised principle of international law; that even if it was, Article 29.3 does not preclude the State from legislating otherwise than in accordance with the rules of international law (and, in this regard, emphasis was placed by them on the Irish wording of the Article). They also concluded that, having regard to the decision of the Supreme Court in *In re Ó Láighleis* [1960] IR 93, and that of the Divisional High Court in *The State (Sumers Jennings) v Furlong* [1966] IR 183, Article 29.3 did not confer any rights on individuals. (In the former case Maguire CJ said that Articles 29.1 and 29.3 clearly refer only to relations between States and confer no rights on individuals, a view which was subsequently endorsed in the *Sumers Jennings* case.)

The Irish side concluded that the Government of Ireland could not legally enter into any agreement, nor could the legislature validly enact any legislation, affecting its relations with other States which would be in breach of the generally recognised principles of international law. For so long as these generally recognised principles forbid the extradition of persons charged with or convicted of political offences the Irish members of the Commission felt they could not advise that any agreement or legislation designed to produce this result would be valid.

The disagreements thus evident in the views of the Law Enforcement Commission are still unresolved and the uncertainties continue. Thus, in *Government of Canada v The Employment Appeals Tribunal and Burke* [1992] 2 IR 484, O'Flaherty J appeared to imply that the Oireachtas was bound by Article 29.3 and could legislate only in accordance with that Article even though the decision in Ó *Láighleis* suggests that this provision was intended to guide but not bind the State. Barr J held in *ACT Shipping Ltd v the Minister for the Marine* [1995] 2 ILRM 30 that a private litigant may invoke Article 29.3 against the State in order to assert that a particular rule 'has in time evolved into Irish domestic law from customary international law' provided that such rule is not contrary to the Constitution, statute law or common law. Finally, in *ACW v Ireland* [1993] 3 IR 232, Keane J appeared to suggest that Article 29.3 was confined to the principles of public international law. An analysis of these and other contemporary decisions suggests that there is a trend towards giving effect in internal domestic law to

the generally recognised principles of international law. However, the parameters of this emerging doctrine are not yet clear.

A submission by Dr Clive R Symmons, School of Law, Trinity College Dublin, which examines the application of Article 29.3 and proposes that it be amended to ensure automatic incorporation of customary international law into Irish domestic law, is included at Appendix 16.

The Review Group notes that Article 29.3 has given rise to difficulties of interpretation. These are:

i) whether Article 29.3 binds the State to implement the generally recognised principles of international law in its international relations or merely provides them as a guideline

ii) whether Article 29.3 binds the State to implement the generally recognised principles of international law in domestic law

iii) whether Article 29.3 can be invoked by private litigants in support of a claim that a particular domestic rule of law or executive action is unconstitutional

iv) whether Article 29.3 covers private international law as well as public international law

Opinion was divided in the Review Group on how to deal with these difficulties, particularly with the first three.

a) whether Article 29.3 should be amended to make it clear that the State is bound to implement the generally recognised principles of international law

Argument for

1 it is correct and proper in a constitutional democracy that the State should declare itself to be bound by the generally recognised principles of international law. In any event, the trend of recent court decisions is in that direction.

Arguments against

1 there is uncertainty as to the content of the generally recognised principles of international law. The State should not bind itself to follow certain principles when these same principles evolve over time and where there will be enduring uncertainty as to their content and as to whether they are binding rules

2 if the State were so bound, it might find itself involved in embarrassing litigation – for example, private individuals might attempt either to prohibit the State from taking a certain course of action or to coerce it to adopt a particular course of action.

b) whether Article 29.3 should be amended to make it clear that the State is bound to implement the generally recognised principles of international law in domestic law

Arguments for

1 if the State is bound by the generally recognised principles of international law in its international relations, its domestic law should also conform to these principles

2 in some instances it is necessary to give effect to the principles internally in order to implement them externally, for example by granting foreign states immunity from the jurisdiction of national courts.

Arguments against

1 the nature of the relationships within a state is fundamentally different from that of relationships between states. Thus, domestic law, which is designed to deal with the former should not be limited by the generally recognised principles of international law which are designed to deal with the latter

2 if private individuals are permitted to rely on the generally recognised principles of international law, this will effectively blur the distinction between a 'dualist' and 'monist' system in that the State will be bound by principles of international law in circumstances where these principles have not been incorporated into domestic law by the Oireachtas in the manner envisaged by Article 29.6 for international agreements

3 such a proposal would also be at odds with the principle enshrined in Article 15.2.1° that the Oireachtas has sole law-making responsibilities (as per the High Court's decision in the *Sumers Jennings* case).

c) whether Article 29.3 should be amended to make it clear that a private litigant can invoke a generally recognised principle of international law in support of a claim that a particular domestic law was unconstitutional

Arguments for

1 if the State or a foreign state can invoke the Article against a private litigant, a private litigant should be able to contend, where appropriate, that a generally recognised principle of international law has been absorbed into domestic constitutional law via Article 29.3 in proceedings against another private litigant, the State or a foreign state

2 the trend in international law is to erode the principle that the function of international law is to regulate relations between states exclusively. This is particularly so in the field of human rights. Accordingly, private citizens should be able to rely, where appropriate, on the generally recognised principles of international law.

Arguments against

1 the principles of international law are designed to regulate inter-state relations only and it would be inappropriate to allow a private individual to rely on such provisions in a domestic court (particularly since we have a 'dualist' system of international law as explained in the discussion later on Issue 9)

2 the arguments against at *b)* 1 and 3 also apply.

Conclusion

The Review Group makes no recommendation on questions *a), b)* or *c)*.

d) whether Article 29.3 should be amended to make it clear that it covers public international law only and not private international law

The Review Group considered that the drafters of the Constitution did not have private international law in mind when drafting Article 29.3 and concluded that this was a question which would be more appropriately dealt with by non-constitutional law.

Recommendation

Amend Article 29.3 to make it clear that it covers public international law only and not private international law.

3 whether Article 29.4.1° should be amended

Article 29.4.1° makes it clear that the executive power of the State 'in or in connection with its external relations' shall, in accordance with Article 28 of the Constitution, be exercised by or on the authority of the Government. As Article 28.2 in turn makes clear, the Government is subject to the provisions of the Constitution in the discharge of the executive power of the State. In other words, the combined effect of these provisions is to emphasise (a) that the conduct of foreign affairs is vested in the Government and (b) that, in the exercise of this power, the Government is subject to the provisions of the Constitution. It is true that the express language was prompted by contemporary circumstances. As noted by Kelly, *The Irish Constitution* (3rd edn, 1994, at 277):

> As the specific reference to Article 28 suggests, subsection 1 of the section might seem redundant if it stood alone; its presence is intended to assert emphatically the status of the Government as controlling external relations despite the contemporary situation in 1937, created by the Executive Authority (External Relations) Act 1936, which featured the British Crown still discharging a vestigial function in this area.

Notwithstanding the fact that these considerations no longer obtain, Article 29.4.1° is useful because it states something which

is only implicit in Article 28.2, namely, that the conduct of external affairs is vested in the executive.

Recommendation

No change is necessary in Article 29.4.1°.

4 whether Article 29.4.2° should be deleted and whether a new provision should be inserted to provide for Ireland's treaty-making provisions, Ireland's membership of the United Nations; and the Framework Document presented by the British and Irish Governments in February 1995

Article 29.4.2° must be viewed in the light of the constitutional history of the State immediately prior to the adoption of the Constitution. Following the amendment of Article 51 of the Constitution of the Irish Free State in 1936 and the subsequent enactment of the Executive Authority (External Relations) Act 1936, all direct references to the Crown were removed from the then Constitution. The Crown had a vestigial presence in as much as s3(1) of the 1936 Act permitted the continuing accreditation of Irish diplomats via the British monarch through a system of external association with the British Commonwealth. For the period between 1937 and 1948, Article 29.4.2° provided a constitutional basis for what otherwise would have been a derogation from the unfettered sovereignty of the State in the matter of external relations. This enabling provision was rendered largely redundant when the State left the Commonwealth following the coming into force in 1949 of the Republic of Ireland Act 1948.

The Review Group notes that even the hypothesis of rejoining the Commonwealth of Nations (as the British Commonwealth has now become) would not require the retention of Article 29.4.2° in its present form, save in the very unlikely event of the function of accrediting diplomats being transferred once more to the British Crown. The Commonwealth is now simply an association of nations which come together for certain agreed purposes and whose decisions are not binding on Member States. Membership of the Commonwealth would involve no intrusion on the executive's freedom to conduct foreign affairs and would therefore need no constitutional underpinning.

The United Nations

The Review Group notes that there is no constitutional provision dealing expressly with Ireland's membership of the UN and that no enabling legislation was enacted by the Oireachtas to facilitate the accession of the State to the UN in 1955. There are circumstances where, by reason of a resolution passed by the Security Council of the UN (of which Ireland only occasionally is a member), the State might be bound in international law to take a certain course of action. The binding character of such resolutions would appear to restrict the executive's freedom to conduct foreign affairs in that – as a matter of international law – the Government's discretion, for example, whether to disrupt

trade or break off diplomatic relations with a country, would have been ousted. Such a restriction on the executive's freedom to act might well – having regard to the principles enunciated by the Supreme Court in *Crotty v An Taoiseach* [1987] IR 713 – be found to be constitutionally objectionable. The Review Group considered whether Article 29.4.2° could be relied upon to justify the constitutionality of Ireland's membership obligations in respect of the UN. Article 29.4.2° applies only where legislation has been enacted enabling the State to accede to the international organisation in question – a crucial point in the *Crotty* case. Moreover, Article 29.4.2° could not be invoked to justify this erosion of the executive's constitutional power, since, as Walsh J pointed out in the course of his judgment in the *Crotty* case, the framers of the Constitution, when drafting this provision, refrained from granting to *'the Government the power to bind the State by agreement with such groups of nations as to the manner or under what conditions that executive power of the State would be exercised'*.

The Review Group, however, also adverts to the provisions of Article 130 (u)(3) of the Treaty of Rome, as inserted by the Maastricht Treaty:

> The Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

Although the wording of this provision is in general terms, its placement in the Maastricht Treaty under a title concerned with development cooperation raises a question as to whether the objectives referred to are special to development cooperation or general.

The Framework Document

The Review Group notes that the Framework Document (which was presented by both the Irish and British Governments in February 1995) contemplated that executive authority in respect of certain designated areas might be delegated to a new North/South body. As paragraph 25 of the Declaration explained:

> Both Governments agree that these [new] institutions should include a North/South body involving Heads of Department on both sides and duly established and maintained by legislation in both sovereign Parliaments. This body would bring together these Heads of Department representing the Irish Government and new democratic institutions in Northern Ireland, to discharge or oversee delegated executive, harmonising or consultative functions, as appropriate, over a range of matters which the two Governments designate in the first instance in agreement with the parties or which the two administrations, North and South, subsequently agree to designate.

Having regard to the *Crotty* case, a proposal for North/South bodies with executive authority might require a specific constitutional amendment in order to make it invulnerable to the argument that it involved a delegation of the executive power of

the Government (within the meaning of Article 28 of the Constitution) to such bodies in a manner contrary to the principle established in the *Crotty* case.

Proposals for change

There are essentially three proposals for change:

a) that Article 29.4.2° should be deleted on the ground that it is now spent and only serves to give an inaccurate picture of Ireland's relations with other states

Arguments for

1 Article 29.4.2° was included in the Constitution to deal with a specific feature of Ireland's relationship with the United Kingdom and the wider Commonwealth. With our departure from the Commonwealth in 1949, there is no longer any need to retain this provision which is now spent

2 even if Ireland were to re-join the Commonwealth, in whatever context, it would be rejoining as a republic. Accordingly, the existence of Article 29.4.2° (which is designed to provide constitutional cover for accreditation of diplomats via the British monarch) would still be superfluous. Moreover, decisions of the Commonwealth do not bind the members of that body. If Ireland were to re-join, there would be no derogation from the executive's freedom to conduct foreign affairs so that, again, Article 29.4.2° would be unnecessary

3 apart from the historical circumstances which obtained during the period of 'external association' between 1936-1949, it is difficult to see how Article 29.4.2° could now be utilised in the context of any modern international organisation.

Arguments against

1 Article 29.4.2° is not completely spent. It does not necessarily follow that, if Ireland re-joined the Commonwealth, it would not revert to a system of 'external association', so that Article 29.4.2° might still be required in that eventuality

2 if Article 29.4.2° is to be amended, it ought to be amended only in the context of an 'agreed Ireland'. It would be premature to make this change in advance of such an agreement

3 if Article 29.4.2° is completely spent, its deletion is not essential.

b) in the wake of the Supreme Court's decision in the Crotty *case, it has been suggested that an amendment should give the executive more extensive treaty-making power*

Arguments for

1 there is a clear necessity to deal expressly with the executive's treaty-making powers in the wake of the *Crotty* case which has unduly restricted them

2 any proposed amendment designed to give the executive greater treaty-making powers could provide for adequate safeguards. These safeguards might include a requirement that any such treaty restricting the conduct of foreign affairs should receive the prior approval of the Oireachtas via legislation.

Arguments against

1 in practice, the *Crotty* decision has not had the negative impact some commentators feared nor is there any empirical evidence in the nine years or so since that decision that it has handicapped the executive's conduct of foreign affairs

2 the *Crotty* decision is correct as a matter of principle because otherwise the Government would be free by mere executive act to accede to treaties (for example the NATO treaty) which would severely restrict the executive's freedom to conduct foreign affairs.

c) that there should be a specific constitutional amendment dealing with Ireland's membership of the United Nations

Arguments for

1 in view of the uncertainty attending our membership of the United Nations, especially in the wake of the *Crotty* case, it is desirable that any doubts be put to rest by a constitutional provision

2 quite independently of any constitutional issues, such a provision would be an earnest of our commitment to the United Nations and the values in its Charter.

Arguments against

1 it is undesirable as a matter of principle that the Constitution should deal with a specific matter such as membership of the United Nations. It is not inconceivable that in the future the State might wish to leave the United Nations or that that body might cease to enjoy its widespread respect and prestige

2 such a clause would be unnecessary and would not serve any useful or practical function. The insertion of such a clause at this stage would only serve to create uncertainty concerning the validity since 1955 of our membership of the United Nations

3 Article 130(u)(3) of the Treaty of Rome (as inserted by the Maastricht Treaty) provides adequate recognition (albeit indirectly) of our responsibilities towards the United Nations.

Recommendation

Delete Article 29.4.2°

The Review Group's view is that it is, for all practical purposes, spent.

Conclusion

Treaty-making powers

A majority of the Review Group rejects a proposal that there should be a new provision in Article 29 which would enable the executive to enter into binding international agreements facilitating co-operation with other States in matters of mutual or common concern, even where those agreements would trench on the executive's power to conduct foreign relations. It is considered undesirable as a matter of principle that the Government should be permitted to cede the executive power of the State through an international treaty, irrespective of any proposed safeguards. If there were proposals to cede such executive authority by treaty or international agreement in specific instances (such as, for example, in the case of North/South bodies as envisaged by the Framework Document), the Review Group considers that this should be done by means of a specific constitutional amendment put to the people by referendum.

Recommendation

A United Nations provision

A majority of the Review Group is in favour of inserting a specific clause dealing with the State's membership of the United Nations. It is envisaged that the clause might be modelled loosely on the corresponding provisions of Article 130(u)(3) of the Treaty of Rome in that such a clause would (a) recognise our existing membership of the United Nations and (b) confirm the State's determination to comply with its obligations under the United Nations Charter. The following draft is suggested:

> *Ireland, as a member of the United Nations, confirms its determination to comply with its obligations under the Charter of the United Nations*.

A majority of the Review Group recommends the insertion of such a clause because it would have symbolic value and would remove any uncertainty concerning the validity of our membership of the United Nations.

5 whether Article 29.4.3°-6° concerning our membership of the European Union requires amendment

These subsections of Article 29.4 comprise the cumulative effect of the amendments of the Constitution which enabled the State to become a member of the European Communities in 1973, to ratify the Single European Act in 1987, to become a member of the European Union by ratification of the Maastricht Treaty in

1992, and in 1992 also to ratify the Agreement relating to Community Patents. All of these amendments were required to overcome constitutional barriers. In the case of the Single European Act, the Supreme Court decision in the *Crotty* case affirmed that constitutional barriers to ratification existed and had not been overcome by the earlier amendment.

As identified by the Supreme Court in the *Crotty* case, the constitutional barriers arose from Title III of the Single European Act in that it would effectively bind the power of the Government when conducting its foreign relations in the future. This was held to be contrary to Article 29.4.1°. The Supreme Court also concluded that ratification of the Single European Act was not 'necessitated by' the obligation of the European Community membership, because it would enter into force only after ratification by all Member States, and thus it did not come under the protection of (the then) Article 29.4.3° (now Article 29.4.5°).

5.1 whether different constitutional provisions are more appropriate as a basis for the State's membership of the Communities and the Union

The Review Group examined the provisions in the constitutions of other states which enabled them to be members of the Communities and the Union. The Review Group is satisfied that Irish constitutional provisions are suited to Irish circumstances and have proved adequate.

5.2 whether the words 'necessitated by' in subsection 5° are too restrictive

It was recalled that in the original draft of the Bill for the Third Amendment of the Constitution Act 1972, the words 'consequent upon' were proposed but were later amended to 'necessitated by' in the course of the consideration of the Bill by the Dáil. The expression 'necessitated by', as interpreted by the Supreme Court in the *Crotty* case, covers only matters of legal obligation. It seems certain that the expression 'consequent upon' would have received a wider interpretation. The Review Group is agreed that the existing wording ensures that in the event of further developments of the Communities or the Union which are not provided for in the existing treaties (such as might well emerge from the pending Inter-Governmental Conference of the Member States) and which were inconsistent with the Constitution, acceptance of such developments by the State should require prior adoption of a constitutional amendment and, thus, the consent of the people. The Review Group feels that this is a valuable democratic safeguard whose erosion would represent an accretion to what has been described as 'the democratic deficit'.

5.3 whether there should be a special blanket provision enabling the State to become party to agreements concluded under the auspices of the Communities or the Union, but not provided for in the Treaties, which would otherwise encounter constitutional barriers and thus require prior specific constitutional amendments

It is recognised that a change such as was considered in regard to 5.2 above would probably also validate State participation in agreements concluded under the auspices of the Communities or the Union, thus avoiding the inconvenience and expense of a referendum in each case where a constitutional barrier, however slight, stood in the way. Such agreements would be principally those envisaged in Article 220 of the Rome Treaty and Article K1 of the Maastricht Treaty, that is, agreements or common action relating to the matters of common concern as set out in Article K1 such as reciprocal granting, regulation, and/or protection of rights for individuals and corporations to facilitate the achievement of objectives of the European Communities and Union. Among those already concluded are the Community Patents Agreement as expressly provided for in Article 29.4.6°, and the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. The Review Group considered whether, in the absence of a change such as was considered in regard to 5.2 above, a special blanket provision should be made for such agreements, thus obviating a succession of amendment provisions like that in Article 29.4.6°. The Review Group concludes that such a provision would of itself constitute an accretion to 'the democratic deficit'. More importantly, it carries the risk of being so interpreted as to cover not only agreements of the kind intended but also agreements providing for fundamental changes or developments.

Recommendation

No such proposals for amendment of Article 29.4.3°-5° should be made.

5.4 whether Article 29.4.5° should be amended to prevent implementation of Community directives by government or ministerial order if amendment of a statute were involved

The decision of the Supreme Court in *Meagher v Minister for Agriculture* [1994] 1 IR 329 was considered by the Review Group. In that case the applicant had challenged the validity of a statutory instrument which had amended an earlier statute. The statutory instrument in question had been promulgated by the Minister in order to give effect to a number of EC directives in Irish domestic law. While recognising that, generally speaking, the Oireachtas was not competent under Article 15 to delegate a power of legislation (including the power to amend a statute) to a Minister, the constitutionality of s 3 of the European Communities Act 1972 (which enabled a Minister to amend statute law by statutory instrument where this was necessary to give effect to a directive) was nonetheless upheld by the court by reason of Article 29.5.4° of the Constitution. The court was satisfied that the sheer number of EC directives was such that membership of the Community necessitated the possibility of implementing directives in Irish law by means of statutory instrument rather than by Act of the Oireachtas, even where amendment of an Act of the Oireachtas was involved.

The Review Group recognises the utility and indeed the necessity for a provision such as s 3 of the 1972 Act. Nevertheless the present situation is not entirely satisfactory. The extensive use of

statutory instruments to implement directives has meant that hundreds of statutory provisions, some important, have been expressly or impliedly repealed by statutory instruments often with a minimum of publicity. The use of statutory instruments ensures speedy and effective implementation of EC law but often at the expense of the publicity and debate which attends the processing of legislation through the Oireachtas. In this respect the operation of the 1972 Act might be said to contribute to an 'information deficit' and possibly a 'democratic deficit'. The Review Group recognises, of course, that, following the judgments of the Supreme Court in the *Meagher* case, and in particular the judgment of Denham J, the use of statutory instruments to implement EC directives is confined to circumstances where the policies and principles have been determined in the EC directive. Thus in many instances there may not be choices available which would warrant an Oireachtas debate. However, the Review Group draws attention to this problem which results from the inapplicability of Article 15 by reason of Article 29.4.5° to legislative amendments or provisions necessitated by EC directives.

Conclusion

The Review Group does not recommend any constitutional amendment but suggests that consideration be given to a re-examination of the role of the Oireachtas and public information relating to the transposition of EC directives into domestic law.

6 whether the wording of Article 29.5.1° should be changed so as to require the Government to lay before Dáil Éireann all international agreements before they enter into force

Many international agreements, including most multilateral ones, enter into force for a State only when it has signed and subsequently ratified them. In such a case the above requirement would be met by laying the agreement in question before the Dáil after signature but prior to ratification. However, some agreements, usually bilateral ones, enter into force for a State through signature alone, and signature often follows closely on conclusion of negotiations. In such a case the above requirement would have to be met by laying the agreement in question before the Dáil prior to signature.

Arguments for

1 to require the Government to put such international agreements as it has signed or will sign before the Oireachtas prior to the State's becoming a party to such agreements would result in a much greater level of awareness among public representatives, the public and the media generally about the State's foreign policy and its relations with other countries on a wide variety of issues

2 it would lead to a greater degree of interest in the Oireachtas in such matters and a corresponding increase in the accountability of the Government to the Dáil for its actions in this regard

3 it might be thought to remedy a 'democratic deficit' and an information deficit by providing greater openness, transparency and accountability.

Arguments against

1 the Government is answerable to the Dáil only in respect of its actual conduct of international affairs and it would be contrary to the express powers given to the Government by Article 28.2 and Article 29.4.1° that it be subject to a form of prior scrutiny of the exercise of its powers

2 no real purpose would be served by the laying procedure if it were not coupled with a requirement of Dáil approval before the State becomes a party to such agreements

3 the exercise might be purposeless and a waste of Deputies' time where, as in some instances, the State has signed international agreements but has not gone on to ratify them or has delayed ratifying them

4 because the proposal does not also require Dáil approval, it represents an unacceptable compromise between the requirement to lay such agreements only after Ireland has become a party to them and a requirement that the Government should have Dáil approval before the State becomes a party

5 the appropriate instrument of scrutiny and control of Government actions in this regard is the Dáil or Seanad or a joint committee of the Oireachtas rather than a constitutional requirement to lay the agreements before the House

6 the requirement to lay agreements before the State has become a party might in some instances lead to a delay in bringing an agreement into force.

Conclusion

No change is either necessary or desirable in Article 29.5.1°.

7 whether Article 29.5.2° requires change

The expression 'a charge on public funds', by virtue of the decision of the Supreme Court in *The State* (*Gilliland) v The Governor of Mountjoy Prison* [1987] IR 201 has been interpreted as meaning indirect as well as direct charges on public funds. In that context a commitment in the Extradition Treaty between Ireland and America to bear the costs and expenses of processing any application for extradition in accordance with the Treaty was held to come within the sub-section and it was found that the Treaty was not binding on the State as it had not received the prior approval of the Dáil.

Proposal for change

No proposal for change has been made which would withdraw the necessity for Dáil approval for international agreements which either directly or indirectly constitute a charge on public funds. Having regard to the provisions of the Constitution which emphasise the primacy of the Dáil in fiscal matters, it is considered desirable that the Dáil should continue to have prior control over the expenditure of funds to which the State may be committed by reason of its adherence to an international agreement.

Recommendation

No change is recommended in the provisions of Article 29.5.2°.

8 whether Article 29.5.3° requires amendment

The Supreme Court's interpretation of Article 29.5.3° in the *Gilliland* case in conjunction with the preceding sub-sections makes it clear that agreements or conventions of a technical and administrative character are not subject to the requirement of either laying before the Dáil or Dáil approval, even where a charge on public funds is created. The wording is considered by the Review Group to be uncertain in the sense that it is not readily ascertainable what criteria are, or should be, applied to identify agreements as technical and administrative and so escape the control otherwise required of Article 29.5.1° and 2°. An example is supplied in the Law Reform Commission report on *The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* [LRC 48-1995]. It expresses the view that this Convention is an agreement of a technical and administrative character – although this is arguable.

Proposals for change

The Review Group considered three possible alternatives:

a) *deletion of Article 29.5.3°. This would have the result that all international agreements would be treated in the same way and fall into two categories only – those requiring to be laid and those requiring approval*

Arguments for

1 greater clarity and certainty is required

2 it would be logical to require the same treatment for all agreements to which the State becomes a party and which also may either directly or indirectly involve a charge upon public funds

3 it is not necessarily logical to exempt such agreements from either of such controls merely because they are technical and administrative if they may also be of some importance either for the State or citizens generally

4 at present the State may be exposed to a charge on public funds of which the Dáil is or may be unaware and may not therefore control

5 the ambiguity of the existing provision imposes on the Minister for Foreign Affairs the difficult task of determining in which cases the requirements of Article 29.5.1° or 2° need not be complied with

6 the Dáil should be aware of all international agreements by which the State is bound

7 to require the Government to put all international agreements to which the State has become a party before the Dáil would result in a much greater level of awareness among public representatives, the public and the media generally about the State's international commitments and its relations with other countries on a wide variety of issues which would lead also to a corresponding increase in the accountability of the Government to the Dáil.

Arguments against

1 with the exception of the *Gilliland* case Article 29.5.3° has not given rise to any other actual difficulty

2 if a purported designation of an agreement as having a technical and administrative character is questioned, it may be challenged in the courts by way of judicial review

3 requirement of the approval or the laying procedure would be an added burden on the Dáil, which would not be justified in the light of the character of the agreements.

b) an amendment that would remove the exemption of such agreements from the requirement that they be laid before Dáil Éireann

Argument for

1 the arguments in favour of proposal *a)* 1-3 and 5-7 above apply.

Arguments against

1 it would be illogical to require agreements or conventions which have a technical and administrative character and also involve a charge on public funds to be laid before the House but not approved

2 the arguments against proposal *a)* at *a)* 1-3 also apply.

c) an amendment that would remove the exemption from the requirement that such agreements be approved of by Dáil Éireann where they involve a charge on public funds

Arguments for

1 this would result in all agreements which involve a charge on public funds being treated equally

2 it would ensure that the Dáil remains aware and in control of public expenditure to which the State will be committed

3 other agreements or conventions of a technical and administrative character which do not involve such a charge do not, having regard to that character, merit or warrant being laid before the House

4 the arguments in favour of proposal *a)* at *a)* 1-5 also apply.

Argument against

1 the arguments against proposal *a)* at *a)* 1-3 also apply.

Recommendation

Amend Article 29.5.3° so that Article 29.5.2° applies to technical and administrative agreements with the consequence that they should require prior Dáil approval where they involve a charge upon public funds.

9 whether Article 29.6 requires amendment

Like most countries with a common law system, Ireland adopts the dualist approach to international agreements rather than the monist approach adopted by many countries with a civil law system. Under the monist approach every international agreement, on entry into force in the State, automatically becomes part of its domestic law. Under the dualist approach this does not happen. Article 29.6 reflects this dualist approach and legislation implementing an agreement is thus required.

The Review Group is not aware of suggestions for change in Article 29.6 although there have been suggestions that particular agreements, notably human rights instruments, should be made part of domestic law (see discussion of Articles 40-44 in chapter 12).

Arguments for change

1 the monist system would ensure that in all cases relating to international agreements their actual terms could be invoked in our courts in support of claims. Under the dualist system one must rely on the provisions of implementing domestic legislation

2 the advantage of international agreements entering into force in the State and automatically becoming part of domestic law directly following their entry into force for the State would obviate the delay which occurs while the State is enacting implementing legislation.

Arguments against change

1 many international agreements have very little or no impact internally and it would be superfluous to have them as part of domestic law

2 the dualist approach gives the Government valuable flexibility as to the most appropriate way to implement an international agreement, not excluding making it part of domestic law. Broadly speaking, this has generally worked well in Ireland

3 a change to the monist approach would bypass the Oireachtas, thus effectively allowing the executive to legislate by ratifying international agreements and effectively make domestic law by negotiating a treaty, which would be a radical change in our legal system.

Recommendation

The Review Group makes no proposal for amendment of Article 29.6.

The Attorney General

30.1 *There shall be an Attorney General who shall be the adviser of the Government on matters of law and legal opinion, and shall exercise and perform all such powers, functions and duties as are conferred or imposed on him by this Constitution or by law.*

30.2 *The Attorney General shall be appointed by the President on the nomination of the Taoiseach.*

30.3 *All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose.*

30.4 *The Attorney General shall not be a member of the Government.*

30.5.1° *The Attorney General may at any time resign from office by placing his resignation in the hands of the Taoiseach for submission to the President.*

30.5.2° *The Taoiseach may, for reasons which to him seem sufficient, request the resignation of the Attorney General.*

30.5.3° *In the event of failure to comply with the request, the appointment of the Attorney General shall be terminated by the President if the Taoiseach so advises.*

30.5.4° *The Attorney General shall retire from office upon the resignation of the Taoiseach, but may continue to carry on his duties until the successor to the Taoiseach shall have been appointed.*

Introduction

The Government must act always within the law: everything done or authorised by the Government must be in conformity with the Constitution. This is a fundamental safeguard for the citizen in a democracy: if any Government action is considered to be illegal, recourse can be had to the courts for redress. Given the complexity of modern administration, the Government requires legal advice of the highest quality to enable it, on the one hand, to avoid acting illegally and, on the other, to assert its valid claims.

In Ireland, the office of Attorney General, which had been based on section 6 of the Ministers and Secretaries Act 1924, was first given constitutional status by Article 30 of the 1937 Constitution. The Attorney General is appointed by the President on the nomination of the Taoiseach and is designated as the adviser of the Government in matters of law and legal opinion. The Constitution provides that the Attorney General shall not be a member of the Government and that he or she shall retire from office upon the resignation of the Taoiseach. Under statute, the Attorney General has responsibility for the Parliamentary Draftsman's Office, the Law Reform Commission, the Chief State Solicitor's Office, estates of deceased persons dying without next-of-kin (though the workload imposed by this responsibility has been greatly reduced since the Succession Act 1965), and advising the Commissioners of Charitable Donations and Bequests. In 1974, the Director of Public Prosecutions was given most of the Attorney General's prosecution powers. The Attorney General filters British extradition warrants under section 2 of the Extradition (Amendment) Act 1987. The Attorney General is also the 'guardian of the public interest'.

In *McLoughlin v Minister for Social Welfare* [1958] IR 1 the Supreme Court said:

> [The Attorney General] is in no way the servant of the Government but is put in an independent position. He is a great officer of state, with grave responsibilities of a quasi-judicial as well as of an executive nature.

To carry out his or her functions as adviser to the Government on the constitutional/legal implications of proposed legislation and of any executive action the Government have taken or propose to take, the Attorney General usually attends at Government meetings and is intimately involved in the process of drafting legislation.

30.6 *Subject to the foregoing provisions of this Article, the office of Attorney General, including the remuneration to be paid to the holder of the office, shall be regulated by law.*

Issues

1 delegation

Both the volume and the complexity of the work dealt with by the Attorney General have increased enormously since 1937. That increase accelerated with Ireland's accession to membership of the European Union and the growth of litigation on constitutional issues in recent years.

The Attorney General cannot handle all of this work personally. Apart from the need to delegate caused by the volume of work, on occasion an Attorney General cannot deal with a particular matter for some other reason such as temporary absence or illness or a conflict of interest. Prior to 1921 in Ireland, and still in England, the legal advisory functions now discharged by the Attorney General were shared with another law officer, the Solicitor General. While there is no longer a Solicitor General in Ireland, the Attorney General has a professional staff of (at the time of writing) sixteen barristers to assist him, in addition to the staff of the Parliamentary Draftsman's office and the Chief State Solicitor's office.

Section 4(1) of the Prosecution of Offences Act 1974 enables the Attorney General to delegate particular functions to his officers, and the Extradition (Amendment) Act 1987 contains provisions enabling the functions conferred on the Attorney General by that Act to be delegated. However, there is some doubt about the extent to which the function of legal adviser conferred on the Attorney General by the Constitution may be delegated, although a cogent argument can be advanced that there must be an implied power to do so.

The Review Group considers it undesirable that there should be any doubt, however slight, concerning such an important matter. The problem should be dealt with by permitting delegation, rather than transfer, of the Attorney General's functions because it is desirable that there should be only one person with ultimate responsibility for advising the Government in legal matters and that that person be one with the special advantage of the intimate knowledge and understanding of public affairs afforded by presence at all Government meetings.

Recommendation

The Constitution should expressly permit delegation of the Attorney General's functions to another senior lawyer with the approval of the Taoiseach.

2 to whom should the Attorney General be accountable for his or her legal advice? To the Government? To the Taoiseach? To the Oireachtas?

The Attorney General's relationship to the Government, being that of lawyer to client, should entail no accountability to the Houses of the Oireachtas. Accountability for advice, and action on it, should be through the Taoiseach, as specified in the Ministers and Secretaries Act 1924. The Taoiseach should decide how much or how little he or she reveals of the advice, as in any other lawyer-client relationship.

Recommendation

Accountability should be through the Taoiseach.

3 whether the Attorney General should be a member of the Oireachtas

Since the Attorney General is the Government's legal adviser, it is important that the selection for the office should be made from the widest possible range of candidates. Qualifications should not require membership of either House of the Oireachtas, but membership of either House should not be a disqualification.

Recommendation

The Attorney General need not be a member of the Oireachtas.

4 whether the responsibilities of 'guardian of the public interest' should be borne by someone other than the Attorney General

The role of 'guardian of the public interest' derives from section 6 of the Ministers and Secretaries Act 1924 which mentions 'the assertion and protection of public rights' as one of the Attorney General's duties. In recent years there has been some concern that, on occasion, the public interest role of the Attorney General may run counter to the obligation to act as legal adviser to the Government.

Conclusion

The function of 'guardian' requires at most 5% of the time of the Attorney General in the average year. The Review Group is not satisfied that the volume of work requires the creation of a separate office and concludes that there are practical advantages in combining the two roles; but if so, the question remains how a conflict of interest between the Attorney General's role as legal adviser to the Government and as 'guardian of the public interest' might be handled. The Review Group considers that the discretion whether a conflict arises should be left with the Attorney General, who will have to act in the full glare of publicity and under the closest of scrutiny by the courts and under the legal system. If he or she decides a particular issue presents such a conflict, he or she should be able to assign the task to one of a small panel of senior lawyers.

The Council of State

Article 31

31.1 *There shall be a Council of State to aid and counsel the President on all matters on which the President may consult the said Council in relation to the exercise and performance by him of such of his powers and functions as are by this Constitution expressed to be exercisable and performable after consultation with the Council of State, and to exercise such other functions as are conferred on the said Council by this Constitution.*

31.2 *The Council of State shall consist of the following members:*

i. *As* ex-officio *members: the Taoiseach, the Tánaiste, the Chief Justice, the President of the High Court, the Chairman of Dáil Éireann, the Chairman of Seanad Éireann, and the Attorney General.*

ii. *Every person able and willing to act as a member of the Council of State who shall have held the office of President, or the office of Taoiseach, or the office of Chief Justice, or the office of President of the Executive Council of Saorstát Éireann.*

iii. *Such other persons, if any, as may be appointed by the President under this Article to be members of the Council of State.*

31.3 *The President may at any time and from time to time by warrant under his hand and Seal appoint such other persons as, in his absolute discretion, he may think fit, to be members of the Council of State, but not more than seven persons so appointed shall be members of the Council of State at the same time.*

Introduction

Modern European States transmuted themselves into democracies by either removing from monarchs all the executive functions of Government and leaving them with a largely ceremonial role as Head of State or replacing the monarchs with elected Presidents, thereby opting to become republics rather than to remain monarchies. Where monarchs remain, they may be provided with a group of advisers, such as the Privy Council in Britain, whom they can consult in relation to the carrying out of their constitutional role. Our Constitution provides the President with the Council of State. Under Article 32, the President is obliged to hear the views of the members and decide what to do following such consultation.

The composition prescribed for the Council of State in terms of present and former members of high office places a wide range of experienced advice at the disposal of the President, which may be further enlarged by direct appointment by the President of up to seven other persons of his or her own choice. Presidents have valued this discretion and have used it to the full, thus strengthening public confidence in the consultative process.

Functions

The Council of State advises on a range of matters:

i) whether the President should communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance (Article 13.7.1°)

ii) whether the President should address a message to the nation at any time on any such matter (Article 13.7.2°)

iii) whether the President should accede to a request from Seanad Éireann to appoint a Committee of Privileges to determine whether a Bill is a Money Bill or not (Articles 22.2.3° and 22.2.6°)

iv) whether the President should concur with the Taoiseach that a Bill passed by the Dáil is urgent and immediately necessary for the preservation of public peace and security, or by reason of the existence of a public emergency, whether domestic or international, so that the time for consideration of such a Bill by the Seanad may be abridged (Article 24.1)

v) whether the President should refer a Bill to the Supreme Court for a decision on the question as to whether such Bill or specified provision or provisions of such Bill is or are repugnant to the Constitution or any provision thereof (Article 26.1.1°)

vi) whether the President should decline to sign a Bill into law following a petition by a majority of members of Seanad Éireann and not less than one-third of the members of Dáil

31.4° *Every member of the Council of State shall at the first meeting thereof which he attends as a member take and subscribe a declaration in the following form:*

'In the presence of Almighty God, , do solemnly and sincerely promise and declare that I will faithfully and conscientiously fulfil my duties as a member of the Council of State.'

31.5 *Every member of the Council of State appointed by the President, unless he previously dies, resigns, becomes permanently incapacitated, or is removed from office, shall hold office until the successor of the President by whom he was appointed shall have entered upon his office.*

31.6 *Any member of the Council of State appointed by the President may resign from office by placing his resignation in the hands of the President.*

31.7 *The President may, for reasons which to him seem sufficient, by an order under his hand and Seal, terminate the appointment of any member of the Council of State appointed by him.*

31.8 *Meetings of the Council of State may be convened by the President at such times and places as he shall determine.*

Article 32

32 *The President shall not exercise or perform any of the powers or functions which are by this Constitution expressed to be exercisable or performable by him after consultation with the Council of State unless, and on every occasion before so doing, he shall have convened a meeting of the Council of State and the members present at such meeting shall have been heard by him.*

Éireann on the grounds that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained (Article 27.4.1°).

Under Article 14.4, the Council of State has residual powers in relation to the presidency: it may by a majority of its members make such provision as to them may seem appropriate for the exercise and performance of the powers and functions conferred on the President by or under the Constitution in any contingency which is not provided for when the Presidential Commission acts in place of the President.

Recommendation

The Review Group considers that no change in these provisions is necessary or desirable apart from deleting from Article 31.2.ii the words 'or the office of President of the Executive Council of Saorstát Éireann' because they are obsolete and amending Article 31.4 to allow members either to make a declaration or an affirmation at their first meeting. Meetings of the Council of State provide evidence of the deliberation given to matters of high import to the State and the Council by its composition provides the President with two streams of political and legal advice as well as the considered views of advisers personally chosen by the President.

[Related Articles

13.2.3° *The President may at any time, after consultation with the Council of State, convene a meeting of either or both of the Houses of the Oireachtas.*

13.7.1° *The President may, after consultation with the Council of State, communicate with the Houses of the Oireachtas by message or address on any matter of national or public importance.*

13.7.2° *The President may, after consultation with the Council of State, address a message to the Nation at any time on any such matter.*

14.4 *The Council of State may by a majority of its members make such provision as to them may seem meet for the exercise and performance of the powers and functions conferred on the President by or under this Constitution in any contingency which is not provided for by the foregoing provisions of this Article.*

22.2.3° *If the President after consultation with the Council of State decides to accede to the request he shall appoint a Committee of Privileges consisting of an equal number of members of Dáil Éireann and of Seanad Éireann and a Chairman who shall be a Judge of the Supreme Court: these appointments shall be made after consultation with the Council of State. In the case of an equality of votes but not otherwise the Chairman shall be entitled to vote.*

22.2.6° *If the President after consultation with the Council of State decides not to accede to the request of Seanad Éireann, or if the Committee of Privileges fails to report within the time hereinbefore specified the certificate of the Chairman of Dáil Éireann shall stand confirmed.*

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.*

26.1.1° *The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.*

26.1.2° *Every such reference shall be made not later than the seventh day after the date on which such Bill shall have been presented by the Taoiseach to the President for his signature.*

27.4.1° *Upon receipt of a petition addressed to him under this Article, the President shall forthwith consider such petition and shall, after consultation with the Council of State, pronounce his decision thereon not later than ten days after the date on which the Bill to which such petition relates shall have been deemed to have been passed by both Houses of the Oireachtas.**]***

The Comptroller and Auditor General

33.1 *There shall be a Comptroller and Auditor General to control on behalf of the State all disbursements and to audit all accounts of moneys administered by or under the authority of the Oireachtas.*

33.2 *The Comptroller and Auditor General shall be appointed by the President on the nomination of Dáil Éireann.*

33.3 *The Comptroller and Auditor General shall not be a member of either House of the Oireachtas and shall not hold any other office or position of emolument.*

33.4 *The Comptroller and Auditor General shall report to Dáil Éireann at stated periods as determined by law.*

33.5.1° *The Comptroller and Auditor General shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.*

33.5.2° *The Taoiseach shall duly notify the President of any such resolutions as aforesaid passed by Dáil Éireann and by Seanad Éireann and shall send him a copy of each such resolution certified by the Chairman of the House of the Oireachtas by which it shall have been passed.*

33.5.3° *Upon receipt of such notification and of copies of such resolutions, the President shall forthwith, by an order under his hand and Seal, remove the Comptroller and Auditor General from office.*

33.6 *Subject to the foregoing, the terms and conditions of the office of the Comptroller and Auditor General shall be determined by law.*

Introduction

The office of Comptroller and Auditor General (C & AG) or its equivalent is to be found in the State framework of most, if not all, modern democracies. The concept of an independent organ of State through which those charged with the responsibility of managing public resources are accountable to the people via elected representatives can be traced back to Athens in the third century BC. The concept has taken a variety of forms and has developed differently from country to country. For instance, in the Mediterranean countries it has made for a Court of Audit with judicial and quasi-judicial powers, whereas in the Scandinavian countries it has made for a dual system of parliamentary auditors and a state office reporting to, and through, the Government to Parliament.

For historical reasons, Ireland followed the Westminster model, namely an independent C & AG reporting to Parliament. The 1922 Constitution provided for the office of C & AG and one of the first pieces of legislation passed by the new Dáil was the Comptroller and Auditor General Act 1923. The basic British legislation governing the powers and duties of the C & AG was retained, namely, the Exchequer and Audit Departments Acts 1866 and 1921. The provisions of Article 33 of the 1937 Constitution reflect, in large part, the original language found in Articles 62 and 63 of the Constitution of the Irish Free State.

Functions

Broadly speaking, the C & AG has two constitutional functions. As Comptroller General of the Exchequer, he or she must ensure that no money is issued from the Central Fund by the Minister for Finance except for purposes approved by the Oireachtas, and as Auditor General he or she must audit the accounts of Government departments and offices. These functions have been articulated in legislation, most recently in the Comptroller and Auditor General (Amendment) Act 1993.

Comptroller function

This function implements the principle of the primacy of Dáil Éireann in the matter of authority over supply to the executive. Effectively, the C & AG acts as the State's guarantor of this primacy. Though formally important, this function is not demanding of time and has posed no legal problems.

Auditor function

The constitutional provision is that the C & AG shall audit the accounts of all moneys administered by or under the authority of the Oireachtas. This covers the C & AG's audit of the accounts of Government departments and offices. The authority for the

audit of the accounts of moneys provided by the Oireachtas to other bodies such as the non-commercial state-sponsored bodies and health boards may be derived from statute rather than from the Constitution. The recent extension of the C & AG's powers to cover what is commonly referred to as value-for-money audit has its legal basis in statute.

Some legal issues

In 1970, counsel's opinion was sought in relation to the C & AG's rights in respect of the audit of Irish Steel Holdings Limited. The matter arose from a decision by the company to change its auditor from the C & AG to a private firm. The then C & AG felt he still had a duty with regard to the audit of the accounts of the company notwithstanding any alternative arrangements for audit made by the company. The advice was that the C & AG had no such duty because moneys disbursed to the company lost the character of moneys administered by or under the authority of the Oireachtas once they had passed to the company. The matter was not contested in the courts.

In 1978, the C & AG was approached as to whether he would be prepared to act as external auditor to the International Labour Organisation and the World Health Organisation. The fees payable for the audits would have included a small honorarium payable to the C & AG. The Attorney General's opinion at the time was that the C & AG was precluded from accepting the positions by virtue of the constitutional provision that he shall not hold any other office or position of emolument (Article 33.3). The C & AG therefore declined the offer and did not pursue the matter further.

The Attorney General, in giving the preceding opinion, made a distinction between moneys administered by the Oireachtas and moneys administered under the authority of the Oireachtas. Accounts of moneys administered by the Oireachtas were seen to comprise the departmental Appropriation Accounts and accounts of departmental funds, while accounts of moneys administered under the authority of the Oireachtas, were seen to comprise accounts of statutory bodies audited by the C & AG as required by the relevant statutes. A distinction was made between these bodies and those where the relevant statute does not appoint the C & AG as auditor but where he is appointed by the body with the agreement of the appropriate Minister with the concurrence of the Minister for Finance.

In the course of drafting the Comptroller and Auditor General (Amendment) Bill 1993, the advice of the Attorney General was sought regarding the constitutionality of giving the C & AG additional powers in regard to value-for-money audit. It is understood that the advice was to the effect that the C & AG could be given extra duties once they were not inconsistent with his constitutional duties and did not impinge on his capacity to carry out his constitutional duties.

The Ethics in Public Office Act 1995 provides that the C & AG is an *ex officio* member of the Public Service Commission established by that Act. In the course of drafting the legislation, the Attorney General gave an opinion that there is no

constitutional objection to the C & AG's sitting on the Commission. However, he stated that it could be argued that the C & AG's role is confined to the matters referred to in Article 33.1.

In 1994 a question arose about the interpretation of a section of the Waiver of Certain Tax, Interest and Penalties Act 1993. The Attorney General maintained that the section precluded the matching of records kept by the Chief Special Collector with those kept by the Revenue Commissioners, and that an audit which included such a matching exercise was not an audit within the meaning of Article 33. The C & AG obtained advice from counsel which opposed the Attorney General's view. Counsel engaged by the Committee of Public Accounts supported the opinion put forward by the C & AG's counsel. The matter comes before the High Court for judgment in the near future.

Recommendation

No change is necessary in the constitutional provisions relating to the Comptroller and Auditor General.

The Courts

Introduction

34.1 *Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.*

34.2 *The Courts shall comprise Courts of First Instance and a Court of Final Appeal.*

34.3.1° *The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.*

34.3.2° *Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court.*

34.3.3° *No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26.*

The present system of courts, as envisaged in Article 34 of the Constitution, was established by The Courts (Establishment and Constitution) Act 1961. It is essentially the same as the system that was established under the previous Constitution and that continued until 1961 under the Transitory Provisions of the present Constitution.

The organisation and the number of judges of the various courts are, pursuant to Article 36 of the Constitution, regulated in accordance with law. The present structure is as follows:

The *Supreme Court* consists of the Chief Justice and up to seven ordinary judges.

The *High Court* consists of its President and up to nineteen ordinary judges.

The Chief Justice and the President of the Circuit Court are ex officio additional judges of the High Court and the President of the High Court is ex officio an additional judge of the Supreme Court. In addition, ordinary Supreme Court and ordinary High Court judges may be requested to sit, respectively, as additional High Court and additional Supreme Court judges.

The *Circuit Court* consists of its President and up to twenty-four ordinary judges. The President of the *District Court* is ex officio an additional judge of the Circuit Court.

The *District Court* consists of its President and up to fifty other judges.

The *Special Criminal Court* came into existence in 1972 when the Government invoked Part V of the Offences Against the State Act 1939, which allows for non-jury courts in times of emergency when the Government by proclamation declares the ordinary courts to be inadequate to secure the administration of justice. There are nine judges assigned to the court, all of whom are serving judges of the High Court, the Circuit Court or the District Court. The court sits as a court of three without a jury. The President of a sitting is one of three of the nine judges appointed to serve in that capacity. Offences scheduled under that Act are tried in the Special Criminal Court. Offences other than those scheduled in the Act can be brought before the Special Criminal Court at the discretion of the Director of Public Prosecutions.

34.3.4° *The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law.*

34.4.1° *The Court of Final Appeal shall be called the Supreme Court.*

34.4.2° *The president of the Supreme Court shall be called the Chief Justice.*

34.4.3° *The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law.*

34.4.4° *No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.*

34.4.5° *The decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed.*

34.4.6° *The decision of the Supreme Court shall in all cases be final and conclusive.*

34.5.1° *Every person appointed a judge under this Constitution shall make and subscribe the following declaration:*

'In the presence of Almighty God I, do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief

Judges

Judges are appointed by the President on the advice of the Government. By virtue of Part IV of the Courts and Court Officers Act 1995 the Government receives from the Judicial Appointments Advisory Board a list of those whom the Board considers suitable for appointment as judges. Retirement ages are sixty-five with a possible extension to seventy (District Court), seventy (Circuit Court, High Court and Supreme Court) and seventy-two for judges appointed before 1996. Judges can be removed from office by the President 'for stated misbehaviour or incapacity' only on a resolution of both Houses of the Oireachtas.

Jurisdiction of the courts

The jurisdiction of each court is established in broad terms by the Constitution. Legislation and, to some extent, case law determine the type of business which can be assigned to, or withdrawn from, each court.

The State (outside of Dublin city) has been divided into twenty-two District Court districts and most of the District Court judges are assigned by the Government to a particular district; the remainder of the District Court judges are assigned to courts in the Dublin metropolitan area or are moveable. Within each district, there is a number of District Court areas, the significance of which is that a court must be held in each area. For the purposes of the Circuit Court, the State has been divided into eight circuits. The District and Circuit courts are considered to be the courts of 'local and limited jurisdiction'. They are local in the sense that each Circuit and District Court judge sitting in any city, town or village has the jurisdiction (generally speaking) to hear only cases which either are brought against defendants living in the county or district for which the judge is sitting or arise from events occurring there or relating to property there.

The High Court has always had a very wide jurisdiction in civil and in criminal cases (when it sits as the Central Criminal Court). The High Court's jurisdiction is underpinned by Article 34.3.1° which gives it 'full original jurisdiction and power to determine all matters and questions, whether of law or fact, civil or criminal'. This gives the court jurisdiction over all justiciable controversies.

The Supreme Court's most important jurisdiction is appellate. Article 34.4.4° provides that no statute may be enacted which excludes the Supreme Court's appellate jurisdiction in cases which involve the constitutionality of a law.

EU law is part of Irish law. In most cases, Irish domestic courts have jurisdiction over actions involving EU law. Where an Irish court has difficulty in interpreting EU law it may (and if it is a final court of appeal it must), by virtue of Article 177 of the EEC Treaty, request a preliminary ruling from the European Court of Justice (ECJ) concerning:

*Justice (*or as the case may be*) without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me.'*

***34.5.2°** This declaration shall be made and subscribed by the Chief Justice in the presence of the President, and by each of the other judges of the Supreme Court, the judges of the High Court and the judges of every other Court in the presence of the Chief Justice or the senior available judge of the Supreme Court in open court.*

***34.5.3°** The declaration shall be made and subscribed by every judge before entering upon his duties as such judge, and in any case not later than ten days after the date of his appointment or such later date as may be determined by the President.*

***34.5.4°** Any judge who declines or neglects to make such declaration as aforesaid shall be deemed to have vacated his office.*

Article 35

***35.1** The judges of the Supreme Court, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President.*

***35.2** All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.*

***35.3** No judge shall be eligible to be a member of either House of the Oireachtas or to hold any other office or position of emolument.*

i) the interpretation of the Treaties

ii) the validity and interpretation of acts of EU institutions

iii) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

This, uniquely, provides for a division of jurisdiction, with the Irish court retaining the power to determine questions of fact and Irish law, while EU law is settled by the ECJ, which makes an authoritative interpretation.

Articles 34-37 contain the main provisions relating to the courts and the judiciary. They have worked well. They have ensured the maintenance of a strong independent court system, which is fundamental to a democratic state. The only significant problem they have presented is the absence of a clear definition of 'limited functions and powers of a judicial nature' in Article 37.1. This problem is referred to in greater detail below. The Review Group has also considered other less significant issues raised by these Articles which might merit amendment.

who judges and how

Article 34.1 provides for the administration of justice by judges appointed under the Constitution and requires that it be administered in public save 'in such special and limited cases as may be prescribed by law'. Article 34.1 must be read in conjunction with Article 37. This latter provision allows the Oireachtas – by way of derogation from the general rule – to confer judicial functions on non-judicial personages provided that such powers have not been conferred in 'criminal matters' and that the functions and powers in question are of a 'limited' nature. The issues raised by the interaction of Article 34.1 and Article 37 are complex. Before examining them, the Review Group considered two other issues connected with Article 34.1, namely, whether there should be a Constitutional Court and whether the requirement that justice be administered in public should be amended.

Issues

1 whether there should be a Constitutional Court

The Review Group considered a suggestion that the power of judicial review of legislation should be transferred from the High Court and Supreme Court to a newly established Constitutional Court. Separate Constitutional Courts exist in a number of civil law countries, including Germany, Italy, Spain and Poland. A Constitutional Court was recently established in South Africa, a country with a mixed civil and common law tradition.

In civil – as opposed to common law – legal systems, the court structure is generally built around subject matter (for example, Labour Court, Administrative Court). In addition, civil legal systems generally provide for a separate court whose sole function is to allocate jurisdiction to different courts in cases of

35.4.1° *A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.*

35.4.2° *The Taoiseach shall duly notify the President of any such resolutions passed by Dáil Éireann and by Seanad Éireann, and shall send him a copy of every such resolution certified by the Chairman of the House of the Oireachtas by which it shall have been passed.*

35.4.3° *Upon receipt of such notification and of copies of such resolutions, the President shall forthwith, by an order under his hand and Seal, remove from office the judge to whom they relate.*

35.5 *The remuneration of a judge shall not be reduced during his continuance in office.*

Article 36

36 *Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:–*

i. the number of judges of the Supreme Court, and of the High Court, the remuneration, age of retirement and pensions of such judges,

ii. the number of the judges of all other Courts, and their terms of appointment, and

iii. the constitution and orgainization of the said Courts, the distribution of jurisdiction and business among the said Courts and judges, and all matters of procedure.

dispute. In France, for example, the *tribunal des conflits* resolves disputed issues as to whether the subject matter of the litigation is public law (in which case jurisdiction is allocated to an administrative court) or private law (in which case jurisdiction is assumed by a *tribunal de grande instance*). In contrast, common law legal systems are generally hierarchical in nature. Thus, the Irish legal system provides for a series of courts commencing with the District Court and rising ultimately to the Supreme Court.

The establishment of a Constitutional Court might therefore present its own difficulties. These would include:

i) the establishment of a judicial mechanism to resolve potential conflicts of jurisdiction between the Constitutional Court and the Supreme Court

ii) a further complication of the resolution of appeals which frequently involve 'mixed' questions of constitutional law and other aspects of law. Contemporary practice demonstrates that major issues of constitutional law often arise in the course of litigation between private litigants: see, for example*, Irish Press plc v Ingersoll Irish Publications Ltd* [1994] 1 IR 176. In this case the petitioners brought an action under section 205 of the Companies Act 1963 claiming they had been oppressed by the actions of the respondent company, but in the course of those proceedings the Supreme Court was required to deliver a ruling on the interpretation of Article 34.1. This case commenced as ordinary private law litigation, but in the course of it major constitutional points were raised. The inconvenience that would arise in having these issues transferred for resolution to a separate Constitutional Court is obvious

iii) a proliferation of court structures in a small state where there should be maximum use of the existing courts.

Moreover, the High Court and the Supreme Court provide many of the services of a Constitutional Court without any of the disadvantages referred to above.

Conclusion

The present integrated court system with the High Court and Supreme Court ruling on both issues of constitutional law and all other legal issues should be maintained.

2 whether the requirement that justice 'be administered in public' should be amended

Article 34.1 requires that justice shall be administered in public, save in such 'special and limited cases as may be prescribed by law'. The word 'law' in this context means an Act of the Oireachtas: see, for example, *In re R Ltd* [1989] IR 126 and *The People (Director of Public Prosecutions) v WM* [1995] 1 IR 226. Accordingly, it seems that every aspect of the administration of justice must be conducted in public, save where an Act of the Oireachtas otherwise provides: see *Roe v Blood Transfusion*

Article 37

37.1 *Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.*

37.2 *No adoption of a person taking effect or expressed to take effect at any time after the coming into operation of this Constitution under laws enacted by the Oireachtas and being an adoption pursuant to an order made or an authorisation given by any person or body of persons designated by those laws to exercise such functions and powers was or shall be invalid by reason only of the fact that such person or body of persons was not a judge or a court appointed or established as such under this Constitution.*

Board [1996] 1 ILRM 555. The Oireachtas has, in fact, provided for diverse statutory exceptions to this rule, the majority of which concern the hearing of family law cases, cases involving children and proceedings involving secret manufacturing processes. In so far as there may be unease regarding the exclusion of the press and the fact that representatives of the press are not heard on the question of whether the public ought to be excluded, this issue can be dealt with by legislation in the manner suggested by the Committee on Court Practice and Procedure in its Twenty-Third Interim Report, *The provision of a procedure to enable Representatives of the Media to be heard by the Court, where an application is being made in civil proceedings to have a case heard otherwise than in public* (1994).

The Review Group sees no reason to suggest any change in the publicity rule contained in Article 34.1. As the Supreme Court stated in the *In re R Ltd* case, this provision constitutes 'a fundamental principle of the administration of justice in a democratic state'. The general requirement that justice be administered in public is in any event required by an obligation under Article 6.1 of the European Convention on Human Rights. Should it think fit, the Oireachtas is free to enact legislation which would extend the category of cases which can be heard in camera, provided always that this can be justified by objective factors.

At present, the publicity requirements of Article 34.1 do not, by reason of Article 38.6, apply to the Special Criminal Court. The court invariably sits in public, although it has power to sit in private under the Special Criminal Court Rules 1975. The Review Group recommends in its discussions on Articles 38 and 39 that Article 38.6 be amended so as to provide that the publicity rule (and the other requirements of Articles 34 and 35) will henceforth apply to the Special Criminal Court and that it will be required to sit in public unless legislation otherwise provides.

Recommendation

No change is proposed.

The Administration of Justice: The Judicial Power and the Independence of the Judicial Function

Introduction

Article 34.1 vests the administration of justice in 'judges appointed in the manner prescribed by this Constitution'. This is one of the cornerstones of the separation of powers prescribed by the Constitution: it insulates the administration of justice from interference by the Oireachtas or the Government. The purpose of a provision of this kind has been summarised by Marshall (*Constitutional Theory,* Oxford 1971, at p 119) as follows:

> The proposition that separation of judicial power is a vital constitutional safeguard comes down to this – that certain rights of citizens ought not to be finally determined except by judicial processes as carried out in courts of law.

The question, however, of the exact limits of the judicial domain remains uncertain. The courts have found it difficult to formulate a completely satisfactory definition of what constitutes the administration of justice. Even though the function of Article 34.1 is to protect this feature of the separation of powers, Professor Casey has observed (*Constitutional Law in Ireland,* London 1992, at p 207) that the courts have not adopted a 'purposive approach' to the question of the extent of the judicial domain:

> ... the question being – what characteristics and qualifications do judges possess which would make them the only proper arbiters of such disputes? But the courts – doubtless prohibited by judicial modesty – have in general abstained from this approach. Instead they have preferred to use analogy and history as guides, looking at what courts characteristically do and have done, and deriving a number of tests from this. In consequence, the line between the constitutionally permissible and the constitutionally prohibited is blurred.

Even if such a purposive approach were adopted, problems of some complexity might persist as they do in other jurisdictions with constitutional provisions similar to those contained in Article 34.1**.** As the Kerr Report stated (*Report of the Commonwealth of Australia Administrative Review Committee,* Parl Paper 144/1971, at paras 62-63):

> The problem created by this division [between judicial and administrative functions] might not be so great if there existed clear criteria which enabled an easy and authoritative determination to be made as to the character of a particular function, that is, whether it is judicial or non-judicial.

The attempt to define the boundaries between judicial and non-judicial powers has given rise to much complex litigation. Thus, for example, in *Deaton v Attorney General* [1963] IR 170 and *The State (O) v O'Brien* [1973] IR 50 it was held, respectively, that the 'selection' of a punishment and the determination

of the place, manner and duration of the punishment of a juvenile offender amounted to the administration of justice. On the other hand, in *In re Gallagher's Application* [1991] 1 IR 31 the continued detention of the criminally insane was held not to amount to the administration of justice, as it was adjudged to be analogous to the executive's role in ordering the compulsory detention of the seriously mentally ill. In *In re Solicitors Act 1954* [1960] IR 217 the Supreme Court held that the Law Society was exercising judicial powers when purporting to strike a solicitor off the role of solicitors, so that the relevant provisions of the Solicitors Act 1954 which had conferred this power were adjudged to be unconstitutional. On the other hand in both *Keady v Garda Commissioner* [1992] 2 IR 197 and *Geoghegan v Institute of Chartered Accountants*, Supreme Court, 16 November 1995, the Supreme Court upheld the validity of procedures whereby, respectively, a member of the Garda might be dismissed by the Garda Commissioner and an accountant might be expelled by his professional association, as in neither case, was the judicial power of the State being exercised.

The drafters of the Constitution were aware of these potential difficulties and accordingly Article 37 (which had no counterpart in the Constitution of the Irish Free State) attempts to deal with the problem by providing that judicial powers of a limited nature may be conferred (other than in criminal cases) on non-judicial personages. Replying to criticism that Article 37 might lead to injustice by allowing persons with no legal training to exercise judicial powers, Mr de Valera replied (67 *Dáil Debates* Col 1511) with words which are no less apposite today:

> Everyone will admit that modern legislation requires that bodies other than the public courts should have powers to exercise functions of a quasi-judicial character. You cannot precisely define those powers. You can only do your best to narrow the opening while allowing for the exercise of the necessary powers. Now the objection is made that in opening the door, we are opening it too much. That, of course, is always a difficulty. You want to open it sufficiently wide to admit all the things that are necessary to be done and you do not want to open it so wide as to make it easy to have abuses.

And yet it can be queried whether Article 37 has, in fact, provided a satisfactory solution to the problem. Any assessment of whether Article 37 applies to a given case requires an analysis of three distinct questions:

i) is the power in question a judicial power?

ii) if the answer to i) is in the affirmative, is that power a 'limited' one?

iii) if the answer to ii) is in the affirmative, does the case concern a 'criminal matter'?

All of these questions are difficult ones with no ready and precise answer. The tests formulated by Kenny J in *McDonald v Bord na gCon* [1965] IR 217 are those which have been generally employed by the courts to attempt to determine the boundaries between judicial and non-judicial powers. Kenny J thus

described the 'characteristic features' of an administration of justice as follows:

i) a dispute or controversy as to the existence of legal rights or a violation of the law

ii) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty

iii) the final determination (subject to appeal) of legal rights and liabilities or the imposition of penalties

iv) the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment

v) the making of an order by the court which as a matter of history is an order characteristic of courts in this country.

And yet these tests cannot be regarded as conclusive on the issue and, in any event, give rise to difficulties in their application, a fact illustrated by the *McDonald* case itself. In the High Court, Kenny J held that the statutory powers conferred on Bord na gCon to exclude a person from a greyhound meeting amounted to an administration of justice, but the Supreme Court – applying Kenny J's own criteria – took a different view and held that the power was not judicial in character. In the *Solicitors Act* case, Kingsmill Moore J had previously warned of the difficulties in formulating a canonical test:

> From none of the pronouncements as to the nature of judicial power which have been quoted can a definition at once exhaustive and precise be extracted, and probably no such definition can be framed. The varieties and combinations of power with which the Legislature may equip a tribunal are infinite, and in each case the particular powers must be considered in their totality and separately to see if a tribunal so endowed is invested with powers of such nature and extent that their exercise is in effect administering that justice which appertains to the judicial organ, and which the Constitution indicates is entrusted only to judges.

Similar difficulties have been encountered throughout the common law world and no completely satisfactory definition of the judicial power has ever been formulated. Thus, in *R v Davison* (1954) 90 CLR 353, the Australian High Court observed in respect of section 71 of the Australian constitution (which provides a close parallel with Article 34.1 of the Constitution of Ireland) that 'many attempts have been made to define judicial power, but it has never been found possible to frame a definition that is at once exclusive and exhaustive'.

Accordingly, uncertainties of this kind relating to a definition of the judicial power may be said to have given rise to the Sixth Amendment of the Constitution Act 1979 which resulted in the amendment of Article 37 by the insertion of a specific clause designed to protect the validity of adoption orders made by An

Bord Uchtála. These possible difficulties are not confined to adoption orders. The Employment Appeals Tribunal has, for example, many of the trappings of a court and it makes findings and awards compensation in a manner which suggests that it is administering the judicial power within the meaning of Article 34.1. It must be an open question whether its powers can be said to be 'limited' (in the sense defined by Kingsmill Moore J in *In re Solicitors Act*) or to be powers of 'far-reaching effect and importance' (see Kelly, *The Irish Constitution,* Dublin 1994, at p 564).

policy considerations

The governing principles which the Review Group believes ought to apply in this context are as follows:

a) the administration of justice should, generally speaking, be confined to the courts

The rationale for this was best explained by Kingsmill Moore J in the course of delivering the judgment of the Supreme Court in the *Solicitors Act* case. In the course of holding that legislation permitting the Law Society to strike solicitors off the roll of solicitors contravened Articles 34 and 37, the judge said:

> The imposition of a penalty, which has such consequences, would seem to demand from those who impose it the quality of impartiality, independence and experience which are required for the holder of a judicial office...

Indeed, it may be noted that the Attorney General's Committee on the Constitution (1968) saw no reason to disagree with this decision:

> The Oireachtas Committee [on the Constitution] asked if there was any necessity for action as a result of the Supreme Court decision in *In re the Solicitors Act 1954.* The essence of the decision in the *Solicitors Act* case*,* in which part of the Solicitors Act was held invalid, was that the 'limited' judicial functions and powers in non-criminal matters must be limited in extent and not merely in number. The committee unanimously agreed that as a matter of policy no amendment of Article 37 to reverse the decision of the Supreme Court was necessary or desirable. It is not desirable to extend the power of many tribunals exercising judicial powers.

It is also clear that, in the majority of instances, administrative bodies will not enjoy the same guarantees of independence as the judiciary. In this regard, it is sufficient to contrast the position of a judge with that of a member of a statutory disciplinary body, as a member of the latter body will not have the same guarantees of security of tenure and remuneration as that of a judge.

Moreover, as such members may have to run for competitive election there is a real danger that, even with the best will in the world, they may be susceptible to self-interested decision-making or to being influenced by private groups within the profession. Even in the case of non-elected bodies whose members have been appointed for limited terms by, for example, the Government

there is a risk that the absence of these guarantees of independence will lead to decision-making which might be perceived – by reason of the absence of such guarantees – as being influenced by policy considerations and a form of institutional bias.

b) the Oireachtas should be free to confer certain powers of a judicial character on non-judicial personages

While there are compelling policy reasons why the administration of justice should, generally speaking, be vested in the judicial arm of government, this is not so in every case. Administrative tribunals are generally considered to be cheaper, speedier and more flexible than the courts. They are also staffed by individuals with specialist expertise in particular fields, for example, the Appeal Commissioners (in the area of tax appeals), An Bord Pleanála, the Competition Authority. While it is probable that at least in some instances the powers exercised by these bodies would be characterised as being judicial in nature, this could not be predicted with any certainty. Accordingly, the Review Group is of the opinion that Article 37 (or some variant thereof) is both necessary and desirable.

c) all decisions of non-judicial persons or bodies exercising judicial powers should be subject to review by the courts

Irish administrative law recognises three distinct types of review by the courts of decisions taken by non-judicial personages:

i) an appeal on the merits (all aspects, factual and legal)

ii) an appeal on a point of law only

iii) judicial review for error of law, procedural impropriety and unreasonableness in law.

An example of the first category is provided by the Fisheries (Consolidation) Act 1959, section 11, in respect of which it has been held that the High Court had full power to review a decision of the Minister on the merits and was not confined 'to considering whether the Minister had acted in violation of some legal principle': see *Dunne v Minister for Fisheries* [1984] IR 230. An example of the second category is provided by section 271 of the Social Welfare (Consolidation) Act 1993 which provides for an appeal to the High Court 'on any question of law' (that is, excluding a consideration of the merits) from decisions of the appeals officer or of the Chief Appeals Officer. The final category permits review by the High Court by virtue of its inherent supervisory jurisdiction. The High Court can thus quash an administrative decision where it contains a serious error of law, procedural impropriety (that is, breach of the rules of fair procedures and constitutional justice) or where the decision under review is manifestly unreasonable in law (see, for example, *The State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] IR 642 and *O' Keeffe v An Bord Pleanála* [1993] 1 IR 39).

It must be noted that, in any event, attempts by the legislature to oust review by the courts of administrative decisions are very rare.

proposals

a) retain Articles 34.1 and 37 in their present form

Arguments for

1 it is illusory to suppose that a completely satisfactory set of words dealing with these complex issues could be formulated. One could not safely assume that any re-drafted version of Article 34.1 and Article 37 would actually represent an improvement on the existing constitutional provisions

2 despite the fact that the courts have struggled to formulate satisfactory definitions of phrases such as 'judicial power', 'limited powers and functions' and 'criminal matters', a considerable body of case law has now built up since 1937 and – to some extent, at least – the law has been thereby clarified. Any changes in either Article 34.1 or Article 37 would be fraught with difficulties and would undermine the existing case law

3 the case law has struck a reasonable balance – the present system provides the protection that people can have their cases decided objectively by judges.

Arguments against

1 the operation of Articles 34.1 and 37 is far from satisfactory. A satisfactory definition of key phrases such as 'judicial power', 'limited power and functions' has proved elusive. This has led to uncertainty and, indeed, occasional inconsistencies in constitutional adjudication. These uncertainties have already prompted the enactment of one *ad hoc* constitutional amendment (Article 37.2) designed to deal with a particular problem arising from fears concerning the operation of An Bord Uchtála

2 the Supreme Court's interpretation of the words 'limited functions' in the *Solicitors Act* case has complicated the manner in which the Oireachtas has been obliged to regulate the statutory functions. The Oireachtas should be free to legislate in matters of professional discipline which would not require that striking off of solicitors, doctors etc should have to be confirmed by the High Court.

b) modify Article 37 by the inclusion of provisions modelled on the Slovak constitution

This proposal is to delete Articles 34.1 and 37 and to replace them by provisions modelled on Article 46(2) and Article 142(1) of the Slovak constitution of 1992. These provisions were examined because they are thought to represent 'state of the art'

continental constitutional thinking on this difficult topic. These Articles provide respectively:

> Any person who claims to have been denied his or her rights through a decision made by a public authority may turn to a court of law to have the legality of the decision reviewed. Unless otherwise provided by law, the review of decisions in matters of fundamental rights and freedoms shall not be excluded from the jurisdiction of courts of law.
>
> The Courts shall rule on civil and criminal matters, and review decisions made by administrative bodies.

Advantage of such a model

1 such provisions might be thought to indicate that the courts' task is that of ruling on matters which are traditionally within the judicial sphere (tort, contract, company law, criminal law etc) while ensuring that there is the opportunity of judicial review of administrative decisions.

Disadvantages

1 the extent of the courts' power of review under this model is not clear. Is it confined to assessing the legality of the decision under review, or does it extend to enquiring into the merits of a decision?

2 the same problems of characterisation remain, albeit under a different guise. How do the courts determine what is a 'civil matter' as distinct from a decision made by an administrative body?

3 the Slovak model would appear to permit the exclusion of judicial review by law, a feature which does not commend itself to the Review Group

4 the Slovak model reflects traditional continental administrative law thinking, and, as such, has been formulated with the classic civil system of administrative courts in mind. The completely different legal basis of our legal system means that the Slovak model would not be an appropriate one for us to follow.

c) replace the word 'limited' by 'defined' to qualify powers and functions subject to a right of appeal on the merits to the High Court

This proposal would enable the Oireachtas to confer 'defined' judicial functions on non-judicial personages, subject to those affected by such decisions having a right of appeal on the merits to the High Court. Those of the Review Group who favour an amendment to Article 37 consider that such an amendment would strike a reasonable balance between the ability of the Oireachtas to vest certain judicial powers in administrative or professional bodies, while preserving for the individuals affected by such decisions a right to have their dispute fully heard before the High Court on appeal. There are, however, members of the Review Group who, for the reasons set out below, consider that, even

with the protection of an appeal on the merits, to give the Oireachtas the power to vest 'defined' powers and functions of a judicial nature is too permissive.

Those in favour of such an amendment envisage that Article 37 might be amended as follows:

> Nothing in this Constitution shall operate to invalidate the exercise of *defined* functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution *provided that any such law gives an appeal on the merits from any decision of such person or body of persons where it exercises such functions or powers of a judicial nature which are not limited functions or powers.*

Arguments for

1 this proposal would circumvent the difficulties thrown up by the *Solicitors Act* case, because it would permit the Oireachtas to vest, for example, the Law Society, with the power to strike off solicitors, subject, of course, to the right of the disciplined solicitor to apply to the High Court to review the legality (and possibly the merits) of that decision

2 it would remove many of the lingering uncertainties about the powers of administrative bodies which exercise judicial powers. As long as the judicial powers conferred by law on non-judicial personages were 'defined', that is to say, limited in extent (as opposed to limited as to their consequences) they would come within the exception provided for by Article 37

3 it would permit the Oireachtas to vest powers and functions of a judicial nature in defined areas in an appropriate body while at the same time reserving to the individuals affected by the decision the right to have their dispute ultimately resolved by the High Court

4 it would reflect what appears to have been legislative practice in relation to bodies where there may have been some doubt as to whether the powers and functions which they were exercising were limited functions, for example the Employment Appeals Tribunal.

Arguments against

1 the word 'defined' is too permissive, as it might permit the Oireachtas in effect to create a surrogate or parallel system of civil justice alongside the existing court system. If the words 'defined functions' were used, it would seem to permit the Oireachtas to transfer entire sections of the administration of justice (such, for example, as powers and functions in relation to company insolvency) to non-judicial personages

2 such a change would undermine the rationale of the decision in the *Solicitors Act* case which stressed that it would neither be consistent with principles of fairness nor the separation of powers that non-judicial persons should be permitted to exercise judicial powers with such far-reaching effects as striking a solicitor off the roll.

The reason for which the appeal to the High Court is proposed is that, if the functions and powers are not limited in their consequences, the High Court would appear to be the appropriate court. If Article 37 were to be amended in this manner, it would be open to the Oireachtas to provide by law that any further appeal to the Supreme Court should be confined to a point of law only.

d) let persons or bodies exercising judicial powers enjoy guarantees of freedom from interference

In regard to this proposal, the guarantees of freedom from interference enjoyed by non-judicial personages who have been entrusted by the Oireachtas with judicial powers could not be the same as – or even approach – those enjoyed by the judiciary. It is obvious that it would not be feasible or practicable to ensure that non-judicial personages exercising judicial powers would enjoy the same guarantees of independence as the judiciary in relation to matters such as tenure and salary. Instead, what is envisaged by the Review Group is that non-judicial personages would enjoy a degree of protection against executive or other interference in respect of the manner in which they exercised the judicial powers in question. The other side of this coin is that the legislation providing for the exercise of judicial powers by non-judicial personages must provide at least some guarantees of 'structural' independence (so that, for example, such persons would not be liable to be removed during their term of office save for misbehaviour or incapacity), even if the level of such guarantees in respect of matters such as tenure and salary does not approach that currently enjoyed by judges.

Argument for

1 if such a guarantee were provided it would remove one of the key objections, identified by the Supreme Court in the *Solicitors Act* case, to the vesting of judicial powers in non-judicial personages, namely, that it is appropriate that judicial powers with such far-reaching consequences should be exercised only by persons with sufficient guarantees of impartiality and independence. In a small society such as Ireland, the necessity for such guarantees is all the greater, as the tendency for administrative decision-making to be influenced on occasion by what the Review Group has already described as 'self-interested decision-making' cannot be excluded.

Argument against

1 the granting of such guarantees of independence to non-judicial personages would be cumbersome and over-

elaborate. It would severely handicap the capacity of the Oireachtas to experiment with different forms of administrative tribunals. A guarantee of independence might mean that, for example, persons elected to professional bodies could not sit in judgment in disciplinary matters, at least where this involved the exercise of judicial powers.

Conclusions

In line with the governing principles already set out above, the Review Group has arrived at the following conclusions:

1 it is desirable that, subject to the Article 37 exception, the administration of justice should remain vested in the courts

Recommendation

No change is proposed.

2 in view of the manner in which our administrative tribunals are established and organised, a majority of the Review Group considers that a recommendation that all persons exercising judicial power should enjoy a guarantee of independence in the performance of their functions – a guarantee which would remove one of the major objections to the vesting of judicial powers in persons other than judges – is not feasible. The question, however, should be kept under review

Recommendation

No change is proposed.

3 The Review Group recognises that Article 37 as it stands is not wholly satisfactory. A majority of the Review Group considers, however, that, since experience has shown that there is no completely satisfactory answer to the problem raised and since there are great difficulties in formulating a different set of words which would deal adequately with these complex issues, Article 34.1 and Article 37 should be retained in their present form

Recommendation

No change is proposed.

whether Article 37.2 should be removed

Article 37.2 was inserted in the Constitution following the referendum on the Sixth Amendment of the Constitution (Adoption) Bill 1978**.** While the Review Group is of the opinion that this amendment might, strictly speaking, have been unnecessary (in that it doubts whether the making of an adoption order could properly be classified as the exercise of judicial power) and that *ad hoc* amendments of this character are, in general, undesirable (because they tend to undermine the universal and enduring character of the Constitution), this

amendment is now in place and, given the special sensitivities in this area, it might be unwise to remove it.

Recommendation

No change is proposed.

Article 34.1 and international commercial arbitration

The development of world trade has meant that the role of international commercial arbitration has become increasingly important. The fundamental objectives of such arbitration are harmonisation, certainty as to the applicable legal principles and a minimum of national judicial supervision. Our present arbitration legislation – the Arbitration Acts 1954-1980 – does not meet these objectives in that, in particular, it provides for the case stated procedure, whereby an arbitrator can state a case on a point of law for the opinion of the High Court, and thus allows delay in the arbitration process and extra expense. It would, of course, be in the public interest if Ireland were to become a recognised centre for international commercial arbitration. To this end, the Review Group understands that there are proposals under official consideration to replace our existing legislation (at least so far as international arbitration is concerned) by new legislation which would be more in keeping with these objectives. However, the drafting of the new legislation has been delayed by concerns that any such proposals might encounter constitutional difficulties. In particular, it has been suggested that legislation which curbed the supervisory role of the courts might infringe a combination of Articles 34.1, 34.3.1° and 40.3.1° in that, in effect, it would deny or severely restrict the right of access to the courts.

Any new legislation is likely to follow the format of either the United Nations Commission on International Trade Law (UNICTRAL) Model Law 1985 or a modified variant thereof such as that currently proposed in England by the Arbitration Bill 1995. While the Review Group does not propose to undertake a detailed review of either of these proposals, it suffices for present purposes to say that both restrict the supervisory role of the courts in the arbitration process. This is perhaps especially true of the UNICTRAL model, because the combined effect of Articles 5, 11, 13, 14 and 34 is to restrict the possibility of judicial involvement in cases to a strictly limited number, such as where the arbitration agreement was invalid, or where one of the parties did not have due notice of the arbitration, or where the award fell outside the scope of the agreement, or where the award was contrary to public policy.

The Review Group considers that it is most unlikely that either of these proposals would be found to be unconstitutional. In the context of an arbitration hearing freely chosen by the parties it may be more accurate to speak of a constitutional right to fair and impartial hearing by an arbitrator than a constitutional right of access to the courts *as such*. After all, the decision of the parties freely to choose a private arbitration tribunal rather than the courts to resolve their disputes must be respected by any legal system and, provided that the jurisdiction of the courts may be invoked to ensure that minimum standards of legality and fair procedures are observed by the tribunal, it does not appear that the constitutional values expressed or implied in Articles 34 and

40.3.1° are thereby infringed. Moreover, the objective of the constitutional right of access to the courts is to ensure that these minimum standards of legality and fair procedures are not otherwise jeopardised. As the leading American jurist Cardozo J said in *Berkovitz v Arbib and Houlberg* 230 NY 268 (1921) in the course of rejecting a challenge to the constitutionality of an arbitration statute on the ground that it impaired the jurisdiction of the New York courts:

> Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist.

Besides, the courts have already indicated that legislation qualifying or restricting the right to sue is not in itself unconstitutional, provided the restrictions can be objectively justified: see *Murphy v Greene* [1990] 2 IR 566. It would appear that any restrictions on the right of access to the courts – in so far, indeed, as it may be accurate to describe a restriction on the grounds on which the courts may intervene as a restriction on the right of access to the courts – which may result from the enactment of either proposal into law can be objectively justified for the reasons already mentioned. At the same time, the UNICTRAL model preserves the courts' right of supervisory review in order to ensure that fair procedures and minimum standards of legality are observed, so that the substance of the constitutional right of access to the courts is thereby protected.

Conclusion

The Review Group sees no reason to believe that the enactment into our domestic law of either the UNICTRAL model law or the version contained in the English Arbitration Bill 1995 would present constitutional difficulties. In those circumstances – and bearing in mind the general undesirability of *ad hoc* amendments to the Constitution – the Review Group does not recommend any change.

The High Court

Article 34.2 provides that the courts shall 'comprise' Courts of First Instance and a Court of Final Appeal. The Review Group considered amending the word 'comprise', for inasmuch as it denotes comprehensiveness the terms 'Courts of First Instance' and 'Court of Final Appeal' might not allow for the establishment of a Court of Appeal or for the development of the court structures in line with the growth in the volume of litigation.

1 intermediate appellate courts

The use of the word 'comprise' is too restrictive inasmuch as it might be thought to preclude the establishment of intermediate appellate courts. It is true that the constitutionality of the Court of Criminal Appeal – an appellate court not mentioned by the Constitution – has been upheld: see *The People (Director of Public Prosecutions) v Conmey* [1975] IR 341. At the same time the Review Group is of the opinion that change is desirable.

Recommendation

Replace the word 'comprise' by the word 'include' and add the words 'and such other courts as may be prescribed by law' to the sentence.

2 future development of court structures

The Review Group noted the huge increase in litigation which has occurred over the last twenty years or so and that the existing court system has come under strain. At some stage in the future the Oireachtas might wish to change or modify established court structures. The Review Group concluded that it would be desirable that Article 34 should permit the Oireachtas, within certain parameters, the maximum possible degree of flexibility.

Recommendation

Article 34.2 should be amended to give the Oireachtas greater flexibility to develop and experiment with different court structures. The following draft is suggested:

> The courts shall include Courts of First Instance, a Court of Final Appeal and such other courts as may be prescribed by law.

3 whether the High Court should have an exclusive 'full original jurisdiction'

Article 34.3.1° vests the High Court with a 'full original jurisdiction' in, and power to determine, 'all matters and questions, whether of law or fact, civil or criminal'. In practice, the jurisdiction of the High Court is not quite as full as this provision might seem to imply. The Supreme Court has

confirmed that this provision permits jurisdiction to be distributed with exclusive effect to courts other than the High Court, provided that the High Court retains an adequate power of review: see *Tormey v Ireland* [1985] IR 283. Moreover, as Henchy J said in *RD Cox Ltd v Owners of MV Fritz Raabe* (1974), Article 34.3.1° does not create any new jurisdiction, but merely declares 'an amplitude of original jurisdiction in the High Court to encompass all currently justiciable matters'. Therefore, the effect of Article 34.3.1° as it has been judicially interpreted is to ensure that the High Court remains the principal court of first instance in our legal system with a wide inherent jurisdiction to determine all justiciable controversies, while at the same time ensuring that the Oireachtas is free to distribute business on an exclusive basis to other courts.

Recommendation

No change is proposed.

Judicial review of legislation

Article 34.3.2° vests in the High Court and the Supreme Court the express power of judicial review of legislation. This is a key provision of the Constitution which to date has proved to be conspicuously successful. The Review Group has nonetheless identified two issues which, perhaps, merit closer attention:

1 whether any intermediate appellate courts such as the Court of Criminal Appeal ought to be given the express power of judicial review of legislation

2 whether the courts should be expressly given jurisdiction to declare an Act of the Oireachtas invalid from a later date than the date of its enactment.

1 whether the power of judicial review of legislation should be conferred on intermediate appellate courts

Article 34.3.2° provides that only the High Court and Supreme Court are vested with express powers to review the constitutionality of legislation enacted by the Oireachtas after the coming into force of the Constitution. (The word 'law' as it appears in Article 34.3.2° has been judicially interpreted as meaning only a law enacted by the Oireachtas created by the Constitution, that is, an Act of the Oireachtas enacted after 1937: see the judgment of the Supreme Court in *The State (Sheerin) v Kennedy* [1966] IR 379.) The object of this restriction was probably to centralise judicial review of legislation in those courts which already had exclusive jurisdiction to review acts of the executive and administration and that it was appropriate that only a court of first instance with full original jurisdiction (that is, the High Court) should, subject to an appeal to the Supreme Court, take so serious a step as to invalidate an Act of the Oireachtas.

This policy is underscored by the language of Article 34.3.2° in that it provides that no question as to the validity of any law

'shall be raised (whether by pleading, argument or otherwise)' in any court other than the High Court or Supreme Court. This means that a litigant wishing to challenge the constitutionality of a post-1937 law must commence proceedings in the first instance in the High Court. One consequence of this is that the constitutionality of such a law may not even be raised by way of case stated from a lower court: see *Foyle Fisheries Commission v Gallen* (1960) *Irish Jurist* Report 35 and *Minister for Labour v Costello* [1988] IR 325.

The Review Group acknowledges that this policy of centralising the judicial review jurisdiction occasionally has had awkward consequences for litigants (such as may have occurred in the two cases just mentioned where the Supreme Court and High Court respectively declined to entertain arguments as to the constitutionality of a law in case stated proceedings from lower courts). A majority of the Review Group is nevertheless persuaded that the policy of centralising jurisdiction in the High Court and Supreme Court is a good one and has been demonstrably successful to date. It is true that the suggestion of permitting the District Court or Circuit Court to state a case concerning the constitutionality of a law to the High Court (with an appeal thereafter to the Supreme Court) is one with some merits. However, a majority is of the view that it would not be desirable that there should be a bifurcated procedure in constitutional actions, with the District Court or Circuit Court finding facts and the High Court pronouncing on the constitutionality of the law in the light of the facts as so found. Because a determination of the facts is an essential feature of constitutional litigation (as indeed also is the determination of vital preliminary issues such as *locus standi*), it considers that it would be more appropriate that the facts should be found by the High Court prior to any adjudication on the constitutional issue. Moreover, experience has shown that the case stated procedure is not always satisfactory inasmuch as key facts may not have been determined by the court stating the case. This would probably be even more so if cases stated were permitted in constitutional actions, because the range of facts that must be determined may often be more extensive than the parties had originally contemplated when requesting the judge to state the case in the first instance. An even more fundamental objection to such a change is that if a case were to be stated on a constitutional issue, the Attorney General (who, by virtue of Order 60 of the Rules of the Superior Courts 1986, is required to be served with notice of every constitutional action) would be bound by a finding of facts contained in the case stated, even though presumably he or she would not have had an opportunity of contesting these facts at the earlier stage of the proceedings.

The basic question is whether it would be advisable to permit the Oireachtas to vest by law the power of judicial review in any intermediate appellate court that it might see fit to create (that is, an appeal court interposed between the High and Supreme Court). At present there exist two intermediate appellate courts, namely, the Court of Criminal Appeal and the Courts-Martial Appeal Court. The establishment of these particular courts was permitted, but not required, by the Constitution, and they were established in the former case by the Courts of Justice Act 1924 and the Courts (Establishment and Constitution) Act 1961 and in the latter case by the Courts-Martial Appeal Act 1983. The latter

court hears appeals from persons subjected to military law who were convicted by court martial, whereas the former court hears appeals from the High Court (Central Criminal Court), the Circuit Court and the Special Criminal Court. Both courts were 'intermediate' in the sense that although they were superior courts of record, consisting in each case of one Supreme Court judge and two judges of the High Court, there was the possibility of a further right of appeal with leave to the Supreme Court. By sections 4 and 5 of the Courts and Court Officers Act 1995 (which have not yet been brought into force) both courts will be abolished and their jurisdictions transferred to the Supreme Court.

It seems clear that Article 34.3.2° precluded both the Court of Criminal Appeal and the Courts Martial Appeals Court from entertaining a challenge to the validity of post-1937 legislation, although on one occasion the former court declared part of a pre-1937 Act of the Oireachtas to be unconstitutional: see *The People (Director of Public Prosecutions) v JT* (1988) 3 Frewen 141 and Kelly, *The Irish Constitution,* Dublin 1994 at pp 424-426.

The Review Group is aware that there were sound policy reasons behind the decision of the Oireachtas to abolish the existing intermediate appellate courts. However, it is not inconceivable that in the future, with further increase in litigation, it would be desirable to establish intermediate appellate courts.

Arguments for intermediate appellate courts

1 the Oireachtas might consider it futile to vest a general broad-based appellate jurisdiction in a Court of Appeal if that court would have no jurisdiction to entertain a challenge to the constitutionality of post-1937 Acts of the Oireachtas

2 such an amendment would not be inconsistent with the existing constitutional policy of 'centralising' the power of judicial review of legislation in the superior courts, since by definition any judge of such an intermediate court would at least have the same standing as that of a judge of the High Court

3 such an amendment would give the Oireachtas a greater degree of flexibility in the organisation of the legal system than it enjoys at present.

Arguments against

1 it is desirable that the Supreme Court, both in practice and theory normally should make the final decision as to the constitutionality of an Act of the Oireachtas

2 if appeals in such cases are to go to the Supreme Court then, if an intermediate appellate court was given jurisdiction, litigants would be involved in three tiers of justice, namely, the High Court, the Court of Appeal and the Supreme Court. This would increase the cost and length of litigation which is

undesirable particularly in cases where the constitutional rights of individuals are very often at issue.

Conclusion

A majority of the Review Group considers that the Oireachtas should not be permitted to vest the power of judicial review of legislation in any such intermediate appellate courts.

2 date of operation of judicial declaration of invalidity of an Act of the Oireachtas

The Review Group considered whether the courts should have power to place temporal limits on the effect of a finding of unconstitutionality. It recognised that a court decision which finds that a particular item of legislation is unconstitutional can have potentially far-reaching effects, particularly where the legislation has been in place for some time and has been widely acted upon. Accordingly, it considered the question whether the Constitution should be amended to ensure that the courts have power to place some form of temporal limitation on the scope of a finding of unconstitutionality. It seems appropriate first to consider briefly some of the case law in this area.

The nature of the problem is illustrated by examining the consequences which might have followed the Supreme Court's decision in *de Búrca v Attorney General* [1976] IR 38. In this case, the court held that key provisions of the Juries Act 1927 were unconstitutional because they excluded women and non rate-payers. The question immediately arose as to whether prisoners convicted by juries whose composition had been found to be unconstitutional would not have to be released. In the event, only one such prisoner sought to challenge the validity of his conviction. While a majority of the Supreme Court acknowledged the invalidity of that conviction, the prisoner was adjudged in the very special facts of that case to have forfeited his right to challenge it, as he had deliberately elected to proceed with a trial in full knowledge of the *de Búrca* case decision which had been handed down in the course of his trial: see *The State (Byrne) v Frawley* [1978] IR 326. It remains an open question what the position might have been had these special factors not been present.

In the seminal decision of *Murphy v Attorney General* [1982] IR 241, a majority of the Supreme Court ruled that a law enacted by the Oireachtas which was later ruled to be unconstitutional was void *ab initio*. Speaking for a majority of the court, Henchy J articulated what he termed the 'primary rule' of redress:

> Once it has been judicially established that a statutory provision is invalid, the condemned provision will normally provide no legal justification for any acts done or left undone or for transactions undertaken in pursuance of it; and the persons damnified by the operation of the invalid provision will normally be accorded by the courts all permitted and necessary redress.

However, Henchy J recognised that this rule was subject to important exceptions, especially having regard to the need to avoid injustice to third parties who had changed their position in good faith in reliance on the validity of the (now condemned) statutory provisions. Moreover, Henchy J also drew attention to the possibility of 'transcendent considerations which make such a course [of redress] undesirable, impractical or impossible'.

In the *Murphy* tax case, the invalidation of a key provision of the Income Tax Act 1967 raised the possibility of enormous claims for arrears of tax which – in the light of the Supreme Court decision – it was clear had been unconstitutionally collected. This did not happen because the Supreme Court held that the State was entitled to defeat the vast majority of such past claims for repayment of taxes by reason of its change of position and expenditure of public funds in reliance in good faith on the validity of the provisions in question. Even where such public policy considerations do not directly come into play, the potentially disruptive consequences of a finding of unconstitutionality may be mitigated by analogous pleas such as laches (that is, undue delay coupled with prejudice) or the Statute of Limitations. Thus, in *Murphy v Ireland* (1996), Carroll J held that a teacher who had been dismissed in 1973 by operation of section 34 of the Offences Against the State Act 1939 was now debarred by both laches and the Statute of Limitations from pursuing a claim for damages against the State, despite the fact that the section in question had been declared to be unconstitutional by the Supreme Court in 1991: see *Cox v Ireland* [1992] 2 IR 503.

While it is true that the Supreme Court ruled in the *Murphy* tax case that a statute of the Oireachtas which is later found to be unconstitutional must be deemed to be void *ab initio*, the Review Group considers that there may be a category of instances of so-called 'creeping unconstitutionality' which the court might not have had directly in mind. Thus, there may be instances where a statute was perfectly valid and constitutional at the date it was enacted, but *became* unconstitutional by reason of changing circumstances such as inflation or population movements. It is possible, for example, for an item of legislation fixing the maximum rent a landlord can recover for his or her property which was perfectly valid at the date of its enactment to have become unconstitutional with the passage of time because of the failure of the Oireachtas to revise the monetary limit upwards in line with inflation.

Experience in other jurisdictions

The question when constitutional invalidity becomes operative has also caused considerable difficulties in other jurisdictions possessing similar powers of judicial review. The United States Supreme Court has held that it has the inherent power to place temporal limits on the effect of its judgments and that it may decline to give a particular ruling or finding of invalidity retrospective effect: see *Linkletter v Walker* 381 US 618 (1965). In that case the court ruled that the US constitution 'neither prohibits nor requires retrospective effect', so that it was the judicial task 'to weigh the merits and demerits' of retroactivity of the rule in question by looking 'to the prior history', to the

'purpose and effect of the new constitutional rule' and to whether 'retrospective operation will further or retard its operation'. This approach has the merit of pragmatism in that it leans against retrospectivity, but it is intellectually difficult to defend. It also leads to arbitrary results, in that, in practice, the benefit of judicial rulings is confined to the litigants in the case before the US Supreme Court or where similar cases are definitively pending at the date of the pronouncement of the judgment. It may be noted that such an approach did not commend itself to our Supreme Court in the *Murphy* case with Henchy J speaking of the arbitrariness and inequality, in breach of Article 40.1, that would result in a citizen's constitutional right depending on the fortuity of when a court's decision would be pronounced.

However, despite these criticisms, it must be noted that pragmatism is also the approach of the European Court of Justice (ECJ) which has frequently asserted the right to place temporal limitations on the scope of its own decisions: see, for example, Case 43/75 *Defrenne v Sabena* [1976] ECR 455 and Case 24/86 *Blaizot v Université de Liege* [1988] ECR 379. Moreover, the ECJ has asserted that it alone has the power to impose such a temporal limitation on the effect of its own judgments: see Case 309/85 *Barra v Belgium* [1988] ECR 355. A further refinement of this point is that a judgment must be deemed to have retroactive effect, *unless* the ECJ itself places 'a limitation of the effects in time of an interpretative preliminary ruling ... in the actual judgment ruling upon the interpretation sought': Case C-57/93 *Vroege* [1994] ECR 1-4541. A recent indication of the criteria governing the decision to place a temporal limitation is supplied by the decision in Joined Cases C-38/90 and C-151/90, *Lomas v United Kingdom* [1992] ECR 1-1781, where the ECJ said that such a limitation might be imposed on the basis of 'overriding considerations of legal certainty involving all the interests in the case concerned'.

The ECJ's case law in this area is highly complex, a point illustrated by the aftermath of its decision in Case 262/88 *Barber v Guardian Royal Exchange* [1990] ECR 1-1889, a case where it was held for the first time that the requirements of Article 119 of the EEC Treaty governing equal pay for men and women applied also to redundancy payments and 'contracted out' pension schemes. The ECJ did purport to place a temporal limitation on the scope of this judgment, but the ambiguities in that portion of the judgment led directly to a special Protocol in the Maastricht Treaty. Protocol No 2 was designed to clarify these ambiguities by restricting further the temporal effect of the *Barber* decision, while containing a saving clause 'in the case of workers or those claiming under them who have before [17 May 1990 – *Barber* judgment] initiated legal proceedings or introduced an equivalent claim under the applicable national law'. The *Barber* decision has given rise to no less that nine separate judgments of the ECJ, each of which seeks to clarify aspects of the ruling as a temporal limitation: see Hyland 'Temporal Limitation of the Effects of the Judgments of the Court of Justice' (1995) 4 *Irish Journal of European Law* 208.

The practice of continental constitutional courts is to lean against retroactivity. Thus, in practice, all rulings of the German constitutional court are prospective in nature, save that a specific legislative provision (section 79(2) of the Federal Constitutional

Court Act) permits new trials in criminal cases where a court convicts a defendant under a subsequently voided statute. The German constitutional court has also devised new strategies designed to deal with the impact of rulings of unconstitutionality. A law may be declared null and void (*nichtig)*, in which case the law will cease to be operative as and from the date of the decision. In addition, the law may be declared to be incompatible (*unvereinbar*) with the Basic Law, in which case the law remains unconstitutional, but not void. In such instances, the law in question is allowed a temporary transitional period in order to allow for the enactment of fresh legislation. This is an example of a so-called 'admonitory' decision of the constitutional court, a strategy which is designed to permit the legislature 'time to adjust to changing conditions or to avoid the political and economic chaos that might result from a declaration of unconstitutionality: see Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, 1989, p 61.

The Irish courts have to date declined to accept any 'admonitory' jurisdiction of this character. As Keane J said in *Somjee v the Minister for Justice* [1981] ILRM 324:

> The jurisdiction of the court in a case where the validity of an Act of the Oireachtas is questioned because of its alleged invalidity ... is limited to declaring the Act in question to be invalid, if that indeed is the case. The court has no jurisdiction to substitute for the impugned enactment a form of enactment which it considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment.

This passage was expressly approved by the Supreme Court in *Mhic Mhathúna v Ireland* [1995] 1 ILRM 69. Perhaps the only example of where our courts have adopted something approaching the 'unconstitutional but not void' admonitory practice of the German courts may be found in *Blake v Attorney General* [1981] IR 117. In this case, having declared that key elements of the Rent Restrictions Acts 1946-1967 were unconstitutional, the Supreme Court expressly indicated that the Oireachtas should take steps to fill the immediate 'statutory void' and indicated that any new legislation 'may be expected to provide for the determination of fair rents, for a degree of security of tenure and for other relevant social and economic factors'. The court also strongly hinted that in this transitional period the applications brought by landlords for possession of rented property should normally either be adjourned or decrees of possession granted with 'such stay as appears proper in the circumstances'.

whether the courts should be expressly given discretion to determine the date of operation of a judicial declaration of invalidity of an Act of the Oireachtas and/or afford relief from the consequences of such a declaration

In the light of the foregoing discussion, two aspects of the invalidity issue need to be considered:

1 the date from which the unconstitutional provision is declared invalid

2 the consequences of such a decision.

1 date of invalidity

At present Article 15.4 expressly prohibits the Oireachtas from enacting any law repugnant to the Constitution. The Review Group has not recommended any change in this Article. The courts have interpreted Article 15.4 to mean that, if a court declares a provision of a post-1937 Act to be repugnant to the Constitution, it is void *ab initio* because Article 15.4 prevents its ever being a valid law. This principle may not apply to a law declared unconstitutional which was not at the date of the passing of the Act repugnant to the Constitution but became so thereafter ('creeping unconstitutionality').

If the courts were now to be given power to declare an Act invalid from, say, a prospective date only, notwithstanding that it was repugnant to the Constitution when passed, this would mean that an Act which was enacted in contravention of Article 15.4 was to be treated as a valid law for the period prior to the effective date of the declaration of invalidity. The arguments for and against doing so may be summarised as follows:

Arguments for

1 at present the potentially chaotic aftermath of a finding of unconstitutionality is avoided only by the somewhat dubious invocation of doctrines such as laches (*Murphy v Attorney General* [1982] IR 241) and estoppel (*The State (Byrne) v Frawley* [1978] IR 326). To give the courts a general power of fixing the date of validity of a finding of unconstitutionality would be to do no more than recognise the reality that the courts will in practice find it necessary to limit the retroactive effect of their rulings

2 if the courts were given such a general power to be exercised on a 'just and equitable' basis, it is to be expected that the power would be exercised in a flexible manner so as to mitigate the unfairness of the arbitrary 'cut-off' dates which is a feature of US and European Court of Justice (ECJ) jurisprudence in this area

3 at present, the fear of the retroactive consequences of a finding of invalidity may deter the courts from ruling that a statute is unconstitutional.

Arguments against

1 the doctrine of voidance *ab initio* is the normal sanction attaching to both unconstitutional statutes and invalid administrative acts

2 if the courts were given the power to limit the temporal effect of a finding of invalidity, this could lead – as demonstrated by the US and ECJ jurisprudence – to arbitrary results and indefensible distinctions

3 it is not clear how the courts would exercise this power if it were conferred. What criteria could be employed to determine the date on which the law became unconstitutional? What parties would be heard by the courts before this power was exercised? In this regard, it may be noted that the successful plaintiff will often be indifferent as to the extent to which a finding of invalidity is given general retroactive effect.

Recommendation

The importance of the prohibition in Article 15.4 in ensuring that the Oireachtas operates within the limits set by the Constitution is recognised. A majority of the Review Group is, therefore, not disposed (Article 26 cases and 'creeping constitutionality' apart) to recommend generally that the courts should have jurisdiction to declare invalid, otherwise than *ab initio,* a statutory provision which at the date of its passing was repugnant to the Constitution.

2 consequences of a declaration of invalidity

Although a provision in an Act may be void *ab initio,* it is a separate issue as to whether the courts have adequate jurisdiction to deal with claims arising in relation to acts done prior to the declaration of invalidity in good faith and in reliance on the invalid law. To date, the courts have shown a willingness to exercise such a jurisdiction based upon doctrines such as laches (*Murphy v Attorney General*), and estoppel (*The State (Byrne) v Frawley* [1978] IR 326) or on the Statute of Limitations (*Murphy v Ireland* (1996)).

The courts appear to recognise that, notwithstanding the invalidity *ab initio,* the clock either cannot or should not be turned back. As Henchy J stated in *Murphy v Attorney General:*

> For a variety of reasons, the law recognises that, in certain circumstances, no matter how unfounded in law certain conduct may have been, no matter how unwarranted its operations in a particular case, what has happened has happened and cannot and should not be undone.

A majority of the Review Group is, however, concerned that, while to date the courts have taken a pragmatic approach to claims resulting from declarations of unconstitutionality of laws and relied upon estoppel etc to prevent claims being pursued in relation to matters done pursuant to the invalid statute, circumstances might arise that would prevent the courts from relying on such expedients. Unacceptable situations could thus arise where relief could not be granted to persons who had acted in good faith, albeit on an invalid law, or where damaging consequences for society could not be averted.

Consideration was, therefore, given to providing the courts with an express constitutional jurisdiction to deal with such situations. The majority of the Review Group saw a special need for such an express provision where the courts were not authorised to fix a date from which invalidity of a law took effect other than the date of the original enactment. Some grounds for a cautious approach were first noted:

1 such a provision should not be drawn so widely as to provide a temptation for enacting legislation of uncertain constitutionality and relieving the State of the consequences, to the prejudice of those unable to obtain relief for damage suffered. This would greatly reduce the protection Article 15.4 is intended to give to individuals

2 if criteria are to be set for the exercise of discretion by the courts, they should include the need to balance the different rights involved: the rights of individuals who had suffered detriment by reason of the invalid law or acts done thereunder; the rights of individuals to be protected where in good faith they had acted in reliance on the invalid law; and, in exceptional circumstances, the interests of the common good where a declaration of invalidity would have adverse consequences for society.

Other members of the Review Group, while recognising that the courts should have jurisdiction to deal with the consequences of a declaration of invalidity, consider that the courts have shown a willingness to date to exercise such a jurisdiction and that the development of this jurisdiction should be left to the courts on a case by case basis. The members who take this view consider that the risks attached to giving an express jurisdiction to the courts in the Constitution (which might lead to a weakening of the protection intended by Article 15.4) are greater than the risk of the courts not developing their jurisdiction to prevent any damaging consequences for society of a declaration of invalidity.

Recommendation

A majority of the Review Group is in favour of amending the Constitution to provide the courts with an express discretion, where justice, equity or, exceptionally, the common good so requires, to afford such relief as they consider necessary and appropriate in respect of any detriment arising from acts done in reliance in good faith on an invalid law.

While the foregoing comments are of general application to findings of constitutional invalidity, special consideration needs to be given to two exceptional categories:

1 the so-called ‘creeping unconstitutionality’ cases

2 cases where validity was originally confirmed on an Article 26 reference.

1 ‘creeping unconstitutionality’ type cases

In this situation, legislation which was constitutional at the date of its enactment has become unconstitutional by reason of changing circumstances (for example, the failure to revise monetary limits in line with inflation or the failure to revise constituency boundaries in line with population movements). It would seem that it would not be correct, even when judged from a purely theoretical standpoint, to describe a law rendered

unconstitutional on this ground as void *ab initio* and that to give the courts express power to determine the date on which such a law became unconstitutional would be simply to acknowledge the realities of this special type of case. Indeed, it is likely that the courts will assert such an inherent power to determine the date the law became unconstitutional in the special instance of 'creeping unconstitutionality', despite some judicial dicta to the contrary: see, for example, the comments of Murphy J in *Browne v Attorney General* [1991] 2 IR 58.

Recommendation

Given the uncertainties in this area, the Review Group favours giving the courts express power, in cases where they declare an Act to be unconstitutional but determine that at the date of its enactment it was not repugnant to the Constitution, to determine the date upon which it became unconstitutional.

2 Article 26 reference cases

These are cases where the Acts in their Bill form were referred to the Supreme Court under Article 26 of the Constitution and whose validity was originally upheld but in respect of which the Supreme Court has subsequently taken a different view and ruled the legislation in question to be unconstitutional. This situation could, of course, arise only if the Review Group's recommendation to amend Article 34.3.3° (which at present confers a permanent immunity on a Bill upheld under the Article 26 procedure) were accepted.

Argument for

1 the special features attending a declaration of invalidity in these circumstances means that the courts should have discretion in such cases to fix a date of invalidity other than the date of enactment. These special features are:

   a) one of the principal purposes of Article 26 is to create legal certainty, particularly where the Bill is of a type which, if it were not referred and were subsequently declared unconstitutional, there would be serious consequences for society or for those who had acted in reliance upon it

   b) the Bill will have been signed into law by the President only after receiving a decision of the Supreme Court to the effect that the Bill is not unconstitutional

   c) having been signed into law pursuant to the express provisions of Article 26.3.3° the Act should never be considered to be protected by Article 15.4 at the time of its enactment and it is thus distinguished from the position of an Act where there has been no Article 26 reference

   d) those administering the legislation and those affected by it must of necessity be entitled to rely on

the Supreme Court decision upholding the validity of the law, especially as in the course of an Article 26 reference the court is obliged to consider every possible set of circumstances and arguments which might render the Bill unconstitutional. (In the course of ordinary litigation the *locus standi* rules generally prevent the court from doing this, because it is confined to dealing with such arguments as are relevant to the plaintiff's personal circumstances.)

e) many persons may have acted to their detriment, or altered their position in good faith, in reliance on the Supreme Court's decision upholding the constitutionality of the Bill.

Argument against

1 the power to impose a temporal limitation results – as is evidenced by the jurisprudence of the European Court of Justice and the US Supreme Court – in arbitrary cut-off dates and indefensible distinctions. This is true of the Article 26-type case as much as of the ordinary case where the court has declared a law to be invalid.

Recommendation

In the special case of declaration of invalidity of a law the Bill for which had been referred to the Supreme Court under Article 26, a majority of the Review Group is in favour of amending the Constitution to give the courts an express jurisdiction to declare the law to be unconstitutional as of a stated date other than the date of enactment.

Article 26 and the finality of a finding of validity

Article 34.3.3° confers immunity from legal challenge upon an Act of the Oireachtas the Bill for which had been referred by the President to the Supreme Court under Article 26. The Review Group has recommended the deletion of this subsection for the reasons set out in chapter 4, section on Article 26 and 34 (part) – 'Constitutionality of Bills and Laws'.

Courts of local and limited jurisdiction

Article 34.3.4° provides:

> The Court of First Instance shall include courts of local and limited jurisdiction with a right of appeal as determined by law.

It compels the Oireachtas to establish courts of local and limited jurisdiction. This was done by the Courts (Establishment and Constitution) Act 1961. The courts in question are generally understood to be the District Court and the Circuit Court.

Article 34.3.4° may thus be regarded as complementing Article 34.3.1°. These provisions contemplate that the High Court will remain the premier court of first instance. It alone of the courts of first instance has a jurisdiction to pronounce on the constitutionality of a law (Article 34.3.2°) and to investigate the legality of a person's detention (Article 40.4.2°). But Article 34.3.4° also envisages the allocation of local and limited jurisdiction to courts such as the District Court and Circuit Court.

current difficulties and proposals for change

Article 34.3.4° has given rise to three distinct, but interrelated, problems of interpretation:

1 what is meant by the 'local' requirement?

2 what jurisdiction is 'limited' for this purpose?

3 does Article 34.3.4° oblige the Oireachtas to provide a right of appeal in all cases?

1 'local ... jurisdiction'

The jurisdiction of the District and Circuit courts is determined by reference to essentially local criteria, such as the place where the tort occurred or where the offence is alleged to have occurred. It is clear that these courts have been established on a local basis, but does Article 34.3.4° require that they are 'local' in their actual operation? In this regard, it may be noted that section 32 of the Courts and Court Officers Act 1995 permits the Dublin Circuit Court to hear criminal cases from all over the State, a provision which scarcely seems in harmony with the requirements of a 'local jurisdiction'. The validity of an earlier version of this provision was, however, upheld by the Supreme Court in *The State (Boyle) v Neylon* [1986] IR 551. At the same time, the requirement as to locality may inhibit the Oireachtas when enacting new courts legislation.

2 'limited ... jurisdiction'

The requirement that the jurisdiction be a 'limited' one is also a potentially inhibiting factor. At present the Circuit Court is, for example, vested with exclusive jurisdiction in some matters (for example, under the Landlord and Tenant Acts) and extensive jurisdiction in other areas. In this regard, it may be observed that the vast majority of indictable crime (other than murder or rape) is tried by the Circuit Court. That court is also empowered to impose very severe sentences. It may be that the 'limited jurisdiction' requirement will cause difficulties in the future or that it might inhibit the Oireachtas from making appropriate changes in the allocation of jurisdiction to different courts. In this respect, it must be noted that the Supreme Court has also suggested that it would be unconstitutional to confer an unlimited jurisdiction on the Circuit Court in admiralty matters: see *Grimes v Owners of the SS 'Bangor Bay'* [1948] IR 350.

Arguments for retaining the 'local and limited' requirement

1 it is desirable as a matter of policy that the High Court should remain as the premier court of first instance and that any other courts of first instance should remain subordinate to that court

2 Article 34.3.4° prevents the Oireachtas from attempting to undermine the prestige and authority of the High Court by creating courts with duplicate jurisdiction to that court

3 Article 34.3.4° has not caused any difficulties in practice.

Arguments for change

1 the 'local and limited' requirement is uncertain and might cause difficulties in the future. The existence of this provision may serve to inhibit the Oireachtas from introducing necessary or desirable legislation to effect changes in the allocation of jurisdiction to the courts

2 it suffices if the Oireachtas respects the primacy of the High Court by not attempting to create other courts with unlimited jurisdiction. The present wording of Article 34.3.4° is potentially too restrictive.

Conclusion

The Review Group is divided on this issue. Some members favour a relaxation of the 'local and limited' requirement so that Article 34.3.4° would be amended to read 'local or limited', while other members favour no change.

3 'with a right of appeal as may be determined by law'

There is a near universal right of appeal from decisions of the District Court (to the Circuit Court) and from the Circuit Court (to the High Court in civil matters and to the Court of Criminal Appeal in criminal cases). It seems, however, that there is no constitutional right of appeal in all cases. This emerges from the judgment of Finlay J in *The State (Hunt) v O'Donovan* [1975] IR 341 where it was held that Article 34.3.4° simply prohibited the constitution of a court of local and limited jurisdiction from which there was no appeal at all, but there was '... a very large gap between that interpretation and one which will exclude the right of the law to determine from which precise decision an appeal will lie'.

Arguments for retaining the provision that the right of appeal should be determined by law

1 the Oireachtas has granted a near universal right of appeal from decisions of courts of local and limited jurisdiction and so this issue has not given rise to difficulties in practice

2 the Oireachtas should be free to restrict or curtail the right of appeal in appropriate cases and therefore the Constitution

should not provide for a right of appeal in all cases. Indeed, Article 34.4.3° already provides that the appellate jurisdiction of the Supreme Court may (subject to the special provisions of Article 34.4.4°) be excluded by law, a power which the Oireachtas is exercising with increasing frequency.

Argument against

1 it is unsatisfactory that important issues should be determined by one judge sitting alone, without guarantee of a right of appeal. The District Court has power to impose significant penalties (for example, imprisonment of up to twelve months) and it would be wrong in principle that the Constitution should not guarantee a full right of appeal in cases of this kind.

Recommendation

No change is proposed.

The Supreme Court

Article 34.4.1°- 6° deals with the jurisdiction of the Supreme Court. The provisions regulate the appellate jurisdiction of the court and provide that its decisions shall be final and conclusive. Article 34.4.5°, which requires the courts to deliver one judgment in the case of a challenge to the validity of a post-1937 Act of the Oireachtas, has already been the subject of separate consideration by the Review Group (see chapter 4 – section on 'Constitutionality of Bills and Laws').

Article 34.4.1° provides that the Court of Final Appeal shall be called the Supreme Court and Article 34.4.2° states that the president of the Supreme Court shall be called the Chief Justice. These provisions do not appear to have excited controversy and have received little judicial consideration. However, the Review Group identified one issue which merits examination:

whether the Supreme Court should be given an additional originating jurisdiction

The Supreme Court has been vested with an original jurisdiction under Article 12.3.1° (establishment of the President's incapacity) and Article 26 (consideration of the constitutionality of a Bill referred to it by the President). The suggestion has been made from time to time that the Supreme Court should be given by law an additional originating jurisdiction to hear certain types of constitutional cases: see, for example, the Eleventh Report of the Committee on Court Practice and Procedure. There appears to be some judicial support for the view that a Bill containing such a proposal would not be unconstitutional under the Constitution as it stands. As Walsh J said in *The State (Browne) v Feran* [1967] IR 147, the effect of Article 34.4.1° is that 'the only court of final appeal shall be the Supreme Court, not that the Supreme Court shall be only a court of final appeal'. He said that the effect of Article 36.iii was that the Oireachtas could confer an original jurisdiction on the Supreme Court, 'though in that case the Court would be a court of first and final instance'.

Other case law of the Supreme Court suggests a narrower approach to its non-appellate jurisdiction. The Supreme Court has recognised that, when hearing an appeal, it has jurisdiction to determine an issue not argued and determined in the High Court but this power will only be exercised in 'the most exceptional circumstances, dictated by the necessity of justice': see *The Attorney General v Open Door Counselling Ltd* (*No 2)* [1994] 2 IR 333. Notwithstanding the earlier dicta of Walsh J in the *State (Browne) v Feran*, there must be considerable doubt whether a Bill giving to the Supreme Court an additional original jurisdiction would be found to be consistent with Article 34.4.

The Review Group considered whether it would be desirable to amend Article 34.4 so as to permit the Oireachtas to pass a law to give the Supreme Court additional originating jurisdiction. It is argued that in certain exceptional cases of major public importance it is desirable that they be finally determined very quickly by the Supreme Court and to achieve this it is necessary to have one hearing before the Supreme Court.

Conclusion

A majority of the Review Group considers it undesirable that Article 34.4 be so amended. The vast majority of cases, including those raising constitutional issues of public importance, require the determination of some facts in addition to issues of law. It is desirable, in such cases, that a judge of first instance hear the witnesses and determine the facts and the relevant issues of law and that there should subsequently be an appeal primarily directed to the issues of law upon the basis of the facts found. The potential for very exceptional cases which are urgent and of major public importance and where facts are not in issue does not appear to warrant the conferring of an originating jurisdiction on the Supreme Court.

The appellate jurisdiction of the Supreme Court

Article 34.4.3° (which is clearly modelled on Article III, section 2 of the constitution of the United States) provides that the Supreme Court shall have appellate jurisdiction from all decisions of the High Court, subject to such exceptions and regulations as may be prescribed by law. In effect, therefore, litigants are given a constitutional right of appeal from the High Court to the Supreme Court, but this right may be delimited or, subject to Article 34.4.4°, even excluded by legislation and it may be observed that in recent years an increasing number of statutes have been enacted restricting or delimiting this right of appeal. The court may also be vested with appellate jurisdiction in respect of decisions of other courts (see, for example, section 29 of the Courts of Justice Act 1924 providing for a right of appeal following the grant of leave from the Court of Criminal Appeal to the Supreme Court).

Article 34.4.4° is a companion provision which provides that no law may be enacted excepting from the appellate jurisdiction of the Supreme Court cases 'which involve questions as to the validity of any law having regard to the provisions of this Constitution'. It may be surmised that US constitutional history provided the inspiration for Article 34.4.4° (and its corresponding provision in Article 66 of the Irish Free State Constitution), as in the (much criticised) case of *Ex parte McCardle* 7 Wall 506 (1869) the US Supreme Court upheld the validity of a law which was designed to oust that court's appellate jurisdiction in an important case where the constitutionality of other federal legislation was under challenge. Legislation of this kind aimed at preventing an appeal in a case involving the validity of any law enacted after the coming into force of the Constitution would now be contrary to Article 34.4.4°, and, in the words of Denham J in *Attorney General v Open Door Counselling Ltd (No 2)* [1994] 2 IR 333, this latter provision 'foster[s] its special role in regard to the Constitution'.

Although Article 34.4.3° and 4° have, broadly speaking, operated satisfactorily to date, the Review Group identified a number of issues requiring attention.

Article 34.4.4°: some potential anomalies

While Article 34.4.4° is designed to ensure that the Supreme Court's appellate jurisdiction cannot be removed in cases involving the constitutionality of any law, this provision has had the consequence – presumably not foreseen by the drafters – that certain rules and practices favourable to the liberty of the individual have been invalidated. In the first of these cases, *The State (Browne) v Feran* [1967] IR 147, the Supreme Court held that the common law rule whereby the State could not appeal against the granting of an order of habeas corpus had not survived the enactment of the Constitution, as it was inconsistent with both subsections 3° and 4° of Article 34.4. In the second case, *The People (DPP) v O'Shea* [1982] IR 384, the Supreme Court ruled that by virtue of these combined provisions an appeal lay to that court against all decisions of the High Court, even including acquittals in the Central Criminal Court (the statutory name given to the High Court when exercising criminal jurisdiction). The potentially anomalous consequences of this decision have been well documented (see, for example, Kelly, *The Irish Constitution*, Dublin 1994, at pp 505-510). One such consequence was that, whereas the prosecution could appeal against an acquittal in the High Court by virtue of Article 34.4.3°, no such right of appeal would obtain if the acquittal were pronounced following trial in the Circuit Court, since there is no constitutional right of appeal from decisions of that court to the Supreme Court.

The Oireachtas has since acted to abolish the prosecution's right of appeal in such cases, thus preserving the traditional unappealability of an acquittal following trial on indictment: see section 11(1) of the Criminal Procedure Act 1993. But the difficulties did not stop there, for section 22(2) provided that:

> This section shall not apply to a decision of the Central Criminal Court in so far as it relates to the validity of any law having regard to the provisions of the Constitution.

In effect, therefore, the question arose of whether a prosecution appeal depended on the fortuitous fact that the validity of a law was under challenge. Nevertheless, the presence of this saving clause was deemed necessary having regard to the provisions of Article 34.4.4°. Section 11 of the 1993 Act has now been repealed and replaced by section 44 of the Courts and Court Officers Act 1995. Section 44 now provides that no appeal shall lie to the Supreme Court from a decision of the Central Criminal Court (High Court) to acquit a person, other than an appeal under section 34 of the Criminal Procedure Act 1967. It does not contain a similar saving clause to that previously contained in section 11(2) of the 1993 Act and, in view of this omission, the constitutionality of this section might be open to challenge unless the courts construe the section as not excluding an appeal in cases where the validity of a law is at issue.

The Review Group accordingly considered a proposal whereby Article 34.4.3° and 4° would be modified in a manner which would avoid these potential anomalies.

Arguments for

1 the drafters of the Constitution never intended that these constitutional provisions – designed to regulate the Supreme Court's appellate jurisdiction and to reinforce its role as the ultimate interpreter of the Constitution – should have the effect of abolishing long-standing rules of practice favourable to personal liberty or creating the anomalies highlighted by decisions such as the *O'Shea* case

2 if the Oireachtas wishes to abolish completely certain existing rights of appeal (for example as has been done by section 44 of the Courts and Court Officers Act 1995), it should be free to do so without running the risk that such an exclusion might run foul of Article 34.4.4°

3 to permit a prosecution appeal against an acquittal only in those circumstances where the validity of an Act of the Oireachtas was under challenge is arbitrary and illogical. If there is to be provision for prosecution appeal at all, it should apply to all cases and not simply the narrow category of instances where validity is at issue.

Arguments against

1 the comparison between an acquittal in the Circuit Court and one in the High Court (sitting as the Central Criminal Court) is not apt, because no challenge can be made to the validity of any law in the course of a trial in the Circuit Court, nor can any decision be properly made in that court on the validity of such a law. In any event, no right of appeal exists from the Circuit Court to the Supreme Court, although this will change when the relevant provisions of the Courts and Court Officers Act 1995 come into operation. There is, however, a mechanism for appealing any decision made in the course of a Circuit Court trial which results in an acquittal under section 34 of the Criminal Procedure Act 1967, although this appeal procedure operates without prejudice to the finality of such an acquittal in that case

2 the existence of a constitutional challenge to the validity of any law in the course of a criminal trial in the High Court cannot be described as fortuitous. On the contrary, such a challenge is a fundamental matter of importance and it is desirable in the public interest that an appeal should lie from that decision to the Supreme Court. This, after all, is the public policy reason which underlies Article 34.4.4°

3 it follows that an acquittal brought about by a wrongful determination as to the invalidity of an Act of the Oireachtas made in the High Court but reversed in the Supreme Court should itself be reversed or should be capable of being reversed. In other words, if evidence is held to be inadmissible by the invalidation of a provision of an Act of the Oireachtas which permitted the reception of such evidence, but the decision invalidating the statutory provision in question is itself successfully appealed to the Supreme Court, any acquittal should not be allowed to stand. An accused person should not be rendered immune from the

criminal process merely by virtue of judicial error at first instance

4 it should not be a constitutional objective that persons acquitted by reason of an erroneous finding of unconstitutionality should not be properly tried

5 while it is true that the operation of Article 34.4.3° and 4° has given rise to some anomalies, in practice these anomalies have affected only a small minority of cases. The Oireachtas has already sufficient power to deal with any such anomalies by enacting legislation which restricts the right of appeal from the High Court to the Supreme Court

6 if it were decided not to amend Article 34.4.4°, the question whether the Supreme Court should be empowered to order a re-trial following a successful prosecution appeal should be considered. In *The People (DPP) v Quilligan (No 2)* [1989] IR 46 a majority of the Supreme Court ruled that it had no inherent jurisdiction to order a re-trial following a successful prosecution appeal. The majority of the court also went on to cast doubt on the constitutionality of any legislation that might be enacted to enable that court to order a re-trial following an acquittal. If it were considered appropriate as a matter of public policy to permit prosecution appeals in circumstances where a law was declared invalid in the High Court, the Supreme Court should be given the power to order a re-trial. In those circumstances, Article 34.4.4° might be amended by the inclusion of the following sentence:

> In any case in which the result of a trial has been determined in the High Court based upon the finding of invalidity of the law concerned, the Supreme Court may, if it reverses that finding, direct a new trial of the matter at issue.

Recommendation

A majority of the Review Group recommends that consideration should be given to the question whether Article 34.4.4° should be amended so as to remove any doubt about the ability of the Oireachtas to exclude by law a right of appeal from a decision to acquit an accused.

The Supreme Court and the validity of laws

Article 34.4.5° has already been the subject of separate consideration by the Review Group: see chapter 4 – section on ‘Constitutionality of Bills and Laws’.

number of judges of the Supreme Court to determine the validity of laws

Article 26.2.1° requires the Supreme Court to consist of not less than five judges for a decision on a Bill referred by the President under Article 26. Article 34 does not specify any minimum number of judges for the determination by the Supreme Court as

to the constitutional validity of a law. Section 7 of the Courts (Supplemental Provisions) Act 1961 requires a Supreme Court of five judges for such decisions. The Review Group has already, in the section on the Constitutionality of Bills and Laws, expressed the view that it is desirable that a minimum of five judges for such decisions should be specified in Article 34. This would be particularly important if the Review Group recommendation for the removal of immunity from challenge of Acts the Bills for which had been referred under Article 26 is accepted. The Constitution, having required five judges for the decision on the Bill referred under Article 26, should likewise require not less than five judges for the subsequent determination of the constitutional validity of the Act.

Recommendation

Provide that in Supreme Court cases where the constitutionality of an Act is being challenged, the court should sit with not less than five judges.

Judges – Personnel Issues

Declaration upon appointment

Article 34.5 provides that every person appointed a judge under the Constitution shall make and subscribe the requisite declaration in open court. The United Nations Human Rights Committee in its final report under Article 40 of the International Covenant on Civil and Political Rights drew attention to the religious references in what was described by some members of that committee as 'a religious oath on entering office' (see O'Flaherty and Heffernan, *International Covenant on Civil and Political Rights*: *International Human Rights in Ireland,* Dublin 1995 at p 74).

Article 34.5.1° uses the word 'declaration' rather than 'oath'. The requirement to make the declaration in its present form could be thought to discriminate against people who do not believe in God or who believe in more than one God. The Review Group considers that the Article should be amended so that it contains one declaration to be taken by all judges without the present religious references or two declarations, one with religious references and one without. A majority of the Review Group favours one declaration only without the religious references. It does not appear desirable that a judge be required openly to choose between two forms of declaration thereby indicating his or her religious beliefs. The daily exercise of the judicial function requires that a judge's impartiality should not be put in doubt by a public declaration of personal values. The same consideration does not apply to the President, in regard to whom the Review Group suggests a choice of alternatives (see chapter 3 – 'The President', Issue 8).

There is one other aspect of the declaration which requires amendment. At present it refers to 'any man'. This should be amended to 'any person'.

Recommendation

1 Amend the declaration in Article 34.5.1° by deleting the first and last phrases referring to God.

2 Change the reference to 'man' to 'person'.

Appointment

Article 35 deals with the method of appointment of judges and also contains certain provisions designed to safeguard the independence of the judiciary.

Article 35.1 provides that 'all judges of the Supreme Court, the High Court and all other Courts established in pursuance of Article 34 hereof' (that is, other than judges appointed to the Special Criminal Court) shall be appointed by the President. Since, by virtue of Article 13.9, this function is not to be independently exercised by the President, but rather is to be performed on the 'advice of the Government', the reality is that the appointment of the judiciary is a matter wholly within the competence of the executive. The Review Group notes that by virtue of Part IV of the Courts and Court Officers Act 1995 new procedures governing the identification of persons suitable for appointment to judicial office by the Government have been put in place.

The Review Group considered two issues in regard to Article 35.1:

1 whether the power to appoint judges should be taken out of the hands of Government and given to the President or some other body

The Review Group, for the reasons indicated in chapter 3 – 'The President', is not in favour of the President being given a discretionary power to appoint judges. The Courts and Court Officers Act 1995 provides for the establishment of the Judicial Appointments Advisory Board to advise the Government on the selection of judges. The Review Group is of the opinion that time should be allowed for a build up of experience of the operation of the Board on this statutory basis before the issue of whether it should be placed on a constitutional basis is considered. The Review Group considers it desirable that judges continue to be appointed by the Government, the authority directly responsible to the Oireachtas and the people.

2 whether to introduce a requirement modelled on Article II, section 2 of the US constitution whereby any judicial appointment would be made with the 'advice and consent' of one or both Houses of the Oireachtas

In the United States, appointments to the Supreme Court (and to other federal judicial posts) are made by the President on the 'advice and consent' of the Senate. This is an instance of the check on the exercise of the executive power which the US system achieves through the separation of powers. Such a system, when viewed from a purely theoretical perspective, has much to commend it. If a similar role were to be vested in our Seanad, it might help to provide that body with a distinct and clearly defined role discharged independently of the Dáil.

The Review Group has nonetheless concluded that a change along these lines would be inappropriate. It sees no point in subjecting the decision of the executive to the formal approval of

the Dáil, because the Government is already democratically responsible for its decisions to that body. If this power were given to the Seanad, it would mean that a body which is only indirectly responsible to the electorate would have the right to review a decision of the Government. Furthermore, the contemporary US experience of public hearings and the scrutiny of judicial appointees demonstrates that there might be a tendency for politicians to divide along party lines and thereby further politicise the judicial appointments process. Such a process could create a situation where opposition groups or the media could attempt to discredit a candidate selected by the Government as a means of discrediting the Government. As the US experience has shown, attempts have often been made to ascertain the value systems of candidates prior to appointment. This tendency is not helpful because it proceeds from an assumption that the candidate for judicial office ought to reflect in office some predetermined views considered suitable by those making the appointment. Finally, the intense public scrutiny of candidates is likely to deter the sort of people who would be suitable appointees.

Recommendation

No change is proposed.

Judicial independence

Article 35.2-5 contains many of the traditional safeguards designed to foster and preserve judicial independence which are common to the constitutional traditions of both the common law world and elsewhere. Thus, Article 35.2 provides that all judges shall be independent in the discharge of their judicial functions, subject only to the Constitution and the law; Article 35.3 provides that a judge shall not be eligible to be a member of either House of the Oireachtas; Article 35.4 deals with the impeachment process and Article 35.5 provides that the remuneration of a judge shall not be reduced during his continuance in office. While these provisions have worked satisfactorily to date, the Review Group has identified a number of issues which appear to merit closer examination.

Before turning to these issues, it is appropriate to point out briefly that**,** while Article 35.2.5° protects judicial independence, no one – neither judges nor others – can ever be completely independent and objective in their approach to the issues which they may have to decide. Many factors help to shape and influence individual attitudes, such as social class, gender, age, professional background, religion. Awareness of these influences is a matter of special relevance for judges who in the course of their work have to determine serious issues affecting the lives of people from a very wide variety of backgrounds. Training for judges may assist in helping to minimise the degree to which personal values and outlook will have a predisposing influence. Judicial training does not raise constitutional issues if it is regulated and managed by the judges themselves.

Conclusion

Save in respect of the issue of judicial discipline, the Review Group sees no reason to make any recommendations for change in respect of this section.

Judicial conduct

At present, such provisions as exist short of impeachment for the regulation of judicial conduct are provided for by statute and apply *only* to judges of the District Court: see generally Casey, *Constitutional Law in Ireland,* London 1992, at p 252. Thus, by virtue of section 10(4) of the Courts (Supplemental Provisions) Act 1961, where the Chief Justice forms the opinion that a District Court judge's conduct is such as 'to bring the administration of justice into disrepute', he may 'interview the [judge] privately and inform him of such opinion'. In addition, section 26(2) of the 1961 Act provides that, if the conduct of an ordinary judge of the District Court is prejudicial to the prompt and efficient discharge of the business of the court, the President of that court may investigate the matter and may report to the Minister for Justice. Finally, by section 21 of the Courts of Justice (District Court) Act 1946, the Minister for Justice may request the Chief Justice to appoint a judge of the High Court or Supreme Court to conduct an inquiry into the conduct or health of a District Court judge.

Judges, of course, are not immune from human frailties and from time to time there are complaints about matters such as disparaging or disrespectful comments, rudeness and failure to attend to judicial duties. Such matters ought to be attended to – at least in the first instance – without having to resort to the drastic remedy of impeachment. The Review Group considers it appropriate that judges themselves should regulate judicial conduct within a legislative framework embracing all the courts. However, it is of the opinion that, lest there be any concern that this section might preclude the Oireachtas from legislating for some form of disciplinary control of the judiciary (short of removal from office), Article 35 should be amended to provide for such a possibility to be exercised by the judges themselves, in accordance with the doctrine of the separation of powers.

Recommendation

While the Review Group is of the opinion that such 'disciplinary' provisions short of impeachment as at present apply to the District Court are probably not inconsistent with Article 35.2 or otherwise unconstitutional, lest there be any doubt in the matter, Article 35.2 should be amended to allow for regulation by the judges themselves of judicial conduct, in accordance with the doctrine of the separation of powers.

Article 35.3 – ineligibility for membership of the Oireachtas

No issue arises in relation to the principle underlying Article 35.3, because the Review Group is of the opinion that no judge should be eligible for membership of either House of the Oireachtas, or, indeed be permitted to engage in any partisan

political activity. However, the Review Group draws attention to two aspects of this section which may call for review.

First, the Irish and English language versions of the text appear to be discordant. The English refers to 'eligible', whereas the Irish uses the words 'a bheith ina chomhalta.' The latter phrase suggests that, while a judge could stand for election to the Oireachtas, he or she could not take his or her seat if elected. It seems to the Review Group that the English phrase more accurately reflects the underlying purpose of this section, in that a serving judge would be simply debarred from standing for election. The Irish language text should be brought into conformity by substituting 'intofa mar chomhalta' for 'ina chomhalta'.

Secondly, the Review Group notes that the prohibition in this section applies only to either House of the Oireachtas. By Article 15.1.2° the Oireachtas as a whole consists of the President and the two Houses, so it appears to the Review Group that these provisions do not, strictly speaking, preclude a serving judge from standing for election as President. Although such an eventuality may be unlikely, there is a case for extending the prohibition in Article 35.3 to the presidency and to membership of any elected assembly.

Thirdly, the phrase 'any other office or position of emolument' in Article 35.3 is regarded in practice as preventing a judge from holding any other *paid* appointment. Many judges hold honorary appointments, often charitable. Judges have often been appointed as chairpersons of tribunals of inquiry. Indeed, the Government tends increasingly to appoint judges as chairpersons of groups or bodies required to report on policy issues. This may be undesirable as such judges risk becoming publicly identified with the policies of the group or body concerned, or may be put in a position of either critic or supporter of the Government. It is important for public confidence in the judiciary and public perception of their independence and impartiality that judges do not directly or indirectly make public statements on matters of policy. The Review Group recognises, however, that there may be certain areas, for example relating to the administration of justice, where it is proper for judges to participate in a group or body whose report may have a policy dimension.

The Review Group considers that the prohibition on judges taking up paid appointments should remain, but in addition, it considers that they should be prohibited from taking up any position which is inconsistent with the office of judge under the Constitution. It would not be wise to attempt to define such positions in the Constitution. If, as suggested in relation to Article 35.2, a judicial disciplinary board, comprising senior judges, were established by law, such a body could decide in any given case whether a position was inconsistent with judicial office.

Recommendations

1 Amend the Irish language text of Article 35.3 by substituting ‘intofa mar chomhalta’ for ‘ina chomhalta’

2 Amend Article 35.3 to make serving judges ineligible to be President or a member of any elected assembly and to prohibit judges, in addition to the existing prohibitions, from holding ‘any other position inconsistent with the office of judge’.

Article 35.4 – the impeachment process

The Review Group has identified three issues:

1 the process itself

2 the meaning of the phrase ‘stated misbehaviour or incapacity’

3 whether these guarantees should extend to all judges appointed under the Constitution.

1 the process itself

The language of Article 35.4.1° is essentially silent on the question of how the impeachment process might work and, since no judge has ever been the subject of such a charge, there is no practical precedent to guide the members of the Oireachtas. At face value, it would seem that the judge could simply be removed by the passage of resolutions to this effect by simple majorities of both Houses. It seems, however, that modern requirements of fair procedure would mean that the judge in question would have to be afforded the right to confront his or her accusers, to cross-examine them and generally to make his or her case before both Houses of the Oireachtas: see, for example, *In re Haughey* [1971] IR 217; *Garvey v Ireland* [1981] IR 75 and *Gallagher v Revenue Commissioners (No 2)* [1995] 1 IR 55.

The Review Group considers that the present impeachment procedures are unsatisfactory inasmuch as they do not provide clear guidance on vital questions such as which House is to prefer the charge, whether the judge in question is entitled to be represented and to be heard, and which House is to hear and determine the charge.

Further, it appears wrong in principle that the removal of a judge or any other constitutional officer should be decided by a simple majority in both Houses – a Government could use its majority in the Oireachtas to remove a constitutional officer for purely partisan reasons. A two-thirds majority requirement would provide some safeguard against such a possibility.

Accordingly, the Review Group considered the suggestion that the more elaborate impeachment procedures provided in the case of the President contained in Article 12.10 ought to be replicated elsewhere in the Constitution in relation to the impeachment of judges and other constitutional officers, such as the Comptroller and Auditor-General and (if the Review Group’s proposals for

the constitutional establishment of the office were to be accepted) the Ombudsman. This would mean that the following additional safeguards would apply:

i) a two-thirds majority would be required

ii) where one House prefers a charge, the other House is required either to investigate the charge or cause it to be investigated

iii) the judge or other constitutional officer would have the right to appear and be represented.

The Review Group concludes that there does not appear to be any substantial argument against providing an Article 12.10 impeachment process for judges and other constitutional officers.

Recommendation

Provide the Article 12.10 impeachment process for judges and other constitutional officers.

2 '... stated misbehaviour or incapacity'

The words 'stated misbehaviour' may yet give rise to difficulties. As noted by Kelly, *The Irish Constitution*, Dublin 1994, at p 552:

> ... does 'misbehaviour' imply simply criminal conduct? Or does it extend more widely and include possible infractions of the accepted (but unwritten) judicial code of behaviour? If, for example, a judge were publicly to endorse a stated party political position or behave in a manner which was universally regarded as unseemly by his judicial colleagues, would this be regarded as 'misbehaviour' within the meaning of Article 35.4.1°?

Conclusion

The Review Group considered whether the phrase 'stated misbehaviour' should be replaced by a more precise phrase. It considers that to use the phrase 'prejudicial to the office of judge' to qualify 'stated misbehaviour' would more clearly identify the elements of what should give rise to impeachment.

Recommendation

Insert 'prejudicial to the office of judge' to qualify 'stated misbehaviour'.

3 whether the impeachment procedures should apply to all judges

The present safeguards against removal apply only to judges of the High Court and Supreme Court. Similar guarantees of tenure have been applied by statute to judges of the Circuit Court and the District Court: see section 39 of the Courts of Justice Act 1924 and section 20 of the Courts of Justice (District Court) Act 1946.

The Review Group considered a proposal that the constitutional safeguards against removal from office should be extended to all judges. However, a majority of the Review Group considers that such a change would be inconsistent with the establishment of the District and Circuit Courts by Act of the Oireachtas as provided in Article 34.3.4° and the policy of the Review Group to give the Oireachtas discretion as to the type of courts which it may establish.

Recommendation

A majority of the Review Group recommends that the Article 12.10 impeachment process should not be extended to District and Circuit Court judges.

Organisation of the Courts

Introduction

Article 36 provides that 'subject to the foregoing provisions of this Constitution relating to the courts,' (that is, Articles 34-35) the following matters are to be regulated by law:

i) the number of judges of the High Court, Supreme Court, the remuneration of such judges, retirement ages and pensions of such judges

ii) the number of judges of the other courts and their terms of appointment

iii) the constitution and organisation of the courts, the distribution of jurisdiction and business among the courts and all matters of procedure.

Article 36 has not given rise to any significant difficulties. Indeed, the relatively permissive language of Article 36 has proved to be of some value because it has vested the Oireachtas with a desirable degree of flexibility in this area. The distribution of business among the courts and all matters of procedure are for regulation by law and are not, therefore, for definition in the Constitution. It is, however, of the greatest importance that the courts system should operate efficiently because inefficiency creates its own injustices, including unnecessary waste of time and money. The Review Group is aware that the Commission on the Management of the Courts, chaired by Mrs Justice Susan Denham, is examining the courts system. However, the suggestion was made that the flexibility which the Oireachtas has might give rise to some undesirable consequences, such as the following:

1 uncertainties in Article 36

i) On one view, Article 36 would apparently permit the 'flooding' of the Supreme Court by a statutory increase in the number of its judges sufficient to overbear an existing majority of a tendency unwelcome to a Government, although it might well be contended that this would directly cut across the guarantee of judicial independence in Article 35.2. Having regard to historical experience elsewhere regarding proposed 'court packing' (for example, in the United States in the 1930s and in South Africa in the 1950s), the Review Group considered two possible suggestions for amendment of Article 36 discussed at 2 and 3 below.

ii) While section 8 of the Courts and Courts Officers Act 1995 and section 10(3) of the Courts (Supplemental Provisions) Act 1961 provide that it shall be the function of the Chief Justice and President of the High Court to arrange the 'distribution and business' of their respective courts, there is no express constitutional bar to this

statutory provision being replaced by another which would transfer this function to a non-judicial authority. However, it would seem highly probable that legislation which purported to authorise such a transfer of authority would be unconstitutional as infringing the guarantee of judicial independence contained in Article 35.2.

2 whether the Constitution should fix the number of Supreme Court judges

One possible solution to any 'court-packing' plan would be for the Constitution itself to prescribe the number of Supreme Court judges. At present, Article 36 permits the number of such judges to be fixed by law, provided that, having regard to the provisions of Article 12.9 and Article 26, there must be at least five such judges. While this proposal has its merits, the Review Group considered that it would deprive the Oireachtas of a flexibility which is desirable in this area. Thus, for example, had the Constitution prescribed such a number, it presumably would have fixed the number of such judges at six (in 1937 the Supreme Court consisted of the Chief Justice, the President of the High Court and four other judges). This would have meant that a constitutional amendment would have been required to accommodate the recent expansion (provided for by the Courts and Court Officers Act 1995) of the Supreme Court to nine judges.

Recommendation

No change is proposed.

3 whether Article 36 should be amended in order to provide expressly that any law passed pursuant to it should be 'consistent with the proper administration of justice'

Argument for

1 such an amendment would serve as a 'catch-all' provision designed to counter potential attempts by either the Oireachtas or the executive to interfere with judicial independence by, for example, reducing the retirement age of serving judges, or assigning the allocation of court business to a non-judicial personage. In this respect, such an amendment would curb the wide and permissive language of Article 36 and reinforce the guarantees of judicial independence contained in Article 35.

Arguments against

1 such a provision is unnecessary in view of the express guarantees for judicial independence already contained in Article 35.2 and the fact that Article 36 is expressly subject to Article 35

2 such an omnibus clause would provide no protection against a 'court packing' plan, since it might be difficult to demonstrate that particular legislation increasing the number

of judges of a particular court was designed to ‘pack’ that court with judges of a disposition favourable to the Government.

Conclusion

The insertion of such a clause would be unnecessary and no change in this regard is recommended.

Trial of Offences

Article 38

38.1 *No person shall be tried on any criminal charge save in due course of law.*

38.2 *Minor offences may be tried by courts of summary jurisdiction.*

38.3.1° *Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.*

38.3.2° *The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.*

38.4.1° *Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion.*

38.4.2° *A member of the Defence Forces not on active service shall not be tried by any courtmartial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any courtmartial or other military tribunal under any law for the enforcement of military discipline.*

38.5 *Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.*

38.6 *The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article.*

Introduction

Although Article 38 consists of only six sections, it is of critical concern because it deals with the rights of the State and the individual where criminal offences are being tried, and with the procedures to protect those rights. Article 39, which has only one section, restricts the crime of treason by defining it.

Issues

The Review Group first considers two related questions – whether the Constitution should identify explicitly the rights of an accused person and whether the Oireachtas should have power to qualify such rights.

1 whether Article 38.1 should be made more explicit

The phrase 'in due course of law' does not of itself identify what is required to ensure that a person on a criminal charge is tried in accordance with this constitutional rule. However, the relevant jurisprudence contains within it protections, rights and principles, some ancient and some more modern, which are designed to ensure that, in the interests of justice, a fair trial is accorded to everyone being tried for a criminal offence. To identify those principles, rights and protections one must necessarily resort to a large body of case law.

The Review Group, therefore, considered proposals that the protections which are implicit in Article 38.1 should be made explicit and that the rights protected by the Article should be enumerated. In this context the Review Group has taken the same approach as in its consideration of the fundamental rights protected by Articles 40-44: it has sought to enumerate the rights and protections established in the international legal order and recognised principally by the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (CCPR), in conjunction with an examination of the rights identified in the relevant Irish case law. The protection afforded by Article 38.1 could then be made explicit by adding a paragraph providing that 'in due course of law' included certain specific rights. The following rights have been recognised in the ECHR and CCPR, and by decisions of the High Court and Supreme Court in Ireland, which in some cases acknowledge the power of the Oireachtas to qualify the rights, and might be included in any such list:

i) to be presumed innocent of a criminal charge until the contrary is proven (*O'Leary v Attorney General* [1995] 1 IR 254, Article 14(2)CCPR, Article 6(2)ECHR)

Article 39

Treason shall consist only in levying war against the State, or assisting any State or person or inciting or conspiring with any person to levy war against the State, or attempting by force of arms or other violent means to overthrow the organs of government established by this Constitution, or taking part or being concerned in or inciting or conspiring with any person to make or to take part or be concerned in any such attempt.

ii) to be informed of the nature and cause of the charge promptly, in detail, and in a language which is understood (*The State (Buchan) v Coyne* [1936] 70 ILTR 185, *In re Haughey* [1971] IR 217, *Director of Public Prosecutions v Doyle* [1994] 2 IR 486, Article 14(3)(a)CCPR, Article 6(3)(a)ECHR)

iii) to be tried without undue delay (*Director of Public Prosecutions v Byrne* [1994] 2 IR 236, *Cahalane v Murphy* [1994] 2 IR 262, Article 4(3)(c)CCPR, Article 6(1)ECHR)

iv) to be given a fair and public hearing by a competent, independent and impartial court established by law *(The People (Director of Public Prosecutions) v McGinley* [1989] 3 Frewen 251, *The People (Director of Public Prosecutions) v WM* [1995] 1 IR 226, *Eccles v Ireland* [1985] IR 545, *The People (Attorney General) v Singer* [1975] IR 408, Article 14(1)CCPR, Article 6(1)ECHR)

v) to be allowed to appear, defend oneself, and be present throughout one's trial (*The People (Attorney General) v Messitt* [1972] IR 204, *Lawlor v Hogan* [1993] ILRM 606, Article 14(3)(d) CCPR, Article 6(3)(c)ECHR)

vi) to be legally represented and, if necessary, to be assisted financially in securing such representation (*The State (Healy) v Donoghue* [1976] IR 325, Article 14(3)(a) CCPR, Article 6(3)(c))

vii) to be given reasonable time and opportunity for the preparation of a defence (*In re Haughey* [1971] IR 217, *O'Callaghan v Clifford* [1994] 2 ILRM, Article 14(3(6)CCPR, Article 6(3)(b)ECHR)

viii) to be given the assistance of an interpreter, where necessary (*The State (Buchan) v Coyne* [1936] 70 ILTR 185, Article 14(3)(f)CCPR, Article 6(3)(e)ECHR)

ix) to give evidence and to secure the attendance and examination of witnesses (including being able to confront one's accusers) and to present evidence in a manner prescribed by law (*In re Haughey* [1971] IR 217, *White v Ireland* [1995] 2 IR 268*,* Article 14(3)(e)CCPR, Article 6(3)(d)ECHR)

x) not to be compelled to incriminate oneself *(Heaney v Ireland* [1994] 3 IR 593, Article 14(2) and (3)(g)CCPR)

xi) to be subject to fair procedures relating to arrest, detention, charging, trial, appeal and sentence, which are prescribed or permitted by law *(The People (Director of Public Prosecutions) v Healy* [1990] 2 IR 73, *Cox v Ireland* [1992] 2 IR 503, Article 14(1)CCPR, Article 6(1)ECHR)

xii) to be allowed to appeal against conviction or sentence as may be prescribed by *law (The People (Attorney General) v Conmey* [1975] IR 341, Article 14(5)CCPR, Article 2 ECHR)

xiii) not to be tried a second time for the same offence following upon a valid conviction or acquittal (*The People (Director of Public Prosecutions) v Quilligan (No 2)* [1989] IR 45, *McCarthy v Garda Commissioner* [1993] 1 IR 489, Article 14(7)CCPR, Protocol VII Article 4 ECHR. Note: Ireland is not a party to this protocol).

The Review Group considers that any amendment enumerating these rights should not prevent the courts from specifying further rights inherent in the guarantee of a trial 'in due course of law', provided these are necessarily implied by the enumerated rights.

Arguments for change

1 such fundamental rights should be given expression in a constitution

2 because many are rights expressly provided for in international conventions, they should be provided for in the Constitution or in legislation, or in both

3 the vagueness of the phrase 'in due course of law' has meant that the judiciary alone has had to determine what is or should be a fundamental constitutional norm relating to criminal trials

4 clarity requires that the rights be spelt out

5 greater protection and respect for these rights may result from their enumeration.

Arguments against

1 the judicial identification of these rights and the interpretation of their extent has not itself given rise to any major difficulties

2 it is inappropriate to enumerate the rights if the list is not considered to be, or intended to be, exhaustive

3 it is inappropriate to be so specific about the extent of a citizen's rights in the Constitution and in relation to one area only of those rights

4 if the Constitution were to enumerate such rights, it would also need to permit the Oireachtas, where appropriate, to regulate, qualify, or even restrict the exercise of some of these rights. But since the extent to which the Oireachtas should be permitted to do this may vary from right to right, it would be difficult to include an adequate guideline in the Constitution as to the extent to which the Oireachtas should be entitled to qualify each such right. With changing patterns of crime and criminal behaviour it might be better to

> allow the courts to determine the precise and detailed rights which are to be included in the guarantee of trial 'in due course of law' and the specific qualifications or restrictions which are permissible in relation to each such right, having regard to the constitutional guarantees given to other individuals.

2 whether the Oireachtas should have power to regulate, qualify and restrict the rights of the accused

If it is considered desirable that an accused's individual constitutional rights (right to an early trial, right to counsel etc) should be spelt out in the Constitution itself, it is equally important to ensure that the Oireachtas can, where appropriate, take legislative steps to regulate, qualify and even restrict the rights in question. The courts recognise that rights protected by Article 38.1 can be qualified and restricted in appropriate cases. As O'Higgins CJ said *In re Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129:

> The phrase 'due course of law' (in Article 38.1) requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society...

This point can, perhaps, be illustrated by two examples concerning, respectively, the privilege against self-incrimination and the right to confront one's accusers.

The privilege against self-incrimination has long been recognised by the common law as an essential ingredient of our criminal justice system. Moreover, in *Heaney v Ireland* [1994] 3 IR 593 Costello J said:

> ... [the] concept is such a long-standing one and so widely accepted as basic to the rules under which criminal trials are conducted that it should properly be regarded as one of those rights which comes within the guarantee of a fair trial contained in Article 38.1...

The fact that the right in question has been held to be impliedly protected by Article 38.1 does not, however, mean that it cannot be validly restricted where appropriate by the Oireachtas. Random examples of the restrictions of this right – and mentioned by Costello J in the *Heaney* case – range from section 107 of the Road Traffic Act 1961 (which enables a Garda to demand that a motorist answer certain questions about the driving of a motor car and punishes a failure to give the answer requested) to section 52 of the Offences Against the State Act 1939 (which enables a Garda to require a suspect arrested under section 30 of that Act to give an account of his or her movements and actions during any specified period and prescribes a penalty of up to six months' imprisonment for failure to answer). In the *Heaney* case, the constitutionality of the restriction on the right against self-incrimination prescribed by section 52 of the 1939 Act was upheld on the ground that it was not a disproportionate interference with that right.

As to being entitled to confront one's accusers, its substance (in particular, the right to cross-examine) must be generally protected, but this does not mean that there is an absolute right,

incapable of qualification. Thus, the Criminal Justice (Evidence) Act 1992 provides that in certain sex offence cases, the victim may give evidence by means of a video-link, that is, he or she will not be physically present in the courtroom when giving evidence. The constitutionality of these provisions – which may be viewed as a modern modification of the traditional rule that the accused is entitled to confront his or her accuser – was upheld in *White v Ireland*, essentially on the ground that these provisions did not compromise the substance of the rights protected and were necessary in order to accomplish and promote other important public interests, such as ensuring that child witnesses were not cowed and overborne by an intimidating and hostile courtroom environment.

Naturally, such rights should not be gratuitously or arbitrarily curtailed and, accordingly, the Review Group considers that any such qualifying clause should require that any restriction be proportionate and necessary to safeguard important public interests, such as the protection of the public, the detection of crime and the welfare of children. Even applying these principles, it is difficult to envisage circumstances which would justify qualifying or limiting some of the rights listed above, for example the right to a fair trial, and therefore some rights may call for special treatment.

The specific enumeration of an accused's rights – some difficulties

Apart from the broader question of whether the enumeration of such rights should be exhaustive and preclude the implication of rights which have no textual basis in the language of the Constitution itself (a question which is considered under Article 40.3), this proposal presents at least one further difficulty, namely, that there might be considerable controversy as to whether some of the rights at present enjoying status as constitutional rights should actually enjoy that status. Conversely, there may be a substantial body of opinion in favour of the protection of certain rights which do not currently enjoy such constitutional status.

The protection against self-incrimination (including the right to silence) might be regarded as an example of the former. Although this right is a traditional one (albeit one which has been encroached upon by a variety of legislative provisions), and has recently received protection at a constitutional level (the *Heaney* case), there are those who might argue that it should not enjoy constitutional protection. The changing patterns of crime and criminal behaviour, emerging criminological insights, and the development of new policing techniques might all argue for a re-assessment of this right.

The rule that the prosecution should not be empowered to appeal against an acquittal might be an example of a right which has not hitherto received constitutional protection, but which – it might be thought – ought to receive such protection. The courts have refused to accord this right that status, essentially on the ground that to do so would run counter to express provisions of the Constitution dealing with appellate jurisdiction: see *The People (Director of Public Prosecutions) v O'Shea* [1982] IR 384 and

Considine v Shannon Regional Fisheries Board [1994] 1 ILRM 499. Article 34.4.3° provides for an appeal in respect of *all decisions* of the High Court to the Supreme Court and Article 34.3.4° provides for a right of appeal 'as determined by law' in the case of appeals from courts of first instance. On the other hand, if such a right were specifically enumerated it might lead to the invalidation of a number of specific provisions which at present allow for an appeal against the dismissal of a prosecution in the District Court (see section 2 of the Summary Jurisdiction Act 1857; section 310 of the Fisheries (Consolidation) Act 1959).

Recommendation

The Review Group considers it desirable to amend Article 38.1 to give explicit constitutional recognition of, and protection for, rights of the type set out in Issue 1 above, provided:

- such explicit statement does not prevent the specification of further rights by the courts provided these are necessarily implied by the enumerated rights
- the power of the Oireachtas to qualify certain of these rights by law is also expressly acknowledged.

While the Review Group is not putting forward any particular draft of such a qualifying clause, useful models might be found in the European Convention on Human Rights (see Articles 5(1) and 10(2)) and the German constitution (see Articles 18 and 19).

3 whether the term 'minor offence' should be defined in Article 38.2

The Constitution does not define a minor offence and it has fallen to the courts to do so. In determining whether a particular offence is or is not a minor offence the court takes account of such factors as the nature of the offence, its moral quality, the period of imprisonment and the amount of any monetary fine permitted, and the state of the law and public opinion at the time of the enactment of the Constitution. The legislature itself, when creating new offences or redefining existing offences, does not specify whether an offence is or is not intended to be a minor offence and leaves the matter to the courts.

The Review Group considered whether it would be possible for Article 38.2 itself to designate criteria by which an offence should be regarded as a minor one or one requiring a trial by jury. However, it satisfied itself that this should not be attempted because of the vast numbers and types of offences and modes of committing them; that it is not necessary to do so in view of the court's jurisprudence on the issue; and that it is preferable that the determination whether a particular offence is or is not a minor offence should continue to be dealt with by the courts on a case by case basis.

Recommendation

No change should be made in Article 38.2.

4 special courts

Under the Offences Against the State Act 1939, which established the mechanism by which it is determined that the ordinary courts are inadequate, Special Criminal Courts have been established between 1939 and 1946, 1961 and 1962 and more recently from 1972 to date. The Report of the Committee on the Constitution (1967) (paragraphs 107-111) considered issues raised by this Article. The practice in relation to such courts has evolved from a position where the court originally sat in military barracks in private and was entirely staffed by military officers to the present position where, despite the stresses and potential risks involved, it sits in public in a courtroom and, most recently, is composed entirely of members of the serving judiciary and operates in a similar way to the ordinary courts, observing the requirement of trial 'in due course of law' with the sole exception, of course, of a jury. Historically, the existence of special courts, their composition and mode of procedure, decisions and duration, have given rise on occasion to controversy.

The Review Group considered the following proposals:

a) whether there should be provision for special courts

Having regard to the long history of intermittent paramilitary violence, the Review Group concluded that it could not recommend the deletion of those provisions which allow the establishment of special courts. Indeed, there might well be other circumstances (for example, activities of organised drug dealers) when the ordinary courts might be unable to secure the effective administration of justice and it would be necessary to have special courts to do so. In addition, it is important to stress that if the Review Group's other recommendations are accepted, every traditional safeguard associated with the administration of criminal justice – with the exception of the right to trial by jury – would henceforth apply to the Special Court and to persons tried before it.

b) whether special courts should have only limited duration

One proposal is that Article 38.3 be amended so as to provide that, once special courts have been established, they should remain established only for a fixed period so that the need to have such special courts is necessarily reviewed and they do not remain in being indefinitely. This might be done by inserting a phrase such as 'for a period fixed by law and renewable in the manner prescribed by law' so that the Article would read:

> *Special courts may be established by law, for a period fixed by law and renewable in the manner prescribed by law, for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.*

Arguments for

1 it is generally desirable that special courts should not be established for any period of time beyond that which is absolutely necessary for the function for which they have been established

2 the necessity to review the basis for the continued existence of such courts should be a fundamental constitutional control over such courts

3 the length of the present period of establishment of the Special Criminal Court has been such that it is desirable in a democracy that the rationale for the continued existence of the court be articulated, debated and decided upon by a fixed periodic review and in as public a manner as possible

4 it is desirable that the onus be put on those who desire the continuation of a special court to take a positive step to justify the necessity for it and the consequent departure from the ordinary form of criminal justice.

Arguments against

1 the Government can be trusted to ensure that special courts will not remain established for longer than absolutely necessary

2 it is unwise, if not impossible, to forecast at the beginning of an 'emergency' which requires special courts how long the emergency will last; to attempt to do so could hinder efforts to restore normality.

Recommendation

On balance, the Review Group considers that Article 38.3 should be amended so as to provide that special courts may be established only for a fixed period as prescribed by law.

c) whether special courts should be exempted from compliance with Articles 34 and 35 as provided for by Article 38.6

Having regard to

i) the case law which requires that a trial before the Special Criminal Court be held in accordance with the Article 38.1 requirement of trial 'in due course of law' (see *Eccles v Ireland* [1985] IR 545)

ii) the practice of the Special Criminal Court in recent years of operating almost identically to a court established under Article 34

iii) the provisions of the European Convention on Human Rights and the response of the State to the UN Human Rights Committee in June 1992, in relation to the composition of such courts, namely

The Special Criminal Court is empowered to try charges where it is considered that the ordinary criminal courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. The Court established since 1972 has always sat as a Court of three serving or former judges, one from each of the High, Circuit and District Courts, sitting without a jury. The Court can act by majority decision but only one decision is pronounced. There is a full right of appeal to the Court of Criminal Appeal.

The provision in Article 38.6 which exempts special courts (as distinct from military courts) from the provisions of Articles 34 and 35 of the Constitution does not appear to be warranted. The proposal is that the phrase 'section 3 or' should be deleted from that subsection. This would have the result that special courts would function under the same general constitutional regime as the ordinary courts with the exception, of course, of a jury. If this recommendation were to be accepted, it would mean, for example, that certain provisions of the Offences Against the State Act 1939 would be rendered unconstitutional: it would no longer be possible for the Government to appoint persons such as barristers, solicitors or officers of the defence forces (section 39(3)) or to remove judges of the court at their will (section 39(2)), or for the Minister for Finance to fix the renumeration of judges of that court (section 39(4)).

Arguments for

1 this would reflect the current practice with regard to such courts

2 having regard to such practice, there appears to be no justification for not applying Articles 34 and 35 to trial before special courts

3 the change would mean that no suggestion could reasonably be made that the State is not honouring its international commitments and guarantees in relation to such trials

4 the only justifiable difference between the ordinary courts and the special courts is the absence of a trial by jury in the latter.

Arguments against

1 circumstances may well change so as to warrant a change from the current practice; it would not be prudent to render this constitutionally impossible

2 it is inconsistent and illogical to require that special courts, whose establishment is based upon the inadequacy of the ordinary courts, should be regulated exactly in the same constitutional manner as the ordinary courts

3 departures from the standards relating to the ordinary courts may regretfully be necessary owing to the actual or potential activities of large-scale organised criminal/paramilitary factions of differing types.

Recommendation

A majority of the Review Group considers that Article 38.6 should be amended so as to remove the exemption of special courts from compliance with Articles 34 and 35. This can be achieved by deleting 'section 3 or ' from Article 38.6.

5 whether Article 38.4.1° should be amended by inserting the words 'by law' after the word 'established'

Article 38.4 may be said to have two purposes:

i) to allow the military authorities to deal with persons subject to military law for offences against military law

ii) to enable military tribunals to deal with a state of war or armed rebellion by the use of informally established military tribunals or so-called 'drumhead' courts martial, to try and punish or otherwise deal with (in an unspecified way) persons who are or are suspected to be engaged in a state of war or armed rebellion, whether as combatants or obstructionists, matters that are militarily necessary to win the war or suppress the armed rebellion taking precedence over the requirements of the ordinary rule of law.

In relation to the first purpose, military tribunals may be established under the Defence Act 1954 and the Rules of Procedure made thereunder to try, either in a summary way or before a court martial, members of the defence forces. Such trials proceed in accordance with the requirements laid down in the Act and Rules of Procedure and appeals from courts martial are taken to the Courts-Martial Appeal Court established by the Courts-Martial Appeal Act 1983, which operates in the same manner as the normal Court of Criminal Appeal and is composed of the same judges as sit in it.

Military tribunals established for the second purpose are not regulated by statute. Article 38.3 is thought to reflect the traditional common law doctrine that the ordinary courts have no jurisdiction in relation to the activities of military tribunals which are dealing with a state of war or armed rebellion.

However, it is questionable whether this doctrine has survived the enactment of the Constitution. When viewed in the context of other constitutional provisions, it must be doubtful whether the provision is self-executing, namely that it entitles military tribunals to be set up for either or both of the purposes specified in the section without any further legal step being taken to allow this to occur – that, in other words, they do not require a statutory basis for their establishment or operation. In the period before independence in 1922 such military tribunals operated following the proclamation of martial law either generally, or in particular counties. Some military courts also operated immediately after independence, following which an Indemnity Act was passed in relation to the actions of those courts and tribunals.

Although the words 'by law' are omitted from Article 38.4 in contrast to their inclusion in Article 38.3, it would be extraordinary, on one view, to interpret Article 38.4 as entitling

the military to take whatever steps they deemed necessary in the event of a war or armed rebellion, and as giving them a free hand constitutionally to act in a way they thought proper. The other and better view is that the proclaiming of martial law in this fashion has not survived the enactment of the Constitution and that it is no longer constitutionally permissible to declare martial law and operate military courts in this informal way. In this regard it should be noted that Article 28.3.1° provides that:

> War shall not be declared and the State shall not participate in any war save with the assent of Dáil Éireann.

and Article 28.3.3° provides that:

> Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law...

In this regard, too, the Review Group's recommendation on Article 28, 'The Government' should be noted.

Although there is a slight difference in terminology between the English and Irish versions of the Constitution – one speaks of time of war, the other of a state of war – it does seem clear that the Constitution, and in particular Article 28.3.3°, intended to give express protection for any act done or purporting to be done in relation to a state of war or armed rebellion, provided that it was done on the basis that it was in pursuance or purported to be in pursuance of a law passed for the purposes specified in Article 28.3.3°. It is difficult to reconcile this express constitutional protection for any acts so done in pursuance of such a law with the survival in another part of the Constitution of a doctrine which allows the military to deal with the same subject-matter, namely a state of war or armed rebellion, without any a priori legal basis for their actions.

Arguments for

1 the proposed amendment would clearly and definitively abolish the common law doctrine of martial law and prevent its reintroduction in any informal way at any period in the future

2 it is clearly desirable that the Constitution should expressly, and in the clearest possible way, define the circumstances in which such military courts operate. The proposal would reflect the current legal position in relation to the first type of military tribunal but would also require the military authorities to have a clear a priori legal basis for their action

3 the position of members of the defence forces, though legally secure at present, would be constitutionally secured by the proposal and could not, having regard to the existing legal position, result in any lack of authority or control by the military authorities over the personnel of the defence forces

4 the position of members of the defence forces in relation to any actions that they might have to take would be constitutionally secure as a result of the proposal

5 it would clearly be undesirable to have any possibility of a repetition of the type of case law that arose both immediately prior to independence and after it was attained in 1922, which revolved around disputes in the ordinary courts as to whether a state of war was or was not raging, and what the jurisdiction of the ordinary courts was, having regard to the evidence as to whether or not a state of war was raging

6 the proposal would have a substantial benefit for the Oireachtas in that it could construct, in advance of any possible state of war or armed rebellion, a legal framework under which military tribunals would operate in those circumstances. At present, it would seem permissible to do this under the provisions of Article 28.3.3° only when a war or armed rebellion or national emergency is held to exist pursuant to the provisions of that section.

Arguments against

1 no necessity for the amendment has been established

2 the legal position in relation to both types of military tribunal is clear.

In addition, the reference to 'state of war' should be amended to include armed conflict as already recommended in relation to Article 28.3.3°.

Recommendation

The Review Group considers it desirable that there should be a constitutional requirement in relation to both categories of military tribunals: that they should be established by law for the trial of offences against military law, and that they should also have a clear legal basis for their operation during, and in dealing with, a state of war, armed conflict or armed rebellion. The Review Group considers that the section should be amended by the insertion of the words ' in accordance with law' after the word 'established' in the first line so that Article 38.4.1° would read:

> *Military tribunals may be established in accordance with law for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war**,** armed conflict or armed rebellion.*

6 the constitutional provision for trial by jury

The concept of a trial by jury is deeply embedded in our criminal justice system. It involves the citizens in the administration of justice and thus brings a democratic element to it and keeps it in touch with the views, attitudes and opinions of the people. It should not, therefore, be lightly interfered with. For the

individual charged with a crime, trial by jury has for centuries, rightly or wrongly, been regarded popularly as a most important safeguard, being a protection against both the zeal of an enthusiastic executive and the rigidity of an ultra-conservative judiciary. This has especially been the case in Irish history, for as Henchy J said in *The People (Director of Public Prosecutions) v O'Shea* [1982] IR 384:

> I am convinced that the indissoluble attachment to trial by jury and to the right after acquittal to raise the plea of *autre fois acquit* was one of the prime reasons why the Constitution of 1937 (like that of 1922) mandated trial by jury as the normal mode of trying major offences. The bitter Irish race memory of politically appointed and executive-oriented judges, of the suspension of trial by jury in times of popular revolt, of the substitution therefor of summary trial or detention without trial, of cat and mouse releases from such detention, of packed juries and sometimes corrupt judges and prosecutors, had long implanted in the consciousness of the people, and therefore in the minds of their political representatives, the conviction that the best way of preventing an individual from suffering a wrong conviction for an offence was to allow him to 'put himself upon his country', that is to say to allow him to be tried for that offence by a fair, impartial and representative jury, sitting in a court presided over by an impartial and independent judge appointed under the Constitution, who would see that all the requirements for a fair and proper jury trial would be observed so that amongst other things if the jury's verdict were one of not guilty, the accused could leave the court with the absolute assurance that he would never again 'be vexed ' for the same charge.

Article 38.5 guarantees trial by jury on a serious criminal charge but not if the offence is a minor offence or one to be dealt with by a special court or a military tribunal. The provision does not itself define what it means by a jury or state the minimum number required to constitute a jury. It is to be noted, however, that the Supreme Court found the Juries Act 1927, which both contained a property qualification and permitted the exclusion of women from serving on juries, to be unconstitutional in the case of *de Búrca v The Attorney General* [1976] IR 38. It is the view of the Review Group that all such matters relating to the number and composition of a jury or the pool of jurors from which a jury must be drawn are matters properly to be regulated by law. Some submissions have been made which argue for the general abolition of trial by jury or its restriction in relation to particular offences. The Review Group has referred to the report of the Government Advisory Committee on Fraud [1992] (The Maguire Committee), and the Fraud Trials Committee Report in the UK [1986] (The Roskill Committee). So far it does not appear that the requirement of trial by jury has, in this jurisdiction, constituted a real or substantial impediment to the effective administration of justice in criminal cases, either generally or in relation to particular types of offences. However, this is a matter which should be kept under review.

While trial by jury is frequently and popularly referred to as meaning a right to trial by jury this is not strictly accurate. Article 38.5 *requires* trial by jury for all non-minor offences. The

only sense in which a right to trial by jury exists is pursuant to the statutory provisions of the Criminal Justice Act 1951 in respect of a list of scheduled offences to the Act. There, an accused person facing one of such scheduled charges may elect to be tried by a jury rather than by a court of summary jurisdiction and this is so irrespective of whether the prosecution regards the offence as being a minor one or wishes to dispose of it summarily.

Normally, all criminal charges are initiated and processed in the District Court. If the offence is minor, it is dealt with summarily in the District Court, in other words by the district judge sitting on his own without a jury. If the charge is not a minor offence (or if the accused is entitled to opt for trial by jury) the relevant documents (referred to as the book of evidence) are served on the accused and, following a judicial examination as to whether there is sufficient evidence upon which to send the accused forward for trial, the accused is either discharged if there is not, or if there is, he or she is sent forward for trial to the relevant court, that is, the Circuit Criminal Court, the Central Criminal Court or more rarely the Special Criminal Court.

The Review Group considered whether it would be appropriate to change the mandatory basis of the provision relating to trial by jury to one where a clear and explicit right to trial by jury for non-minor offences was conferred on accused persons.

It was suggested that this would then enable persons to waive that right and with the consent of the prosecutor (and presumably also of the court), have the matter dealt with summarily in the District Court whether by way of a trial there or on a plea of guilty.

The Review Group considers that the conferring of an explicit constitutional right to trial by jury rather than the existing mandatory provision, with such intended consequences, would be wrong because it would erode the principle of trial by jury for major offences with the full range of punishment available on conviction.

The Review Group wishes to draw attention to one further matter in relation to trial by jury. If the foregoing recommendation for amendment of Article 38.6 were accepted so that the only difference between special courts and ordinary courts was the absence of a jury in the former, consideration should be given to an amendment of Article 38.3.1° to permit the trial of offences before special courts where one rather than both conditions is met. Article 38.3.1° reads:

> Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.

This would allow cases to be dealt with in circumstances which involve no direct threat to the maintenance or preservation of public peace and order but which may result in the ordinary courts proving to be inadequate for the effective administration of justice. Such circumstances might include the nature of the offence, the probable length of the trial, the nature and

complexity of evidence (such as relating to fraud cases) or possibly prejudicial pre-trial publicity. In circumstances where a trial before the special courts gave the accused all the constitutional protections of a trial 'in due course of law' but of course without a provision for trial by jury it would appear a reasonable constitutional balance to permit the trial of offences before a special court where it was determined in accordance with the relevant legislation that the ordinary courts were inadequate to secure the effective administration of justice in relation to those offences without the additional requirement that the ordinary courts are inadequate to secure the preservation of public peace and order.

Recommendation

The Review Group does not recommend any change in the current provision for trial by jury in relation to all offences other than minor offences and offences tried before the special court or military tribunals. A majority of the Review Group suggests that, if the amendment recommended above to Article 38.6 is accepted, and only if it is, Article 38.3.1° might also be amended so as to permit the trial of offences before special courts where the ordinary courts are inadequate to secure the effective administration of justice *or* the preservation of public peace and order. This would permit the enactment at a future date of appropriate legislation if it appeared that the ordinary courts with trial by jury were inadequate to secure the effective administration of justice.

7 whether constitutional provision should be made for the trial of offences committed extra-territorially

States are entitled under public international law to exercise a degree of extra-territorial jurisdiction in criminal matters. Among the more widely accepted bases for the assumption of such jurisdiction are that the alleged offender is a national of the state exercising the jurisdiction, that the offence adversely affected the national interests of that state, and that the offence is recognised as an international crime in respect of which any state may exercise jurisdiction.

The Constitution does not provide explicitly for the trial of offences committed outside the territory of the State. The only reference to extra-territorial effect is in Article 3. That Article (a) restricts the ordinary legislation enacted by the Oireachtas from applying to Northern Ireland and (b) preserves for the Oireachtas the capacity which Saorstát Éireann had to enact laws having extra-territorial effect at the time the Constitution was adopted. In Irish constitutional history, sovereignty – and therefore the power to enact laws with extra-territorial effect – derives from the enactment by Dáil Éireann of the Constitution of the Irish Free State (Saorstát Éireann) Act 1922, which acknowledged that 'all lawful authority comes from God to the people'. In the British legal context, Saorstát Éireann's power to enact such laws derived from the Statute of Westminster 1931 which empowered Dominions to enact laws with extra-territorial effect.

Public international law affords sufficient ground for the Oireachtas to enact legislation having extra-territorial effect.

There is already such legislative provision: for example, section 39 of the Extradition Act 1965, the Offences Against the Person Act 1861 (Adaptation) Order 1973 and the Criminal Law (Jurisdiction) Act 1976. There is no need, therefore, for constitutional provision. However, if it is considered desirable to have an explicit provision, this might be done in a general way – because it is not an issue solely in relation to the trial of offences – for example, in the context of the general legislative power of the Oireachtas under Article 15.

Conclusion

It is not necessary for the Constitution to authorise the Oireachtas expressly to legislate extra-territorially. The Review Group considers that, if it is desired to have an explicit provision, it would be more appropriate to Article 15 than to Article 3.

8 whether constitutional provision should be made to deal with extra-territorial trial of offences committed within the jurisdiction of the State and for the surrender of fugitive offenders either to other states or to international tribunals established to deal with any such offences

The Review Group considered whether a section should be added to Article 38 to permit the trial outside the country of a person who has actually committed offences here or has been deemed to have done so. There are certain circumstances in which a person can be deemed to have committed an offence here, such as an offence committed on board an Irish-registered aircraft.

Arguments for change

1 Article K(1) of Title VI of the Treaty on European Union dealing with the provisions on co-operation in the fields of justice and home affairs identifies *inter alia* the following matters as matters of common interest:

(5) combating fraud on an international scale in so far as this is not covered by 7-9

(7) judicial co-operation in criminal matters

(8) customs co-operation

(9) police co-operation for the purpose of preventing and combating terrorism, unlawful trafficking and other serious forms of international crime including if necessary certain aspects of customs co-operation in connection with the organisation of a Union-wide system for exchanging information within a European Police Office (Europol)

The K4 co-ordinating committee may at some stage propose a variety of measures which would make it either desirable or necessary that there be a European Union-based system relating to the trial of some offences. The inclusion of the suggested section might facilitate such a development

The proposed change would subsequently allow the Oireachtas to regulate by law the circumstances in which the State could hand over suspects for trial either under the provisions of an Article K convention, or another international agreement or to an international tribunal within the framework of the European Union, without the possible need for further constitutional amendment

2 apart from a European Union-based mechanism for the trial of offences, such a provision might allow for possible future development of an international terrorist/criminal court to deal with a variety of offences, whether regionally based or otherwise. Consideration of the establishment of such a court has been supported by eminent lawyers and is under consideration in the United Nations

3 in regard to human rights, it may be considered desirable to allow the State, for example, to render up for trial persons who are alleged to have committed war crimes, genocide, other crimes against humanity, hostage-taking or hijacking of aircraft, in appropriate cases, even though the State itself might have jurisdiction to try them

4 it would be seen to be a further strengthening of the State's commitment to the protection of human rights and to the punishment of crimes against humanity and other serious international crime being dealt with at an international level

5 if this construction were judicially adopted, it might not prevent the surrender of offenders who might also be dealt with within the jurisdiction for trial outside the jurisdiction. This doubt arises because at present trial 'in due course of law' under Article 38.1 properly construed may mean trial *in* the State and *before* the courts of the State.

Arguments against

1 in so far as any Article K conventions or agreements are concerned, these should be dealt with under the provisions of the Maastricht Treaty and, if a further constitutional change is warranted, it should be considered in the context of that actual agreement and be subject, therefore, to the will of the people

2 in so far as any other changes are necessary or desirable to deal with any jurisdictional anomalies or the surrender of offenders these are capable of being dealt with by ordinary legislation

3 priority should not be afforded the assumption of jurisdiction by another state or an international tribunal, thereby subordinating the exercise of jurisdiction over the offence by the State to that of the other state or international tribunal

4 it seems improbable that Article 38.1 will be interpreted so as to entitle an alleged offender to trial in the State and before the courts of the State, at all events where the offences in question have a significant connection with the requesting country. Thus, if a 'rogue' financial trader, using a computer

in this State, were to commit a fraud which impacted primarily on an institution in another state, it is probable that he or she would be extraditable to that state (assuming, of course, that the necessary extradition arrangements were otherwise in order). Furthermore, the Supreme Court has already ruled that the Director of Public Prosecutions cannot be compelled to prosecute in respect of any particular offence (save in the absence of exceptional circumstances) and that the right to access to the courts does not extend to the right to be prosecuted: *The State (McCormack) v Curran* [1987] ILRM 225. As it would seem, therefore, that an alleged offender cannot, generally speaking, insist as a matter of constitutional entitlement on trial in this State, there would appear to be no necessity to make the change proposed.

Conclusion

In general, no constitutional amendment is required to permit the extra-territorial trial of offences committed within the jurisdiction of the State or the surrender of fugitive offenders to stand trial for such offences in another state or before an international tribunal. However, were it to be decided that priority should be afforded the assumption of jurisdiction over such an offence or offences by another state or international tribunal, constitutional provision should be made for this.

9 whether it is appropriate that the Constitution should define the offence of treason

Article 39 is inspired in part by Article III of the United States Constitution and also echoes some of the pre-1922 statutory provisions regulating the offence of treason. Historically, the offence of treason had two categories, high treason and petty treason. It was regulated by a large number of statutes which were obviously inconsistent with the provisions of Article 39, and were not therefore carried over by the provisions of Article 50 of the Constitution. They were cleared from the statute book only as recently as 1983 by the Schedule to the Statute Law Revision Act 1983. The law of treason and its extension in the Treason Felony Act 1848 were used in dealing with the activities of Irish nationalists and republicans throughout the nineteenth century and into the twentieth century. The term has important historical and political resonances for that reason. Treason is now regulated by Article 39 and by the provisions of the Treason Act 1939 giving effect to it. This provides for the trial and conviction of anyone committing treason in the State, or in the case of an Irish citizen or a person ordinarily resident here, if committed outside the State.

A submission has been made to the Review Group that it is inappropriate for the Constitution to define any offence and that Article 39 should be deleted.

Arguments for deletion

1 the Constitution mentions a number of offences but only defines one

2 there is no necessity to retain the provision

3 it is unclear from its terms whether it applies only to citizens who have a duty of fidelity to the nation and loyalty to the State under Article 9 or also necessarily extends to all persons whether citizens or aliens resident in the State or indeed to all acts of any person inside or outside the State who does any act described in the Article

4 other offences involving subversion are referred to but not defined in the Constitution

5 the offence should logically be restricted to citizens in view of the terms of Article 9 and should therefore be deleted or amended accordingly.

Arguments against

1 the Constitution should itself define what it regards as fundamentally unconstitutional activity aimed at the State or the organs established by the Constitution in the same way that it clearly defines the extent of or the limit to the constitutional function of, for example, the Government or the Oireachtas

2 it is important for historical and political reasons that the offence of treason should be regulated by the Constitution and should not be capable of being expanded by the Oireachtas

3 traditionally laws of treason have often been misused by government factions to deal with political enemies. The Article clearly represents a constitutional bar to this ever happening here and should be retained for that reason

4 if it is committed within the jurisdiction by a person who is not a citizen, no immunity is justified in line with the general principle that the law applies equally to all persons while in the State, whether citizens or aliens.

Recommendation

No change should be made in Article 39.

Introduction to Fundamental Rights

Among the innovative features of the Constitution of the Irish Free State of 1922 was that it provided for the protection of certain fundamental rights and vested the courts with express powers to invalidate legislation adjudged to infringe such rights. In retrospect, it would have to be conceded that these innovations were not immediately successful and, indeed, during the period of that Constitution only two items of legislation were declared to be unconstitutional. Several reasons may be advanced as to why this was so. First, during the entire period of its existence, that Constitution was capable of amendment by ordinary legislation. Indeed, the courts had ruled that, where there was a clash between an Act of the Oireachtas and the Constitution, the former prevailed because it must be taken to have implicitly amended the Constitution: see *Attorney General v McBride* [1928] IR 541. Secondly, most members of the new judiciary had been schooled in the British tradition of parliamentary sovereignty and were not at ease with concepts of fundamental rights and powers of judicial review of legislation. Finally, the unsettled political conditions prevailing in the aftermath of the Civil War and the perceived need for decisive executive and legislative action did not assist in the creation of a 'rights' consciousness.

At all events, the drafters of the new Constitution were determined to retain a mechanism whereby fundamental rights could be protected against infringement by statute and by executive action. As early as 1934, when the first steps were taken in the drafting of an entirely new Constitution by the establishment of a top-level civil service committee whose task it was to review the existing Constitution, its terms of reference reflected these concerns. The committee was required:

1 to ascertain which of the Articles of the Constitution '... should be regarded as fundamental in the sense that they safeguarded democratic rights'

2 to submit a recommendation as to how these Articles might be especially protected from change.

The committee's report (SPO 2979) (which was private to the Government) formed the basis for the drafting of the new Constitution which took place over the following two years.

The provisions made for the protection of fundamental rights in the Constitution were more elaborate than heretofore and the drafters had clearly learnt from the experience of the 1922 Constitution. In the first place, Articles 46 and 47 provided that (with the exception of a transitional period which lapsed in 1941) the new Constitution could be amended only by means of a referendum. This ensured a degree of constitutional stability which was a necessary pre-condition to the development of judicial review. Secondly, the range of rights to be protected was more extensive and included new rights in relation to matters such as equality before the law, good name, the family, education and property. Indeed, to an extent, the new Constitution reflected some sophisticated legal thinking (especially by the standards of the day), even if this was not widely appreciated at the time. This sophistication, coupled with some

skilful and elegant drafting, ensured that the Constitution was sufficiently flexible and had an in-built capacity for organic growth through judicial interpretation. Moreover, the fundamental rights provisions have, generally speaking, proved to be an effective method of safeguarding individual rights so that 'the overall impact of the courts on modern Irish life, in their handling of constitutional issues, has been beneficial, rational, progressive and fair' (Kelly, *The Irish Constitution,* Dublin, 1994, at xcii). In addition, the existence of this constitutional jurisprudence has undoubtedly assisted the State in maintaining a relatively good record before the European Court of Human Rights.

But if the Constitution's method of recognising and protecting fundamental rights was advanced for its time – and, in this respect, it must be recalled that, with the obvious exception of the United States, there were very few other countries with such a system of judicial review of legislation in place at that time – the experience of almost sixty years has demonstrated that Articles 40-44 contain flaws and are in need of revision.

In the first place, the list of rights expressly protected by the Constitution is, by contemporary standards, incomplete. In some respects, this should come as no surprise, because the major international human rights documents – such as the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights – were drafted well after the Constitution came into force. Thus, even a right which is virtually universally recognised as fundamental in a civilised society – such as the right to travel (whether within the State or abroad) – was not expressly protected by the Constitution as originally enacted. The right to travel is now protected in the context of Article 40.3.3°, but it is scarcely satisfactory that such an important right does not receive general constitutional protection.

Secondly, some of the difficulties presented by an incomplete list of rights have been ameliorated by the development of the doctrine of unenumerated personal rights in Article 40.3.1°. A comparison of the language of Article 40.3.1° with that of Article 40.3.2° suggests that the drafters never intended that the list of rights expressly enumerated by the Constitution would be exhaustive. Since the decision of Kenny J in *Ryan v Attorney General* [1965] IR 241, the courts have recognised as many as twenty 'unenumerated' personal rights which fall to be protected by Article 40.3.1°. These rights include the right to earn a livelihood, the right to privacy and the right to found a family. Some of the rights protected under this rubric might well be considered to be but extensions of rights necessarily implied by other provisions of the Constitution (for example freedom to communicate might well be thought to be an aspect of the right of free speech in Article 40.6.1°.i), but it is difficult to find obvious textual justification in the case of some of the other unenumerated personal rights (for example the right to privacy). While the development of the unenumerated rights doctrine has in many respects proved to be beneficial, unease has been expressed in many quarters that the language of Article 40.3.1° – which simply enjoins the State to respect and, as far as practicable, by its laws to defend and vindicate the 'personal rights' of the citizen – offers no real guidance to the judiciary as to what these personal rights are. The experience of thirty years or so since *Ryan*

has demonstrated that there does not appear to be any objective method of ascertaining what these personal rights are.

Thirdly, the Constitution's qualifying clauses require an overhaul. With the exception of rights such as freedom from torture and slavery (which Articles 3 and 4 of the European Convention on Human Rights declare to be absolute), there are few rights – however fundamental – which can be regarded as absolute or not subject to qualification. Experience has shown that the fundamental rights provisions of Articles 40-44 do not adequately deal with this issue. Some rights are described in absolutist language (for example the reference in Article 41.1.1° to the 'inalienable and imprescriptible rights' of the family), whereas other rights are expressed in highly qualified form (for example the rights of free speech, association and assembly in Article 40.6.1°). This drafting has undoubtedly caused the courts difficulties, a point well illustrated by *Murray v Ireland* [1985] IR 532. In this case the plaintiffs were husband and wife who were serving life sentences for murder. They claimed that the absence of facilities for conjugal relations meant that they were denied the right to start a family, a right which they maintained was, by virtue of Article 41.1.1° an 'inalienable and imprescriptible' right of the family. Their claim was rejected by the High Court (and subsequently, on appeal, by the Supreme Court) but only on the basis of an interpretation of Article 41 which deviated from the strict language of the text. In the words of Costello J:

> The power of the State to delimit the exercise of constitutionally protected rights is expressly given in some Articles and not referred to at all in others, but this cannot mean that where absent the power does not exist. For example, no reference is made in Article 41 to any restrictive power, but it is clear that the exercise by the Family of its imprescriptible and inalienable right to integrity as a unit group can be severely and validly restricted by the State when, for example, its laws permit a father to be banned from the family home or allow for the imprisonment of both parents of young children.

These difficulties are also present in the provisions dealing with property rights. On the one hand, Article 40.3.2° provides that the State, *inter alia*, guarantees by its laws to protect the individual's property rights 'as best it may from unjust attack' and 'in the case of injustice done' to vindicate these rights. On the other hand, Article 43.2.2° provides that the exercise of property rights may be 'delimited by law' with a view 'to reconciling their exercise with the exigencies of the common good'. These two different tests have caused the courts considerable difficulties in deciding whether particular legislation restricting such rights is or is not valid. Of course, the drafting of any qualifying clause is something which requires careful attention. It may, for example, prove to be impossible to draft a general qualifying clause which applies to all constitutional rights. However, the Review Group has been impressed by the qualifying language used by the European Convention on Human Rights and some of its suggestions in respect of the fundamental rights area have been influenced by the text of the Convention and the case law which it has generated.

Conclusion

While the Review Group is struck by the general sophistication of Articles 40-44 and recognises that, by the standards of the day, they represented a far-sighted attempt to improve the method of protecting fundamental rights against legislative and executive attack, nevertheless there are three key features of these provisions which require attention, namely the incomplete nature of the rights protected; the development of the unenumerated rights doctrine and the varying language of the clauses which qualify both the enumerated and unenumerated rights protected by the Constitution. It is on these issues that the Review Group focuses its attention.

whether the Constitution's fundamental rights provisions should be replaced by the European Convention on Human Rights and Fundamental Freedoms

The entry into force of the European Convention on Human Rights and Fundamental Freedoms (ECHR) in 1953 has been undoubtedly the greatest achievement of the Council of Europe. The convention was promulgated, of course, as a direct response to the Holocaust and the atrocities of World War II and is a European development of the UN Declaration of Human Rights 1948. At the time, most Western countries considered that, with relatively few exceptions, their legal systems matched up in every respect with the guarantees of the ECHR. One key innovation of the ECHR was that it permitted the right of access of individual citizens to an international court, namely, the European Court of Human Rights, which could hear such complaints against contracting states. This right of petition was, however, conditional on the contracting states permitting their citizens to take such cases. At first, states were slow to do so and, by the entry into force of the ECHR in September 1953, Ireland and Sweden were the only states permitting such petitions. In time, nearly all other contracting states came to permit such petitions (for example, Germany 1957, the United Kingdom 1965 and France 1975). By May 1996 thirty-three states had ratified the ECHR with all of them permitting the right of individual petition. A further six states have signed the ECHR subject to ratification.

The potential of the ECHR has gradually developed over time. By the end of the 1960s, the European Court of Human Rights was delivering only two or three judgments a year, but by the 1990s the volume of cases referred each year to the court was being measured in hundreds. With the increasing prestige and authority of the ECHR and the European Court of Human Rights, there came increasing pressure in many countries to transpose the convention into domestic law. It may be noted that this pressure was most marked in countries with an essentially dualist tradition (such as Sweden and the United Kingdom) whose legal system did not otherwise provide for judicial review of legislation. Thus, in the last few years both Iceland (1994) and Sweden (1995) have taken the step of formally incorporating the ECHR as part of domestic law.

This problem did not, by and large, arise in monist countries because of the primacy afforded to international treaties (such as the ECHR) over domestic law by the legal systems of those countries. In the Netherlands, for example, the courts enjoy no power to declare a law to be inconsistent with the Constitution, but they may declare the law to be inconsistent with the ECHR on the basis that treaty law takes precedence in the case of conflict over domestic law.

methods of incorporating the ECHR into domestic law

Before considering the arguments for and against incorporation, something should be said about the possible means by which any such incorporation might take effect. If the ECHR were to be incorporated into domestic law so that it would have superior effect to any legislation or, indeed, to the Constitution itself, the only feasible method would be by way of specific constitutional amendment. Ordinary legislation would not suffice for this purpose. If the Constitution were to be amended, any such amendment might take two forms. The first method would be to replace the existing fundamental rights provisions with the text of the ECHR. The other method might follow the lines of the amendment to the Swedish Constitution which took effect in January 1995. Chapter 2, section 23 of that constitution now provides:

> No law or other regulation may be enacted contrary to Sweden's obligations as follow from the European Convention on Human Rights.

The arguments for incorporating the ECHR into Irish law

The major argument for incorporation is that it would enable litigants to rely on the provisions of the ECHR before the Irish courts. The arguments for incorporation have been fully considered in other jurisdictions, most recently in 1993 by the report of an expert committee which had been required by the Icelandic Minister for Justice to consider this question: see Stefánsson and Adalsteinsson 'Iceland' in Scheinin (ed), *Incorporation and Implementation of Human Rights Norms in the Nordic and Baltic Countries* (Martinus Nijhoff, 1996). In their report *(Frumvarp til laga um mannréttindasáttmala Evrópu*, 1993), a majority of the committee put forward reasons for incorporation, some of which would also have relevance in the case of Ireland. The committee noted that when Iceland first ratified the ECHR it had been assumed that the provisions of Icelandic law were in conformity with it. With the evolution of the jurisprudence of the European Court of Human Rights, the incompatability between the ECHR as judicially interpreted and Icelandic domestic law had become more and more evident, thus strengthening the case for incorporation. The committee also advanced other reasons:

- the rights of the individual would be additionally protected
- some provisions of the ECHR were more detailed than those in domestic Icelandic law and in some cases they filled gaps in Icelandic legislation
- parties to litigation concerning human rights would be able to invoke the Convention and cite decisions of the European Court of Human Rights as direct precedents in the Icelandic courts
- individual litigants would be able to secure judicial rulings in Iceland on various matters which otherwise would have to be referred to the European Commission on Human Rights and the European Court of Human Rights
- incorporation would involve an increased awareness of, and respect for, human rights among the general public, the

judiciary, lawyers and those involved in the preparation of legislation

- incorporation would be in line with the general trend in Europe and would bring Icelandic legislation into line with that of countries with which Iceland has most contact. This in turn would lead to increased international trust in the respect for human rights shown by the Icelandic government

- an indirect consequence of incorporation would be that it would tend to promote a broader interpretation of the Icelandic constitution to ensure (where appropriate) that there was consistency with the decisions of the European Court of Human Rights.

The majority Report was accepted by the Icelandic Parliament and legislation incorporating the ECHR came into force in Iceland in May 1994. In the context of Ireland, not all of these arguments would be regarded as compelling. In the first place, the replacement of the existing fundamental rights provisions by the ECHR would lead to a diminution in some individual rights, as some rights (for example personal liberty in Article 40.4) are more extensively protected by the provisions of the Constitution than under the equivalent provisions of the ECHR. Secondly, incorporation would not, as such, fill any gaps at constitutional level, since every substantive right afforded by the ECHR is either expressly protected by the Constitution or has been recognised by the courts as an unenumerated right under Article 40.3.1°. At the same time, incorporation by replacement would lead to new gaps in areas such as the right to jury trial and the guarantee that the State shall not endow any religion. Moreover, if the Review Group's recommendations in relation to the fundamental rights provisions of the Constitution were to be accepted, the gaps in some areas between the higher level of protection afforded by the Constitution by comparison with the ECHR will become even greater. This will be especially true in areas such as equality before the law and the rights of children. Finally, the replacement of the fundamental rights provisions of the Constitution by the text of the ECHR would represent too great a change in our legal system and one which would not be warranted by any existing flaws in those provisions. It would mean jettisoning almost sixty years of well established and sophisticated case law. As we have noted, incorporation may represent a very desirable option in those countries which – unlike Ireland – did not previously have an advanced system of judicial review of legislation. The Review Group considers that in the present Irish context it is much better to build on and improve the existing fundamental rights provisions of the Constitution (including, where necessary, liberally drawing on some of the ECHR text for this purpose) rather than opting for direct incorporation of the ECHR. Ireland's already good record before the European Court of Human Rights would be likely to be even further improved if the Review Group's recommendations with regard to amendment of the fundamental rights provisions were to be accepted.

Conclusions

Having regard to the provisions of Article 40, the Review Group does not favour the direct incorporation of the ECHR in the Constitution. It has instead decided that it would be preferable to draw on the ECHR (and other international human rights conventions) where:

i) the right is not expressly protected by the Constitution

ii) the standard of protection of such rights is superior to those guaranteed by the Constitution; or

iii) the wording of a clause of the Constitution protecting such right might be improved.

This requires a section by section analysis of the fundamental rights provisions of the Constitution and it is to this task that the Review Group now turns.

Equality before the Law

40.1

All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function

Introduction

Democracy is premised on equality. The American and French revolutions of the late eighteenth century were fought in the name of liberty and equality and, since then, these values have been central to western democracy. Since the two values do not always pull in the same direction, it has often been necessary to find an accommodation between them; but, whether in harmony or in competition, they have underpinned the relationship between the individual and the state and have determined the choice and formulation of many human rights norms.

Nowadays the constitutions of most European states contain guarantees of equality before the law, and the guarantee is included in international human rights texts, notably the International Covenant on Civil and Political Rights to which Ireland is party. It is not surprising that equality before the law should have been included by the drafters among the fundamental rights provisions of the 1937 Constitution.

In the words of the Universal Declaration of Human Rights, equality as a human right means that all human beings are equal in dignity and rights. This simple statement, however, belies the elusive nature of the concept and its often difficult application to particular circumstances.

The concept of equality

Equality is a measure of how society treats difference. It does not mean that differences should be ironed out in pursuit of uniformity or homogeneity. Rather it seeks to ensure that differences between people are not unjustly used to favour or to disadvantage some in relation to others and that disadvantage unjustly suffered by some persons as compared with others is rectified. A complex notion, it is nevertheless generally understood to comprise several dimensions.

First, equality requires that if a difference between persons is not relevant for a particular purpose, it should be ignored. Furthermore, if the difference is relevant but only partially so, in so far as it is not relevant, it should be ignored. This dimension of equality ensures that to the extent there is no material difference between persons, they are treated the same.

Secondly, equality endorses the recognition of pertinent differences and requires that persons be treated differently to the extent that there is a relevant difference between them. To treat persons the same when they are in fact already unequal is to perpetuate rather than to eliminate inequality. As the US Supreme Court has recognised, ‘sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike’ (*Jenness v Fortsom* 403 US 431 (1971); or as our own Supreme Court has put it, ‘Article 40 does not require identical treatment of all persons without recognition

of differences in relevant circumstances' (*O'Brien v Keogh* [1972] IR 144 and *de Búrca v Attorney General* [1976] IR 38 per Walsh J).

Equality, therefore, prohibits both direct and indirect discrimination. The European Court of Justice (ECJ) explained these concepts of direct and indirect discrimination in Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* [1995] ECR I - 225 in the following terms:

> It is also settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations.

Direct discrimination thus involves treating people differently when they are in a comparable situation and should be treated the same. It occurs when someone is disadvantaged or favoured in comparison to someone else by reference to some characteristic such as colour or religion and there is no good reason for distinguishing between them on this basis or the distinguishing characteristic does not justify the extent of the disadvantage or favour. Indirect discrimination involves treating people the same when they are in different situations and should be treated differently. It is determined by the differential impact of the same treatment on the members of one group of persons in comparison to the members of another. If such differential impact operates to the advantage or disadvantage of the members of one group rather than the other, then, unless such differential is capable of objective justification, the apparent equal treatment amounts to indirect discrimination. Both these dimensions of discrimination have been acknowledged by courts and other bodies in their interpretation of constitutional and international guarantees of equality before the law.

Equality is, however, more than the absence of discrimination, whether direct or indirect. The attainment of equality is not solely a matter of individual effort. It involves the development of strategies which would actively promote a civil society based on principles of social, economic and political inclusion. This embraces the taking of positive measures to enable persons to overcome disadvantage and to afford them real equality of opportunity; and it is important to recognise that such measures do not constitute discrimination but rather promote equality.

Since the sources of disadvantage are multifarious, different measures may be needed to overcome different types of disadvantage. While it would probably not be possible in the Constitution to address the various different measures which are needed, some types of disadvantage may be of such importance as to warrant specific provision at the constitutional level for their elimination.

Limits of the existing guarantee of equality

The narrow wording of the guarantee and its interpretation by the courts have been widely observed and criticised by both academic and political commentators and in many of the

submissions received by the Review Group. Consequently one of the main concerns of the Review Group has been to identify what, if any, extension of the guarantee may be desirable or necessary. Another has been to eliminate bias which, though it may be historically explicable, is today socially and morally unacceptable. The Review Group has also considered whether other provisions, in addition to the guarantee of equality before the law, should be inserted in the Constitution in order to further the objective of equality.

Other constitutional provisions relating to equality

Article 40.1 is a general equality guarantee, but it does not stand alone as a safeguard against discrimination. Discrimination in specific areas and on specific grounds is dealt with in a number of other provisions. These are Article 9.1.3° (discrimination on the ground of sex in relation to nationality and citizenship), Article 16.1.1°, 2° and 3° (discrimination on the ground of sex as to eligibility for membership of Dáil Éireann and voting at an election for members of Dáil Éireann), Article 40.6.2° (discrimination on the grounds of political opinion, religion or class in relation to freedom of assembly and of association), Article 44.2.3° (discrimination by the State on the grounds of religious profession, belief or status) and Article 44.2.4° (discrimination on the ground of religion in relation to the public funding of schools).

Issues

1 whether the equality guarantee should be denominated as a core norm in the Constitution

It has been submitted to the Review Group that equality should be denominated in the Constitution as a 'core norm' in order to emphasise its fundamental importance. Otherwise, it is suggested, it is in danger of losing out in the inevitable boundary adjustment between it and other rights. The proposal appears to envisage establishing the right to equality as having precedence over all or most other rights.

Arguments for

1 because democracy is premised on the principle of equality, it is desirable that it should be defined in the Constitution as a core norm which would inform, temper and qualify other constitutional provisions

2 true liberty depends on equality in a broader than legal sense – on having the resources for effective participation in the democratic system. Exclusion from full and equal participation for whatever reason, economic, social, cultural or any other, weakens the sense of community and common purpose and thus makes more difficult the achievement of

desirable reforms, such as the removal of unfair discrimination

3 greater economic equality would lead to greater political stability on which the effective functioning of democracy depends

4 there is a danger that the equality provisions of the Constitution might be interpreted as subordinate to other provisions unless the judiciary is expressly required by the Constitution to treat equality as a core norm.

Arguments against

1 it is not appropriate to introduce into the Constitution a form of ranking of fundamental rights, the consequences of which could not be predicted and might on occasion be undesired. Equality before the law is a fundamental right whose position will be strengthened by the constitutional amendments recommended later in this chapter

2 the guarantee of equality before the law in Article 40.1 is an absolute guarantee which is already central and must inform the interpretation of other rights, many of which are expressly qualified

3 the second and third arguments above in favour of the proposal are essentially political arguments for an optimum degree of socio-economic equality rather than strictly for equality before the law. The interrelationship between the two is acknowledged but the former is a policy issue appropriate to be addressed by Government and Oireachtas rather than by a constitutional assertion.

Recommendation

The Review Group considers that equality before the law is a fundamental right whose position will be strengthened by constitutional amendments recommended later in this chapter. However, a majority of the Review Group considers it unnecessary and inappropriate to designate a right to equality as taking precedence over others and prefers that reconciliation of rights, where they are in conflict, should remain a matter for the courts. A minority fears that the absence of such a provision would mean that equality will be subordinated to other constitutional values.

2 whether the words 'as human persons' in Article 40.1 should be deleted or revised

The courts have cited the phrase 'as human persons' as a reason for affording a narrow interpretation to the material scope of the guarantee of equality before the law. Thus it has been said that the guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow (*Quinn's Supermarket v Attorney General* [1972] IR 1), and that it relates to the essential attributes of citizens as persons, those features which make them

human beings, and has nothing to do with their trading activities or with the conditions on which they are employed (*Murtagh Properties Ltd v Cleary* [1972] IR 330).

This interpretation of human personality has been criticised and the Review Group is of the view that a textual amendment is desirable to secure a broader interpretation of the guarantee of equality. The phrase 'as human persons' is not found in constitutional guarantees of equality before the law in other jurisdictions or in international instruments to which Ireland is a party.

Recommendation

The words 'as human persons' should be deleted.

3 whether the guarantee of equality should be limited to citizens

The distinction between citizens and non-citizens may be a relevant distinction for some purposes, for example, entry into the State, but it is questionable whether the constitutional guarantee of equality should be limited a priori to citizens. Equality before the law is a fundamental human right, and fundamental human rights inhere in all human beings by virtue of their humanity not merely in citizens. Extension of the guarantee to everyone does not preclude the State from distinguishing between citizens and non-citizens where there is a legitimate reason for so doing, for example in relation to voting and immigration.

Recommendation

The guarantee of equality should not be confined to citizens but should be extended to all individuals.

4 whether the guarantee of equality should be extended to other persons or bodies in addition to natural persons

The courts have held that the right-holders under Article 40.1, as worded, are human beings as individuals and not collective or legal persons such as companies, churches and trade unions (*Quinn's Supermarket v Attorney General*). This means that the guarantee does not extend to the collective or legal bodies through which individuals often pursue their common interests, and it has been suggested that collectivities or groups should also be entitled to this guarantee.

The Review Group considers, however, that equality is a fundamental human right inherent in individuals and is not so in legal bodies which vary greatly in their nature and purpose.

Recommendation

The Review Group recommends that the guarantee of equality should not be extended to legal persons or collective bodies.

5 whether the obligation to respect equality should be directly enforceable against persons or bodies other than the State

The question whether Article 40.1 is enforceable against persons or bodies other than the State is a potentially troublesome one. There have been some (very slight) judicial hints that Article 40.1 may apply to the private law arena: see *Murtagh Properties Ltd v Cleary*. In addition, the courts have held in some cases that other constitutionally guaranteed rights were enforceable against a non-State entity: see *Glover v BLN Ltd* [1973] IR 388. At the same time, there are indications that the courts are unwilling to apply the Constitution to purely commercial relationships between private parties, as this might represent, in the words of McCracken J in *Carna Foods Ltd v Eagle Star Insurance Co (Ireland) Ltd* [1995] 1 IR 526 a 'serious interference in the contractual position of parties in a commercial contract'.

One immediate problem is the question of what constitutes the State for this purpose. Although there is no authoritative judicial ruling on this question, it would seem that the addressees of Article 40.1 include local authorities, but difficulties may arise in borderline cases such as State-sponsored bodies, universities and bodies established by statute. Similar difficulties have arisen in the United States where the US Supreme Court has ruled that the equality provisions of the 14th Amendment 'erect no shield against merely private conduct, however discriminatory or wrongful': *Shelley v Kraemer* 334 US 1 (1948). This case concerned the enforcement of restrictive covenants contained in conveyances precluding the purchase of the property by persons of designated races and the court noted that for so long as 'those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not be violated'. However, in this case there was more, as the covenants 'were secured only by judicial enforcement by state courts of the restrictive terms of the agreement' and, accordingly, this was held to constitute 'State action' and, hence, trigger the application of the equality guarantee. This decision has subsequently given rise to a series of complex judicial decisions on the question of State action: see, for example, *Burton v Wilmington Parking Authority* 365 US 715 (1961) where it was held that the fact that a restaurant was a lessee of a State authority was sufficient to ensure that the 14th Amendment applied. The extension of this doctrine in cases such as *Burton* has been criticised by a noted commentator on the ground that it fails to take account of the special cases where the individual's liberty, privacy and autonomy should outweigh 'even the equal protection of the laws': see Henkin, 'Shelley v Kraemer: Notes for a Revised Opinion' in 110 *University of Pennsylvania Law Review* 473 (1962). The US Supreme Court has, to some extent, drawn back from the *Burton* decision by holding in *Moose Lodge v Irvis* 407 US 163 (1972) that all State involvement, however indirect, is sufficient to attract the application of the equal protection doctrine. In that case it was held that the grant of a liquor licence was not sufficient State action, because discrimination:

> by an otherwise private entity would be violative of the Equal Protection Clause [of the 14th Amendment] if the private entity receives any sort of benefit or service at all from the State, or if it is subject to State regulation in any

degree whatsoever. Since State-furnished services include such necessities of life as electricity, water, police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct.

It may also be noted that the German and Italian courts lean against giving the equality principle a 'horizontal effect', that is, they confine its application to the State and do not apply it to third parties: see Kelly, 'Equality before the Law in Three European Jurisdictions', 1983, *Irish Jurist* 259. While the Irish jurisprudence in this area is surprisingly undeveloped, it would seem that persons deriving their authority from statute or otherwise exercising public law functions probably constitute the State for the purposes of Article 40.1.

The second question is whether Article 40.1 should apply to private organisations such as trade unions, banks and insurance companies. Because such bodies exercise enormous influence and control over the lives of people, it has been suggested that the obligation should be extended to them in addition to the State. While an extension of the obligation to all persons might be seen as too broad-ranging, if not altogether unworkable, the question of whether Article 40.1 should be extended to cover some such bodies deserves to be considered.

Argument for extension

1 discrimination is often practised by persons and bodies other than the State. A more extensive obligation to respect equality would afford constitutional protection to the victims of such discrimination.

Arguments against

1 a constitution regulates the relations between an individual and the State. The regulation of relations between individuals is a legislative matter

2 it would constitute an unjustified intrusion upon individual autonomy

3 on occasion it would conflict with other fundamental rights such as freedom of expression and of association

4 it is difficult to identify to whom other than the State the obligation should apply

5 it is preferable to leave it to the Oireachtas to determine particular areas of activity to which the guarantee of equality should be applied as it has done, for example, in the area of employment law.

Recommendation

The Review Group considers that the constitutional obligation to respect equality should not be directly enforceable against persons or bodies other than the State and public bodies.

6 whether the State's obligation should encompass a duty to ensure respect for equality by persons and bodies other than the State

It is clear that the State's obligation to respect equality applies to the exercise of State authority. It would seem that all arms of government are bound thereby: the administration, the executive, the legislature and the judiciary; certainly the equality guarantee has been so interpreted in other jurisdictions.

While the State may, for example by legislation, impose an obligation on other persons and bodies to respect equality, at present it is not clear whether and, if so, to what extent, the State is required by the Constitution to ensure respect for equality by other persons and bodies.

Arguments for extension of the State's obligation

1 discrimination is often practised by persons and bodies other than the State, and a State obligation to ensure respect for equality by other persons and bodies would afford constitutional protection to the victims of such discrimination

2 equality is such a fundamental democratic value that the State should ensure it is generally respected.

Arguments against

1 it would constitute an unjustified intrusion upon individual autonomy

2 on occasion it would conflict with other fundamental rights such as freedom of expression and of association

3 the extent of the State's obligation to ensure that other persons and bodies respect equality would be unclear

4 it is undesirable and contrary to the separation of powers that the courts should have the power to require State action, for example legislation, to ensure equality in private relations. Such matters are more properly regarded as policy issues to be determined by the Government and/or the Oireachtas

5 an obligation on the State to ensure general respect for equality is more appropriately addressed in the Constitution as a non-justiciable directive of social policy.

Recommendation

There should be no enforceable constitutional obligation on the State to ensure respect for equality by persons or bodies other than the State and public bodies.

7 whether the second sentence of Article 40.1 should be deleted, extended or replaced

The second sentence of Article 40.1 specifies some legitimate bases for the differential legislative treatment of persons, namely, physical and moral capacity and social function. The

qualification contained in the second sentence was intended to accommodate the differences of capacity and of social function which often compel different treatment by the law: see the comments of Mr de Valera at 67 *Dáil Debates* 1590. A good statement of how this second sentence should operate was provided by the judgment of Henchy J in *Dillane v Ireland* [1980] ILRM 167:

> When the State ... makes a discrimination in favour of, or against, a person or category of persons, on the express or implied grounds of a difference of social function the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of.

Unfortunately, the second sentence has too frequently been used by the courts as a means of upholding legislation by reference to questionable stereotypes, thereby justifying discrimination against, for example, an unmarried person as compared with a married person *(The State (Nicolaou) v An Bord Uchtála* [1966] IR 567) and a man as compared with a woman: *Norris v Attorney General* [1984] IR 36*; Dennehy v Minister for Social Welfare* (1984) and *Lowth v Minister for Social Welfare* [1984] ELR 119. Moreover, the second sentence is not exhaustive since the courts have regarded discrimination on other bases as justified: see, for example, *O'B v S* [1984] IR 316.

A further difficulty is that the second sentence refers to 'enactments' of the State. The use of this word suggests that the second sentence can be invoked in the context of legislation only, for example that the State is required to abide by a type of formalistic equality by treating every-one the same – regardless of relevant differences – *unless* legislation allows for differing treatment. A further problem is that there appears to be authority for the view that the reference to 'enactments' confines the application of Article 40.1 to the operation of statutory law and common law, as the Supreme Court has ruled that Article 40.1 does not apply to international agreements such as treaties: *McGimpsey v Ireland* [1990] 1 IR 110. There also appears, however, to be some subsequent authority for the view that Article 40.1 is a more free-ranging concept which can apply to purely executive acts, divorced from the legislative context: see, for example, the comments of Denham J in *Howard v Commissioners of Public Works* [1994] 1 IR 101 and the judgments of Blayney and Denham JJ in *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10.

In order to make it clear that legislative distinctions may legitimately be made on other grounds and to counteract any judicial tendency to reinforce inequality on the grounds of respecting differences of capacity or social function, it may be desirable to delete, extend or replace this sentence.

Arguments for deletion

1 there are many grounds in addition to physical or moral capacity and social function on which differential treatment

is justified and it is not possible to list these grounds exhaustively

2 the named grounds have on occasion been interpreted by members of the judiciary in a way which perpetuated stereotypes and thereby endorse inequality where these stereotypes are based on unequal social relationships

3 removal of the references to differences of capacity and of social function would facilitate a more egalitarian interpretation of the provision.

Argument for extension

1 explicit constitutional protection for legislative distinctions is desirable and the grounds need to be extended to cater for other acceptable bases of distinction.

Argument for replacement

1 explicit provision should be made in the text of Article 40.1 to make it clear that the Oireachtas may differentiate between people when there is a valid reason for doing so and any such different treatment is proportionate. Such a provision might read:

> This shall not be taken to mean that the State may not have due regard to relevant differences.

Argument for retention

1 physical or moral capacity and social function are widely accepted as legitimate grounds for differential legislative treatment.

Recommendation

A majority of the Review Group favours replacement of the second sentence in Article 40.1 by:

> This shall not be taken to mean that the State may not have due regard to relevant differences.

This recasting of the second sentence will entail the dropping of the reference to 'in its enactments'. This phrase is too restrictive and the Review Group is of the opinion that the State should not only be generally bound by the precept of equality, but should also be permitted to have regard, where appropriate, to relevant differences even if this has not been expressly sanctioned by legislation.

8 whether there should be an express prohibition of direct and indirect discrimination on specified grounds

A guarantee of equality before the law is capable of being interpreted in a way which does not prohibit all discrimination by the State. 'Law' may be construed to mean legislation only,

though it has not been so narrowly construed by the courts which have been prepared to strike down common law distinctions as contrary to the guarantee of equality before the law: see, for example, *W v W* [1993] 2 IR 476. The courts have also regarded the guarantee as applying to the conduct of the courts themselves and to executive action which is legislatively based. However, the guarantee probably does not extend to State activities which have no legal basis; and the Review Group is of the opinion that it is desirable that there be included in Article 40.1 an express prohibition of discrimination which would apply to all State activities and would strengthen the guarantee of equality.

The Review Group is further of the opinion that both direct and indirect discrimination should be expressly prohibited. While a prohibition on discrimination or guarantee of equality before the law is capable of being interpreted to catch both direct and indirect discrimination, it seems that the courts do not always regard the latter as falling within the scope of Article 40.1: see for example *Draper v Attorney General* [1984] IR 277. Explicit provision has been made in the constitutions of a number of other countries and in international human rights texts for the prohibition of indirect discrimination, and the Review Group considers it desirable that Article 40.1 should contain such a provision. Indirect discrimination can be as prejudicial and hurtful as direct discrimination to those who are the object of it. It is often less apparent than direct discrimination and can easily be overlooked.

The Review Group received submissions from many sources urging the specification of prohibited grounds of discrimination, and believes that an express prohibition on specified grounds would be reassuring to those groups the members of which would be protected thereby.

Typical grounds of prohibited discrimination in the constitutions of other countries and in international human rights instruments (including the International Covenant on Civil and Political Rights and the European Convention on Human Rights to both of which Ireland is a party) are: sex, race, colour, language, religion, political or other opinion, national, social or ethnic origin, property, birth or other status. The listed grounds are usually illustrative rather than exhaustive. A majority of the Review Group favours an illustrative list which would include all of the universally agreed grounds specified above as well as age, disability, sexual orientation and, particularly in the Irish context, membership of the travelling community.

The Review Group notes that the word ‘discrimination’ is used in two different senses. It is sometimes used, as it has been by the courts in their interpretation of Article 40.1, without any pejorative connotation. Used in this sense, it signifies the differential impact of the same treatment on persons belonging to different categories, for example women as distinct from men. Since there may exist good reason for the differential treatment or impact, some epithet such as ‘unfair’ or ‘invidious’ is needed to indicate that not all such discrimination is prohibited. At other times the word ‘discrimination’ of itself carries pejorative connotations. It is regarded as occurring only where no objective justification exists for the differential treatment or impact. Because of this ambiguity in the use of the word, and in view of

the sense in which it has been used by the courts in their interpretation of Article 40.1, the Review Group thinks it desirable that the prohibition be phrased in terms of unfair discrimination.

Recommendation

A majority of the Review Group recommends that there should be added to Article 40.1 a section in the following terms:

> No person shall be unfairly discriminated against, directly or indirectly, on any ground such as sex, race, age, disability, sexual orientation, colour, language, culture, religion, political or other opinion, national, social or ethnic origin, membership of the travelling community, property, birth or other status.

9 whether there should be a separate provision expressly guaranteeing equality between women and men

Although women comprise 50.3% of the Irish population, they do not occupy a commensurate position in the economic, social and political spheres. They comprise almost 99% of homeworkers, but just 36% of the total employed labour force (Employment Equality Agency (EEA), *Women in the Labour Force,* Stationery Office, Dublin 1995). When women do enter paid employment they are disproportionately represented in the lower paid and insecure areas of the labour market: 72% of all part-time workers are women and 85% of the lowest paid part-time workers are women (see Blackwell, J and Nolan, B, 'Low Pay – The Irish Experience', in B Harvey and M Daly, *Low Pay: The Irish Experience,* Dublin 1990, p 11; EEA, op cit, pp 13-14). At the other end of the employment spectrum, men occupy the senior posts in most private and public sector organisations, and in all 86% of employers are men (EEA, op cit, pp 43-50; McCarthy, E*, Transitions to Equal Opportunity at Work in Ireland*, EEA, Dublin 1988; Central Statistics Office, *Labour Force Survey 1993*, Stationery Office, Dublin 1995). Men own most of the land in Ireland with 90% of farm holders being men; and women's dependency is reflected in both the tax and social welfare codes (see *Second Commission on the Status of Women: Report to Government,* 1993).

The nature and scale of inequality between women and men are not unique to Ireland. It is a universal experience and historically has been a feature of most known societies. This fact is increasingly gaining worldwide recognition, and explicit provision has been made in the constitutions of several countries for equality between men and women (see, for example, Article 3(2) of the Basic Law of Germany). Such provisions are generally understood not only to afford protection against discrimination on the basis of sex but also to open the way for *de facto* equality between the sexes and to legitimise positive measures to accelerate the process. The advancement of the equality of the sexes has been accepted as a major goal by European states, and active consideration is currently being given by the member states of the Council of Europe to the adoption of an additional protocol to the European Convention on Human

Rights whereby this equality would become an independent, justiciable human right.

Arguments for a separate provision

1 the historical and cross-cultural evidence of pervasive inequalities based on sex suggest that such inequalities need to be addressed at the constitutional level if they are to be overcome

2 it would accelerate *de facto* equality between women and men

3 inequalities based on sex are increasingly being addressed in international human rights instruments and in the constitutions of other countries

4 it would have an important symbolic value since it would send out a message that women's continued subordination to men in so many institutions and systems is unacceptable and should be redressed.

Arguments against

1 it is invidious to include a special provision which addresses inequality on the basis of sex but not on other grounds

2 Article 40.1 in the recommended revised form, guarantees equality before the law for all individuals. This includes equality between men and women. If a separate express guarantee of equality between the sexes were included this might suggest that the general guarantee was not intended to be all-embracing and weaken its impact.

Conclusion

A majority of the Review Group does not regard it as necessary to have an express guarantee of equality between men and women having regard to the general guarantee of equality before the law and the prohibition on discrimination.

10 whether there should be explicit provision in relation to the burden of proof of discrimination

The burden of proof in a legal action lies on the plaintiff. It has often proven difficult in practice for persons who believe they have been the victims of discrimination to prove the existence in law of unfair treatment. As a result, it has been suggested that if the plaintiff can prove differential treatment on some basis to his or her detriment, then the burden of proving that there exists justification for the differential treatment should shift to the defendant. Questions of proof are not generally regarded as constitutional matters, but there is constitutional precedent for regarding it as such in cases of alleged discrimination: see Annex following – section 8(4) of the constitution of South Africa. It may be desirable to include such a provision in the Constitution as an expression of the importance attached by the State to the elimination of discrimination.

Arguments for explicit provision

1 there is much evidence that it is particularly difficult for a plaintiff to satisfy the burden of proof in cases of alleged discrimination

2 the victims of discrimination are often vulnerable individuals who do not have the resources necessary to prove discrimination

3 while facilitating proof of discrimination by the plaintiff, it would not unfairly prejudice the defendant in that where justification exists for the differential treatment, the defendant would be able to plead such justification

4 the issue of the burden of proof is an important aspect of the achievement of equality.

Arguments against

1 a constitution should not concern itself with such matters of legal procedure

2 the issues relating to burden of proof are not susceptible to a single rule. The burden may shift several times within the one action. Justice can better be achieved by permitting such flexibility to continue.

Recommendation

A majority of the Review Group does not favour any change.

11 whether there should be a right to freedom from poverty and social exclusion

Economic inequalities need to be addressed if the social divisions in Ireland are to be contained and reduced. It has been suggested that one way of doing this at the constitutional level in the context of fundamental rights would be for the State to guarantee a general right to freedom from poverty and social exclusion. The Review Group has, therefore, considered whether such a right should be guaranteed by the Constitution.

The inclusion of such a right in the Constitution would render it justiciable.

The Government, through its endorsement of the National Anti-Poverty Strategy as outlined in *Poverty, Social Exclusion and Inequality in Ireland* (Inter-departmental Policy Committee on the National Anti-Poverty Strategy, Discussion Paper, 1995, p 3) has accepted the following definition of poverty:

> People are living in poverty, if their income and resources (material, cultural and social) are so inadequate as to preclude them from having a standard of living which is regarded as acceptable by Irish society generally. As a result of inadequate income and resources people may be excluded and marginalised from participating in activities which are considered the norm for other people in society.

Poverty is defined herein not only as a state or condition of lack or want, but also as a relative condition in which a) one is deprived of a reasonable standard of living relative to others generally in society and b) as a result, one is excluded and marginalised from participating in activities which are considered the norm within society. Thus, poverty and social exclusion are linked; this is now the accepted way of defining poverty within the European Union poverty programmes.

Arguments for a right to freedom from poverty and social exclusion

1 because Ireland is a relatively wealthy society, it is appropriate that a constitutional provision be introduced giving all people a right to freedom from poverty.

   Ireland occupies nineteenth place on the World Human Development Index for 1995, up from twenty-first place a few years previously. Yet economic inequalities are extensive, and pervasive over time. When poverty is measured in relative terms (which is now the accepted way of measuring it within Ireland), it has been shown that the number of people living in poverty increased between 1973 and 1987 (*Poverty, Social Exclusion and Inequality in Ireland,* op cit, p 6).

2 the tendency for relative poverty to rise suggests that some constitutional protection is necessary for the most vulnerable members of society

3 because the Government endorsed a programme of action geared not only to eliminating absolute poverty in the developing world but to a substantial reduction of overall poverty and inequalities at the national level (at the UN World Summit for Social Development, Copenhagen, March, 1995), and because 1996 has been deemed the International Year for the Eradication of Poverty, it is both timely and appropriate that Ireland's commitment to the eradication of poverty 'as an ethical, social, political and economic imperative of humankind' (Copenhagen Declaration, Commitment 2) should find constitutional expression.

Arguments against

The main arguments against inserting a personal right to freedom from poverty and social exclusion in the Constitution, and to providing specific personal economic rights, are summarised of the end of Issue 12 below, where the Review Group's majority recommendation also appears.

12 whether there should be provision for specific economic rights as a counterweight to economic inequality

Economic inequality in Irish society appears in the way in which wealth such as land and business capital is distributed, and in which income and welfare are structured. The 1987 Household Budget Survey undertaken by the ESRI shows that 75% of

households in Ireland own no farm land but the top 5% of all households own 66% of all net wealth in the form of farm land (see Nolan, B, *The Wealth of Irish Households,* Combat Poverty Agency, Dublin 1991, p 46). When it comes to private businesses, 1% of households own 60% of all such wealth (ibid, p 52). In addition, inequality is maintained in pay agreements and welfare provisions. In 1987 terms, 28% of all employees within the State were earning a gross wage of £130 per week or less (Blackwell and Nolan, op cit, p 19). An estimated 30.4% live below the 'poverty line', defined as having an income 60% or less of the average industrial wage (see Callan, T and Nolan, B, *Poverty and Policy in Ireland,* Dublin 1994, p 32).

It has been estimated that, within Ireland, the richest 10% (measured in terms of disposable income) receive 25% of total income while the bottom 10% receive 2.5%. The only countries within the twenty-five OECD countries with a more uneven distribution of income are the US and the UK (Atkinson et al, *Income Distribution in OECD Countries: The Evidence from the Luxembourg Income Study*, OECD, Paris 1995).

The constitutions of several countries and international human rights texts guarantee economic rights, and some of these rights are targeted at the alleviation of economic inequality.

Arguments for the provision of specific economic rights

1 constitutional recognition of some such right as the right of everyone to an adequate standard of living, including adequate food, clothing and housing, or a right to an adequate income, would signal a commitment by the State to ensuring the basic material needs of all persons within the State and would enable the judiciary to provide redress to anyone denied these minimum entitlements

2 such a constitutional provision would recognise (i) the interdependence between the resources which people own and control and their access to justice and other aspects of equality and (ii) the need for an assurance of basic economic rights as a counterweight to economic inequality

3 greater economic equality would lead to greater political stability on which the effective functioning of democracy depends. A society strongly polarised in economic terms is fundamentally unstable. The sources of instability include political alienation from the democratic process and the development of alternative 'economies' based on crime or illegal trading. The latter is particularly likely to happen in societies which encourage high levels of consumption through advertising, media images etc, and thereby create high levels of aspiration for a wide range of goods and services. The message of pervasive consumption is universal, and is not confined to any one sector of society. The frustration arising from the inability to match aspiration and realisation is a fountain of political instability

4 economic inequality and poverty are socially and economically dysfunctional as they result in inefficient use of talents and resources and substantial costs to the State (and

this means the members of society generally) both directly via welfare, housing, health and other costs, and indirectly through the alienation and detachment which develops among those economically excluded from equal participation in society. Because of this it is desirable that economic inequalities should be proscribed at the constitutional level.

Arguments against including in the Constitution a personal right to freedom from poverty or specific economic rights

1 it is not contested that differentials in the distribution of income and wealth may be wider than society should accept or that policy should not properly be directed towards eliminating poverty, homelessness, exclusion or marginalisation, and other social ills. The main reason, however, why the Constitution should not confer personal rights to freedom from poverty, or to other specific economic or social entitlements, is that these are essentially political matters which, in a democracy, it should be the responsibility of the elected representatives of the people to address and determine. It would be a distortion of democracy to transfer decisions on major issues of policy and practicality from the Government and the Oireachtas, elected to represent the people and do their will, to an unelected judiciary

2 this may be illustrated by reference to the implications of conferring a constitutional right on everybody to freedom from poverty, a condition not susceptible to objective determination. It would then become a matter for judges in particular cases to determine what constitutes poverty (absolute or relative) and what minimum income would be needed, according to circumstances, to overcome it. Government and Oireachtas would have no discretion as to what amount of revenue could, or should, be raised from the public to fund the remedial requirement

3 the solving of economic and social problems is an integral element of any political agenda but the degree to which a solution can be sought or found must depend on the resources which the community is prepared to make available at any given time. It would not accord with democratic principles to confer absolute personal rights in the Constitution in relation to economic or social objectives, however desirable in themselves, and leave the Oireachtas with no option but to discharge the cost, whatever it might be, as determined by the judiciary

4 there could, however, be no objection to expressing the substance of these objectives as directive principles addressed to Government and Oireachtas but not justiciable in the courts

5 as regards inequalities of wealth and income, it is open to the Government and the Oireachtas to reduce such inequalities, to any desired extent, by fiscal policy measures. Moreover, the Constitution (Article 43) expressly envisages curtailment by the State of property rights in accordance with the principles of social justice and the exigencies of the common good

6 it is obviously important that no one should be allowed to fall below a minimum level of subsistence so as to suffer from a lack of food, shelter or clothing. If this should ever happen, despite the social welfare system, the Constitution appears to offer ultimate protection through judicial vindication of fundamental personal rights such as the right to life and the right to bodily integrity.

Recommendation

A majority of the Review Group agrees with the arguments stated above against the inclusion in the Constitution of a personal right to freedom from poverty or of specific personal economic rights.

13 whether there should be a separate provision for a right of effective access to the courts

Even if provision is made for substantive equality of rights, rights may be meaningless for persons who are not able to assert them. Persons may be intimidated by the legal process; they may not know how to go about enforcing those rights; or they may not be able to afford lawyers' fees. The Report to the Minister for Justice of the Committee on Civil Legal Aid (1977), chaired by Mr Justice Pringle, pointed out, *inter alia*, that people from disadvantaged communities are often unable to secure equal access to justice owing to lack of finance, insufficient knowledge of legal rights and the social and cultural gaps which exist between lawyers and potential clients. Since that date there have been some improvements in some respects: there is now, at least, a system of legal aid in place in civil cases (however inadequate this is considered to be) and the scheme itself has recently been placed on a statutory footing by the Civil Legal Aid Act 1995. As sections 24-28 of that Act specify the criteria governing the grant of legal aid, it may be anticipated that this will be judicially interpreted as giving certain enforceable legal rights to legal aid.

The Irish courts have not hitherto, generally speaking, been disposed to recognise a constitutional right to legal aid, although in more recent times there have been mixed signals in this regard. In *O'Shaughnessy v Attorney General* (1971) O'Keeffe P rejected a plaintiff's claim that the provisions of the Criminal Justice (Legal Aid) Act 1962 were unconstitutional inasmuch as they did not provide for civil legal aid. Gannon J adopted a similar view in *MC v Legal Aid Board* [1991] 2 IR 43 and in *Corcoran v Minister for Social Welfare* [1992] ILRM 133 Murphy J rejected a similar claim in respect of the non-availablility of civil legal aid before administrative tribunals. However, in *Stevenson v Landy* (1993) Lardner J held that the constitutional obligation with regard to the administration of justice meant that the Legal Aid Board was required to grant legal aid in circumstances where a mother likely to be affected by wardship proceedings had a 'worthwhile contribution' to make to the hearing of the case. And in *Kirwan v Minister for Justice* [1994] 2 IR 417 the same judge ruled that an applicant who was being detained in the Central Mental Hospital was entitled to free legal aid in respect of his appearance before a committee established by the Minister for Justice whose task it was to advise on whether persons such as the applicant were fit to be released from detention.

At European level, of course, Ireland was found guilty of breaching Article 6 of the European Convention on Human Rights by not ensuring that the indigent plaintiff could have effective access to the courts in respect of her family law proceedings against her husband: *Airey v Ireland* (1979-80) 2 EHRR 305. As the European Court of Human Rights said:

> The Convention is intended to guarantee not rights which are theoretical or illusory but rights which are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.

But contrary to what is sometimes supposed, the court did not require that legal aid be supplied in all cases of hardship on the part of a litigant. The question of the determination of the means used to secure the right of access to the courts was, in principle, a matter for the State:

> The institution of a legal aid scheme ... constitutes one of those means but there are others, such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures will be taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6(1).

In the light of these considerations, the question arises whether there should be provision for a right of effective access to the courts.

Arguments for an effective right of access to the courts

1 the constitutional principles governing equality before the law, the right to a fair trial and access to the courts are well established. A natural extension of these principles is the inclusion of a constitutional right of access to justice. In the absence of such a right, the principles outlined above may be largely aspirational for those who lack the means to pay for legal services. Moreover, when access is available to those on low incomes through the Free Legal Aid service, it can be provided only in a limited range of cases (see The Legal Aid Board *Annual Report*, 1993; and the Annual Report of the Free Legal Advice Centres, *Access to Justice*, 1994)

2 if all people in society are to have equal access to justice, they must have the means, resources and support to ensure this. The Constitution has a role to play in ensuring that all people have effective, as well as formal, equality of access to justice. At present, there is no duty on the State to provide for civil legal aid, for example, and attempts to establish such a right before our courts have been generally unsuccessful. Given the lack of equality in access to justice, constitutional assurance of such access seems crucial, especially for those who are economically disadvantaged.

Arguments against

1 equality before the law can be understood to include equal access to justice and has been so interpreted in other jurisdictions

2 it is a matter for legislation to specify such free legal aid or other measures as the Oireachtas may judge to be necessary to support the constitutional provision for equality before the law and access to the courts.

Recommendation

The Review Group notes that the right of access to the courts is already protected as an implied personal right by virtue of Article 40.3.1°. Furthermore, the Review Group will be recommending at the conclusion of its discussion of Article 40.3.1° that this right should receive express enumeration in the Constitution. While the Review Group agrees that this right should not remain a purely theoretical one, a majority considers that there is no need to go further and specify in the Constitution how the Oireachtas might give practical effect to the right of access.

14 whether there should be provision for specific measures to secure equal access to justice

Over the last twenty years a variety of measures has been taken in many countries with the objective of promoting equal access to justice. Two such measures, class actions and public interest actions, relate to matters of standing in court. They make it possible for concerned individuals and organisations to approach the court in order to claim relief in the public interest or on behalf of others who would not be able to enforce their rights themselves. In Ireland, the *locus standi* rules are relatively generous. In effect, the courts have distinguished between two types of cases. In the majority of cases the plaintiff will be required to demonstrate that, in the words of Henchy J in *Cahill v Sutton* [1980] IR 269, 'the impact of the impugned law on his personal situation discloses an injury or prejudice which he or she has either suffered or is in imminent danger of suffering'. However, there is also a category of cases in which the plaintiff will either suffer no personal injury by the operation of the impugned law or executive action or, if he or she does, he or she will share it in an undifferentiated way with all other citizens. In those circumstances, the courts will afford standing to any bona fide interested citizen: see, for example, *McGimpsey v Ireland* [1990] 1 IR 110; *McKenna v An Taoiseach* [1995] 2 IR 10 and *Riordan v Spring* (1995).

In other jurisdictions, class (or representative) actions have proved to be an effective procedure in constitutional litigation. By this procedure an individual may bring or defend an action on behalf of persons with a common interest or common grievance. Order 15, rule 9 of the Rules of the Superior Courts 1986 provides for such representative actions and while this procedure (or something akin to it) has been invoked on occasion in the course of constitutional litigation (see, for example, *Greene v Minister for Agriculture* [1990] 2 IR 17), the Irish case law in this area is relatively underdeveloped.

A public interest action differs from a representative action in that the plaintiff who takes the action does not represent any particular individual or individuals, but acts on behalf of the public at large or a segment of the public. The various cases involving the special context of Article 40.3.3° (see, for example, *Society for the Protection of Unborn Children (Ire) Ltd v Coogan* [1989] IR 734) are the only instances of where this form of public interest action was permitted by the courts.

While it is not usual for such specific measures as standing and class actions to be constitutionally prescribed, section 7(4) of the constitution of South Africa makes express provision in this regard:

a) When an infringement of or threat to any right entrenched in this Chapter [on fundamental rights] is alleged, any person referred to in b) shall be entitled to apply to a competent court of law for relief, which may include a declaration of rights.

b) The relief referred to in paragraph a) may be sought by –

   i) a person acting in his or her own interest

   ii) an association acting in the interest of its members

   iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name

   iv) a person acting as a member of or in the interest of a group or class of persons, or

   v) a person acting in the public interest.

In practice, Irish law already corresponds to section 7(4), save that, generally speaking, one person is not permitted to take an action on behalf of a group or class of persons (unless of course such persons are not themselves in a position to take such action: see *Society for the Protection of Unborn Children (Ire) Ltd v Coogan*). However, the question arises as to whether express constitutional provision should be made in Ireland for *locus standi* rules and class actions vindicating fundamental rights.

Arguments for the provision of specific measures

1 the constitutional prescription of specific measures would secure more effective access to justice for all, irrespective of income, education or social class

2 without such provision, many people may not be in a position to assert their constitutional rights.

Argument against

1 specific measures are more appropriately provided for in legislation.

Recommendation

Having regard to the generally liberal and flexible nature of our *locus standi* rules, the Review Group is not persuaded that there is any need for an express provision along the lines of section 7(4) of the constitution of South Africa. However, if the Review Group's recommendations in respect of a Human Rights Commission were to be accepted, consideration should be given to permitting that body either to take constitutional actions on behalf of individual citizens or the public at large in appropriate circumstances. The commission might also be given the right to intervene as an *amicus curiae* in some constitutional actions involving fundamental rights.

15 whether there should be explicit protection for affirmative action to promote equality

In a society where there are disparities in income and wealth, some persons must occupy the lowest positions. There is much empirical evidence that those who do will be the most vulnerable and marginalised, including working class women and children, the unemployed and disabled people (Nolan and Farrell, 1989; Murray, 1990; Callan and Nolan, op cit). So, although working class women or disabled people may have a formal right to enter particular professions, schools or colleges, they often will not be able to avail themselves of this right because they lack resources to compete on equal terms. Given their relatively low economic standing, they will not be able to compete equally for other valued goods and services either.

By taking affirmative action, the problem may be overcome, to some degree, depending on the nature of the action taken.

It is now not unusual for explicit provision to be included in constitutional and international human rights texts allowing for affirmative action to be taken to promote equality (see, for example, section 8(3)(a) of the constitution of South Africa and Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination). Explicit provision is seen as necessary to permit the taking of positive measures to rectify disadvantage and to ensure that such measures do not constitute prohibited discrimination. Such measures could be drafted so as to comply with certain criteria, such as proportionality, so that they do not in fact go beyond the rectification of disadvantage and operate to the unjust advantage of the target group, thereby introducing a new inequality. To be lawful, any such legislative measures would also have to respect any limits imposed by EU law (see, for example, Case C-450/93, *Kalanke v Bremen*, Judgment of the European Court of Justice, 17 October 1995).

Arguments for explicit protection

1 equality of formal rights and opportunities has, of itself, little impact on the promotion of equality in any substantive sense. Substantive equality depends not only on having the formal right to participate but on having the actual ability and resources to do so. To ensure that people will have the capacity to participate in democratic society on an equal basis with others, affirmative action is necessary, particularly for those who have experienced substantial prior disadvantages for whatever reason. It is, therefore, appropriate that the legislature and the Government should be free to take such action as they deem necessary for the promotion of substantive equality in society. Without constitutional protection for affirmative action, the legislature and the Government may not be in a position to introduce positive measures to overcome those systemic inequalities which perpetuate cycles of disadvantage

2 an explicit protection for affirmative action may clarify that the equality guarantee extends beyond the prohibition of discrimination to the taking of positive measures to overcome disadvantage

3 it is usual for explicit provision to be made in international human rights texts permitting such action and making it clear that it does not constitute prohibited discrimination

4 explicit provision permissive of affirmative action is to be found in the constitutions of some countries.

Arguments against

1 positive legislative measures to reduce disadvantage and promote greater equality of opportunity continue to be introduced here as elements of social and fiscal policy without encountering constitutional difficulty

2 the scope of 'affirmative action' might be unduly widened by a constitutional provision and thus create conflict with other constitutional requirements

3 such a provision could permit primacy to be afforded to group rights over individual rights

4 it could also permit measures to be taken today which would discriminate between two groups solely because of the historical disadvantage of one group.

If there is to be explicit provision for affirmative action, an ancillary issue arises as to whether the groups in respect of which positive measures are to be permitted should be identified in the Constitution or whether they should be covered by a general description such as 'persons disadvantaged by unfair discrimination'.

Another ancillary issue is whether affirmative action designed to correct historical inequality should be subject to some general time-limit. Some human rights texts which explicitly allow for affirmative action in order to rectify historical disadvantage provide that such action shall be discontinued after the objectives

of equality of opportunity and treatment have been achieved. No specific time-limit is specified since the time needed to rectify disadvantage will depend upon a number of factors, including the type of measures taken and the particular disadvantage which it is sought to redress.

On this subsidiary issue, it appears to the Review Group that no time-limit would be appropriate. The nature of the measures which it would be appropriate to take as well as the time needed to achieve their purpose would vary according to the specific case, and decisions thereon are more properly regarded as policy decisions to be taken by the legislature and the Government rather than specified in the Constitution.

Conclusion

The Review Group is divided on the basic issue whether it is necessary or desirable to include specific authorisation of 'affirmative action' in the Constitution. Because of the difficulty of defining 'affirmative action' and of appointing reasonable constitutional limits to the exercise of such an authority and because of the primary responsibility of Government and Oireachtas in determining the associated policies, some members prefer that pursuit of the objective of rectifying unfair disadvantage should continue to be legislatively authorised, at least until (if ever, given the amendments proposed) a constitutional barrier presents itself. Other members preferred that a specific provision should be included in the constitution, loosely based on Article 8(3) of the South African constitution (see Annex following), on the grounds that the realisation of any substantive degree of equality for marginalised social groups would be advanced by a constitutional provision and that it would give the Government and the Oireachtas constitutional protection for any affirmative action policies they might wish to introduce.

Summary of recommendations

A majority of the Review Group recommends that Article 40.1 be amended along the following lines:

40.1.1° All persons shall be held equal before the law. This shall not be taken to mean that the State may not have due regard to relevant differences.

40.1.2° No person shall be unfairly discriminated against, directly or indirectly, on any ground such as sex, race, age, disability, sexual orientation, colour, language, culture, religion, political or other opinion, national, social or ethnic origin, membership of the travelling community, property, birth or other status.

Annex

The South African Constitution[1]

Section 8

1) Every person shall have the right to equality before the law and to equal protection of the law.

2) No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds, in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

3) a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons, disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

   b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection 2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

4) Prima facie proof of discrimination on any of the grounds specified in subsection 2) shall be presumed to be sufficient

[1] *Since the Review Group completed its work, the text of the constitution of the Republic of South Africa (as adopted by the Constitutional Assembly on 8 May 1996) became available. Its provisions in relation to equality are as follows:*

Section 9

1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection 3). National legislation must be enacted to prevent or prohibit unfair discrimination.

5) Discrimination on one or more of the grounds listed in subsection 3) is unfair unless it is established that the discrimination is fair. proof of unfair discrimination as contemplated in that subsection until the contrary is established.

Titles of Nobility or Honour

40.2

40.2.1° *Titles of nobility shall not be conferred by the State.*

40.2.2° *No title of nobility or of honour may be accepted by any citizen except with the prior approval of the Government.*

The prohibition in this subsection on the conferring of titles of nobility follows immediately on the declaration of personal equality in Article 40.1 and is a recognition that such titles are not appropriate for bestowal by a democratic republic.

From the distinction between titles of nobility and of honour in the second subsection it may be inferred that the State is not prohibited by the first subsection from conferring titles of honour. The State has not, however, conferred such titles. Whether it should do so, and in what manner, are matters for Government and Oireachtas to determine, if and when they see fit.

The second subsection forbids the acceptance by any citizen of a title of nobility or of honour (sc. from an external source) except with prior Government approval.

Recommendation

No change is proposed.

Personal Rights

40.3

40.3.1° *The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*

40.3.2° *The State shall, in particular, 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.*

Background

Article 40.3.1° provides that the State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. Its interpretation has been closely linked with Article 40.3.2°, which provides that the State shall, in particular, 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 courts have interpreted Article 40.3.1° as a guarantee of many personal rights which are not specifically enumerated in the Constitution such as the right to marital privacy and the right to bodily integrity.

There was no equivalent to Article 40.3.1° in the 1922 Constitution. For many years little emphasis was placed on it as a repository of fundamental rights because it does not refer to any specific fundamental rights and also because in an early decision the Supreme Court indicated that the guarantee contained in it was not a guarantee for any particular citizen but rather for the citizens of the State generally (*In re Article 26 and the Offences Against the State (Amendment) Bill* [1940] IR 470). They held that the reconciliation of the rights of citizens as a whole was a matter entirely for the Oireachtas. This decision, which interpreted Article 40.3.1° extremely restrictively, suggested that it could not be relied upon to assert the existence of individual personal rights of the citizen which the State had an obligation to respect. The result was that for many years there was little focus on Article 40.3.1° as a protection for fundamental rights.

In 1965 a new approach to the interpretation of Article 40.3.1° became evident in the landmark judgment of *Ryan v Attorney General* [1965] IR 294 where a more expansive view was taken of its meaning. The plaintiff in that case claimed that the fluoridation of her water supply was harmful and interfered with her right to bodily integrity, a right which is not specifically mentioned in the Constitution. Kenny J, in a judgment that was upheld by the Supreme Court, held that Article 40.3.1° protected rights which were not stated explicitly in the text of the Constitution and that the plaintiff had a constitutional right to bodily integrity, an unenumerated right protected by Article 40.3.1°. The basis for this conclusion was that the use of the words *in particular* before the listing of individual rights in Article 40.3.2°, together with the reference to *personal rights* in Article 40.3.1°, meant that the statement of rights in the Constitution was not intended to be exhaustive and that the Constitution protected other latent, unspecified rights. Kenny J went on to identify a latent right to bodily integrity by reference to the Christian and democratic nature of the State and to a papal encyclical which identified *bodily integrity* as being amongst the natural rights of a person.

Thereafter, many other rights to which there is no explicit reference in the Constitution were identified by the courts as being amongst the latent or

i) the right to bodily integrity (*Ryan v Attorney General*)

ii) the right not to be tortured or ill-treated *(The State (C) v Frawley* [1976] IR 365)

iii) the right not to have health endangered by the State (*The State (C) v Frawley* [1976] IR 365)

iv) the right to earn a livelihood (*Murphy v Stewart* [1973] IR 97)

v) the right to marital privacy (*McGee v Attorney General* [1974] IR 284)

vi) the right to individual privacy (*Kennedy v Ireland* [1987] IR 587)

vii) the right to have access to the courts (*Macauley v Minister for Posts and Telegraphs* [1966] IR 345)

viii) the right to legal representation on criminal charges (*The State (Healy) v Donoghue* [1976] IR 325)

ix) the right to justice and fair procedures (*In re Haughey* [1971] IR 217, *Garvey v Ireland* [1980] IR 75)

x) the right to travel within the State (*Ryan v Attorney General*)

xi) the right to travel outside the State (*The State (M) v Attorney General* [1979] IR 73)

xii) the right to marry (*Ryan v Attorney General*, *McGee v Attorney General*)

xiii) the right to procreate (*Murray v Ireland* [1985] IR 532)

xiv) the right to independent domicile (*CM v TM* [1991] ILRM 268)

xv) the right to maintenance (*CM v TM*)

xvi) the rights of an unmarried mother in regard to her child (*The State (Nicolaou) v An Bord Uchtála* [1966] IR 567, *G v An Bord Uchtála* [1980] IR 32)

xvii) the rights of a child (*In re Article 26 and the Adoption (No 2) Bill 1987* [1989] IR 656, *G v An Bord Uchtála*, *PW v AW* [Ellis J unreported High Court, 21 April 1980], *FN (a minor) v Minister for Education and Others* [1995] 2 ILRM 297)

xviii) the right to communicate (*The State (Murray) v Governor of Limerick Prison* [D'Arcy J unreported High Court, 23 August 1978], *Attorney General v Paperlink Ltd* [1984] ILRM 343)

These developments mean that the doctrine of unenumerated rights enshrined in the Constitution has become a powerful source for the identification of hitherto unrecognised rights touching upon fundamental aspects of human activity. They arise partly from the fact that the list of fundamental rights specifically protected by the

Constitution is relatively short. They also reflect changes in social attitudes and concepts of justice and fairness that have occurred since 1937.

However, the identification of unenumerated rights has occurred on an *ad hoc* basis as required by the facts of particular cases. Frequently the issues arose because of the failure of the Oireachtas to legislate in certain areas, for example availability of contraceptives (*McGee v Attorney General*) and the regulation of telephone tapping (*Kennedy v Ireland*). As a result, we have a disparate set of rights which does not correspond to the broadly expressed and wide-ranging fundamental rights recognised in international conventions. Thus, the right to marital privacy was identified long before the general right to individual privacy. Similarly, some very specific and narrowly defined individual rights have been identified which would not normally be seen in texts of fundamental rights, where the expression of rights tends to be of a more general nature. Thus, the right to marital privacy and the right to maintenance would normally be understood as being encompassed in a more general right to marry. Furthermore, the list of rights identified to date is by no means complete and many rights contained in international conventions dealing with fundamental rights, such as the right not to be held in slavery or the right not to be imprisoned for non-payment of debt, have not yet been recognised because of the absence of case law in this area. It is obvious, therefore, that the process whereby individual unenumerated rights have been identified to date has not been based on a coherent theory of fundamental rights.

Elements of Article 40.3.1°

Article 40.3.1° obliges the State in its laws to respect, defend and vindicate the citizen's personal rights. Laws in this context cover not only legislation but also the common law. The obligation upon the State is not absolute in that its obligation is only to defend and vindicate the personal rights as far as practicable. Thus, the subsection acknowledges the fact that there is no absolute guarantee for the personal rights of the citizen. The guarantee is expressed to apply to citizens and it would seem that it generally would include aliens (*Kennedy v Ireland*). As is clear from the wording of Article 40.3.1°, no criteria are given within the section for the determination of what constitutes a *personal* right. It is apparent from the provisions of the next subsection, Article 40.3.2°, that personal rights include the life, person, good name and property rights of the citizen but, beyond that statement, there is no guidance from Article 40.3.1° itself as to what constitutes a personal right.

Benefits of Article 40.3.1°

The broad wording of Article 40.3.1° has had the important advantage of being flexible and allowing the scope of constitutional protections to develop gradually and to be extended to new important areas without the necessity of having referendums each time to enable the identification of widely accepted personal rights. It has enabled the courts to respond to changing perceptions of

justice and individual freedoms in society and reflects a useful capacity within the Constitution to adapt to social changes and changing ideas of personal rights. If the Article were more precise, the courts would equally be more restricted in the degree to which they could protect individual rights. The fact that the wording of Article 40.3.1° enables the courts to identify unspecified personal rights, means that the Constitution, through the process of judicial interpretation, can recognise and enforce the personal rights of people whose interests are not adequately protected by the democratic process. Increasingly over the years individuals who have considered that their needs are not being met by the institutions of representative democracy have turned to the courts (albeit not always successfully) to vindicate what they consider to be personal rights, for example *The State (Healy) v Donoghue* (where the constitutional right to legal representation funded by the State for indigent persons in criminal cases was recognised by the Supreme Court) and *O'Reilly v Limerick Corporation* [1989] ILRM 181 (where Costello J held that the State was not obliged to provide members of the travelling community with serviced halting sites). The courts, therefore, have become a place of last resort for persons who consider that the system has not answered their needs and this has become a useful social safety valve. In addition, Article 40.3.1° as interpreted to date emphasises individual rights and rejects a positivistic view of rights under which the only rights of a person are those given by positive law.

Problems associated with Article 40.3.1°

In its early phase the significance of the change in the interpretation of Article 40.3.1° initiated in *Ryan v Attorney General* was not generally appreciated save for the prescient comments of the late Professor John Kelly in his introduction to *Fundamental Rights in the Irish Constitution*, 2nd edn, 1967. There was relatively little criticism of the new approach probably because of the potential it offered for the development of human rights protection in a legal system which hitherto had been heavily influenced by the positivistic tradition of English constitutional law. However, it has led to the identification of new rights which, although they are positive additions to the scope of the rights protected by the Constitution, sometimes lack a clear textual basis within the Constitution, for example the general right to privacy, or a textual basis which is cognisable by the courts, for example the right to earn a livelihood which is clearly linked to Article 45 and therefore not cognisable by the courts. In contrast, other rights are reasonably implied by the text such as the right to procreate which could be implied from Article 41 dealing with the family. The identification of new rights in such a process is open to objection on the grounds that such rights are grounded in implication only, and even more importantly, that there may be no textual basis for their identification. While it is certainly arguable that it is both inevitable and necessary that the interpretation of the Constitution should develop over time and that in the future some rights should properly be recognised as existing even though they arise by implication only, it is less clear that new rights should be recognised where they lack any textual basis.

It was some time before it was understood that the effect of this new approach was that it gave very considerable latitude and power to the courts in determining what rights were among the unspecified personal rights protected by Article 40.3.1°. This latitude arises from the absence of clear criteria and sources for the identification of personal rights. It creates a broad spectrum of possibilities for the recognition of new rights ranging from those which have a clear textual basis to those which do not. Few would dispute that the result of such judicial interpretation of the Constitution has been beneficial. However, the identification of rights which have no clear connection with the constitutional text and the potential for judicial subjectivity in the identification of rights arising from the lack of objective criteria for the courts have given rise to some concern and the Review Group has, therefore, given consideration to the whole issue of how such rights have been and should be identified.

Sources for the identification of rights

The courts have referred to several different sources in the process of the identification of personal rights. By far the most important has been reference to the doctrine of natural law (for example *McGee v Attorney General*, *Norris v Attorney General*). The natural law is not regarded as being superior to the Constitution (*In re Article 26 and Information (Termination of Pregnancy) Bill 1995* [1995] 1 IR 1), but natural law principles may be referred to in identifying the meaning of the Constitution. Natural law postulates that there are certain rights inherent in man as a human being which are not dependent upon positive law for their existence, but which precede positive law and exist independently of it, being derived from a higher natural order. Natural law is considered to express the fundamental morality on which civilisation rests, guaranteeing rights inherent in the status and dignity of every member of human society. There are different theories of natural law. Some consider natural law as the law of God as ascertained by reason but other theories of natural law do not depend on the existence of God but consider the principles to be evident from the intrinsic nature of man and the natural order in which man lives.

The reference by the courts to natural law as a source for the identification of personal rights under Article 40.3.1° is unsurprising since the drafters of the 1937 Constitution clearly held natural law principles, as is evident from several references in the text. For example, there is a reference in the Constitution to the family possessing *inalienable and imprescriptible rights, antecedent and superior to all positive law* (Article 41) which indicates that these are pre-existing rights of the family which do not depend for their existence on positive law. In Article 42.1 there is a reference to the State guaranteeing to respect *the inalienable right and duty of parents to provide* for the education of their children. Article 42.5 refers to the *natural and imprescriptible rights* of the child. In Article 43.1 there is a reference to man *in virtue of his rational being*, having *the natural right, antecedent to positive law, to the private ownership of external goods*.

Apart from the references to natural rights, there are also various religious references in the Constitution which have affected the way

natural rights have been interpreted. There is the reference in Article 6 to the powers of government being derived from the people *under God*. There is a reference to the *Most Holy Trinity* in the Preamble which also refers to obligations owed to the *Divine Lord Jesus Christ*. Article 44.1 provides that the State acknowledges that the homage of public worship is due to *Almighty God* and that *His Name* shall be held in reverence. These religious references have resulted in the natural law references being interpreted from a theistic standpoint only and to the courts adopting an essentially theistic version of natural law (for example *Norris v Attorney General*) and one which has sometimes been closely linked to Catholic teaching (*Ryan v Attorney General*).

Apart from natural law, other sources have also been adopted. The first such source was the *judicial* reference to the Christian and democratic nature of the State *(Ryan v Attorney General*) which was also adopted in *Kennedy v Ireland*. This source overlaps in part with that of natural law. Another source emerged in *Norris v Attorney General* where Henchy J took a different approach in identifying personal rights by reference to the essential characteristics of the individual personality of the citizen in his or her capacity as a vital human component in a social, political and moral order posited by the Constitution. Reference has also been made to the contents of the Preamble as a source and in particular to the concepts of

- *Prudence, Justice and Charity* (see the minority judgment of McCarthy J in *Norris v Attorney General* and the judgment of the Supreme Court in *In re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995)*
- *the dignity and freedom of the individual* (see the judgment of Henchy J in *McGee v Attorney General*)
- *the common good* (see judgment of Walsh J in *McGee v Attorney General*),

which are referred to there. On occasion, the courts have regard to the international conventions to which Ireland is a party such as the European Convention on Human Rights, where fundamental rights are specifically listed which do not form part of Irish domestic law. While the courts have not relied on such conventions, they have been influenced by them in the identification of the content of particular fundamental rights (for example *Desmond v Glackin* [1992] ILRM 49). Sometimes reference has also been made to the contents of the Directive Principles contained in Article 45 (for example *Murtagh Properties Ltd v Cleary* [1972] IR 330).

Problems with the sources used for the identification of personal rights

The reference by the courts to the foregoing sources for the identification of personal rights causes some difficulties.

a) natural law

The reference to natural law has been an important factor in the development of constitutional interpretation since the 1960s. Its

emphasis on the inherent rights and dignity of man and the link between law and morality are positive aspects in favour of its use as a reference for the interpretation of personal rights. However, natural law cannot prevent the extreme incursion on personal rights which can be created by a positivist legal system in a tyrannical regime such as Nazi Germany, as is sometimes suggested.

The main problem associated with natural law as a guide for interpretation is the difficulty of determining its content: there is no single version of natural law nor is there a text of natural law to which reference can be made to ascertain its content. Humanists and different religious denominations differ in their interpretation of the content of natural law and the nature and extent of the duties which flow from it. The problems which this poses for judges in selecting from different versions of natural law were referred to by Walsh J in *McGee v Attorney General*:

> In a pluralist society such as ours, the courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law.

As is discussed further below, the courts have attempted to deal with the problem posed by the uncertain nature of natural law by attempting to interpret the Constitution and to determine where necessary what rights are superior to positive law by reference to the judge's own ideas of prudence, justice and charity. The overall result is that reference to the principles of natural law, in the absence of a text establishing its principles, lacks the objectivity and precision which might reasonably be expected.

b) Christian and democratic nature of the State

The test of the Christian and democratic nature of the State was a test put forward without explanation or justification for its adoption by Kenny J in *Ryan v Attorney General*. While it is clear that the State envisaged by the Constitution is a democratic one, it is less clear what are the ramifications of this characteristic for the purposes of interpretation of Article 40.3.1°. Other Articles of the Constitution expressly provide for what would reasonably be regarded as the essential elements of democracy namely, the right to vote, the holding of elections and accountability of the Government to the elected representatives. It is not always self-evident what extra dimension is added by the application of the principle of democracy to the identification of rights under Article 40.3.1°, nor, for example, is it immediately clear what is the connection between a democratic principle and the right to bodily integrity. The concept of democracy can be interpreted both narrowly and broadly. Defined narrowly, democracy might be considered to cover only those formalistic, essential elements referred to above. Defined more broadly, it might embrace a wide range of diverse characteristics of democratic states such as freedom from torture, freedom of expression and freedom to travel. This was the approach adopted by Finlay P in *The State (M) v Attorney General* where he held that the right to travel outside the State was a hallmark of free, democratic states. The reference to the principles of democracy as a source for the identification of fundamental rights thus involves discretion for the courts and a degree of uncertainty.

The identification of rights by reference to the Christian nature of the State is also unsatisfactory. While the Preamble suggests that the State is a Christian one, other parts of the Constitution do not indicate that the State is necessarily to be exclusively regarded as a Christian state for the purposes of identifying personal rights. Article 6 of the Constitution refers non-denominationally to the powers of Government being derived *under God* and Article 44 provides for freedom of religion and provides that the State shall not endow any religion. Accordingly, it seems unsatisfactory to adopt the elements of just one form of belief, namely Christianity, as the test for the identification of personal rights under Article 40.3, which are supposed to be common to all citizens regardless of belief.

A further difficulty of adopting the Christian nature of the State as a source is that it is unclear whether Christian values ought always to be applied. There has already been some inconsistency in adopting particular Christian beliefs as a source. For example, Kenny J adopted a papal encyclical *Pacem In Terris* as a source for the identification of the personal right of bodily integrity. However, the conclusion of the Supreme Court in *McGee v Attorney General* that the restrictions upon the importation of contraceptives by a married couple infringed the couple's right to marital privacy conflicted with the Catholic Church's teachings as set out in another papal encyclical *Humanae Vitae*. Neither is it clear which Christian beliefs are to be adopted where there are differences between them. Not all Christian churches take the same view on particular issues thus making it difficult to adopt the Christian nature of the State as a determining factor in the existence of personal rights under Article 40.3.1°.

c) the Preamble

The reference to the concepts of *Prudence, Justice and Charity, dignity and freedom* and *the common good* referred to in the Preamble as sources for the identification of personal rights referred to above seems to have occurred because the courts were faced with the problem of having no single, well-defined and objective source for the identification of personal rights. Walsh J stated in *McGee v Attorney General*, in the context of considering the nature and extent of the duties that flow from natural law, that it was the duty of the judges to interpret the Constitution and to determine where necessary which rights are superior or antecedent to positive law or which are imprescriptible and inalienable. He said that there were certain guidelines laid down in the Constitution itself, namely the concepts of prudence, justice and charity, and went on to say:

> *According to the Preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured*. The judges must, therefore, as best they can from their training and experience interpret these rights in accordance with *their* ideas of prudence, justice and charity. [emphasis added]

Similar views were expressed more recently in the Supreme Court's decision in *In re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill*

1995. Clearly, there is a real potential for judicial subjectivity in this approach.

The identification of rights by reference to broadly defined and potentially competing concepts such as prudence, justice, charity, freedom, dignity and the common good is unsatisfactory since these are concepts which are capable of different interpretations, depending upon the context, and if the application of these concepts produces conflicting results, it is unclear how such a conflict is to be resolved.

d) essential characteristics of the person

The difficulty with the test formulated by Henchy J in *Norris v Attorney General* whereby the identification of rights is based upon the essential characteristics of the individual, is that even with this secular, humanistic test, there is a substantial element of judicial subjectivity in the identification of such rights. Judges may vary in their perceptions of what constitute the essential characteristics of the individual and the rights which flow from them.

e) Article 29.6 - international conventions

A difficulty also arises in the identification of rights by reference to international conventions where such conventions have not been made part of domestic law, in accordance with Article 29.6. Until incorporated into Irish law, such conventions are not enforceable in the domestic sphere. This means that, if reference is made to them by the courts as inspirational sources for the identification of fundamental rights, this gives a form of indirect effect to the conventions domestically, notwithstanding the provisions of Article 29.6.

f) Article 45 - Directive Principles

A similar difficulty arises regarding reference to Article 45. Article 45 sets out various principles to which the legislature should have regard but which are not cognisable by the courts. Many of these concern matters which arguably could be considered as falling within the scope of personal rights such as the protection of the health of workers or the tender age of children (Article 45.4.2°). The wording of Article 40.3.1° enables matters which were supposed to be beyond the scope of judicial enforcement to be rendered indirectly cognisable by the courts by virtue of being identified as a personal right, as occurred in *Murtagh Properties v Cleary*, although in other instances the courts have refrained from taking any account of the contents of Article 45 (see FitzGerald CJ in *McGee v Attorney General* and Kingsmill Moore J in *Comyn v Attorney General* [1950] IR 142). The result is that the identification by the courts of certain personal rights under Article 40.3.1° risks intrusion by the courts into areas of social policy which the Constitution itself regarded as the proper sphere of the Oireachtas and Government.

The effect of the broad wording of Article 40.3.1°

The absence of a single, well-defined and objective source for identifying such rights means that there is a very large measure of discretion left to the courts which obviously places them in a difficult position. While inevitably there is some element of discretion involved in the interpretation of any Article of the Constitution, the problem is far more pronounced in the case of Article 40.3.1° because of its very broad wording. It gives no clear framework for the identification of fundamental personal rights by the courts, and the identification of rights to date has derived from a series of disparate sources which are not well defined. Article 40.3.1° may reasonably be regarded as structurally flawed in that it casts a very difficult task upon the courts without giving them any guidance or structure within which to identify those rights.

The overall effect of this lacuna is that it can lead to the refusal to recognise personal rights which some people would regard as fundamental (for example unmarried fathers in *The State (Nicolaou) v An Bord Uchtála*) or, alternatively, the recognition of personal rights with which some would disagree (for example marital privacy in *McGee v Attorney General*). It has also meant that the courts are drawn into what may reasonably be regarded as law-making in fundamental areas which is not consistent with the principles of democracy. The courts are ill-equipped to engage in resolving what are, in effect, difficult issues of social policy and relative priorities which are more properly the domain of the people speaking through the provisions of the Constitution or alternatively through their elected representatives.

The courts themselves have been conscious of the problem and have exercised self-restraint. They have tried to avoid straying into areas of policy making which offend the principle of a separation of powers endorsed by the Constitution. This principle requires that policy making be carried out by those electorally accountable and not by unelected judges as, for example, in regard to abolition of tax free allowances and increases in social welfare allowances (*Mhic Mhathúna v Ireland and the Attorney General* [1995] 1 ILRM 69), the rights of members of the travelling community to serviced halting sites (*O'Reilly v Limerick Corporation*), and the wife's entitlement to interest in the family home (*L v L* [1992] ILRM 115). However, the fact remains that many difficult issues of social policy have been significantly determined by the courts (such as the rights of married couples to contraceptives (*McGee v Attorney General*), rights of homosexuals (*Norris v Attorney General)*, rights of unmarried mothers (*G v An Bord Uchtála*), and these issues have been determined in an unstructured, piecemeal way as and when cases came before the courts.

Another difficulty caused by the provisions of Article 40.3.1° is one of uncertainty. The identification of a right involves an obligation upon other parties to respect that right. At present, new rights can be identified which do not have an obvious connection with the text of the Constitution, making it difficult for the State, as guarantor of personal rights, to ascertain its obligations and order its affairs accordingly. For example, the decision that an individual has a right to legal aid in certain circumstances could have significant financial implications for the State, affecting the resources available for other policy objectives.

Possible solutions: general consideration

The wording of Article 40.3.1° is unsatisfactory because it gives insufficient guidance and framework to the courts for the identification of personal rights and it can lead to the courts having to resolve major social policy issues. Before considering possible solutions to this problem, the following general points should be borne in mind:

a) endorsement of different role for the courts

One approach to this issue would be to accept unreservedly that the courts are entitled to decide difficult issues of social policy where these derive from the determination of the personal rights of individuals, regardless of the fact that this means that judges would have very wide discretion in interpreting the Constitution. Such an approach, which could be reflected in an amended wording of Article 40.3.1°, would benefit individuals who might be marginalised by the democratic process and whose personal rights might have been somewhat neglected.

Major difficulties make the attribution of such a role to the courts unacceptable. It would confer a role on unelected judges quite different from that which the Constitution now ordains. It would conflict strongly with the democratic nature of the State whereby those who formulate policy should be directly accountable to the electorate. There would also be the difficulty of the potential for conflict with the policy of the Government and the Oireachtas. Furthermore, the judicial process and the resources of the courts are not geared towards the sophisticated analysis of issues which is necessary for determining social policy.

b) alteration of Article 40.3.1°

Another approach to this problem would be to accept that some scope for identification of further personal rights is desirable so as to ensure that the Constitution remains flexible and responsive but to restrict the scope of the discretion that is given to the courts by altering the wording of Article 40.3.1°. Such an approach would accept that it is impossible in a constitutional document to provide for every eventuality, that the protection of personal rights cannot be left solely to elected representatives and that there will be certain situations where it will fall to the courts to determine the existence or extent of those personal rights. If it is considered desirable that the Constitution should continue to enable the identification of further unenumerated rights, it might be possible to amend Article 40.3.1° so that such identification would be confined to rights which are implicit in the text of the Constitution and which are cognisable by the courts. Such an approach would not eliminate altogether the problem of subjective judicial determination of personal rights since there would inevitably be some subjective judgment in determining whether there was a clear connection between the implied right and other explicit rights. However, by making the criteria for such determination clearer, it would result in the reduction in the scope for the exercise of judicial discretion and thus remove the present major objection to the language and interpretation of Article 40.3.1°.

Such a restriction could mean that the Constitution would be less responsive to the changing needs of society. One way of minimising this effect would be to extend the list of specified personal rights in the Constitution to include the unenumerated rights identified so far and also to add rights explicitly protected in international conventions and other constitutions, many, if not all, of which rights would constitute natural law rights also. Indeed, it is possible to view such international conventions as the European Convention on Human Rights (ECHR) and the Covenant on Civil and Political Rights (CCPR) as embodying internationally recognised natural rights and the statement of rights protected in those conventions is in many respects much wider than those which have to date been identified under Article 40.3.1°. The impact of such a change would mean that important unspecified natural law rights would be protected but there would be a firmer democratic basis for the identification than there is at present.

If it were determined that unenumerated rights could only be identified by reference to rights already contained in the text of the Constitution, it would be appropriate to consider inserting other specific rights beyond the scope of those contained in international conventions which would be appropriate to Irish circumstances.

c) associated effects of alteration of Article 40.3.1°

Before making any change in Article 40.3.1°, the interaction of any proposed change with the rest of the Constitution would have to be considered. An alteration to Article 40.3.1° may affect not only rights determined under that Article but may also impact upon the definition of rights under other Articles, which were developed with partial reliance on Article 40.3.1°, for example the right to litigate. The prevailing harmonious method of constitutional interpretation requires that provisions of the Constitution should not be interpreted in isolation from one another. If the Constitution is to continue to have references in it which suggest that it is permeated by natural law, this will leave open to some degree the possibility of judicial interpretation of a revised version of Article 40.3.1° by reference to natural law concepts with the result that a large degree of uncertainty and subjectivity may remain. On the other hand, the removal of all references to natural law principles would change the Constitution itself into a positivist document, a course with some disadvantages. Apart from the intrinsic merits of natural law itself, about which views may differ, problems of continuity would be created by its removal. Natural law is a significant influence within the Constitution as a whole and its removal might in some circumstances impact upon the status of constitutional jurisprudence, not only in regard to Article 40.3.1°, that has built up already around the natural law elements of the Constitution.

d) United States constitution

It is worth noting that a more restrictive approach to constitutional interpretation applies to the United States constitution. The US constitutional framework is somewhat different from the Irish one but nonetheless there are interesting parallels. Despite espousing natural rights thinking at an early stage, the US Supreme Court has taken the position that the only rights which courts can legitimately

recognise are those mentioned, explicitly or implicitly, in the written Constitution. The ninth amendment to the United States constitution provides:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People.

This provision has obvious similarities to Article 40.3.1°. While there have been some attempts to interpret the ninth amendment in a very broad fashion, in more recent years the US Supreme Court has limited constitutional rights to those which were expressly or by implication mentioned in the constitution itself (*San Antonio Independent School District v Rodriguez* 411 US 1 (1973)).

Having regard to the foregoing, the Review Group has considered the following issues in regard to Article 40.3.1°:

Issues

1 whether Article 40.3.1° should be retained in its present form

Arguments for

1 overall the operation of Article 40.3.1° has been a positive feature of the Constitution and has allowed it to develop and to protect important rights of individuals which were not specified elsewhere in the text. Article 40.3.1° provides important flexibility and potential for adaptation to social change in a document which of its nature could not cover all eventualities and which cannot be changed without referendum

2 the removal of Article 40.3.1° in its present form would remove part of the underpinning of some constitutional jurisprudence to date with the possibility of creating confusion and uncertainty about the continued existence of certain rights.

Arguments against

1 Article 40.3.1° allows the courts too much latitude in the identification of personal rights, is undemocratic, infringes the principle of the separation of powers and leads to uncertainty

2 the identification of personal rights can at times be a controversial issue and it is preferable that as far as possible the identification should be made by the people themselves. Article 40.3.1° does not accord with this principle, leaving, as it does, wide discretion to the judiciary

3 if Article 40.3.1° is amended in line with the recommendations made by the Review Group, there should be minimal difficulty regarding the continuity of constitutional jurisprudence.

Recommendation

Article 40.3.1° should not be retained in its present form.

2 whether Article 40.3.1° should be retained in an amended form

The Review Group considered various possibilities in regard to the format of a revised version of Article 40.3.1° from which two main options emerged. Essentially, it is a question of how far democratic influence rather than judicial discretion should determine the identification of personal rights. In the discussion which follows, the adjective 'inexhaustive' is used to describe a list of rights which is widely representative but does not purport to be comprehensive.

One option is to amend Article 40.3.1° so as to provide an inexhaustive list of fundamental rights which could specifically encompass fundamental rights that have been identified by the Irish courts to date and which might also include those set out in the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (CCPR), so far as may be considered appropriate, and other personal rights which might be particularly appropriate in an Irish context, but with the unlimited possibility for identification by the courts of further personal rights.

Arguments for

1 this would mean that fundamental rights would have a sounder basis than that provided by simple reliance on judicial interpretation of the Constitution

2 the explicit statement of those rights would be consistent with the approach taken to Article 38.1 in the context of the right to a fair trial

3 this option would have the benefit of an explicit list of rights being in the Constitution, thereby bringing Ireland into line with international standards of protection of personal rights and would also mean that the Constitution remained as flexible as it is at present for the identification of further rights in line with social change, with such further rights being likely to have a clearer textual basis because of the inclusion of a broad list of protected rights.

Arguments against

1 the maintenance of an unlimited possibility for the courts to interpret the Constitution means that most of the problems associated with Article 40.3.1° in its present form would remain

2 since many of these rights have already been recognised or could be recognised in the future by the courts, there is no necessity to specify them in the Constitution; moreover, they are so many in number that it is undesirable that each of them should be specifically listed.

A second approach, affording greater certainty as to the nature and range of fundamental rights guaranteed by the Constitution and restricting the discretion of the judiciary to add new rights,

would be to specify in the Constitution a comprehensive list of fundamental rights which should confine recognition by the courts of additional rights to rights necessarily implied by those expressly listed. In any such comprehensive listing, the rights should be expressed with a sufficient level of generality to enable the courts to identify within them specific rights which would be necessarily implicit within the broadly described rights.

Arguments for

1 having a comprehensive (as distinct from an inexhaustive) list of rights specified in the Constitution would provide greater certainty and substantially allay concern about excessive judicial discretion

2 at the same time, the courts would be permitted to interpret the precise content of this expanded list of rights thus preventing the creation of an undesirable constitutional rigidity and allowing responsiveness to social change

3 this approach represents a reasonable compromise between the removal altogether of the judicial power to identify unenumerated rights and the very broad discretion which exists at present.

Argument against

1 some flexibility and responsiveness in the identification of further rights would be lost.

Recommendation

On balance, the Review Group favours an amendment of Article 40.3.1° which would provide a comprehensive list of fundamental rights which could specifically encompass the personal rights which have been identified by the Irish courts to date, and which might also include those set out in the European Convention on Human Rights and the International Covenant on Civil and Political Rights, so far as may be considered appropriate, and other personal rights which might be particularly appropriate in an Irish context, and which should confine further recogntion of fundamental rights by the courts to those necessarily implicit in the rights expressly listed.

Express provision for a comprehensive list of rights

The Review Group, having considered the question whether the unenumerated rights which have been identified should be expressly recognised in the Constitution, has concluded that they should. This section considers the consequential question of which rights should be so specified and the appropriate mechanism whereby this might be done.

identification of rights

The unenumerated rights which have been identified to date by the courts are set out at the beginning of this chapter.

Because the courts operate in a case by case manner, making each decision on the basis of the issue which is before them and, as a general rule, deciding only what is necessary to be decided in the particular case, the list of unenumerated rights does not in any sense form a coherent code. Some rights which are undoubtedly important have not fallen to be identified by the courts as personal rights under Article 40.3.1° because no litigation has ever taken place in which such an issue was raised. In some cases rights are already recognised under Irish law, whether at common law, or under statute, and no plaintiff has found it necessary to argue that there may, in addition, be rights which are of a sufficiently fundamental nature to be recognised as personal rights under Article 40.3.1°.

It is necessary, therefore, in attempting to formulate a comprehensive list of rights which are appropriate for constitutional protection, to have regard to a somewhat wider list than merely the rights identified to date as unenumerated rights. A possible approach is to supplement that list of unenumerated rights with those rights which are recognised in the principal international human rights instruments, for example the International Covenant on Civil and Political Rights (CCPR) and the European Convention on Human Rights (ECHR), but which have not to date received recognition as personal rights in the Constitution of Ireland. As already pointed out, many of these rights are recognised in Irish law even though they lack a constitutional basis (for example, the right to be registered at birth).

A list of rights to be considered for express inclusion in the Constitution would include, in addition to the unenumerated rights already listed, the following which are contained in the international human rights instruments:

i) the right not to be held in slavery or servitude or to be required to perform forced or compulsory labour (Article 8 CCPR, Article 4 ECHR)

ii) a general right to non-discrimination on such grounds as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status
(Articles 2 and 3 CCPR, Article 14 ECHR)

iii) a right not to be subjected without free consent to medical or scientific experimentation (Article 7 CCPR)

iv) a right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (Article 11 CCPR)

v) the rights of aliens not to be expelled other than in accordance with law and to be allowed to give reasons against expulsion, to have their case reviewed, and be represented for this purpose (Article 11 CCPR)

vi) the right to recognition as a person before the law (Article 16 CCPR)

vii) the right not to be condemned to death or executed (Sixth Protocol, ECHR, Second Protocol, CCPR)

viii) the right of a child to a name and registration at birth (Article 24 CCPR)

ix) the rights of unmarried persons to family life under Article 8 of the European Convention on Human Rights (*Keegan v Ireland* (1994) 18 EHRR 342)

x) the rights of members of ethnic or religious groups or of linguistic minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language (Article 27 CCPR).

how the rights should be specified

At first sight, the simplest procedure would be to add a provision to Article 40 of the Constitution to the effect that the personal rights referred to in Article 40.3.1° include the following rights and then to set out a list of all the rights concerned. This would be similar to the approach which the Review Group has recommended in relation to the method of making explicit the rights which have been held to be inherent in the concept of 'due course of law' in Article 38.1 of the Constitution, which deals with trial of offences. This course of action could be followed whether or not it is intended to retain Article 40.3.1° in its present form, thereby allowing the courts free rein to recognise new personal rights, or to modify the provisions to restrict the recognition of further rights. If it were desired to prevent the recognition of further rights, the provision would begin by stating that the personal rights referred to in the Article are those, and only those, set out in the constitutional provision.

A difficulty arises, however, by virtue of the disparate nature of the rights in question. Clearly they are not all of the same order. In some cases the right which has been recognised by the courts is probably, on closer analysis, merely a particular example of a more general right. An example of a general right is the right to freedom of movement. On a more particular level, it includes the right to leave one's country; it also includes the right to a passport.

In some cases alternative analyses as to the basis of the court's decision may be open. For example, one may view the privacy cases as deciding that there is a right to privacy in certain defined circumstances, or as particular instances of a more general right to privacy. Generally speaking, it would seem desirable, in attempting to formulate a comprehensive list of rights, to state the rights in as broad a form as possible. If it is clear that one right is merely a particular instance of a more general right, it should be sufficient to state the general right.

The rights now being considered for express inclusion in the Constitution could be classified as follows:

i) *rights relating to life and health* These would include, as well as the express guarantee to vindicate the life of every citizen in Article 40.3.2°, the rights to bodily integrity and not to have one's health endangered, which have been identified by the courts. They would also include the right not to be tortured or subjected to inhuman or degrading treatment or punishment, and the right not to be subjected to medical or scientific experimentation without free consent

ii) *rights relating to personal freedom* These include, as well as the right to personal liberty expressed in Article 40.4.1°, the rights not to be held in slavery or servitude or required to do forced or compulsory labour, which are contained in Article 4 of the ECHR and Article 8 of the CCPR. These have to date not been identified by the Irish courts as personal rights under the Constitution, but they are guaranteed by statute and may be inherent in Article 40.4.1°

iii) *rights relating to family life* These include, as already indicated, the right to marry, to found a family and to procreate, the right to marital privacy, and rights relating to the duties and obligations of parents and spouses *inter se.* Generally speaking, these rights would seem to be most appropriately contained in the Article dealing with the family

iv) *the rights of natural parents* These relate to the right of natural mothers to the care and custody of their children, the right to maintenance and the rights of natural fathers as recognised under the ECHR. These rights should be dealt with in the Article on the family

v) *children's rights,* including the right to an upbringing and education, to maintenance, to realise their personality and dignity as human beings, and the rights to a name and to be registered at birth, which is contained in CCPR. These rights are separately referred to in the Review Group's discussion of Articles 41 and 42

vi) *rights relating to privacy* A question arises as to whether there should be a separate provision dealing with a general right to privacy, or whether the right to marital privacy should be encompassed in the Article dealing with the family and the right to privacy in communication dealt with by way of an expansion of the current provisions dealing with freedom of expression. Article 8 of the ECHR refers to 'the right to respect for ... private and family life ...'. It would seem that, aside from the specific instances of marital privacy and privacy of communication, there is a general right of privacy of which these are specific examples (see *Kennedy v Ireland* [1987] IR 587; *In re a Ward of Court* [1995] 2 ILRM 401). The Review Group therefore recommends that a specific right of individual privacy be referred to in Article 40. This right should be stated in general terms and should be wide enough to cover the question of the right to respect for one's correspondence.

In its consideration of Article 40.5 (Inviolability of the Dwelling), the Review Group considered whether this provision should be extended to include respect for correspondence (Article 8 of the ECHR brackets together private and family life, home and correspondence) but decided that respect for correspondence should be dealt with in the context of privacy

vii) *rights connected with the administration of justice* Some of these have already been dealt with in relation to the discussion of Article 38, but only in the context of the trial of criminal offences. Among the rights which have been identified as personal rights of the citizen are the right to litigate, the right of access to the courts and the right to justice and fair procedures. The latter right, of course, goes beyond questions relating to the administration of justice and covers also administrative procedures. In addition, the CCPR has identified a right not to be imprisoned for debt and a right to recognition as a person before the law. The question arises whether these rights should be expressed in Article 40 or whether it would be more appropriate that they be placed in Article 34 along with other questions dealing with the courts and the administration of justice

viii) *the right to work and earn a livelihood,* which has been identified as a personal right under Article 40.3.1°

ix) *freedom of movement and the right to travel* These rights have been recognised as unspecified rights under Article 40. Article 2 of the fourth protocol to ECHR and Article 12 of the CCPR recognise the freedom to choose one's residence and the freedom to leave and enter one's country, together with the freedom not to be expelled from one's country. Freedom to travel between the State and another State is now expressly referred to in the special context of Article 40.3.3° in a clause added by the Thirteenth Amendment of the Constitution Act 1993

x) *the rights of aliens* These are the rights referred to in Article 11 of the CCPR, and are set out above

xi) *the right not to be discriminated against on grounds such as sex, race, colour, language, religion or other opinion, national or social origin, association with a national minority, property, birth or other status in the enjoyment of other rights.*

where these rights should be located in the Constitution

The Review Group considers that, while there would be merit in a complete re-arrangement of the fundamental rights provisions of the Constitution, what is important is the content rather than the layout. It has, therefore, worked on the assumption that the basic structure will remain unchanged (that is, that there will be separate Articles dealing with Personal Rights, the Family, Education, Private Property and Religion) and looked at how to

insert the previously unenumerated rights into the Constitution in the least disruptive manner.

It seems clear that the rights relating to *life and health*, the rights relating to *personal liberty,* and the right to *freedom of movement* should appropriately be contained in a recast version of Article 40. These rights are all related to the existing content of the Article.

The rights which relate to *family life* should more appropriately be dealt with in the context of Article 41 (The Family), as should children's rights and the rights of natural parents. The right to *privacy* should be expressly provided for in Article 40. While the *rights connected with the administration of justice* might logically be expressly provided for in Article 34, in some respects the right to fairness of procedures goes beyond questions of justice and the courts system. The Review Group, therefore, considers that this right should also be expressly provided for in Article 40.

The right to work and earn a livelihood It is difficult to decide where this should be placed. From the point of view of content, it is most closely related to Article 45, but since, unlike the remainder of that Article, it would be a justiciable right, that would not be an appropriate location. The most appropriate location may be among the list of rights in Article 40.6.

The rights of aliens The rights of aliens will be put on a statutory footing in legislation which is nearing the final stages in the Oireachtas. The Review Group considers that special provisions dealing with the treatment of aliens can more appropriately be dealt with in the context of ordinary legislation. Of course, if the Review Group's recommendations are accepted and implemented, aliens will have the right to enjoy most of the fundamental rights provided for in the Constitution in common with citizens.

The general right to non-discrimination should be contained in a revised Article 40.1.

Group rights These are not appropriate for insertion into Article 40 since they are not personal rights.

Article 40.3.2°

Article 40.3.2° already provides express recognition for certain rights, namely: 'the life, person, good name, and property rights' of the citizen.

Elsewhere the Review Group recommends that property rights should no longer be dealt with in Article 40.3.2° but should be dealt with in a single recast Article 43.

If Article 40 is to be recast, as the Review Group recommends, by the addition of the range of rights referred to above, it would be more logical that the guarantee to protect and vindicate the life and person of every person should appear in the same provision as the other rights relating to life and health, and that the right to a good name should be dealt with in a separate provision.

capital punishment

The existing provision relating to the right to life is a qualified one. The obligation on the State is 'to protect as best it may from unjust attack' the life of its citizens. It is clear from the terms of the Constitution itself, which contains a number of references to capital punishment (Article 13.6, Article 40.4.5°), that the right to life in Article 40 does not in itself preclude the State from providing for capital punishment. Capital punishment has been abolished by the Criminal Justice Act 1990, and the State is under an international obligation not to use capital punishment by virtue of its acceptance of the sixth protocol to the ECHR and the second protocol to CCPR.

Recommendation

The right not to be sentenced to death or executed should be expressly provided for in the provision dealing with the right to life. If it were also provided that Article 28.3.3° could not be used to override such a provision, the other safeguards in the Constitution for persons sentenced to death could be deleted. Otherwise, they would have to remain.

structure of a revised Article 40

A possible structure for a recast Article 40, if the unenumerated rights were expressed, would be as follows:

Article 40

1 revised guarantee of equality, right of non-discrimination

2 titles of nobility

3 1° revised general personal rights clause

2° i right to life and person

ii no death penalty

iii right to bodily integrity (including the right not to be subjected to experimentation, not to be tortured or inhumanely treated and to have one's health protected)

iv right to one's good name

v right to privacy

3° right to life of unborn

4 1° personal liberty (including the right not to be held in slavery or servitude or to be required to do forced or compulsory labour)

2°-6° *Habeas Corpus*

5 inviolability of the dwelling

6 freedom of expression

7 freedom of assembly

8 freedom of association

9 freedom of movement and choice of residence

10 right to work and earn a livelihood

11 right of access to the courts

12 right to fair procedures.

Other issues

1 whether the fundamental rights protected by the Constitution should be limited to citizens

The scope of the right at present is expressed to be limited to citizens. This issue arises not only in the context of unenumerated rights but more generally in regard to the other personal rights protected by the Constitution. Human rights inhere in all human beings by virtue of their humanity. Accordingly such rights should, in general, not depend upon citizenship but should apply to all human persons, irrespective of their origins. As considered further in this section of the Report dealing with equality, there may, however, be some limited circumstances where there is a legitimate reason for distinguishing between citizens and non-citizens.

Recommendation

In general, personal rights should not be confined to citizens but should be extended to all human persons. There may be some rights which should be confined to citizens.

2 whether the scope of the guarantee should be extended to legal persons

The fundamental rights provisions of the Constitution as interpreted by the courts cover a wide variety of different rights, most of which might be regarded as essential human rights which inhere in all human beings by virtue of their humanity (for example the right to marry, the right to bodily integrity). Such rights are incapable of being enjoyed by legal persons. Articles 40 to 44 also cover rights which do not derive from what might be considered to be the essential elements of humanity but are nonetheless considered to be fundamental to any civilised legal system, such as the right to fair procedures. Such rights are usually but not necessarily restricted to human beings and could also apply to legal persons.

Ideally a constitution should make clear which rights may be relied upon by legal persons and which may not, but in the format of the Constitution at present there is no clear division. In some cases the courts have already held that legal persons are not entitled to rely upon the provisions of Article 40.3 (*Attorney General v Paperlink Limited*, *Chestvale Properties Limited v Glackin* [1992] ILRM 221). However, persons, such as shareholders, who have an interest in legal persons may in any event be able to rely on infringement of their own individual constitutional rights under Article 40.3.1° (*Private Motorists' Protection Society and Moore v Attorney*

General [1983] IR 339). In some other cases legal persons have successfully relied upon various fundamental rights in the Constitution such as freedom of expression (*Attorney General of England and Wales v Brandon Book Publishers Ltd* [1986] IR 597), freedom of association (*NUR v Sullivan* [1947] IR 77) although this point was not expressly considered, property rights (*Iarnród Éireann v Ireland* [1995] 2 ILRM 161).

In general, the Review Group is of the view that the rights protected by Articles 40 to 44 should be enjoyed by human persons only. The Review Group, however, recognises that in some limited cases there may be a collective dimension to the satisfactory exercise of a right and accordingly it may be appropriate in certain limited circumstances to enable a collectivity to exercise such a fundamental right. Attention is drawn to this issue which ought to be carefully considered in the drafting of any revision of Articles 40 to 44 or any particular part of them.

Recommendation

No change is proposed.

3 whether the guarantee should be addressed more widely than simply to the State

The guarantee in its present form is by means of an obligation on the State in its laws to respect, defend and vindicate the personal rights of the citizen. Accordingly, the addressee of the obligation is the State and the duty to guarantee rights is cast upon the State, although the courts have already in some instances held that parties other than the State were obliged to respect an individual's constitutional rights. Thus in *Educational Company of Ireland v Fitzpatrick* [1961] IR 345 employees of the plaintiff company were involved in picketing the company so as to get it to require other non-union employees to join the trade union. Despite the fact that this action amounted to a trade dispute pursuant to the Trade Disputes Act 1906, the Supreme Court held that, because the constitutional right to freedom of dissociation as well as freedom of association was involved, the picketing could not be regarded as lawful as it was aimed at coercing persons into joining a union against their wishes (see *Meskell v CIE* [1973] IR 121). It is notable also that the courts have allowed the State to compel third parties to observe the personal rights of an individual, even in the absence of legislation such as occurred in *Attorney General (Society for the Protection of Unborn Children) v Open Door Counselling and Dublin Well Woman Centre* [1988] IR 593. In that case, injunctions were granted restraining the defendants from providing information within Ireland on abortion services available in Britain, which infringed the Constitution before Article 40.3.3° was amended to allow such information to be provided.

Overall, it is mainly an issue for the Oireachtas to determine the degree to which third parties are obliged to respect an individual's personal rights, which obligation can be regulated in appropriate areas by means of legislation, such as in the field of employment law.

The question arises whether the Article should be altered to make explicit, and extend the scope of, the obligation on third parties to

respect the personal rights of individuals even in situations where there is no legislative obligation to do so. The issue arises partly from the fact that the definition of 'the State' for this purpose is unclear. While it is clear that the strict entity of the State itself is bound by the obligation, the extent of the obligation of other parties such as state-sponsored bodies, publicly funded institutions or local authorities is less obvious.

However, even if the precise identity of those entities covered by the reference to 'the State' is clarified, there is a problem of establishing what other entities should be covered. While in general terms it might be considered desirable to extend the scope of the addressee of the guarantee, which would expand the extent to which individual personal rights are respected, it would be very difficult to define to whom the extended obligation should apply and to determine whether it ought to apply, for example, to large and small corporate entities, associations and private individuals. There is also the concern that the extension to individuals could create undue intrusion on the autonomy of the individual. Such an extension would involve a potential conflict between fundamental rights enjoyed by third parties such as the freedom of expression and association.

It is difficult to make an a priori distinction that deals satisfactorily with the myriad situations which can arise in the context of wide-ranging fundamental rights. Comparative constitutional experience suggests that in areas where there is no legislative regulation, it is preferable that the issues concerning the degree to which third parties may have to respect an individual's fundamental rights ought to be determined by the courts on a case by case basis and the Review Group considers that this is the correct way of dealing with this issue.

Conclusion

There should be no express obligation in the Constitution on anyone other that the State to respect, defend and vindicate the personal rights of the citizen. However, an individual should not be precluded from seeking to enforce such rights against another person.

4 whether the obligation upon the State should be such as to make it liable for failure to legislate

There have been some conflicting indications as to whether the word 'laws' is to be interpreted to mean only such legislation as already exists or whether it should be interpreted such that the State has a constitutional duty to remedy legislative omissions which threaten personal rights. The precise degree to which the State is accountable for failure to legislate is somewhat unclear at present as is shown by the following cases. In *Crowley v Ireland* [1980] IR 102 the Supreme Court held that the obligation contained in Article 40.3 upon the State extended to its legislative activity only although some dicta of Kenny J arguably suggested that he was prepared to hold that, if it could be established that legislation would have remedied a breach of constitutional rights, the State would be liable for having failed to legislate. Dicta of O'Keeffe P in *O'Shaughnessy v Attorney General* (1971) suggested that the State's obligation extended to legislative activity only. In some cases the courts have indicated that the court's jurisdiction is limited to

declaring that legislation or common law principles already in being are invalid (see *Somjee v Minister for Justice* [1981] ILRM 324 and *Mhic Mhathúna v Ireland*). In *Pine Valley Developments Limited v Minister for the Environment* [1987] IR 23 Finlay CJ reserved his position on the question whether an action lay for failure on the part of the Oireachtas to provide legislative protection for personal rights, as distinct from an action to set aside or invalidate legislation which failed adequately to protect or vindicate them.

However, the courts have sometimes shown a greater willingness to vindicate the rights of persons whose claims arise in circumstances where the Oireachtas has failed to legislate to vindicate their personal rights. In *Byrne v Ireland* [1972] IR 241 the Supreme Court indicated that, where rights were granted by the Constitution to a citizen, unless some contrary indication appeared in the Constitution, the Constitution had to be deemed to create an appropriate remedy for the enforcement of those rights. Likewise *in McGee v Attorney General* Walsh J indicated that a constitutional right carried with it its own right to a remedy for the enforcement of that right. In *The State (Healy) v Donoghue* the Supreme Court held that the State had an obligation to provide legal aid for indigent defendants in criminal cases, even if no statutory scheme existed. By implication the State had a positive duty to legislate to provide legal aid so as to vindicate such a defendant's right to fair procedures.

An even more explicit statement of the willingness to hold the State liable for failure to legislate is evident in *AD v Ireland* [1994] 1 IR 369 where the plaintiff claimed that the State's failure to pay compensation to her for severe injuries she received as a result of a crime failed to vindicate her right to bodily integrity. Carroll J held that if there is a constitutional right which is being ignored by the State, the courts would provide a remedy in the absence of the State being willing to observe that right. In the circumstances of that particular case, Carroll J did not accept that the plaintiff had established a constitutional right to compensation from the State for criminal injuries, but was clearly willing to hold the State liable for its failure to vindicate such a right, if it had been shown to exist. She held that the decision to introduce a scheme for compensation was a policy matter and one for the Government to decide.

The effect of these decisions has extended widely the State's accountability in areas where it has failed to legislate.

The concept of the liability of the State for failure to legislate is already well established in Community law albeit in that somewhat different context. Thus in *Tate v Ireland* [1995] 1 ILRM 507 Carroll J held that the plaintiffs, who were women, were entitled to damages arising out of the failure by the State, in breach of its obligations under Community law, to implement Directive 79/7/EEC, whereby there was to be equal treatment for men and women as regards social security. Carroll J held that the plaintiffs were entitled to be paid the same sums as were payable to men during the relevant period.

This decision was in line with the approach of the European Court of Justice in *Cotter and McDermott v Ireland (No 2*) C-377/89 [1991] ECR I-1155 where it held that Directive 79/7/EEC had to be interpreted to mean that women were entitled to the same increases in social security benefits received by men after expiry of the period

allowed for implementation of the directive. It is also in line with the approach of the European Court of Justice in *Francovich v Italy* C-6/90 and C-9/90 [1991] ECR 1-5337 where it was held that a member state is liable to compensate for loss and damage suffered as a result of the state's failure to implement a directive where (a) the directive grants rights to individuals, (b) it is possible to identify the content of those rights on the basis of the provisions of the directive and where (c) there is a causal link between the breach of the state's obligation and the loss and damage suffered. (See also the judgment of the European Court of Justice in Joined Cases C46 and 48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *R v The Secretary of State for Transport ex parte Factortame* March 5 1996). The effect of these decisions is to allow an affected person to claim damages for the failure by the state to legislate in line with a Community directive.

It must be observed, however, that the context of Community law is somewhat different to that which would prevail if the obligation upon the State to vindicate personal rights under Article 40.3.1° extended to omissions to legislate. There is a higher degree of clarity about the obligations on a member state contained in directives and the only issue for a member state is the manner of their implementation. In contrast there is likely to be a much higher degree of uncertainty regarding the content and scope of personal rights protected by Article 40.3.1° even if Article 40.3.1° is amended in the format recommended by the Review Group and accordingly it would be more difficult for the State to ascertain the scope of its obligations.

If the State's liability extends to omissions to legislate, its liability is potentially extremely broad and ill-defined, extending into areas which may not hitherto have been considered to fall within the scope of personal rights under the Constitution. Clearly the extension of the liability of the State for omissions to legislate so as to vindicate personal rights, can involve the courts in practice in issues of policy-making and raises fundamental issues of whether it is compatible with the principle of the separation of powers. At a practical level there could be serious difficulties associated with such an extension such as where particularly controversial issues were involved and a Government was unable to get the relevant legislation through the Oireachtas.

Discussion

In formulating its view, the Review Group considered that there were two separate issues involved: first, whether a failure by the State to legislate in particular areas could amount to a breach of its obligations under Article 40.3.1° *'to guarantee in its laws to respect and as far as practicable, by its laws to defend ...'*. There is already some authority for the proposition that an individual can establish a breach of his or her constitutional rights as a result of the State's failure to legislate and overall the Review Group did not consider that this ought to be changed.

The second and probably more difficult issue is what legal remedy ought properly to flow from a determination that there has been a breach of an individual's constitutional rights by a failure to legislate: see Sherlock 'Self-executing Provisions in EC Law and

under The Irish Constitution' (1996) 2 *European Public Law* 103 The courts have already indicated that, where breaches of constitutional rights are concerned, a constitutional right carried within it its own right to a remedy or for the enforcement of it (see Walsh J in *Meskell v CIE* [1973] IR 121). On some occasions this has involved the granting of injunctive relief as where in *Crotty v An Taoiseach* [1987] IR 713 an injunction was granted against the Government preventing it from depositing the instruments of ratification in relation to the Single European Act. Likewise in *Lovett v Gogan* [1995] 1 ILRM 12, where a person's right to earn a livelihood was being infringed by unlawful action, the Supreme Court held that the remedies available for breach of a constitutional right included an injunction where that was the only way the courts could protect against an invasion of constitutional rights.

As a general principle courts do not like to grant declaratory relief unless it can be followed up by an enforceable order (*Dudley v An Taoiseach* [1994] 2 ILRM 321). As far as the present issue is concerned an enforceable order which was to be of real benefit to a plaintiff whose personal rights were not vindicated might require that the courts order the Oireachtas to legislate, a situation which clearly would cause difficulties having regard to the principle of the separation of powers. It may be that the usual reluctance of the courts to grant declaratory orders without an appropriate enforcement order should yield in circumstances where the addressee of the order is the State. Thus, a declaration of a breach of an individual's rights should be sufficient where the State is the addressee of the order, without an accompanying enforcement order, an approach for which there is already some authority (*McMenamin v Ireland* [1994] 2 ILRM 368). While the separation of powers principle suggests that an order requiring the State to legislate would be an inappropriate remedy, there could be no objection to the grant of an award of damages against the State in favour of persons whose rights have been infringed.

One particular area where the question of the appropriate remedy to be obtained has arisen is where there is a failure by the State to vindicate rights by omission to legislate and the omission causes unlawful discrimination by failing to extend a particular benefit to an excluded class of persons. This arose in *Somjee v The Minister for Justice* where Keane J held that a determination by the courts that under-inclusive legislation was invalid would not benefit the plaintiff since this would not afford her the benefit of the particular substantive right concerned. Keane J stated:

> The Court has no jurisdiction to substitute for the impugned enactment a form of enactment which it considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment.

However, the later judgment of McMahon J in *Draper v Attorney General* [1984] IR 277 suggests that such legislation may not necessarily be completely outside the scope of judicial review where there was a duty to enact legislation which remained even after unconstitutional legislation is invalidated. A similar assertiveness appears in *McKinley v Minister for Defence* [1992] IR 333 where the Supreme Court held that a denial of a common law right to consortium to a wife, where it existed for a husband, infringed Article 40. The court held that making the common rule conform with the Constitution, by applying it to the wife also, removed an

unconstitutional discrimination. The court was in effect holding that the State failed to uphold the wife's right to equality of treatment as a result of its failure to extend the benefit of the right to consortium to the wife. Rather than declare the right granted to the husband unconstitutional by virtue of its being unfairly discriminatory, the Supreme Court was prepared to hold that the wife also had such a right. Furthermore, the court was prepared to hold that Section 35 of the Civil Liability Act 1961, which recognises the existence of the right of action in a husband to sue for loss of consortium, had to be construed so as to include a wife within its terms. Such a determination clearly poses some difficulties having regard to the principle of separation of powers since the court, as part of its remedy, was extending a benefit which the Oireachtas had itself declined to do.

Conclusion

The State ought to be accountable for omissions to legislate resulting in failure to vindicate an individual's personal rights. However, the accountability of the State for omissions to legislate ought probably to be confined to declaratory judgments to that effect and/or to an entitlement to damages. It ought not to result in the courts effectively ordering the State to legislate in particular areas, because of the infringement of the principle of separation of powers. Constitutional amendment may not be required having regard to the developed state of the law in this difficult area.

Group rights

The Review Group has not specifically addressed the question of the recognition and protection of collective or group rights. To the extent that they are not exclusively personal rights, but rather rights possessed by collectivities, they would not be appropriate for insertion into Article 40. Provision exists in the Constitution for some collective rights, for example, in Articles 44.2.5°-6°, and the Review Group has considered these rights in the context of its review of these particular provisions. A more general examination of group rights would involve consideration of the groups which should be entitled to the constitutional recognition and protection of their rights and of what rights should be protected. It would also involve consideration of many complex issues such as the relationship between the rights of a group and those of the individual members of the group, of other groups and of society in general. However, if a Human Rights Commission of the type discussed in Chapter 17 – 'New Provisions' were to be established, this is a task which it might be asked to perform.

Qualifying clause

As the Review Group has already noted, one of the unsatisfactory features of the fundamental rights provisions is the manner in which the qualifying clauses have been drafted. This is as true of Article 40.3 as of the other fundamental rights provisions of the Constitution. Thus, Article 40.3.1° imposes an obligation on the

State ‘to respect’ and ‘as far as is practicable’ by its laws to ‘defend and vindicate’ the unenumerated personal rights. Article 40.3.2° refers in somewhat different language to the State’s duty to protect the enumerated personal rights – life, person, good name, and property rights – from ‘unjust attack’. It appears to the Review Group that the subjective language of these particular qualifying clauses should be replaced by a more comprehensive qualifying clause containing firmer legal criteria. Of course, it may be that it would be inappropriate to have a universal qualifying clause covering every single personal right to be enumerated in the Constitution. In particular – as in the case of the European Convention on Human Rights – rights, such as the right to life and freedom from torture and slavery, may call for special treatment. However, the Review Group considers that, subject to these considerations, the enumerated personal rights should be subject to a general and more comprehensible qualifying clause along the lines of Article 10(2) of the European Convention on Human Rights.

Recommendation

The existing qualifying clauses contained in Article 40.3.1° and Article 40.3.2° should be replaced by a general and more comprehensive qualifying clause along the lines of Article 10(2) of the European Convention on Human Rights. Certain rights – such as the right to life and freedom from torture and slavery – may call for special treatment.

Rights to Life (‘Unborn’ and Mother)

40.3.3°

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

This subsection shall not limit freedom to travel between the State and another state.

This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.

Background

The immediately preceding subsection (Article 40.3.2°) was in the original text of the Constitution and commits the State ‘by its laws to protect as best it may from unjust attack and, in the case of injustice done, vindicate the life ... of every citizen’. Abortion, the unlawful procurement of a miscarriage, was prohibited by the Offences Against the Person Act 1861 (sections 58 and 59), a statute which is still in force. The right to life of the ‘unborn’ was recognised in the course of Supreme Court judgments (for example Walsh J in *McGee v The Attorney General* [1974] IR 284, Walsh J in *G v An Bord Uchtála* [1980] IR 36). However, the Supreme Court judgment in the *McGee* case, in which a right to marital privacy in the use of contraceptives was recognised, aroused concern that judicial extension of this principle of privacy might lead to abortion becoming lawful here, just as in the US the Supreme Court’s decision in *Roe v Wade* 410 US 113 (1973) led to its being lawful there. The two largest political parties undertook, in the context of general elections in 1981 and 1982, that a constitutional amendment would be introduced to block such a development, which they considered would be generally unacceptable**,** whether resulting from judge-made law or from legislation. The formula which is now part of Article 40.3.3°, guaranteeing explicitly the right to life of the ‘unborn’ with due regard to the equal right to life of the mother, was put to the people by referendum in September 1983, and adopted by a large majority.

Developments since 1983

Various Supreme Court judgments between 1983 and 1989 were negative towards the operation in Ireland of abortion referral services. However, a ruling of the European Court of Justice in 1991 undermined this stance by suggesting that agencies here of foreign abortion clinics, and these clinics themselves, might be entitled, under EC law, to disseminate information in Ireland about the services they lawfully provided elsewhere in the Community.

Efforts to preserve the existing Irish prohibition on abortion and on dissemination of relevant information gave rise to Protocol No 17 to the Maastricht Treaty on European Union signed in February 1992. Later (following the *X* case described below), a Solemn Declaration on that Protocol stated, in effect, that the Protocol was not intended to prevent travel abroad to obtain an abortion where it was legally available, or the availability in Ireland of information about abortion services on conditions to be laid down by law. While the Protocol was intended to prevent any EU law permitting abortion from overriding the application in Ireland of Article 40.3.3° before it was amended by the travel and information referendums of 1992, there is doubt whether it is still effective in the light of these amendments.

There is also a question as to the legal significance of the Solemn Declaration which provides that 'at the same time the High Contracting Parties solemnly declare that in the event of a future constitutional amendment in Ireland which concerns the subject-matter of Article 40.3.3° of the Constitution of Ireland and which does not conflict with the intention of the High Contracting Parties hereinbefore expressed, they will, following the entry into force of the Treaty on European Union, be favourably disposed to amending the said Protocol so as to extend its application to such constitutional amendment if Ireland so requests'. The effectiveness of this Declaration may be in doubt, since the European Court of Justice has generally refused to admit contemporary declarations of this kind as an aid to construing the EC treaties and legislation: *see R v Home Secretary ex p Antonissen* (Case C-292/89) [1991] ECR 1-745.

In 1992, in *The Attorney General v X* [1992] 1 IR 1, which became known as the *X* case, where a sexually-abused young teenager had become pregnant, was considered suicidal, and had been restrained by the High Court from travelling to England for an abortion, the Supreme Court, by a majority, held that the injunction restraining the girl from leaving the jurisdiction should be lifted. The Supreme Court held that the right to life of the unborn had to be balanced against the mother's right to life and that Article 40.3.3° permitted termination of a pregnancy in the State where there was a real and substantial threat to the mother's life, as distinct from her health. It also held that the threat of suicide constituted a threat to the mother's life for this purpose. Some statements of the majority of the court (in comments which were not part of the binding *ratio* of the decision) indicated that the constitutional right to travel under domestic law could be restrained so as to prevent an abortion taking place abroad where there was no threat to the mother's life.

This judgment, although it eased the widespread concern for the girl and her family, caused misgivings of principle both for those concerned about the admission of a suicidal disposition as a ground for abortion and for those opposed to permitting abortion at all in the State. There was also much concern about *any* restriction on freedom to travel and *any* curtailment of access to information. In a desire to ease some of these concerns and, at the same time, to augment support for the Maastricht Treaty, new referendums were undertaken to confirm freedom to travel to use an abortion service lawfully operating elsewhere and freedom to obtain or make available information relating to such services, subject to conditions to be laid down by law; and the third referendum proposed to amend the 1983 wording by adding the following:

> It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.

While the travel and information referendums were passed, the referendum providing for the foregoing change of wording was defeated by a two-to-one majority (1,079,297 versus 572,177). It was rejected, apparently, by those who disliked its restrictiveness

as well as by those opposed to abortion being legalised here on any ground.

Incidence of abortion

Numbers of Irish women travel abroad annually to avail themselves of legalised abortion services in other jurisdictions, mostly Britain. Official British statistics (Office of Population Censuses and Surveys, London) show that over 80,000 abortions have been performed on Irish women in England and Wales since 1970. In 1994, the latest year for which full figures are available, 4,590 women normally resident in the Republic of Ireland had legal abortions in England and Wales. The ratio of such abortions to live births in the State is almost 1 to 10. (See the paper submitted by Women and Pregnancy Study Centre, Trinity College, Dublin, Appendix 21.)

While opposite standpoints – 'pro-life' or 'pro-choice' – have tended to dominate the public discussion of the abortion issue, there is much private sympathy and concern for the personal, social and moral anxieties of those facing crisis pregnancies, particularly where rape, incest or other grave circumstances are involved. It may be doubted whether enough attention is being given to such basic matters as education on sexuality, human reproduction and relationships as a way of reducing the incidence of abortion, counselling in relation to crisis pregnancies, and the promotion of women's and men's sense of parenthood as a valuable contribution to society. The Review Group appreciates that there are much wider considerations involved than constitutional or legal provisions but it is on these that the Review Group must necessarily focus.

Difficulties

The state of the law, both before and after the *X* case decision, gives rise to much dissatisfaction.

There is no definition of 'unborn' which, used as a noun, is at least odd. One would expect 'unborn human' or 'unborn human being'. Presumably, the term 'unborn child' was not chosen because of uncertainty as to when a foetus might properly be so described.

Definition is needed as to when the 'unborn' acquires the protection of the law. Philosophers and scientists may continue to debate when human life begins but the law must define what it intends to protect.

'Unborn' seems to imply 'on the way to being born' or 'capable of being born'. Whether this condition obtains as from fertilisation of the ovum, implantation of the fertilised ovum in the womb, or some other point, has not been defined.

In the context of abortion law, which deals with the termination of pregnancy, a definition is essential as to when pregnancy is considered to begin; the law should also specify in what circumstances a pregnancy may legitimately be terminated and by whom.

If the definition of 'pregnancy' did not fully cover what is envisaged by 'unborn', the deficiency would need to be remedied by separate legal provisions which could deal also with other complex issues, such as those associated with the treatment of infertility and *in vitro* fertilisation.

At present, all these difficulties are left to the Supreme Court to resolve without explicit guidance.

The impossibility of reconciling the 'equal' rights to life of the 'unborn' and the mother, when the two rights come into conflict, was manifested in the *X* case.

Following the *X* case judgment, the scope of admissibility of a suicidal disposition as a ground for allowing an abortion and the absence of any statutory time-restriction on intervention to terminate a pregnancy remain causes of disquiet.

Possible approaches

The definitional difficulties are open to four different approaches:

i) to leave things as they are, relying on the Supreme Court to determine the meaning of 'unborn'

ii) to write a definition of 'unborn' into the Constitution itself

iii) to authorise expressly by a constitutional provision the making of all necessary definitions by legislation

iv) to make definitions by legislation in the expectation that, if challenged, they may be held by the Supreme Court to be in conformity with the Constitution as it is.

The Review Group considers that definition is required. Approaches ii) and iii) would require approval by a referendum.

Apart from the definitional problems, there are various possible approaches to clarifying the state of the law. Equally, however, there is a great divergence of public opinion as to what issues should be addressed, and how; value judgments are involved in every case. The Review Group has considered five options which are discussed in turn:

a) introduce an absolute constitutional ban on abortion

b) redraft the constitutional provisions to restrict the application of the *X* case decision

c) amend Article 40.3.3° so as to legalise abortion in constitutionally defined circumstances

d) revert, if possible, to the pre-1983 situation

e) regulate by legislation the application of Article 40.3.3°.

a introduce an absolute constitutional ban on abortion

This must rest on a clear understanding of the meaning of 'abortion'. The 1861 Act prohibits 'unlawfully procuring a miscarriage' which might nowadays be rendered as 'illegal termination of pregnancy' but, in either case, the words 'unlawful' and 'illegal' are significant. If an abortion can be either lawful or unlawful, the word on its own must be understood to refer neutrally to the termination of a pregnancy or procurement of a miscarriage. To ban abortion *simpliciter* could thus criminalise medical intervention or treatment necessary to protect the life of the mother if such intervention or treatment required or occasioned the termination of her pregnancy.

According to a press report (*The Irish Times,* 10 September 1992), the Pro-Life Campaign considers 'a complete prohibition on abortion is legally and medically practicable and poses no threat to the lives of mothers'. Reference is made to 'the success of medical practice in protecting the lives of mothers and their babies', and it is claimed that 'a law forbidding abortion protects the unborn child against intentional attack but does not prevent the mother being fully and properly treated for any condition which may arise while she is pregnant'. Either of two hypotheses seems to be involved here – that the termination of a pregnancy is never necessary to protect the life of the mother or that, if it is, such medical intervention is already protected by law and that this protection would not be disturbed or dislodged by a constitutional ban on abortion. It would not be safe to rely on such understandings. Indeed, as explained later, if a constitutional ban were imposed on abortion, a doctor would not appear to have any legal protection for intervention or treatment to save the life of the mother if it occasioned or resulted in termination of her pregnancy.

It would not, therefore, be reasonable to propose a prohibition of abortion (understood as termination of pregnancy) which did not expressly authorise medical intervention to save the life of the mother.

b redraft the constitutional provisions to restrict the application of the *X* case decision

The attempt to do this by referendum as recently as 1992, by ruling out the mother's suicidal disposition and mere risk to her health as justifications, failed conspicuously. There would obviously be extreme reluctance to go this route again, given the uncertainty as to what precise amendment of the 1983 subsection would be likely to command the majority support of the electorate.

c amend Article 40.3.3° so as to legalise abortion in constitutionally defined circumstances

Although thousands of women go abroad annually for abortions without breach of domestic law, there appears to be strong opposition to any extensive legalisation of abortion in the State. There might be some disposition to concede limited permissibility in extreme cases, such, perhaps, as those of rape,

incest or other grave circumstances. On the other hand, particularly difficult problems would be posed for those committed in principle to the preservation of life from its earliest stage.

d revert, if possible, to the pre-1983 position

This presents itself as a reaction to the unsatisfactory position created by the equal rights provision of the 1983 Amendment. There is a view that experience since 1983 is a lesson in the wisdom of leaving well enough alone, of being content to rely on the judgment of a majority of legislators, and of recognising the superior capacity of legislation to provide, for example, necessary clarification as to when medical intervention is permissible to terminate a pregnancy.

It does not appear, however, that it would now be feasible or safe to revert simply to the pre-1983 situation, which was governed basically by the 1861 Act.

That Act prohibited the *unlawful* procurement of a miscarriage, leaving it to be understood that miscarriages procured consistently with ethical medical practice were not unlawful. So, before 1983, the position was that unlawful procurement of a miscarriage was prohibited by legislation, ethical medical intervention to protect the life of the mother, even if it occasioned or resulted in termination of her pregnancy, might well have been regarded under the 1861 Act as not being unlawful, and a number of comments of individual Supreme Court judges had affirmed the right to life of the unborn human being. However, the extent of the doctor's protection under the 1861 Act was never tested in an Irish court and carried no certainty.

Reverting to the pre-1983 situation would, therefore, be unsafe unless there were an express assurance of the protection afforded to doctors.

It is essential to have specific legislative protection for appropriate medical intervention because it cannot safely be said how far, if at all, the presumed 1861 Act protection is now effective in Ireland. Moreover, the protection could not be allowed rest on such an uncertain base as ethical medical standards. These are not uniform even amongst doctors in one country and medical ethics may change over time. Even prior to the 1967 Abortion Act in England, it would seem (in *R v Bourne* [1939] 1 KB 687) that abortion was permissible if the pregnancy threatened to make the mother a 'physical or mental wreck'. In any case, in this litigious age, doctors could not safely rely on any convention not clearly specified and confirmed by law.

Reverting to the pre-1983 situation would involve:

i) removing the abortion issue from the Constitution by deleting, without prejudice to particular decisions taken under it, the 1983 insertion (the Eighth Amendment) and

ii) placing renewed trust in the legislature by relying henceforth on the prohibition in the 1861 Act, reinforced, however, by specific legislative protection for medical intervention to save the life of the mother.

As shown by the 1992 referendums, however, there would be public insistence on retaining the travel and information provisions as independent entitlements.

Moreover, it would appear that recourse could still be had to the provisions which would remain in the Constitution protecting life and other rights (for example Article 40.3.1° and 2°).

There could, in any case, be no assurance that a referendum proposal as outlined at i) and ii) above would commend itself to a majority of the electorate.

e regulate by legislation the application of Article 40.3.3°

Relying on legislation alone would avoid the uncertainties surrounding a referendum but the legislation would have to conform to the principles of the *X* case decision and be within the ambit of Article 40.3.3° generally.

In brief, legislation could:

i) include a definition of 'unborn' (preferably 'unborn human') or, in the context solely of abortion law, a definition of 'pregnancy', even if 'unborn' were not thereby fully covered. Any legislative definition of 'unborn' would, of course, be open to constitutional challenge but could be an advance towards clarifying the law

ii) afford express protection for appropriate medical intervention

iii) require written certification by appropriate medical specialists of 'real and substantial risk to the life of the mother'

iv) in preference to leaving the matter to medical discretion, and again subject to possible constitutional challenge, impose a time-limitation to prevent a viable foetus being aborted in circumstances permitted by the *X* case decision.

Conclusion

While in principle the major issues discussed above should be tackled by constitutional amendment, there is no consensus as to what that amendment should be and no certainty of success for any referendum proposal for substantive constitutional change in relation to this subsection.

The Review Group, therefore, favours, as the only practical possibility at present, the introduction of legislation covering such matters as definitions, protection for appropriate medical intervention, certification of 'real and substantial risk to the life of the mother' and a time-limit on lawful termination of pregnancy.

Personal Liberty

40.4

40.4.1° *No citizen shall be deprived of his personal liberty save in accordance with law.*

40.4.2° *Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law.*

40.4.3° *Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Supreme Court by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the Supreme Court has determined the question so referred to it.*

Introduction

Article 40.4.1° sets out the basic principle that no citizen shall be deprived of his or her liberty save in accordance with law. In view of the simplicity of its wording, the provision has given rise to little difficulty.

The categories of detention authorised by law are clearly identified:

arrest and limited detention following upon arrest

detention without bail pending trial

imprisonment following upon conviction

imprisonment for contempt of court

internment

detention under the Mental Treatment Acts 1945-1961

detention of persons with infectious diseases

detention of alcoholics, drug addicts and vagrants

detention of juveniles

detention for the purposes of extradition

detention for the purposes of excluding and deporting aliens under the Aliens Act 1935

imprisonment for wilful refusal to comply with court orders concerning payment of debt.

Issues

1 whether Article 40.4.1° should be replaced by a provision similar to Article 5 of the European Convention on Human Rights

The Review Group has already rejected the wholesale incorporation into the Constitution of international human rights conventions. It has instead decided that it would be preferable to draw on these conventions where:

i) the right is not protected by the Constitution

ii) the standard of protection of such rights is superior to that guaranteed by the Constitution

iii) the wording of the clause in the Constitution protecting such a right might be improved.

Article 5 of the European Convention on Human Rights provides for an exhaustive enumeration of the categories of deprivation of liberty which can be considered to be lawful once carried out in accordance with a procedure prescribed by law. It provides:

40.4.4° *The High Court before which the body of a person alleged to be unlawfully detained is to be produced in pursuance of an order in that behalf made under this section shall, if the President of the High Court or, if he is not available, the senior judge of that Court who is available so directs in respect of any particular case, consist of three judges and shall, in every other case, consist of one judge only.*

40.4.5° *Where an order is made under this section by the High Court or a judge thereof for the production of the body of a person who is under sentence of death, the High Court or such judge thereof shall further order that the execution of the said sentence of death shall be deferred until after the body of such person has been produced before the High Court and the lawfulness of his detention has been determined and if, after such deferment, the detention of such person is determined to be lawful, the High Court shall appoint a day for the execution of the said sentence of death and that sentence shall have effect with the substitution of the day so appointed for the day originally fixed for the execution thereof.*

40.4.6° *Nothing in this section, however, shall be invoked to prohibit, control, or interfere with any act of the Defence Forces during the existence of a state of war or armed rebellion.*

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court

b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

These correspond broadly with the categories of detention authorised by Irish law, except in two respects: Irish legislation (1) provides for internment and (2), in some cases, the Convention permits preventive detention. The power of

internment is conferred by the Offences Against the State (Amendment) Act 1940 which came into law following a reference to the Supreme Court by the President under Article 26 for an opinion as to its constitutionality (an almost identical provision having been struck down the year before by the decision of Gavan Duffy J in the *State (Burke) v Lennon* [1940] IR 136). The Supreme Court advised the President that the 1940 Bill was constitutional, it became law and on one view remains at present unassailable by virtue of the provisions of Article 34.3.3° of the Constitution. However, this view may be open to some doubt as the decision of the court was a decision of the old Supreme Court, namely the one continued in force by virtue of the transitory provisions of the Constitution, and was not a decision of the new Supreme Court which was required to be established under Article 34 of the Constitution (and was not so established until 1961 and which alone might be thought to have jurisdiction under Article 26 of the Constitution). Additionally, if the rule against subsequent challenge embodied in Article 34.3.3° is removed, the internment provisions authorised by the 1940 Act will be capable of being challenged as not being consistent with the provisions of the Constitution. However, since the passing of the 1940 Act and the entry into force of the European Convention on Human Rights, any operation of the internment provisions would in ordinary circumstances be contrary to Article 5 on the Convention unless a derogation permitted by Article 15 of the Convention is justified. Article 15 of the Convention provides:

> 1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its obligations under international law.
>
> 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
>
> 3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Thus, when Ireland reintroduced internment in 1957, the Court of Human Rights in the *Lawless* case reviewed the circumstances which gave rise to the derogation (as it did subsequently concerning the introduction of internment in Northern Ireland in the case brought by Ireland against the United Kingdom) to determine whether it was justified having regard to the existing state of affairs and concluded that it was. Thus, a switch to an Article 5-type provision which does not expressly permit internment would not prevent internment being introduced in circumstances where an Article 15 derogation was entered and was capable of being justified.

On the other hand, pre-trial preventive detention expressly contemplated by Article 5(1) has been held to be inconsistent with the provisions of the Constitution in the case of *The People (Attorney General) v O'Callaghan* [1966] IR 501 and *The People (Director of Public Prosecutions) v Ryan*, Court of Criminal Appeal, 30 November 1992. A switch to an Article 5(1)(c)-type provision would result in a lessening of the general protection of the right to individual liberty in the circumstances.

The provisions of Article 5(2), (3), (4) and (5) are already adequately protected under other provisions of the Constitution either impliedly or expressly. The Review Group does not recommend the replacement of Article 40.4.1° and it should accordingly be retained.

Recommendation

No change is proposed.

2 whether the word 'person' should be substituted for 'citizen'

Because the Review Group does not perceive any need to replace the broad wording of Article 40.4.1° by the listing contained in Article 5(1) of the Convention, the only other significant proposal for reform of Article 40.4.1° is that relating to the use of the word 'citizen'.

The use of the word 'citizen' may be thought to be slightly misleading as it might suggest that non-citizens do not have the protection of their right to liberty guaranteed under the Constitution. In law, aliens are as much subject to the law in so far as it permits any restriction on their right to liberty as any citizen is, and indeed the law provides for restrictions on aliens which are not applicable to citizens, such as those contained in the Aliens Act 1935 and the order made thereunder and in the Prisoners of War and Enemy Aliens Act 1956. However, the section does not entitle any invasion of an alien's right to liberty or to disregard that right in any way not otherwise authorised by law. It is clear from the terms of Article 40.4.2°, which provides for the constitutional remedy of an enquiry into the legality of a person's detention, that this is not restricted to citizens but applies to all persons who are detained, and it is clear from the case law that an alien detained is as much entitled to have the legality of his or her detention inquired into as a citizen. The Review Group considers that the retention of the word 'citizen' in Article 40.4.1° would serve no purpose and accordingly recommends its replacement by the word 'person'.

This is also in line with the Review Group's recommendations in respect of the other aspects of the fundamental rights provisions of the Constitution. The Review Group is of the opinion that it would be desirable that the protection of Article 40.4 should extend to all persons, and not merely citizens.

Such an amendment would, firstly, bring this subsection of Article 40.4 in line with the rest of that Article which refers to 'person' and not to 'citizen'. In practice, aliens can and do avail themselves of the enquiry procedure (formerly referred to as the

habeas corpus procedure) set out at Article 40.4.2°-5°. Secondly the use of the word 'person' as opposed to 'citizen' in this subsection would clarify the entitlement of aliens to benefit from the guarantee of personal liberty. In view of the fact that the right not to be illegally detained is one of the most fundamental of rights, there would appear to be no justification for appearing to limit the benefit of this right to citizens.

Recommendation

The word 'person' should be substituted for 'citizen'.

3 whether Article 40.4.2° requires amendment

Article 40.4.2° sets out the procedure to be followed where an Article 40 detention enquiry is being conducted by the High Court. The Review Group regards it as a matter of fundamental importance to have such a procedure provided for in the Constitution itself as an indispensable guarantee of judicial protection of an individual's right to liberty whether against the State or any person. There does not appear to be any reason to amend it.

Recommendation

No change is proposed.

4 whether the case-stated procedure is redundant because of the developed case law

Article 40.4.3° provides for a procedure for the stating of cases to the Supreme Court where the High Court is of the view that the law which allows for the detention of a person is, in fact, invalid. The historical background is that this provision, inserted by the Second Amendment of the Constitution Act 1941, followed upon the Supreme Court's rejection of an attempted appeal in the case of *The State (Burke) v Lennon* [1940] IR 136 in which the internment provisions of the Offences Against the State Act 1939 were declared to be unconstitutional. In view of the decision of the Supreme Court in the case of *The State (Browne) v Feran* [1967] IR 147, the result of which was to hold that a right of appeal did lie from a decision of the High Court made in an Article 40 enquiry directing the release of a prisoner, Article 40.4.3° may be thought to be redundant and that therefore the Review Group could recommend its deletion.

Arguments for deletion

1 while at the time of the original enactment of the Constitution an appeal against an order under Article 40 was not thought to be permitted, this is now permissible following the decision in *The State (Browne) v Feran.* Accordingly, the State now has a choice, which it did not originally have, whether an appeal should be taken against such an order

2 the effect of Article 34.4.4° is to prevent the Oireachtas from seeking to remove this type of appellate jurisdiction from the Supreme Court

3 it is unnecessary that in every single case, irrespective of whether the State wishes that an appeal be taken, the matter should be required to be considered by the Supreme Court

4 if the High Court states a case based upon its determination as to the invalidity of one section of an Act, the Supreme Court appears to be precluded from considering the constitutionality of other sections of the Act, in particular where there has been no adjudication in the High Court as to their invalidity. Thus this subsection of the Article does not inevitably lead to the totality of the law being considered by the Supreme Court as to its constitutionality.

Arguments against

1 it is appropriate that the Supreme Court be required to pronounce upon the correctness of a decision of the High Court which invalidates legislation and frees from custody all those who were held pursuant to that legislation

2 in the absence of such a provision the High Court would be obliged to free immediately all such detained persons while any such appeal as might be taken from such a decision was pending before the Supreme Court

3 the substance of the provision enabling the High Court either (a) not to release unconditionally such detained persons or (b) to release them on appropriate bail conditions pending the Supreme Court appeal is both a necessary and prudent safeguard against the prospects of judicial error at first instance which either might, or should, be rectified by an appeal to the Supreme Court. The experience before this provision was inserted into the Constitution by the Second Amendment eloquently supports this view. In *The State (Burke) v Lennon* all those interned were immediately freed. The infamous raid on the Magazine Fort in the Phoenix Park, in which it was suggested that some of these were involved, took place before the right of appeal (which subsequently was held not then to exist) was sought to be exercised

4 the entirety of the Act should be referred by the High Court in a case stated to the Supreme Court for decision as to its constitutionality rather than any individual section or sections, as this would appear to conform with the spirit of the requirement of this section of the Article.

Recommendation

No change is proposed or required in Article 40.4.3°.

5 whether a division of the High Court should hear Article 40 detention enquiries

Article 40.4.4° provides for the possibility of an Article 40 detention enquiry being heard by a Divisional Court of the High Court consisting of three judges, where the President or in his absence a senior judge so directs. This provision was inserted by the Second Amendment of the Constitution Act 1941 and it is thought that it was intended to prevent applicants for habeas corpus being able to pick their judges and, by so doing, hoping to predetermine the outcome of their application for release. It was thought necessary to empower the President of the High Court in an appropriate case to determine whether an application for release should be heard by one judge or by three. In practice resort to this has been infrequent, though it has been utilised in connection with two important extradition cases in the recent past: see *Kane v The Governor of Mountjoy Prison* [1988] IR 757 and *Finucane v MacMahon* [1990] 1 IR 165. There are provisions in section 45 of the Supreme Court of Judicature (Ireland) Act 1877 allowing Divisional Courts to be assembled; moreover, Article 36 iii of the Constitution provides that the constitution and organisation of the court shall be regulated in accordance with law. Accordingly, on one view it might not be thought to be necessary to retain such a provision. However, the provision has not given rise to any difficulties, it is not objectionable in any way, and in the view of the Review Group constitutes a useful permissive power which may be invoked in appropriate cases where substantial questions arise concerning the fundamental right to liberty which should properly be heard by three judges. Accordingly, the section ought to be retained.

Recommendation

Article 40.4.4° should be retained.

6 appeals relating to death sentences

Article 40.4.5° deals with Article 40 detention enquiries where a death sentence may have been imposed. The Review Group notes that the death penalty has been abolished as a sentence which may be imposed, by the Criminal Justice (Amendment) Act 1990. Unless the death penalty were to be specifically prohibited by the Constitution and the other provisions referring to the death penalty were also removed, this provision would not be redundant and should be retained. In view of the terms of Article 28.3.3° which permit of the declaration of a State of Emergency together with legislation in pursuance of a State of Emergency which might authorise the imposition of a death penalty, as it did in the past, it would appear to be necessary as a minimum check on the legality of the operation of such emergency legislation to retain the provisions of Article 40.4.5°. The Review Group considers that the Constitution should prohibit the reintroduction of the death penalty.

Recommendation

Prohibit the re-introduction of the death penalty. If this is not deemed desirable, Article 40.4.5° should be retained. If it is prohibited, Article 28.3.3° will require amendment so that the death penalty cannot be imposed in any circumstances.

7 bail

The right of an accused person to bail pending his or her trial on a criminal charge has been recognised as an essential concomitant of the right of the citizen to liberty, because punishment for an offence begins at conviction. The presumption of innocence has been judicially considered to have the substantive effect of not allowing an accused person to be punished by being detained until his or her trial on the charge of which he or she has been accused, either because of the facts of the accusation itself or because of the belief that he or she may in the future commit other offences, perhaps not yet in contemplation. This right may be curtailed at present only in circumstances where there is a reasonable probability that the accused, if released on bail, will not stand his or her trial or will interfere with witnesses or otherwise interfere with evidence and thus seek to evade being brought to justice in relation to the charge concerned.

The Review Group notes that the recent report of the Law Reform Commission on the question of bail is under active consideration by the Government and, having regard to the terms of reference of the Review Group which excuse it from attending to this subject, it makes no substantive recommendations on it.

Inviolability of the Dwelling

40.5

The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.

Introduction

Article 40.5 provides that the dwelling of every 'citizen' is 'inviolable' and shall not be forcibly entered 'save in accordance with law'. This provision parallels similar protections contained in other international instruments and constitutions: see, for example, Article 8 of the European Convention on Human Rights, the Fourth Amendment of the US constitution, Article 13 of the German constitution, Article 14 of the Italian constitution and Article 18(2) of the Spanish constitution. Although Article 40.5 is, broadly speaking, a satisfactory provision which has not given rise to difficulties, the Review Group has examined a number of suggestions for its improvement.

Issues

1 whether the word 'person' should replace 'citizen'

In line with its recommendations in respect of the other aspects of the fundamental rights provisions of the Constitution, the Review Group recommends that the word 'person' should replace 'citizen' in Article 40.5. In any event the EU treaty may require that EU nationals be accorded the benefit of the protection of this section. The Review Group is of the opinion that it would be desirable that the protection of Article 40.5 should extend to all persons, and not only citizens.

Recommendation

Replace the word 'citizen' in Article 40.5 by the word 'person'.

2 whether the words 'dwelling' and 'inviolable' need to be further defined

i) The word 'inviolable' has not been the subject of any judicial decisions. 'Forcible entry' is a specific way of violating a citizen's dwelling. The extent of the protection afforded by the word 'inviolable' is obviously wider but its exact extent is not clear. It has given rise to no difficulty, however, and in the view of the Review Group it is preferable to leave its interpretation to the judiciary to be developed on a case-by-case basis.

ii) The meaning of the word 'dwelling' has been examined in a series of judicial decisions. The word is generally understood to mean the structure of the house and does not cover its surrounding area (such as a driveway or garden) or curtilage: see *Director of Public Prosecutions v Corrigan* [1986] IR 290

and *Director of Public Prosecutions v Forbes* [1993] ILRM 817. It does not extend to licensed premises: see *Director of Public Prosecutions v McMahon* [1986] IR 393. However, it does cover dwellings such as trailers/caravans, tents and mobile homes.

The Review Group is of the opinion that it would not be appropriate to attempt to put forward a precise definition of these words in the text of the Constitution. The word 'dwelling' has a relatively clear meaning and, where necessary, can be defined on a case-by-case basis by the courts, thus preserving a flexibility of interpretation which would be appropriate for a word of this kind.

Recommendation

No change is necessary.

3 whether the constitutional protection against forcible entry and search should extend beyond the dwelling to cover, for example, business premises and legal persons as opposed to natural persons

The law relating to forcible entry of a premises (other than dwelling houses) and the search and seizure of materials found therein is governed by existing common law rules and a diverse number of statutes authorising the issue of search warrants which entitle forcible entry to be gained to the premises or property the subject of the search warrant. In general these are issued by judges of the District Court although one notable exception may be found in section 29 of the Offences Against the State Act 1939 (as amended by section 5 of the Criminal Law Act 1976), where a search warrant may be issued by a Garda superintendent.

Having regard to the decision of the Supreme Court in *The People (Director of Public Prosecutions) v Kenny* [1990] 2 IR 110, the person applying for a search warrant must show that he or she has reasonable cause for the relevant suspicion and the judge must make an independent objective decision as to whether reasonable grounds exist for the issue of the search warrant. Any substantial illegality attaching to the issue or execution of the search warrant may give rise to a legal cause of action. Thus legal protection exists against unlawful searches or seizures. The question of whether Article 40.5 extends to legal persons has never been judicially examined. Having regard to the fact that Article 40.5 refers to dwellings, it seems unlikely that Article 40.5 can be invoked by legal persons.

The question the Review Group has considered is whether it is necessary or appropriate to elevate the existing legal protections to the constitutional level in respect of business premises and in respect of property owned by legal persons. The Review Group notes that the European Court of Justice has declined to extend such protection to office premises (see *Dow Benelux NV v The Commission of the European Communities* (Joined Cases 97-99/87) [1989] ECR 3137). The Review Group also notes that Article 8.1 of the European Convention on Human Rights provides that:

> Everyone has the right to respect for his private and family life, his home and correspondence.

This provision reflects elements of the unenumerated right of privacy which may be protected by Article 40.3, the protection of the family contained in Article 40.1 and the protection of the dwelling found in Article 40.5, all of which are dealt with by the Review Group in those contexts.

The Review Group considers that extended protection, on a constitutional level, to office and business premises and to legal persons is neither appropriate nor necessary. A legal person does not have a dwelling as such and the Review Group considers that the protection of the right of a citizen in respect of his dwelling differs qualitatively from the protection of premises and was intended to be confined to natural persons and properly so. More fundamentally, the Review Group believes that the protections afforded by Article 40.5 are designed to protect individual human rights (as are the rest of the fundamental rights Articles), in this case against oppressive encroachment by agents of the State.

Conclusion

Article 40.5 should not be extended to cover business office premises and legal persons.

Freedom of Expression

40.6.1°.i

40.6.1° *The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-*

i. *The right of the citizens to express freely their convictions and opinions.*

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

Introduction

Article 40.6.1°.i provides, *inter alia*, that the State guarantees liberty for the exercise, subject to 'public order and morality' of the right of citizens to express freely 'their convictions and opinions'. It also provides that the 'publication or utterance of blasphemous, seditious or indecent matter' is an offence 'which shall be punishable in accordance with law'. This provision parallels (with important differences) similar provisions designed to protect free speech contained in other international instruments and constitutions: see for example Article 19 of the International Covenant on Civil and Political Rights (CCPR), Article 10 of the European Convention on Human Rights (ECHR), the First Amendment of the US constitution, Article 5 of the German constitution, Article 21 of the Italian constitution and Article 20 of the Spanish constitution.

Indeed, the right of free speech and of expression is one which is guaranteed in virtually every constitution and relevant international human rights instrument. The right of free speech is generally considered to be a key fundamental right and, in this respect, the language of the German Constitutional Court in its celebrated decision in the *Luth* case 7 Berf GE 198 (1958) cannot be improved upon:

> The basic right to freedom of opinion is the most immediate expression of the human personality in society and, as such, is one of the noblest of human rights. ... It is absolutely basic to a liberal-democratic order because it alone makes possible the constant intellectual exchange and the contest among opinions that form the lifeblood of such an order; it is the matrix, the indispensable condition of nearly every other form of freedom.

Of course, the right of freedom of speech is not – and cannot be – absolute. The extent to which such a right can and should be circumscribed is considered below. It may be that the drafters of the Constitution intended to protect the substance of the right of free speech, while providing that it should be qualified by reference to considerations such as 'public order' and 'morality'. Nevertheless, even to judge from the language of Article 40.6.1°.i, the extent of the protection of free speech provided for by this subsection seems weak and heavily circumscribed. As McGonagle has observed ('Freedom of Expression and Information', in *Irish Human Rights Yearbook,* 1995, p 130):

> A guarantee of freedom of expression may have been enshrined in the ... Constitution of 1937 but its formulation was so qualified and ambivalent as to leave expression and information issues virtually untouched and unlitigated for several decades to come.

Indeed, the weakness of the guarantee in practice may be judged from the fact that the courts have yet to invalidate a single statutory provision by reference to Article 40.6.1°.i and with a few (relatively recent) exceptions, such case law as exists has tended to emphasise the Constitution's limitations on the freedom of expression. Indeed, unlike other areas of the personal rights provisions, the relative paucity of the case law in this area is such that not much would be lost if Article 40.6.1°.i were to be replaced. Article 10 of the European Convention on Human Rights provides:

> 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Review Group is of the opinion that Article 40.6.1°.i as drafted is unsatisfactory and for this and other reasons outlined, recommends that the subsection be replaced by a new clause protecting the right of free speech modelled on the foregoing Article of the Convention.

restrictions on the right to free speech – general policy considerations

It may be noted that Article 10.2 of the European Convention on Human Rights (and, indeed, the corresponding provisions of other constitutions) expressly allows legislation regulating the exercise and content of free speech. (It is true that the language of the First Amendment of the United States constitution is absolutist, but the US Supreme Court has rejected the suggestion that there cannot be some control of free speech.) Any re-drafted version of Article 40.6.1°.i would have to permit the Oireachtas to regulate and control the exercise of free speech in order to deal with matters such as obscenity and incitement to violence.

The key point, however, is that any legislative restrictions on the exercise of free speech must be 'necessary in the public interest' and that the onus ought to be on the State to demonstrate that such restrictions are objectively justifiable. It may be that such a development would emerge from the existing language of Article 40.6.1°.i (especially having regard to the application of the proportionality doctrine to other areas of the fundamental rights provisions) but the Review Group is of the opinion that this

process would be better accomplished by a re-drafted version of Article 40.6.1°.i along the lines already suggested.

some difficulties

Apart from these general considerations, the text of Article 40.6.1°.i has given rise to difficulties. It suffices to mention briefly some:

i) 'the right of citizens'

On the face of it, the right is confined to citizens and excludes non-citizens and legal persons. In practice, the courts have tacitly circumvented these potential difficulties. Thus, in *Attorney General of England and Wales v Brandon Book Publishers Ltd* [1986] IR 597, a limited company was permitted to rely on Article 40.6.1°.i in order to defeat an attempt to restrain the publication of a book written by a deceased member of the British security services.

ii) 'the State shall endeavour to ensure that ...'

This language is awkward in that it is not clear whether it places the State under a legally cognisable obligation.

iii) 'the organs of public opinion, such as the radio, the press, the cinema...'

This provision already seems dated in that it does not take account of subsequent developments such as television and the Internet. Any re-draft which attempts to be specific in this area would probably be soon outmoded.

iv) 'The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law.'

The meaning of this sentence is somewhat obscure. On one view, it seems to create (or, at the very least, require the creation of) offences of blasphemy, sedition and indecency. On the other hand, Mr de Valera is reported to have been of the view that Article 40.6.1°.i created no new offences and that it simply referred to the existing common law offences: see O'Higgins, 'Blasphemy in Irish Law' (1960), 23 *Modern Law Review* 151. It is necessary, however, that separate consideration be given to the issue of the existing constitutional offences of blasphemy, sedition and indecency.

the media

After mentioning the right of citizens to express freely their convictions and opinions, Article 40.6.1°.i goes on to refer to the media ('the organs of public opinion') in terms which recognise their importance in educating (and influencing) public opinion and their 'rightful liberty of expression, including criticism of Government policy' but forbid their use 'to undermine public order or morality or the authority of the State'. The question arises whether their importance is such that they should have a constitutional obligation to afford access for the expression of a

widely representative range of views in the interests of democracy.

Both the print and electronic media exercise an important role in the formation and development of public discourse in contemporary society. They occupy a central position, not only in informing, but also in creating and interpreting events, and in prioritising particular events and issues over others as worthy of public transmission and attention.

Given that 96% of Irish households have at least one television, that 59% have videos, that 89% of people listen to at least one radio station per day, and that well over half a million Irish newspapers are sold daily within the country, it is obvious that the scope and influence of the media on opinion formation is considerable. (See Kelly, M and Truetzschler, W, 'Ireland: From Nation Building to Economic Prerogatives', in Euromedia Research Group, *The Media in Western Europe*, Sage, London 1996.)

Because of the potential role which the media can play in the development and operation of political culture through opinion formation, the issue of its ownership and control is an important consideration within a democratic society. Public Irish television stations (RTE 1 and Network 2) control less than half the market share of televisual viewing (48%) with BBC channels, UTV and Channel 4 accounting for 42% of market share and the Satellite channels accounting for 10% (AGB TAM/RTE, 1995, *A Report on Television Trends in Ireland 1990-1994,* Dublin). Within the press, Independent Newspapers has control of, or exercised a controlling interest in, 65% of the total market share for Irish newspapers in 1994, while the Competition Authority's *Interim Report* (1995) found that News International had a 30% share of both the Irish daily tabloid and Sunday tabloid markets.

Advertising bodies constitute a further influence on the operation of both the print and broadcasting media, because 43% of revenue for Irish newspapers comes, on average, from advertising while 64% of broadcasting revenue for public broadcasting is derived from advertising (Kelly and Truetzschler, 1996, ibid).

Although there is no doubt that the media can and do operate as a 'guardian of democracy', the extent to which this happens varies with a number of contingencies. While 'freedom of expression' for media-related institutions is undoubtedly essential for such democratic guardianship, the latter is also dependent on the value accorded to democratic principles by the media itself, and by the procedures in operation for making the media accountable to democratic principles. Where a large section of the media is under the control of a small group, which is neither democratically representative nor accountable, there is always a possibility that such a group will exercise disproportionate influence on opinion formation owing to its controlling financial (and inevitably, editorial) influence on the medium in question. The media should not only have the freedom, but also the responsibility for upholding democratic principles. If this is not the case, then the media may become the organ of opinion of those persons or groups with sufficient resources to exercise a controlling interest within it. Given the scope and influence of the media in defining, interpreting and prioritising particular

events, such a development would seriously impede the effective operation of democracy in society.

Conclusion

The dangers outlined above are admittedly serious. Where there are statutory licensing requirements or where public corporations established by legislation are involved, it is possible to provide some protection for balanced presentation of news and views but in other cases recourse can be had only to legislative protection against monopolies or the abuse of monopoly positions. No private medium of expression can be compelled to express particular opinions or even a representative range of opinions without infringing the right of free speech. It would seem that constitutional provision could scarcely go further in promoting responsible freedom of expression than Article 40.6.1°.i will, when amended on the model of Article 10 of the European Convention on Human Rights, as recommended by the Review Group.

free speech and the defamation laws

The manner in which the defamation laws operate has been the subject of controversy for some time. It would have to be conceded that aspects of the defamation laws are arcane and unsatisfactory and, in certain respects, inimical to the right of free speech: see, for example, O'Dell, 'Does Defamation Value Free Expression?' (1990) 12 *Dublin University Law Journal* 50. At the same time, the Review Group is conscious of the great damage to an individual's reputation which a defamatory article may wreak. The Review Group considers that if there is to be a major review of the defamation laws in the manner suggested by the Law Reform Commission in *Report on the Civil Law of Defamation,* LRC-38, 1991, p 38, this is best achieved through legislation.

As far as the Constitution is concerned, the essential question is whether the defamation laws effect a fair balance between the right of free speech on the one hand and the need to protect individual reputations on the other. This is certainly the approach of the European Court of Human Rights in the *Tolstoy Miloslavsly* case and, although the Irish courts have yet fully to consider this question, there appears to be a hint of this approach in the earlier judgment of Geoghegan J in *Foley v Independent Newspapers Ltd* [1994] 2 ILRM 61. Of course, if the Review Group's recommendations with regard to Article 40.6.1°.i were to be accepted, it would mean that the guarantee of free speech would be thereby strengthened. Such a strengthening of the right of free speech might to some extent alter the balance between the right of free speech and the right to a good name, but this would be a matter for the courts to work out on a case by case basis. One way or the other, the courts would be required to ensure that the respective rights were fairly balanced.

Conclusion

While the Review Group agrees that certain aspects of the defamation laws are not satisfactory, the question of any reform is principally a matter of legislative policy for the Oireachtas. As far as the Constitution is concerned, the task of the courts is to ensure a fair balance between potentially competing rights of free speech and good name. If the Review Group's recommendations with regard to Article 40.6.1°.i were to be accepted the courts would still be required on a case by case basis to ensure that the balance was fair.

Other issues

1 whether the Constitution should contain the offence of blasphemy

Spoken blasphemy was an offence at common law, but there does not appear to have been any prosecution in respect of this offence since 1909 : see O'Higgins, loc cit. In the case of blasphemous libel (that is, in written form), section 13(1) of the Defamation Act 1961 provides that the publication of a blasphemous or obscene libel shall be an offence carrying a maximum penalty of two years' imprisonment.

The Review Group notes that this matter was extensively considered by the Law Reform Commission in its consultation paper *The Crime of Libel* (1991). The commission concluded that it was likely that the constitutional reference to blasphemy 'was intended to be confined to religious beliefs in the Judaeo-Christian religion.' Some support for this view may, perhaps, be found in the subsequent judgment of the English High Court in *R v Chief Magistrate, ex p Choudhury* [1991] QB 429 where it was held that the common law offence of blasphemy was confined to the Christian religions, so that the publication of *The Satanic Verses* (a book considered by some Muslims to be blasphemous) did not constitute a blasphemous libel. On the other hand, the guarantee of non-discrimination and equality of religious treatment contained in Article 44.2.3° might suggest that the offence of blasphemy would have to be extended to all religions.

The content of the offence of blasphemy is also unclear. The Law Reform Commission observed that the offence was 'totally uncertain as to both its *actus reus* and its *mens rea'* (terms applying to the guilty act and to the guilty intention, respectively). The Review Group agrees with the commission's conclusion:

> Bearing in mind that the Constitution guarantees freedom of conscience and profession of religion (Article 44.2) as well as freedom of speech, it seems most unlikely that the offence of blasphemy envisaged in the Constitution would extend to a denial of the truth of the doctrines of Christianity, as distinct from an insulting and outrageous attack upon such doctrines.

Any other view would not be consistent with the guarantees of freedom of speech and free conscience which are necessary ingredients of a free society. Having regard to these and other difficulties inherent in the offence (which were comprehensively

examined by the Law Reform Commission), the Review Group sees no reason to disagree with the commission's views:

> We are of the view that there is no place for the offence of blasphemous libel in a society which respects freedom of speech. The strongest arguments in its favour are (i) that it causes injury to feelings, which is a rather tenuous basis on which to restrict speech, and (ii) that freedom to insult religion would threaten the stability of society by impairing the harmony between the groups, a matter which is open to question in the absence of a prosecution. Indeed, we consider the absence of prosecution to indicate that the publication of blasphemous matter is no longer a social problem.

The Review Group also notes the commission's recommendation that:

> in any more extensive revision that may be undertaken of the provisions of the Constitution which, for one reason or another, are generally considered to be anachronistic or anomalous, the opportunity should be taken to delete the provision relating to blasphemy.

The Review Group considers that the retention of the constitutional offence of blasphemy is not appropriate. The contents of the offence are totally unclear and are potentially at variance with guarantees of free speech and freedom of conscience in a pluralistic society. Moreover, there has been no prosecution for blasphemy in the history of the State. In so far as the protection of religious beliefs and sensibilities is necessary, this is best achieved by carefully defined legislation along the lines of the Prohibition of Incitement to Hatred Act 1989 which applies equally to all religious groups, but which at the same time took care to respect fundamental values of free speech and freedom of conscience.

Recommendation

The retention of the present constitutional offence of blasphemy is not appropriate.

2 whether the Constitution should retain the offence of publication of seditious matters

The common law provides for the offence of seditious libel, but there appears to have been no prosecution for this offence in the history of the State. A seditious libel consists of the written publication of words with seditious intention. The latest prosecution in this country appears to be *R v McHugh* [1901] 2 IR 569, where the libel consisted of a suggestion that a judge had procured a corrupt verdict from a jury in order to please the Government. In *McHugh's* case 'seditious intention' was defined by Lord O'Brien CJ in the following terms:

> A seditious intention is an intention to bring into hatred or contempt or to excite disaffection against the person of His Majesty, his heirs or successors, or the government or constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice,

> or to excite His Majesty's subjects to attempt otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.
>
> An intention to point out that His Majesty has been misled or mistaken in his measures, or to point out errors or defects in the government or constitution by law established, with a view to their reformation, or to excite His Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to secure their removal, matters which are producing or have a tendency to produce, feelings of hatred and ill-will between classes of His Majesty's subjects, is not a seditious intention.

The origins of the offence were explained by the Law Reform Commission of Canada (LRC Canada, *Crimes against the State*) as follows:

> The original aim of the crime of sedition was to forbid criticism and derision of political authority ... [The] offence was a natural concomitant of the once prevalent view that the governors of the State were wise and superior beings exercising a divine mandate and beyond the reproach of the common people.

There is no doubt that, historically, legislation governing sedition was used as a means of suppressing legitimate criticism of government policy. This is especially true in the United States, where the Sedition Act 1798 was widely used as a means of suppressing criticism of President Adams and his Federalist party. When the Republican party came to power with the election of President Jefferson in 1800, all those who had been convicted under the Act were quickly pardoned. In a celebrated statement asserting the right of free speech, Jefferson explained his actions thus:

> I discharged every person under punishment or prosecution under the Sedition Act, because I considered, and now consider, that law to be a nullity, as absolute and palpable as if Congress had ordered us to fall down and worship a golden image; and that it was as much my duty to arrest its execution in every stage, as it would have been to rescue from the fiery furnace those who should have been cast into it for refusing to worship the image.

Indeed, it would seem that the present common law offence is unconstitutional inasmuch as Article 40.6.1°.i guarantees that the right of free speech extends to criticism of government policy. It was precisely for this reason that the Law Reform Commission in its consultation paper on *The Crime of Libel* (1991) recommended the abolition of this offence.

There are also several statutory provisions which traverse at least some of the ground covered by the common law offence. By section 10 (1) of the Offences against the State Act 1939, it is an offence, *inter alia*, to publish a 'seditious document'. Section 2 defined 'seditious document' as including such matters in a document as would suggest that 'the Government functioning

under the Constitution is not the lawful government of the State' or a document 'in which words, abbreviations, or symbols referable to a military body are used in referring to an unlawful organisation.'

In practice, these provisions of the Offences Against the State Act 1939 are not enforced (at least as far as the news media are concerned). Indeed, an attempt to enforce some of these very broad provisions would almost certainly run up against constitutional difficulties and such provisions would almost certainly contravene Article 10 of the European Convention on Human Rights. However, it may be noted that in *People (Director of Public Prosecutions) v O'Leary* (1988) 3 Frewen 163, the poster of a man in a paramilitary uniform bearing the legend 'IRA calls the shots' was regarded as an 'incriminating' document within the meaning of section 2 of the Offences against the State Act 1939, and the defendant was thereby convicted of possession of 'incriminating documents' within the meaning of section 12 of that Act (this is a similar offence to the offence of publishing a seditious document).

The Review Group is of the opinion that it is unsatisfactory that the Constitution should attempt to prescribe or require the creation of the offence of sedition, especially where the *actus reus* of the offence is so uncertain.

Recommendation

Delete 'seditious' from Article 40.6.1°.i.

If the Review Group's recommendations to the effect that any redrafted version of Article 40.6.1°.i should be modelled on the provisions of Article 10 of the European Convention were accepted, the Oireachtas would retain the capacity to criminalise publications which posed a genuine and real threat to public order.

3 whether the publication or utterance of indecent matter should remain a constitutional offence prescribed by law

Article 40.6.1°.i appears to criminalise the publication or utterance of 'indecent matter', but it does not provide any definition of indecency and since this part of Article 40.6.1°.i has to date received scant judicial examination, there has been no judicial definition of these words. It is not absolutely clear whether the Constitution is in this respect self-executing (in the sense that it creates the criminal offence of publishing or uttering indecent matter), or whether it merely authorises the creation of such an offence by law. In either case, the question of what constitutes the *actus reus* of such an offence is uncertain.

The publication of an 'obscene libel' is by section 13 of the Defamation Act 1961 an indictable offence, although again no definition is provided. The classic common law test of obscenity was whether 'the tendency of the matter charged as obscene was to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall': see *R v Hicklin* (1868) LR 3 QB 360. In addition, there is a corpus of (mainly pre-1922) legislation prescribing a

variety of offences connected with indecent or obscene publications or displays (for example, the Indecent Advertisements Act 1889). There is also at present a miscellany of statutory provisions restricting the publication of indecent matter. By section 6 of the Censorship of Publications Act 1946, the Censorship Board is empowered to ban the publication of books which in its opinion are 'indecent or obscene' and section 9 contains similar powers in relation to periodicals. The word 'indecent' is defined by section 1 of the 1946 Act as being 'suggestive of, or inciting to, sexual immorality or unnatural vice or likely in any other way to corrupt or deprave.' Analogous provisions exist for the censorship of films (Censorship of Films Acts 1923-1992) and videos (Video Recordings Acts 1989-1992).

Conclusions

The Review Group is aware that public standards and attitudes on the question of what constitutes indecency have changed in the last thirty years or so. Indeed, if the statutory controls were strictly applied, many books, periodicals and films which are now freely available and which do not excite public controversy would have to be banned. Of course, the Review Group is not suggesting that the Oireachtas should be powerless to deal with material which is grossly obscene or which depicts acts of gross violence or cruelty, but it is of the opinion that the qualifying language of Article 10(2) of the European Convention on Human Rights (on which it suggests that any re-drafted version of Article 40.6.1°.i should be modelled) would vest the Oireachtas with sufficient powers to curb the publication or distribution of such material.

The Review Group considers that this part of Article 40.6.1°.i should be deleted. If the provision were strictly applied, it might extend its application far beyond expressly pornographic or otherwise indecent matter. It is generally agreed that experience with censorship as it operated in the 1940s and 1950s was unhappy. The Review Group considers that restrictions of this kind would not be compatible with the protection of the right of free speech and the right to communicate ideas and information. Furthermore, such restrictions (at least if strictly applied) would almost certainly conflict with Article 10 of the European Convention on Human Rights. While the European Court of Human Rights has upheld a conviction for obscenity where the publication or display is liable 'grossly to offend the sense of sexual propriety of persons of ordinary sensitivity' (*Müller v Switzerland* (1991) 13 EHRR 212), it must be doubtful whether a conviction for the publication of material which is merely 'indecent' would satisfy the requirement of Article 10 of the Convention. Moreover, it does not appear appropriate that the Constitution should create a criminal offence, such as indecency, whose content is so ill-defined and vague.

Recommendation

The provisions of Article 40.6.1°.i, which prescribe or require the creation or existence of the offence of publishing or uttering indecent matter, should be deleted. A replacement should provide for the regulation by law of obscene material so that the Oireachtas would be empowered to legislate in a manner which struck a fair balance in this sensitive area between the right of free speech and access to information on the one hand and pressing public interests on the other, such as the prevention of the portrayal of women in a degrading fashion and the protection of children.

4 whether the right to free expression should be subject to 'the test of public order and morality and the authority of the State'

As the Review Group notes elsewhere in its Report (see, for example, the discussion on Article 44.2.1° in chapter 12 – section on 'Religion'), the use of the qualifying phrase 'public order and morality' is too general and all-embracing to be regarded as satisfactory and this is also true of the reference to the 'authority of the State'. Of course, the Oireachtas should have suitable powers to prevent, for example, unlawful organisations asserting that they are the lawful government of the State or attempts to incite violence or to engage in paramilitary recruiting. But, short of this, the right of free speech should protect the rights of those persons who wish to engage in protest which the political establishment finds offensive and, subject to the above-mentioned reservations, extend to those persons who reject the State and its authority. The US Supreme Court has expressed the view – with which the Review Group respectfully agrees – that the right of free speech should extend even to those who wish to engage in vulgar protests about controversial political matters: see *Cohen v California* 403 US 15 (1971) (where the plaintiff wore a teeshirt in court bearing the words 'fuck the draft') and *Texas v Johnson* 491 US 397 (1989) (burning of US flag as a form of political protest).

In the opinion of the Review Group, what is required is a clear and forthright assertion of the right of free speech and the right to impart ideas and receive information. This right should be capable of being qualified by the Oireachtas for clearly defined reasons (which would include the protection of 'national security') and subject to a proportionality requirement.

Recommendation

The right to free expression should not be subject to 'the test of public order and morality and the authority of the State', since this test is too all-embracing. Instead, the Oireachtas should have the right to qualify by law the right of free expression for adequate reasons of public interest. As suggested below (under 6), the revision of Article 40.6.1°.i should follow the model of Article 10(1) of the European Convention on Human Rights.

5 whether Article 40.6.1°.i should be replaced by the provisions modelled on Article 10 of the European Convention on Human Rights

The Review Group has already rejected the wholesale incorporation into the Constitution of international human rights conventions. It has instead decided that it would be preferable to draw on these conventions where:

i) the right is not protected by the Constitution

ii) the standard of protection of such rights is superior to those guaranteed by the Constitution

iii) the wording of a clause protecting such a right might be improved.

As to i), it is clear that the right to free speech is protected by both Article 40.6.1°i of the Constitution and Article 10 of the Convention. However, it seems that under Irish law the right to communicate and to impart ideas does not derive from Article 40.6.1°i, but is regarded as an unenumerated right protected by Article 40.3.1°: see for example, *Attorney General v Paperlink Ltd* [1984] ILRM 373. It seems to the Review Group that even in this respect the language of Article 40.6.1°.i is deficient in that it does not – unlike Article 10(1) of the Convention – expressly protect the right to 'impart information and ideas.'

As to ii), a comparative examination of both the respective texts and the case law of free speech show Article 10 of the Convention to be superior to Article 40.6.1°.i. As already mentioned, the language of Article 40.6.1°.i seems weak and heavily circumscribed and the little case-law it has generated is for the most part uninspiring. In contrast, Article 10 of the Convention has proved to be widely effective in practice and some of the most important decisions of the European court of Human Rights have been in this area. Thus, for example, the court has delivered important judgments upholding the right of free speech in areas such as contempt of court (*Sunday Times Ltd v United Kingdom* (1979) 2 EHRR 245), criminal libel (*Lingens v Austria* (1986) 8 EHRR 103), advertising (*Markt Intern v Germany* (1990) 12 EHRR 161), the distribution of information (*Open Door Counselling Ltd v Ireland* (1993) 15 EHRR 244), aspects of official secrets legislation *(Vereniging Weekblad Bluf! v The Netherlands* (1995) 20 EHRR 189), damages awards in libel actions *(Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442), the confidentiality of journalists' sources *(Goodwin v United Kingdom* (1996)), and the right of journalists to disseminate information *(Jersild v Denmark* **(**1995) 19 EHRR 1).

At the same time, the qualifying language of Article 10.2 of the Convention is such that it permits legislation restricting the right of free speech if this is proportionate and necessary to secure important social aims such as the interests of national security, the prevention of disorder or crime, the protection of the health, morals or reputation of others. Thus, the European Court of Human Rights has upheld legislation dealing with matters such as gross obscenity (*Müller v Switzerland* (1991) 13 EHRR 212, a regional ban on the distribution of a film which was grossly insulting to Christianity (*Otto-Preminger Institut v Austria* (1995) 19 EHRR 34), and the control by means of a licensing system of foreign broadcasts (*Groppera Radio AG v Switzerland* (1990) 12

EHRR 321). Indeed, the European Commission of Human Rights saw no incompatibility between the broadcasting ban effected by section 31 of the Broadcasting Authority Act 1960 and Article 10: see *Purcell v Ireland* (1991) 12 HRLJ 254.

As to iii), the Review Group is of the view that the language of Article 10 is more succinct and lucid than that of Article 40.6.1°.i and more completely protects the substance of the combined rights of free expression, speech and information.

Moreover, Article 10 has demonstrated in practice (in a way, perhaps, that Article 40.6.1°.i has not) that the freedom of the press is protected by its provisions. This is borne out by the decisions of the European Court of Human Rights in cases such as *Sunday Times, Jersild, Tolstoy Miloslavsky* and *Goodwin*. A recast Article 40.6.1°.i modelled on Article 10 would, in fact, provide a great boost for the freedom of the press and, by extension, contribute significantly to free and open debate in our society. At the same time, other constitutional provisions (such as the guarantees of good name and privacy) would provide important protections for the citizen against the possibility of abuse by an overbearing and reckless media.

The replacement of Article 40.6.1°.i should be closely modelled on Article 10 of the European Convention on Human Rights already quoted in the Introduction.

6 whether any recast version of Article 40.6.1°.i should provide that the Oireachtas would retain the capacity to insist on a licensing regime for broadcasting and cinema enterprises

Article 10(1) of the European Convention on Human Rights provides that this Article 'shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises'. This provision was presumably inserted for the avoidance of doubt, lest it be argued that the right of freedom of expression would invalidate broadcast licensing regimes. With the possible exception of cinemas, the Review Group is not aware of any European state which does not provide for a licensing regime for broadcasting and television. The existence of such a licensing regime is generally justified on the following grounds:

i) the limited number of frequencies and channels available

ii) control of the manner in which broadcasting is organised, particularly in its technical aspects (for example, avoiding interference with other signals)

iii) the necessity to regulate electronic media such as television and videos having regard to the potentially dramatic impact of such media as compared with print media.

As to i), the European Court of Human Rights has accepted that 'as a result of the technical progress made over the last decades, justification for these restrictions can no longer be found in considerations relating to the number of frequencies and channels available': see *Informationsverein Lentia v Austria* (1994) 17

EHRR 93. As to ii), considerations pertaining to the organisation of broadcasting are still highly relevant. Such considerations can justify controls based on technical considerations (such as avoiding interference with broadcast signals): see *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321. Controls bearing on the quality and balance of programmes were held by the European Court of Human Rights in *Informationsverein Lentia* to satisfy the objectives of Article 10(1). The final possible justification – the greater impact of the electronic media – does not appear to have been judicially examined.

In *Informationsverein Lentia* the European Court of Human Rights ruled that licensing regimes must also comply with the proportionality requirements of Article 10(2). It ruled that as the Austrian public monopoly on broadcasting imposed 'the greatest restrictions on the freedom of expression', the 'far reaching character of such restrictions' meant that they could only be justified 'where they correspond to a pressing need'. This the Austrian authorities could not do, as the court found that the modern rationale for the monopoly – the desirability of maintaining political balance and impartiality of reporting – could be met by less restrictive alternatives, such as by imposing such conditions in any licences given to independent broadcasters.

The Review Group considers that, while it might be contended that a provision of this kind is, strictly speaking, unnecessary, the better course is to not depart from this aspect of the European Convention when re-casting Article 40.6.1°.i of the Constitution in the light of Article 10 of the Convention. Such a provision ensures that legitimate interests of the State are protected, while at the same time providing – as demonstrated by the case law of the European Court of Human Rights – that aspects of any licensing system which actually impinge on the substance of the right of free speech can be justified only where 'they correspond to a pressing need'.

Recommendation

Any recast version of Article 40.6.1°.i should follow the model of Article 10(1) of the European Convention on Human Rights and provide that the Oireachtas shall retain the capacity to insist on a licensing regime for electronic media. However, as the Review Group has already noted in the context of the existing language of the roughly parallel provisions of Article 40.6.1°.i, it would be inappropriate to identify precisely the technology in question and for that reason the precise words of this part of Article 10(2) ('broadcasting, television and cinema enterprises) should not be used.

Freedom of Assembly

40.6.1°.ii

40.6.1° *The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-*

ii. *The right of the citizens to assemble peaceably and without arms.*

Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.

Introduction

Article 40.6.1°.ii guarantees the 'right of citizens to assemble peaceably and without arms'. The exercise of this right – like the companion rights of free expression and association also guaranteed in Article 40.6.1° – is expressed to be subject to 'public order and morality'. The proviso to Article 40.6.1°ii states that provision may be made by law 'to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace' or to be a 'danger or nuisance to the general public'. It also states that legislation may be enacted to prevent or control meetings in the vicinity of either House of the Oireachtas. Finally, Article 40.6.2° provides that legislation regulating the right of freedom of assembly shall contain no 'political, religious or class discrimination'.

The guarantee of freedom of assembly corresponds to guarantees found in other constitutions: see for example, Article 8 of the German constitution, Article 17 of the Italian constitution, Article 21 of the Spanish constitution and section 16 of the constitution of South Africa. The right is also guaranteed by Article 19 of the International Covenant on Civil and Political Rights and Article 11 of the European Convention on Human Rights.

Surprising as it may seem, Article 40.6.1°.ii appears to have been at issue in only two cases to date. In *Brendan Dunne Ltd v Fitzpatrick* [1958] IR 29 (a picketing case) Budd J held that the right of freedom of assembly was forfeited where public order was disturbed:

> To my mind, if citizens in the course of an assembly commit a breach of the peace or some other breach of the law, they thereby disturb public peace and their actions are not protected by the Constitution in respect of the breach of law committed.

In the other case, *The People (DPP) v Kehoe* [1983] IR 136, McCarthy J held that the majority of those persons participating in a political march 'were there for the purpose of exercising their constitutional right to express peacefully their social or political opinions'. This, however, was not true of some marchers who were in possession of offensive implements and weapons. As these weapons were not 'accoutrements of peaceful protest', Article 40.6.1°.ii did not apply to such persons as they had not assembled peaceably.

While the Review Group considers that the substance of the guarantee – the right to assemble peaceably and without arms – is perfectly satisfactory, it has nonetheless identified certain issues arising mainly from the qualifying clause which require further consideration

Issues

1 whether the right of assembly should include the right to hold a stationary meeting or demonstration on a public highway

At common law, a public road or highway may be used only for the purpose of exercising the right to pass and re-pass. There is no common law right to hold a stationary meeting or demonstration on a roadway and this principle remains 'unaffected by the fact that such meetings are frequently held': see Kelly, *The Irish Constitution,* Dublin 1994, at p 960. Given that Article 40.6.1°.ii guarantees the right of assembly (that is, the right to come together for the purposes of a meeting), it may be that this common law would not survive constitutional challenge. It should also be noted that section 9 of the Criminal Justice (Public Order) Act 1994 provides that any person who 'without lawful authority or reasonable excuse wilfully prevents or obstructs the free passage of any person or vehicle in a public place' is guilty of an offence.

It may be argued that, if the substance of the guarantee of freedom of assembly is to be meaningful, the right must extend – at least on occasion – to the right to hold a stationary meeting or demonstration on a public thoroughfare. This is because, in many instances, the entire purpose of the meeting or demonstration is to permit the marchers to be addressed by a speaker or speakers. In the majority of cases, this right must, of necessity, take place on a public road.

Even if the right of freedom of assembly was to be held to embrace a stationary meeting or demonstration on a public highway, such a right would have to be subject to important qualifications. In the first place, this right could not be exercised in a manner which severely jeopardised the right of free passage of other members of the public. Moreover, the right of freedom of assembly should not extend to intimidating members of the public by, for example, picketing private houses. In this regard it may be noted that the US Supreme Court has upheld the validity of a law banning targeted residential picketing, remarking on the unique nature of the home as 'the last citadel of the tired, the weary and the sick': see *Frisby v Schultz* 487 US 474 (1988). Nevertheless, there are many cases where the holding of a stationary meeting on a public highway would not compromise traffic management, still less public order and public safety.

Conclusion

The Review Group considers that the question whether the right of freedom of assembly should embrace the right to hold a stationary meeting on a public highway is best left for resolution by the courts on a case by case basis.

2 whether the Constitution gives the Oireachtas too great a latitude in preventing or controlling meetings

The right of assembly is qualified by a variety of restrictions at common law and by statute. The question whether such common

law restrictions have, in fact, survived, having regard to the fact that Article 40.6.1°.ii appears to envisage that any restrictions will be imposed by law (that is, Act of the Oireachtas) is a question which does not require to be answered here. Important statutory restrictions are, however, to be found in sections 27 and 28 of the Offences against the State Act 1939 and in sections 7 to 9 and Part III of the Criminal Justice (Public Order) Act 1994.

Section 27(1) of the 1939 Act provides that:

> It shall not be lawful to hold a public meeting which is held by or purports to be held by or on behalf of or by arrangement with or in concert with an unlawful organisation or which is held or purports to be held for the purpose of supporting, aiding, abetting or encouraging an unlawful organisation or of advocating the support of an unlawful organisation.

Section 28 – which deals with meetings in the vicinity of the Houses of the Oireachtas – is considered below.

Section 7 of the 1994 Act makes it an offence to distribute or display in a public place material which is 'threatening, abusive, insulting or obscene' with a view to provoking a breach of the peace or being reckless as to whether a breach of the peace may be thereby occasioned. Section 8 gives the Gardaí power to 'move on' persons who are loitering in a public place where there is 'a reasonable apprehension for the safety of persons or the safety of property or for the maintenance of public peace'. Section 9 is considered above. Part III of the 1994 Act deals with crowd control at public events.

While it may be said that, generally speaking, the power to regulate freedom of assembly conferred by the proviso to Article 40.6.1°.ii has been exercised heretofore in a relatively careful fashion by the Oireachtas, the Review Group is nonetheless of the view that the powers in question are too broad and far-reaching. The difficulties with the general 'public order and morality' qualifying clause – which applies to all the rights protected by Article 40.6.1° – have already been documented in the context of the right of free expression. The Review Group accordingly turns its attention to those provisions of the qualifying clause which are specific to the right of assembly:

> which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public...

The Review Group agrees that the right of freedom of assembly should be qualified by public order considerations. As Roberts J said in *Cantwell v Connecticut* 310 US 296 (1940):

> When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order appears, the power of the State to prevent or punish is obvious.

The difficulty with the present wording is that it appears to echo pre-1922 Irish case law which, in the opinion of the Review Group, insufficiently protects the rights of assembly and free

speech. In particular, the words 'determined in accordance with law to be calculated to cause a breach of the peace' etc appear to give the Oireachtas and, by extension, the police and other civil authorities, a wide discretion to curtail the right of freedom of assembly. Such an important right should only be curtailed or qualified when this is clearly and objectively necessary having regard to pressing public order and other similar considerations. The reference to 'nuisance to the general public' must be taken in the context in which the word 'nuisance' appears ('danger or nuisance to the general public...') so that it may be expected that the nuisance referred to must be one which substantially interferes with the rights of other members of the public. However, it would not be satisfactory if this provision were interpreted in a manner which would mean that the right of assembly could be curtailed *simply* because other members of the public might be – or even were – annoyed or offended by the march or demonstration in question.

As far as the pre-1922 authorities already referred to are concerned, the leading case is still *Humphries v Connor* (1864) 17 ICLR 1. Here the plaintiff walked down the main street in Swanlinbar wearing an Orange lily. A hostile crowd gathered and threatened the plaintiff with violence. The court upheld the right of a policeman to remove the emblem (which the plaintiff herself had declined to remove) on the ground that any act designed to prevent a breach of the peace was thereby lawful. In another celebrated pre-1922 decision, *O'Kelly v Harvey* (1883) 14 LR Ir 105, the Land League had arranged for a meeting to be addressed by Parnell at Brookeborough. Placards then appeared calling on the local Orangemen to assemble in order 'to give Parnell and his associates a warm welcome...' It was held by the former Court of Appeal that police action taken to disperse the meeting was lawful, provided they had reasonable grounds for believing that by no other means could they discharge their duty to preserve the peace. Commenting on the decisions, Professor Casey in *Constitutional Law in Ireland,* London 1992, p 474, observes that they have the effect of:

> ...vesting a very considerable discretion in the police. They also mean that persons may be restrained from pursuing a lawful course of conduct because of threatened or actual violence by others. However, it cannot be gainsaid that the very object of some meetings or processions may be to provoke violence by others; the right of assembly is not always invoked for laudable motives. The cases cited enable the police to cope with such 'bad faith' assemblies. Of course, they also produce a risk of abuse – that the police may interfere with bona fide meetings because this is easier than affording proper protection.

It is unfortunate that there is no case law interpreting the proviso in Article 40.6.1°.ii. If, however, the proviso to Article 40.6.1°.ii is to be interpreted as meaning that persons can be prevented from exercising their right of peaceable assembly *simply* because they may annoy, offend or even disturb the sensibilities of persons to whom their message is unwelcome, then the Review Group considers that change would be desirable, because the Constitution as thus interpreted would not adequately protect the substance of the right of free assembly.

In this regard the Review Group draws attention to the approach of the European Court of Human Rights in its leading decision on freedom of assembly, *Plattform 'Arzte für das Leben' v Austria* (1991) 13 EHRR 204, and the decision of the US Supreme Court in *Madsen v Women's Health Centre* 512 US 443 (1994). In the former case, the European Court said that the guarantee of freedom of assembly in Article 11 of the European Convention on Human Rights meant that:

> A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of their right to demonstrate.

In the *Madsen* case, Rehnquist CJ said:

> Absent evidence that the protester's speech is independently proscribable (that is, 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this [restraining order] is unconstitutional. As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.

The Review Group finds such approaches more satisfactory than that exhibited in the pre-1922 Irish decisions already referred to.

Recommendation

Because there is some risk that this aspect of Article 40.6.1°.ii might be interpreted as enabling the authorities to curtail the right of free speech and assembly simply because the sensibilities of others might be offended, the Review Group recommends that this aspect of the proviso to the Article be amended.

3 whether the Constitution should provide for legislation preventing or controlling meetings in the vicinity of either House of the Oireachtas

Article 9 of the 1922 Constitution did not contain a qualifying clause of this character. However, it may be surmised that the threat of serious public disorder posed in the mid-1930s by the threat of organised marches on the Dáil formed the background to this qualifying provision. At all events, section 28 of the Offences Against the State Act 1939 takes up this idea by providing that it shall not be lawful to hold a public meeting or procession within 'one half mile' of any place where the Houses of the Oireachtas are sitting where this has been prohibited by an officer of the Garda Síochána not below the rank of Chief Superintendent or where 'a member of the Garda Síochána calls on the persons taking part in such meetings or procession to

disperse'. The question arises as to whether it is appropriate that the Constitution should contain a clause of this nature.

Arguments for

> this is a special provision designed to deal with a particular aspect of freedom of assembly. It does not pose any great obstacle in practice to the exercise of the right of assembly. Indeed, this clause may be regarded as a safeguard for parliamentary democracy in that it is essentially designed to prevent any attempt to intimidate the Oireachtas.

Arguments against

> it is not appropriate that the Constitution should contain a special provision of this kind. The right to march to the Oireachtas is a key and much treasured aspect of the right of freedom of assembly. Any real or genuine public order threat can be dealt with by a recast version of the qualifying clause.

Recommendation

No change is proposed.

4 whether the existing qualifying clause should be replaced by a new re-modelled version based on Article 11(2) of the European Convention on Human Rights

Article 11(2) provides:

> No restriction shall be placed on the exercise of [the right of freedom of assembly] other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

This is the preferred option of the Review Group. Any such qualifying clause ensures that the right of freedom of assembly will be overborne only where there are compelling reasons justifying the restrictions in question. The reference to the special position of the police, defence forces etc is in some respects superfluous in an Irish context, given that the Supreme Court has already stated that members of such forces must of necessity accept that their constitutional right of association (and, by implication, assembly) is necessarily attenuated by reason of the special circumstances of their employment: see *Aughey v Ireland* [1989] ILRM 87.

Recommendation

Article 40.6.1°.ii should be recast in the manner suggested, with a qualifying clause modelled on the provisions of Article 11(2) of the European Convention on Human Rights. The following draft is suggested:

1 All persons have the right to assemble peaceably and without arms.

2 No restrictions shall be placed on the exercise of this right other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the protection of health or morals or for the protection of the rights and freedoms of others.

3 This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

4 Without prejudice to subsection 2 of this section, provision may be made by law to prevent or control meetings in the vicinity of either House of the Oireachtas.

Freedom of Association

40.6.1°.iii

40.6.1° *The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-*

iii. *The right of the citizens to form associations and unions.*

Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.

Introduction

Article 40.6.1°.iii guarantees the 'right of citizens to form associations and unions'. The exercise of this right – like the companion rights of free expression and assembly also guaranteed in Article 40.6.1° – is expressed to be subject to 'public order and morality.' The proviso to Article 40.6.1°iii states that provision may be made by law 'for the regulation and control in the public interest of the exercise of the foregoing right.' Finally, Article 40.6.2° provides that legislation regulating the right of freedom of assembly shall contain no 'political, religious or class discrimination'.

The guarantee of freedom of association corresponds to guarantees found in other constitutions: see, for example, Article 9 of the German constitution, Article 18 of the Italian constitution and section 17 of the South African constitution. The right is also guaranteed by Article 22 of the International Covenant on Civil and Political Rights (CCPR) and Article 11 of the European Convention on Human Rights (ECHR). However, unlike most other constitutions and other international human rights conventions, the Irish Constitution has not considered it necessary to make an express reference to the right to form political parties and the right to engage in political activities.

statutory regulation of the right of association

The right of association is regulated by statute in a variety of ways. The principal statutory provisions may be found in sections 16 and 18 of the Offences Against the State Act 1939 (which provide that it shall be an offence to organise a secret society in either the Defence Forces or the Garda Síochána and also empower the Government to proscribe any unlawful associations) and the Electoral Act 1992 (which provides for a registration system for political parties). The Oireachtas made one major attempt – contained in Part III of the Trade Union Act 1941 – to regulate the right to join trade unions, but these provisions were found to be unconstitutional by the Supreme Court in *NUR v Sullivan* [1947] IR 77. Part III had provided for the establishment of a Trade Union Tribunal which could determine that the employees of a particular class or type were to be represented by one or more trade unions. The Tribunal determined that all CIE employees were to be represented by the ITGWU alone, but the plaintiff union successfully challenged the validity of the legislation. The Supreme Court held that the legislation in question was not merely 'a

control of the exercise of the right of association, but a denial of the right altogether'. Whether this reasoning gave sufficient weight to the 'regulation and control' qualifying clause may be doubted and it is notable that this aspect of the decision has never subsequently been applied. In the other major decision concerning the right of association – *Educational Co of Ireland Ltd v Fitzpatrick (No 2)* [1961] IR 345 – the Supreme Court held that the right of association implied the correlative right not to join a trade union. This meant that the picketing of employers with a view to getting them to force their non-union employees to join a union was thereby rendered unlawful. As Budd J said, the effect of Article 40.6.1°.iii was to ensure that 'a citizen may not be compelled to join any association or union against his will'. It may be noted that a similar view was taken of the 'closed shop' by the European Court of Human Rights in *Young v United Kingdom* (1982) 4 EHRR 38. In that case the court held that the dismissal of certain employees for failure to join a specified trade union had entailed a breach of Article 11 of the European Convention on Human Rights.

While the Review Group considers that the substance of the constitutional right of freedom of association is generally satisfactory, it has identified certain issues which require further consideration.

Issues

1 whether the right should be confined to citizens and natural persons

In line with its general policy on the fundamental rights provisions of the Constitution, the Review Group considers that the right of freedom of association should not be confined to 'citizens', but should extend to other persons.

The question of extending the protection to legal persons is somewhat more problematic. The Review Group is generally opposed to extending the protection of fundamental rights to legal persons. It recognises, however, that in the special instance of the right of association, there may be a case for saying that the essence of the right would be undermined if the legal person through which the right was exercised – such as a company or trade union – could not itself invoke the freedom in question. In this regard it may be noted that in the *NUR v Sullivan* case, the plaintiff – who successfully challenged the legislation in question – was a legal person.

Recommendation

The guarantee of freedom of association should not be confined to citizens and the words 'persons' should be substituted for 'citizens'.

2 whether the exercise of the right should be subject to the 'public order and morality' requirement

The Review Group has already expressed the view that these qualifying words are too broad and may tend to undermine the substance of the right confirmed. Accordingly, in line with its recommendations in respect of freedom of expression and assembly, the Review Group considers that this language should be replaced by a more carefully drafted qualifying clause modelled on the language of Article 11(2) of the European Convention on Human Rights, thus expressly incorporating a proportionality requirement.

Recommendation

The 'public order and morality' qualifying language of Article 40.6.1°.iii should be replaced by a more carefully drafted qualifying clause modelled on Article 11(2) of the European Convention on Human Rights.

3 whether Article 40.6.1°.iii should be reformulated in order to give the Oireachtas a wider power to regulate the right to join a trade union

This question was considered by the Committee on the Constitution (1967) which concluded that the question of the proliferation of unions and inter-union disputes was better dealt with by legislation than by constitutional amendment. That committee understood that legislation prescribing minimum numbers of members and increased deposits for unions seeking negotiating licences was then imminent. In the event, that legislation was not proceeded with. However, the Trade Union Act 1975 and the Industrial Relations Act 1990 seek to mitigate this problem by encouraging trade union mergers and the general rationalisation of union structures.

The Review Group considers that no change is necessary. Firstly, the problem of inter-union demarcation disputes is less acute now than before. Secondly, any attempt to redraft Article 40.6.1°.iii with the specific aim of reversing the *NUR v Sullivan* case would be difficult without including a degree of detail which would be inappropriate in the Constitution. Finally, there is at least some reason to believe, in view of subsequent case law, that the reasoning in the *NUR v Sullivan* case would not be followed today.

Recommendation

No change is proposed.

4 whether Article 40.6.1°.iii should be reformulated in order to provide for the 'closed shop'

Prior to the Supreme Court's decision in the *Educational Company* case, it was lawful for employees to take industrial action to compel employers to maintain a 'closed shop'. The question whether Article 40.6.1°.iii should be amended in order to restore the status quo prior to the Supreme Court decision in

the *Educational Company* case was also examined by the 1967 committee. The committee considered that the matter was best dealt with by legislation which was understood to be imminent. Although a Bill was drafted, it was not proceeded with, presumably because of insurmountable constitutional difficulties. The 1967 committee noted that it would be very difficult:

> to draft a constitutional amendment to cover this point without going into a degree of detail in regard to trade union activities which would be inappropriate in the text of the Constitution.

Apart from these considerations, regard must now be had to the jurisprudence of the European Court of Human Rights. In the *Young v United Kingdom* case, the court held that the dismissal of certain employees by British Rail for failure to join a trade union constituted an infringement of their right of freedom of association under Article 11 of the Convention. As the court explained:

> To construe Article 11 as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee ... [A] threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union.

In the *Young* case the court expressly refrained from considering the wider issue of whether the 'closed shop' was contrary to the Convention in every case. It is clear from the court's judgment in *Sibson v The United Kingdom* (1994) 17 EHRR 193 that the 'closed shop' (or some variant thereof) is not always contrary to the Convention. Here the plaintiff – who was already a trade union member and had no ideological opposition to such membership – resigned from that trade union following allegations of dishonesty. When the trade union in question objected to his working at the main depot, he was offered the possibility of working at another nearby depot to which his employers were in any event contractually entitled to move him. The working conditions were not materially different from those prevailing at his original place of employment and there was no specific requirement of union membership. The court concluded that such treatment did not, having regard to such factors, strike at the very substance of the freedom of association guaranteed by Article 11. The precise issue which featured in the *Sibson* case does not appear to have been examined by an Irish court, but there has been at least one judicial suggestion that where an employer required of all prospective employees that they must join a trade union, this would not infringe the guarantee of freedom of association: see Henchy J in *Becton Dickinson v Lee* [1973] IR 1. It might be argued that this form of 'closed shop' does not strike at the guarantee of freedom of association, although in such cases employees may feel they have little option but to join the trade union.

Irrespective of the precise limits of the *Educational Company* and *Young* cases, it would seem that any attempt to reverse the decision in the *Educational Company* case would run counter to

the guarantees contained in Article 11 of the European Convention on Human Rights. Moreover, to compel employees to join a trade union who are ideologically opposed to this course of action would represent an unacceptable infringement of personal liberty. At the same time, it would seem, that in some circumstances at least, the existence of the 'closed shop' is not contrary to Article 11 of the Convention and is probably not unconstitutional.

Conclusion

There is no need to amend Article 40.6.1°.iii in order to reverse the decision in the *Educational Company* case.

5 whether the right of freedom of association should be reformulated in order to ensure that an employer is bound to negotiate with a union or association chosen by the employee

The right of freedom of association does not extend to ensuring that an employer *must* bargain with the trade union or organisation of the employee's choice in relation to terms and conditions of employment: see for example, *Abbott and Whelan v ITGWU* (1982) 1 JISLL 56, *Nolan Transport (Oaklands) Ltd v Halligan* [1995] ELR 1 and *Association of General Practitioners Ltd v Minister for Health* [1995] 1 IR 382. However, this does not mean that a dispute about trade union recognition cannot amount to a lawful trade dispute within the meaning of the Industrial Relations Act 1990.

Argument for

1 if an employer is not bound to recognise an association or trade union chosen by an employee (or, at least, the majority of the employees), the constitutional right of freedom of association may remain illusory, to the particular detriment of temporary, low paid and part-time workers.

Arguments against

1 the right of freedom of association – like other fundamental rights – is principally designed to regulate the relationship between the State and its citizens. Article 40.6.1°.iii is designed to ensure that the State respects the individual's right of freedom of association. The exercise of this right should not have 'horizontal effect' in a manner which could affect the rights of other private persons, such as employers

2 if the right of freedom of association were to extend to ensuring that an employer is bound to negotiate with a union or association chosen by the employees, this would be contrary to the voluntary nature of industrial relations

3 Government policy regarding inward investment might be jeopardised if foreign firms establishing themselves here were to be effectively coerced to negotiate with particular trade unions

4 the question whether employers should be compelled to negotiate with a particular union is a matter of industrial relations policy which is more appropriate for legislation.

Conclusion

The Review Group is not persuaded that the right in question should be given constitutional status. The issue is one of industrial relations policy and thus more appropriate for resolution by the Government and the Oireachtas.

6 whether the existing qualifying clauses should be replaced by a new remodelled version based on Article 11(2) of the European Convention on Human Rights

This is the preferred option of the Review Group and the reasons for this view have already been set out in the section dealing with Freedom of Assembly.

Prohibition of Discrimination in Regulating Freedom of Assembly and Association

40.6.2°

Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.

Article 9 of the Constitution of the Irish Free State provided that laws regulating how the right of forming associations and the right of free assembly may be exercised shall contain no political, religious or class discrimination. Article 40.6.2° reproduces the same prohibition but simply adds the words 'and unions' after the word 'associations'. Professor Casey has noted that the prohibition of religious discrimination seems somewhat superfluous, having regard to Article 44.2.3°: see *Constitutional Law in Ireland*, London 1992 at p 553.

This prohibition appears to have featured in only one case to date: *NUR v O'Sullivan* [1947] IR 77. While this constitutional provision has remained largely dormant, it may be said to retain a certain (if admittedly limited) utility. It ensures, for example, that the Oireachtas will not enact legislation regulating political parties in a manner which is discriminatory. It also ensures that freedom of assembly is not regulated in a manner which effectively discriminates against the exercise of this right by members of political or religious minorities. Despite the fact that this prohibition appears to have had a limited impact to date, it may be said to provide a useful restraint on the power of the Oireachtas to regulate freedom of association and freedom of assembly. Accordingly, the Review Group considers that Article 40.6.2° should be retained.

Recommendation

No change is proposed.

The Family

Article 41

41.1.1° *The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*

41.1.2° *The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.*

41.2.1° *In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.*

41.2.2° *The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.*

41.3.1° *The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.*

41.3.2° *No law shall be enacted providing for the grant of a dissolution of marriage.*

41.3.3° *No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved.*

Introduction

Article 41 contains the main provisions relating to the family. Article 42 is closely linked with Article 41 and has been construed by the courts as containing in Article 42.5 a guarantee of children's rights which go beyond education (*In re The Adoption (No2) Bill 1987* [1989] IR 656). Article 40.3 is also relevant, because the rights of an unmarried mother in relation to her child and the rights of a child born of unmarried parents have been held to be personal rights protected by Article 40.3 (*The State (Nicolau) v An Bord Uchtála* [1966] IR 567 and *G v An Bord Uchtála* [1980] IR 32.

Article 41 was a novel provision in 1937. The Constitution of 1922 contained no provision relating to family and marriage. It is generally considered that Articles 41and 42 were heavily influenced by Roman Catholic teaching and Papal encyclicals. They were clearly drafted with only one family in mind, namely, the family based on marriage.

The family in Irish society has been profoundly affected by social trends since 1937. The mores of Irish society have changed significantly over the past six decades. The traditional Roman Catholic ethos has been weakened by various influences including secularisation, urbanisation, changing attitudes to sexual behaviour, the use of contraceptives, social acceptance of premarital relations, cohabitation and single parenthood, a lower norm for family size, increased readiness to accept separation and divorce, greater economic independence of women.

The most striking changes in the family in Ireland since 1937 are the 30% drop in the birth-rate from 18.6 to 13.4 per 1.000, the rise from 3% to 20% in the proportion of births outside marriage and the increase from 5.6% to 32.4% in the proportion of married women who work outside the home. The traditional family consisting of a husband, wife and four to five children has dwindled to husband, wife and two children.

The absence of divorce in Ireland and the significant increase in marital breakdown has meant that there are many couples living together, some with children, who may wish to be married. This has distorted attitudes to non-marital families and, in particular, has resulted in anomalies in the tax and social welfare codes.

The 15th Amendment

The constitutional amendment to replace Article 41.3.2°:

A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that:

i *at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,*

ii *there is no reasonable prospect of a reconciliation between the spouses,*

iii *such provision as the Court considers proper having regard to the circumstances, exists, or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and*

iv any further conditions prescribed by law are complied with.

These social changes call for amendments in the Constitution, some of which raise difficult issues that require the achievement of delicate balances for their resolution.

Provisions

At the time of drafting the report the litigation on the divorce referendum is proceeding. The Review Group is in a position where the current provisions of Article 41.3 are unclear. The provisions of Article 41, Article 42 and Article 40.3 as they have been interpreted by the courts and in so far as they relate to the family might be divided as follows:

1. recognition and protection of the family based on marriage and the rights of such family units
2. protection for certain rights of parents and children resulting from a family based on marriage and for other relationships recognised by the natural law, that is, those of natural mothers and children
3. recognition and support for a particular role of women and mothers within the home
4. protection for the institution of marriage and consequent prohibition of (or limited permission for) divorce and recognition of certain foreign divorces.

Issues

The Review Group has identified eleven issues which need to be addressed:

1. the constitutional definition of 'family'
2. the balance between the rights of the family as a unit and the rights of the individual members
3. constitutional protection for the rights of a natural father
4. express constitutional protection for the rights of a natural mother
5. expanded constitutional guarantee for the rights of the child
6. the relative balance between parental and children's rights
7. the description and qualification of family rights
8. the continued constitutional protection of the institution of marriage and any necessary constitutional limitations to be placed on it

9. whether there should be an express right to marry and found a family

10. the reference to the role of women and mothers or other persons within the home

11. whether the Constitution should continue to regulate the position of foreign divorces and, if so, how

1 constitutional definition of 'family'

The family recognised and protected in Articles 41 and 42 is the family based on marriage. In *The State (Nicolaou) v An Bord Uchtála* Walsh J in the Supreme Court judgment stated that it was:

> ... quite clear ... that the family referred to in [Article 41] is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the laws for the time being in force in the State.

Support for this view derives from Article 41.3.1°:

> The State pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack.

The effect of this definition is that neither a non-marital family nor its members are entitled to any of the protection or guarantees of Article 41. Likewise, they are probably not comprehended by the terms of Article 42: see *G v An Bord Uchtála*. As indicated above, rights of an unmarried mother and of a child of unmarried parents, which some might consider as rights resulting from a family relationship, have been held to be personal rights which the State is obliged to protect under Article 40.3. An unmarried father has been held to have no personal rights under Article 40.3 in relation to his child (*The State (Nicolaou) v An Bord Uchtála*). In that case the father sought to challenge the provisions of the Adoption Act 1952 which permitted the adoption of his child without his consent.

The Review Group has received many submissions to the effect that Article 41 should be amended so as to recognise in the Constitution family units other than the family based on marriage.

In Irish society there are numerous units which are generally regarded as family units but which are not families based on marriage. There are differences in the treatment of such family units for different purposes. For certain Social Welfare purposes heterosexual couples cohabiting are effectively treated as a family unit. They are not in general so treated for the purposes of tax laws or succession laws.

The Review Group appreciates the point of view of those who feel that persons living in family units not based on marriage should have constitutional recognition. However, the constitutional protection of rights of any family unit other than a family based on marriage presents significant difficulties.

The first and obvious difficulty is that once one goes beyond the family based on marriage definition becomes very difficult. Thus the multiplicity of differing units which may be capable of being considered as families include:

> a cohabiting heterosexual couple with no children
>
> a cohabiting heterosexual couple looking after the children of either or both parents
>
> a cohabiting heterosexual couple either of whom is already married
>
> a cohabiting heterosexual couple either of whom is already married, whose children (all or some of them) are being looked after elsewhere
>
> unmarried lone parents and their children
>
> homosexual and lesbian couples.

Questions will also arise such as what duration of cohabitation (one month? six months? one year? five years?) should qualify for treatment as a family. Furthermore, certain persons living together either with or without children may be deliberately choosing to do so without being married, that is, choosing deliberately not to have a legal basis for their relationship. Would it be an interference with their personal rights to accord in effect a legal status to their family unit?

The Review Group has considered the provisions in relation to family and marriage in many of the European constitutions, in the European Convention on Human Rights (ECHR) and the International Covenant of Civil and Political Rights (CCPR). None appears to attempt a definition of a 'family' in terms other than one based on marriage. Some clearly link family with marriage. Others are silent on the matter. Macedonia and Slovenia refer expressly to non-marital cohabitation in apparent distinction from the family. Some refer to the equal rights of children born 'out of wedlock' with those 'in wedlock' or 'of marriage' (Poland and the Slovak Republic) or the equal rights of children born 'outside matrimony' with those born 'in matrimony' (Slovenia).

If an amendment were made so that the family referred to in the Constitution was not confined to the family based on marriage, it would seem necessary to leave to the judiciary, on a case by case basis, the definition of the form of units which might constitute a family within the meaning of any such amended provision. While this could create uncertainty, it is essentially the approach of the ECHR, Article 8(1) of which provides:

> Everyone has the right to respect for his private and family life, his home and his correspondence.

The focus of the Article is, however, on the protection of an individual's right to family life as distinct from protection of the rights of a family unit.

The European Court of Human Rights and the European Commission of Human Rights have interpreted 'family life' within the meaning of Article 8 as extending beyond formal or legitimate arrangements. The Commission in *K v UK* No 11468/85 50 DR 199 stated:

> The question of the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties.

In *Keegan V Ireland* (1994) 18 EHRR 342 the court stated:

> The Court recalls that the notion of the 'family' in this provision is not confined solely to marriage-based relationships and may encompass other *de facto* 'family' ties where the parties are living together outside of marriage. A child born from such a relationship is *ipso jure* part of that 'family' unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life, even if at the time of his birth the parents are no longer cohabiting or if their relationship has then ended.

The present emphasis of Article 41 is the protection of rights of the family as a unit rather than the protection of rights of individuals resulting from a family relationship (see Issue 2 below). The Review Group considers that this approach presents particular difficulties if the family unit is extended beyond the family based on marriage by reason of the uncertainties referred to above as to the existence at any given time of any such family unit.

An alternative approach is to retain in the Constitution a pledge by the State to protect the family based on marriage but also to guarantee to all individuals a right to respect for their family life whether that family is, or is not, based on marriage. For the reasons that appear later in this section of the report, this is the preferred option of the Review Group.

2 the balance between the rights of the family unit and those of the individual members

The rights referred to in Article 41.1 are the rights of the family as a unit as distinct from the rights of individual members of the family. In *Murray v Ireland* [1985] IR 532, Costello J stated:

> The rights in Article 41.1.1° are those which can properly be said to belong to the institution itself as distinct from the personal rights which each individual member might enjoy by virtue of membership of the family.

A similar approach was taken by Finlay CJ in *L v L* [1992] 2 IR 77 where he said:

> Neither Article 41.1.1° - 2° purports to create any particular right within the family, or to grant to any individual member of the family rights, whether of property or otherwise, against other members of the family, but rather deals with the protection of the family from external forces.

The Review Group considers that the present focus of Articles 41 and 42 emphasises the rights of the family as a unit to the possible detriment of individual members. Giving to the family unit rights which are described as 'inalienable or imprescriptible', even if they are interpreted as not being absolute rights, potentially places too much emphasis on the rights of the family as a unit as compared with the rights of individuals within the unit. It is desirable that the family should retain a certain authority and autonomy. However, this should not be such so as to prevent the State from intervening where the protection of the individual rights of one member of the family requires this or to prejudice the rights of the individuals within the family. Professor William Duncan (see Appendix 22 – 'the constitutional protection of parental rights') has identified the problem as follows:

> The problem seems to be essentially that of achieving a legal balance which will offer security and a measure of equality to individual family members in a manner which does not devalue or endanger the family as an institution.

The history of adoption legislation in the State and the reluctance of the Oireachtas until recently to permit the adoption of legitimate children undoubtedly was influenced by a fear that any such provision would conflict with the rights of the family in Article 41.1.1°. The circumstances in which the Adoption Act 1988 permits the adoption of legitimate children are extremely limited, essentially those envisaged in Article 42.5, namely where parents for physical or moral reasons have failed in their duty towards their children. It was primarily in reliance upon that Article, while referring also to the obligations of the State under Article 40.3 to vindicate the personal rights of a child whose parents had failed in their duty to it, that the Supreme Court upheld as constitutional the Adoption (No2) Bill 1987 in the relevant Article 26 reference.

From the Review Group's consideration of the family and marriage provisions in many of the European constitutions and in the ECHR and CCPR, it appears that with the exception of Luxembourg, none guarantees expressly the rights of the family unit as such. Many recognise the family as a primary or fundamental unit in society and some state that it is entitled to the special protection of the State or society but the rights or duties which derive from marriage, family, parenthood or as a child are guaranteed to or imposed on the individuals. The Review Group considers that this would be the better approach in any revised form of Article 41.

3 constitutional protection for the rights of a natural father

A natural father is considered not to have any constitutionally-protected rights to his child. This arises from the decision of the Supreme Court in *The State (Nicolaou) v An Bord Uchtála*. In that case the child of a natural father had been adopted pursuant to the Adoption Act 1952 without his consent. He challenged the provisions of the Adoption Act which permitted that to be done. The Supreme Court held:

i) a natural father is not a member of a family within Article 41

ii) a natural father is not a 'parent' within Article 42

iii) a natural father has no personal right in relation to his child which the State is bound to protect under Article 40.3

The basis for the third conclusion is stated by Walsh J:

> It has not been shown to the satisfaction of this Court that the father of an illegitimate child has any natural right, as distinct from legal rights, to either the custody, or society of that child and the Court has not been satisfied that any such right has ever been recognised as part of the natural law. If an illegitimate child has a natural right to look to his father for support that would impose a duty on the father but it would not of itself confer any right upon the father.

Since the decision of the Supreme Court in *The State (Nicolaou) v An Bord Uchtála*, there have been two significant developments in relation to the legal as distinct from the constitutional position relating to the rights of a natural father.

Firstly, section 12 of the Status of Children Act 1987 amended the Guardianship of Infants Act 1964 by the insertion of the following section:

> 6A(1) Where the father and mother of an infant have not married each other the court may, on the application of the father, by order appoint him to be a guardian of the infant.

The above section has been construed by the Supreme Court as giving to an unmarried father a right to apply to the court to be appointed a guardian as distinct from giving to him a right to be a guardian which is capable of being annulled, that is to say, a defeasible right (*K v W* [1990] ILRM 121).

There are two particularly important consequences for an unmarried father who is appointed a guardian of his children. Under section 10(2) of the Guardianship of Infants Act 1964, he is entitled, as against every person who is not a joint guardian of the children with him (normally the mother), to the custody of the children. Also, under the Adoption Acts his child may not be adopted without his consent unless the court makes an order dispensing with his consent. However, a father who is not appointed the guardian of his children has no such defeasible right to custody nor to have to give his consent for the adoption of his child.

The second important development is the finding by the European Court of Human Rights that Ireland was in breach of Article 8 of the ECHR in that it failed to respect the family life of an unmarried father who had had a stable relationship with the mother of his child in permitting the placement of the child for adoption without his knowledge or consent: see the *Keegan* case.

Ireland is, therefore, now obliged to give natural fathers to whom children are born in the context of 'family life' as interpreted by the European Court of Human Rights, a legal opportunity to establish a relationship with that child. This obviously requires a legal entitlement to be consulted before the child is placed for adoption; also it would seem to require that he be entitled at a minimum to rights of access to the child and possibly defeasible rights to joint guardianship or joint custody with the natural mother. The European Court of Human Rights expressly declined to consider whether Ireland was in breach of Article 8 by reason of its failure to grant to Mr Keegan a defeasible right to be the guardian of his child. It expressed its approach to these issues as follows:

> According to the principles set out by the Court in its case law, where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family.

There is of course no requirement that these rights be constitutional rights. It would be sufficient for Ireland in order to comply with its obligations under the ECHR to grant such rights by legislation.

There has been much criticism of the continued constitutional ostracism of natural fathers. This can be readily understood in relation to those natural fathers who either live in a stable relationship with the natural mother, or have established a relationship with the child. However, there does not appear to be justification for giving constitutional rights to every natural father simply by reason of biological links and thus include fatherhood resulting from rape, incest or sperm donorship.

The Review Group considers that the solution appears to lie in following the approach of Article 8 of the ECHR in guaranteeing to every person respect for 'family life' which has been interpreted to include non-marital family life but yet requiring the existence of family ties between the mother and the father. This may be a way of granting constitutional rights to those fathers who have, or had, a stable relationship with the mother prior to birth, or subsequent to birth with the child, while excluding persons from having such rights who are only biological fathers without any such relationship. In the context of the Irish Constitution it would have to be made clear that the reference to family life included family life not based on marriage.

4 express constitutional protection for the rights of a natural mother

A natural mother is not considered to have any rights protected by Articles 41 or 42. She is considered to have rights in relation to her child which are personal rights protected by Article 40.3 (*G v An Bord Uchtála*).

The Review Group is recommending that rights previously identified by the courts as unenumerated personal rights protected by Article 40.3 should now be enumerated in the Constitution. It would be appropriate that the rights of a natural mother be specified in Articles 41 and 42. If as suggested above a new section were inserted in Article 41 giving to everyone a right to respect for their family life, this would clearly include the rights of a natural mother in relation to her child.

Consideration should also be given to whether any modified form of Article 42.1 which refers to parental rights should expressly include unmarried parents. If this were done, care would have to be taken with the drafting to avoid giving rights to natural fathers who have no relationship with the natural mother or no relationship, other than a biological one, with the child.

5 expanded constitutional guarantee for the rights of the child

There is no express reference in Article 41 to the child. As already indicated, the focus of this Article is on the rights of the family as a unit and on protection of it from intervention by the State rather than on the rights of the individual members of the family. Only Article 42.5 makes reference to the rights of the child and imposes any specific obligation on the State.

The *Report on the Kilkenny Incest Investigation* chaired by Judge Catherine McGuinness observed that 'the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the right of parents than to the rights of children' and went on to recommend the amendment of the Constitution to include 'a specific and overt declaration of the rights of born children'.

unenumerated rights

Over the years judicial interpretation of the Constitution has revealed certain unenumerated rights to which the child is entitled:

1 the judgments of the High Court and the Supreme Court in *G v An Bord Uchtála* [1980] IR 32 identify:

   i) the right to bodily integrity

   ii) the right to an opportunity to be reared with due regard to religious, moral, intellectual and physical welfare.

   The judgments went on to emphasise that the State, having regard to the provisions of Article 40.3.1°, must by its laws defend and vindicate these rights as far as practicable.

O'Higgins CJ in the Supreme Court added to the list when he pointed out that a child, having been born, has the right 'to be fed and to live, to be reared and educated and to have the opportunity of working and realising his or her full personality and dignity as a human being and that these rights must equally be protected and vindicated by the State.'

2 the Supreme Court returned to this issue in *In re Article 26 and the Adoption (No 2) Bill 1987* [1989] IR 656.

In this reference to the Supreme Court to test the constitutionality of the Bill, the court was required to construe Article 42.5 and in doing so stated that the rights of a child are not limited to those contained in Article 41 and 42 but include the rights referred to in Articles 40, 43 and 44. This important statement confirms that the child is entitled to all of the personal rights identified in Article 40.

3 *FN (a minor) v Minister for Education* [1995] 2 ILRM 297 was a High Court case dealing with child care and the detention of a child with very special needs caused by a hyperkinetic conduct disorder. It was held that 'where there is a child with very special needs which cannot be provided by the parents or guardian there is a constitutional obligation on the State under Article 42.5 of the Constitution to cater for those needs in order to vindicate the constitutional rights of the child'.

However, it was stated that this was not an absolute duty. Later in the judgment it was stated by Geoghegan J:

> ... the State is under a constitutional obligation towards the applicant to establish as soon as reasonably practicable ... suitable arrangements of containment with treatment for the applicant.

This is a strong affirmation by the High Court of the constitutional obligation on the state to make proper provision for the welfare of a child suffering a psychiatric illness. This is consistent with the judgment of the High Court in *G v An Bord Uchtála* which identified the child's constitutional right to be reared with due regard to her religious, moral, intellectual, physical and social welfare. This wording follows closely on Article 42.1 with the important distinction that the word *welfare* is included instead of *education*.

Consistent with the view already expressed by the Review Group relating to the specific inclusion in the Constitution of identified unenumerated rights, the Review Group recommends the express inclusion of the unenumerated rights of the child set out above. A child is, of course, a person, and therefore the general constitutional rights shared by adults, such as the right to bodily integrity, will be protected elsewhere in the Constitution. Article 41 should contain an express guarantee of those rights of a child which are not guaranteed elsewhere and are peculiar to children, such as the right to be reared with due regard for his or her welfare.

United Nations Convention on the Rights of the Child (CRC)

In September 1992, Ireland ratified the CRC. It constitutes a comprehensive compilation of child-specific rights, many of which have already been identified by the superior courts as unenumerated rights under the Constitution. They include the right to education, freedom of religion, expression, assembly and association.

However, two separate and distinct issues are of interest and may inspire constitutional amendment.

1 The first of these is contained in Article 7 of CRC which states

> The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire nationality and, as far as possible, the *right to know and be cared for by his or her parents* (emphasis added).

The Review Group recommends that a child ought to have a right as far as is practicable to his or her own identify which includes a knowledge and history of his or her own birth parents. The child ought to be entitled to this information not only for genetic and health reasons but also for psychological reasons. The Review Group recognises that in the case of adoption it may be desirable in the child's interests to regulate the time and manner in which the child should be entitled to this information. There may be other situations where such regulation is also desirable. Thus, the protection of any such right in the Constitution should be subject to regulation by law in the interests of the child.

In addition, the child should have a right as far as is practicable to be cared for by both parents. This is particularly so where the child is a non-marital child. It has already been pointed out that a natural father has no constitutionally protected rights in relation to his child. However, the judgment of Walsh J in *The State (Nicolaou) v An Bord Uchtála* seems to imply that such a child may have a constitutional right to know and be cared for by his or her natural father where it stated:

> If an illegitimate child has a natural right to look to his father for support, that would impose a duty on the father but it would not of itself confer any right upon the father.

2 Throughout the text of the CRC, reference is made to the concept of the 'best interests of the child': see *inter alia* Articles 3, 9 and 18. These Articles deal with different situations such as actions concerning children where the best interest of the child shall be 'a primary consideration' (Article 3), the prohibition of a separation of a child from his or her parents against his or her will, except in certain circumstances, and where 'such separation is necessary for the best interests of the child' (Article 9), where it provides that both parents shall have common responsibilities for the

3 upbringing and development of the child and that 'the best interests of the child will be their basic concern' (Article 18).

Section 3(2)(b) of the Child Care Act 1991 provides that the Health Board, in exercising its function in the care and protection of children, shall 'have regard to the rights and duties of parents, whether under the Constitution or otherwise and shall regard the welfare of the child as the first and paramount consideration'. Accordingly, it appears that the operation of the Child Care Act will closely coincide with the principles set out in CRC.

Section 3 of the Guardianship of Infants Act 1964 also provides that the court shall regard the welfare of the infant as the first and paramount consideration.

However, in *In re JH (an infant)* [1985] IR 375 the Supreme Court held that section 3 of the 1964 Act must 'be construed as involving a constitutional presumption that the welfare of such a child is to be found within the family unless the Court is satisfied that there are compelling reasons why this cannot be achieved or the evidence establishes an exceptional case where the parents have, for moral or physical reasons, failed, and continue to fail to provide education for the child'. In this instance the child was returned to his natural parents who had married subsequent to his birth and placement for adoption but before finalisation of the adoption.

The Review Group considers that, notwithstanding the above legislative provisions, it is desirable to put into the Constitution an express obligation to treat the best interests of the child as a paramount consideration in any actions relating to children. Any such provision might be modelled, with the appropriate changes to suit an Irish context, on Article 3.1 of the CRC which provides:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies the best interests of the child shall be of paramount consideration.

The existence of such a provision would oblige those making decisions in relation to children to take into account not only the child's right to be cared for by his or her parents (which the Review Group suggests should now be constitutionally protected) but also such matters as the desirability of continuity in a child's upbringing. This is expressly recognised by Article 20.3 of the CRC and referred to by Professor Duncan (See appendix 22).

6 the relative balance between parental and children's rights

Closely linked with issues relating to the balance between the rights of the family unit and of the individual members are the issues relating to the correct balance between any constitutional protection of family autonomy or parental rights and the rights of the child. Professor Duncan has discussed these fully.

Express constitutional permission for State intervention is limited at present in Article 42.5 to 'exceptional cases, where the parents

for physical or moral reasons fail in their duty towards their children'. If a decision is made to amend Article 41 so as to grant express rights to children and also maintain an express guarantee of parents' rights and duties, it would appear necessary to expand the circumstances referred to in Article 42.5 so as to include a situation where the protection of the constitutionally guaranteed rights of children require intervention. A re-wording of the State's duty to the child under this Article is necessary in the light of the Review Group's proposed amendments to guarantee expressly certain rights of the child and elsewhere remove adjectives and phrases which appear to refer to natural law which have been a source of some difficulties (see Issue 7 below).

Further, if parental rights and children's rights are both being expressly guaranteed, it would be desirable that the Constitution make clear which of these rights should take precedence in the event of a conflict between the rights. One can envisage, for example, a situation where a child has lived for, say, ten years with foster parents and a natural father or mother seeks to recover the custody of that child. The natural mother might well have a constitutional right to the custody of the child but the best interests of the child might require it to remain with its foster parents. If, as suggested above, there is an express statement included in any revised Article 41 that in all decisions affecting a child its best interests should be a paramount consideration, then this would resolve any conflict in favour of the child.

7 the description and qualification of family rights

Article 41.1.1° recognises the family as 'a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law'. Article 42.1 refers to the 'inalienable right and duty of parents', Article 42.5 refers to the 'natural and imprescriptible' rights of the child. These are clearly references to natural law. As Mr Justice Walsh has stated (See 'The Constitution and Constitutional Rights' in *The Constitution of Ireland 1937 to 1987*, IPA, Dublin 1988):

The Constitution does not claim to confer or bestow any of the rights set out [in Articles 41 to 44] but rather expressly acknowledges them as having existence outside the law and beyond the law.

Notwithstanding this, no clear meaning of these terms has emerged from the judicial consideration of them. In *Ryan v Attorney General* [1965] IR 294 Kenny J interpreted 'inalienable' as meaning 'that which cannot be transferred or given away' and 'imprescriptible' as 'that which cannot be lost by the passage of time or abandoned by non-exercise'. However, in *G v An Bord Uchtála* Walsh J referred to some inalienable rights being 'absolutely inalienable' and others as 'relatively inalienable'. Moreover, notwithstanding the absolutist language of this subsection, Costello J in *Murray v Ireland* [1985] IR 532 considered that the rights of the family under the Constitution may be validly restricted by the State. Further in *In the Matter of The Matrimonial Home Bill 1993* [1994] ILRM 241, the Supreme Court, in holding that the Bill, which gave rights to a spouse to a joint tenancy in the family home, was unconstitutional, stated:

> ... the court is satisfied that such provisions [of the Bill] do not constitute reasonably proportionate intervention by the State with the rights of the family and constitute a failure by the State to protect the authority of the family.

The Review Group, as already indicated, considers that there should continue to be express protection for the rights of the family based on marriage. It recognises that it would not be possible to set out comprehensively in the Constitution what are the rights of the family and the precise interpretation of such rights will fall to the courts. However, it considers that the rights protected should not be described as 'inalienable' or 'imprescriptible'. These words have given rise to judicial decisions which some consider as tilting the balance in favour of the autonomy of the family to the possible detriment of individual members: see, for example, *In re JH (an Infant)*. Others consider that the present Article 41 has prevented some of the excesses of State intervention in family life experienced in other jurisdictions: see Professor Duncan – Appendix 22. The Review Group considers that the protection of the family in its constitutional authority together with the express guarantee of certain rights of the child (see Issue 5 above) and specific criteria for state intervention as suggested below should provide a reasonable balance.

Apart from the necessity for the State to act where the rights and welfare of a child requires this, there may be other circumstances in which the State should be permitted to interfere with the exercise of family rights or restrict their exercise. The situation which arose in *Murray v Ireland*, where convicted criminals are imprisoned and deprived of the ability to exercise their conjugal rights, is one such example. Notwithstanding that the courts have interpreted even the rather absolutist wording of the existing provisions of Article 41 as not preventing certain restrictions on the exercise of family rights by the State, it appears desirable to set out in the Constitution the relevant criteria which should apply to any such restriction by the State. Article 8.2 of the ECHR might provide a useful model for any such qualifying clause. It provides:

> There shall be no interference by a public authority with the exercise of this right (to respect for, *inter alia*, family life) except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.

Article 8.1 of the Convention guarantees respect for private life, home and correspondence in addition to family life. Hence not all the above criteria may be relevant to guarantees in relation to family life alone.

8 the continued constitutional protection of the institution of marriage and any necessary constitutional limitations to be placed on it

The issue to be considered here is whether the Constitution should retain Article 41.3.1° or a revised form of it. The Article provides:

> The State pledges itself to guard with special care the institution of marriage, on which the family is founded and to protect it against attack.

The effect of this Article is that the State may not penalise marriage or the married state. This Article has been relied upon successfully to challenge a number of provisions which had the effect of penalising the married state: see for example, *Murphy V Attorney General* [1982] IR 241 – the challenge to the prejudicial taxation of married couples. It would also appear to provide constitutional justification for legislation favouring the married state.

The retention of a pledge to protect marriage similar to this Article would not appear to conflict with Ireland's obligations under the European Convention on Human Rights, Article 12 of which provides:

> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

This has been construed by the European Court of Human Rights as permitting a State to treat families based on marriage more favourably than ones not so based, provided treatment of the latter does not conflict with those individuals' rights to family life under Article 8 of the Convention.

The Review Group considers that a revised Article 41 should retain a pledge by the State to guard with special care the institution of marriage and to protect it against attack but that a further amendment should be made so as to make it clear that this pledge by the State should not prevent the Oireachtas from providing protection for the benefit of family units based on a relationship other than marriage.

While the Review Group favours an express pledge by the State to protect the family based on marriage, it does not favour the retention of the words 'upon which the family is founded' in Article 41.3.1°. These words have led to an exclusively marriage-based definition of the family which no longer accords with the social structure in Ireland.

9 express guarantee of the right to marry and found a family

Such rights have been held to be amongst the unenumerated personal rights guaranteed by Article 40.3 (*Murray v Ireland*). The Review Group has recommended elsewhere in this report that Article 40.3 be replaced by a comprehensive list of rights. A majority of the Review Group consider that the right to marry and to procreate or found a family should be included among the rights guaranteed in Article 41 as distinct from Article 40. It appears more appropriate to have all the family rights in the one Article.

If, as recommended by the Review Group, Article 40.3.1° is amended to include a comprehensive list of rights, an express right to marry and to procreate or found a family should be guaranteed in Article 41. Such rights have been held by the courts to be personal rights guaranteed by Article 40.3.

10 the reference to the role of women and mothers or other persons within the home

Article 41.2 assigns to women a domestic role as wives and mothers. It is a dated provision much criticised in recent years. Notwithstanding its terms, it has not been of any particular assistance even to women working exclusively within the home. In the *L v L* case the Supreme Court rejected a claim by a married woman who was a mother and had worked exclusively within her home to be entitled to a 50% interest in the family home. At common law, it has been held that a married woman who makes a financial contribution directly or indirectly to the acquisition of a family home is entitled to a proportionate interest in it. However, this principle is of no help to the significant number of women who do not have a separate income from which they can make financial contributions to a family home but who contribute by their work within the home and in many instances relieve their husbands of domestic duties thereby permitting them to earn money. The Supreme Court considered that, while Article 41.2.2° imposed an obligation on the judiciary as well as on the legislature and the executive to endeavour to ensure that 'mothers should not be obliged by economic necessity to engage in labour outside the home to the neglect of their duties within the home', this Article did not confer jurisdiction on the courts to transfer any particular property right within a family.

These provisions have also been cited by the State in support of legislation which appeared to discriminate on grounds of sex. In *Dennehy v The Minister for Social Welfare* (1984) Barron J used Article 41.2 to support his conclusion that the failure of the State to treat deserted husbands in the same way as deserted wives for the purposes of Social Welfare was justified by the proviso in Article 40.1 (the recognition of a difference in capacity and social function).

The Review Group considered whether this Article should simply be deleted or whether section 2.1° should be retained in an amended form which might recognise the contribution of each or either spouse within the home.

The Review Group is conscious of the importance of the caring function of the family. It considers it important that there is constitutional recognition for the significant contribution made to society by the large number of people who provide a caring function within their homes for children, elderly relatives and others. On balance, therefore, the Review Group favours the retention of Article 41.2 in a revised gender neutral form. The retention of Article 41.2.2° may not be appropriate to a gender neutral form of the Article. The revised form of Article 41.2 might read:

> The State recognises that home and family life gives to society a support without which the common good

> cannot be achieved. The State shall endeavour to support persons caring for others within the home.

11 whether the Constitution should continue to regulate the position of foreign divorces and, if so, how

Article 41.3.3° may be regarded as complementing the provisions of the divorce prohibition contained in Article 41.3.2°. The language of this subsection is not easy to interpret. However, the following extract from the judgment of Kingsmill Moore J in *Mayo-Perrott v Mayo-Perrott* [1958] IR 336 has been subsequently accepted as authoritative:

> The general policy of the Article seems to me to be clear. The Constitution does not favour the dissolution of marriage. No laws can be enacted to provide for the grant of a dissolution of marriage in this country. No person whose divorced status is not recognised by the law of this country for the time being can contract in this country a valid second marriage. But it does not purport to interfere with the present law that dissolutions of marriage by foreign courts, where the parties are domiciled within the jurisdiction of those courts, will be recognised as effective here. Nor does it in any way invalidate the remarriage of such persons.

The judge went on to hold that it was open to the Oireachtas to regulate the question of the recognition of foreign divorces by law, as the operation of Article 41.3.3° is essentially contingent on their being 'a subsisting valid marriage under the law for the time being in force.'

At the date of the enactment of the Constitution, the law in force for the purposes of Article 41.3.3° was a common law rule by which it was provided that a foreign divorce would only be recognised if both parties were domiciled in the foreign state where the divorce was granted. That common law rule interacted with another common law rule whereby the wife was presumed to take her husband's domicile and the operation of both rules had peculiar consequences. It meant, for example, that an English divorce obtained by a husband who previously acquired an English domicile of choice would have that divorce recognised in this State because (a) the wife was taken to have an English domicile of dependency and (b) it satisfied the criteria for recognition at common law as both parties were domiciled in England.

These common law rules have been overtaken by two significant developments within the last decade. In the case of divorces granted after 2 October 1986, the recognition criteria have been relaxed by section 5 of the Domicile and Recognition of Foreign Divorces Act 1986. This provides that a divorce granted after that date will be recognised in the country where either spouse is domiciled or, where neither spouse is domiciled in the State, if it is recognised in the countries where the spouses are domiciled. The recognition of divorces granted *prior* to 2 October 1986 is now governed by the rules formulated by the Supreme Court in *W v W* [1993] 2 IR 476. In that case, the court first ruled that the common law rule regarding domicile of dependency was unconstitutional as it discriminated against wives, contrary to

Article 40.1. The court went on to hold that the common law rules of recognition required to be modified in the light of that finding of unconstitutionality and ruled that a divorce granted prior to 2 October 1986 should be recognised if granted in the country in which either of the parties to the marriage was domiciled at the date of the proceedings. However, a foreign divorce granted to a couple where *both* of the parties were domiciled in Ireland will never be recognised in this State.

Since at the date of the submission of this report it was unclear as to whether the divorce prohibition had been validly deleted and replaced by the 15th Amendment of the Constitution, the Review Group has decided to approach the foreign divorce issue from two perspectives. The first assumes that Article 41.3.2° has been deleted, the second assumes that it has not.

whether Article 41.3.3° should be retained if the original Article 41.3.2° is deleted and replaced by the 15th Amendment

It might be thought that because Article 41.3.3° complemented the original prohibition on divorce, it was rendered redundant by the deletion of that prohibition. The Review Group is not persuaded by this suggestion and considers that Article 41.3.3° might still have a relevant role even in the wake of the enactment of the 15th Amendment. The 15th Amendment provides for the granting of divorce in certain limited circumstances, including proof that the parties to the marriage 'have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years'. If Article 41.3.3° did not expressly provide the Oireachtas with the capacity to enact legislation providing for the recognition of foreign divorces, even where they did not satisfy the requirements specified by the 15th Amendment in the case of divorces granted in this State (for example, foreign divorces granted after one year), it might mean that legislation providing for the recognition of such foreign divorces could be held to be unconstitutional as being contrary to, *inter alia*, Article 41.3.1° whereby the State guarantees to protect the institution of marriage against attack.

By international standards, the requirements specified by the 15th Amendment are highly restrictive. Accordingly, in order to avoid the prospect of 'limping marriages' (that is marriages which remain valid in one country but considered to have been dissolved in another country), the Review Group considers it appropriate that the Oireachtas should retain an express capacity to provide for the recognition of such divorces, even where the criteria for the granting of such divorces (for example, one year's separation) would not in themselves satisfy the requirement of the 15th Amendment had the divorce been sought in this State.

whether Article 41.3.3° should be amended if the divorce prohibition remains in place

If the divorce prohibition remains in place, it is appropriate that the Oireachtas should retain an express capacity to recognise the circumstances (if any) in which a foreign divorce should be recognised. In the absence of Article 41.3.3°, there would be a danger that all foreign divorce recognition rules would be held to

be unconstitutional. Such a development would not only lead to striking anomalies, but it would not be in harmony with the general principles of both public and private international law.

Conclusion

The Review Group considers it important that there is a coherent approach to the family provisions in Article 41 and to the education and religion provisions in Articles 42 and 44 in so far as they affect the family. As indicated at the outset of this section of the report, the Review Group considers that Articles 41 and 42 were drafted with only one family in mind, namely, the family based on marriage with children. For that reason and notwithstanding that the recommendations retain many of the elements of Article 41, they necessitate significant amendment of the Article. It is to be noted that the recommendations set out below are interdependent. They involve delicate balances such that, if any part of the recommendations were not acceptable, a change might be required in the remainder of the recommendations.

Recommendations

1 All family rights, including those of unmarried mothers or fathers and children born of unmarried parents, should now be placed in Article 41.

2 Delete existing Articles 41.1.1°, 41.1.2°, 41.2.1°, 41.2.2° and 41.3.1°.

3 The description of any rights or duties specified in Articles 41 or 42 should not include adjectives such as ‘inalienable’ or ‘imprescriptible’.

4 A revised Article 41 should include the following elements:

i) recognition by the State of the family as the primary and fundamental unit of society

ii) a right for all persons to marry in accordance with the requirements of law and to found a family

iii) a pledge by the State to guard with special care the institution of marriage and protect it against attack subject to a proviso that this section should not prevent the Oireachtas from legislating for the benefit of families not based on marriage or for the individual members thereof

iv) a pledge by the State to protect the family based on marriage in its constitution and authority

v) a guarantee to all individuals of respect for their family life whether based on marriage or not

vi) an express guarantee of certain rights of the child, which fall to be interpretated by the courts from the concept of ‘family life’, which might include:

a) the right of every child to be registered immediately after birth and to have from birth a name

b) the right of every child, as far as practicable, to know his or her parents, subject to the proviso that such right should be subject to regulation by law in the interests of the child

c) the right of every child, as far as practicable, to be cared for by his or her parents

d) the right to be reared with due regard to his or her welfare

vii) an express requirement that in all actions concerning children, whether by legislative, judicial or administrative authorities, the best interests of the child shall be the paramount consideration

viii) a revised Article 41.2 in gender neutral form which might provide

The State recognises that home and family life give society a support without which the common good cannot be achieved. The State shall endeavour to support persons caring for others within the home

ix) an amended form of Article 42.5 expressly permitting State intervention either where parents have failed in their duty or where the interests of the child require such intervention and a re-statement of the State's duty following such intervention

x) an express statement of the circumstances in which the State may interfere with or restrict the exercise of family rights guaranteed by the Constitution loosely modelled on Article 8(2) of ECHR

xi) retention of the existing provisions in Article 41.3.3° relating to recognition for foreign divorces.

Education

Article 42

41.1 *The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.*

42.2 *Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.*

42.3.1° *The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.*

42.3.2° *The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.*

42.4 *The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.*

42.5 *In exceptional cases, where the parents for physical or moral reasons fail in the duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*

There are almost 1,000,000 people, including children, young and mature people, enrolled in full-time education in the State. They attend schools, colleges, universities and adult and further education centres.

Primary education

The primary education sector comprises national schools, special schools and non-aided private primary schools. It serves almost 500,000 children. There are just over 3,200 national schools and 115 special schools. There is also a small number of non-aided national schools catering for about 2% of the population. The national schools, which account for the education of 98% of children in the primary sector, are staffed by over 20,000 teachers.

The term ‘primary school’ is increasingly being used in recent years to replace the term ‘national school’ which more accurately describes publicly funded primary schools. There is no legislation underpinning the founding of these schools but their origins date back to the Stanley Letter of 1831. The national school system was intended to be a system of religiously mixed schools. However, during the nineteenth century the three main churches (Catholic, Church of Ireland and Presbyterian) refused to co-operate in the provision of religiously mixed education and the system became increasingly denominational. By the early twentieth century only a relatively small number of schools were under religiously mixed management.

While the *de facto* denominational reality of the national school system has never been legislatively enshrined, the successive editions of *Rules for National Schools* since the foundation of the State have increasingly recognised this denominational reality (see Appendix 24 – ‘The multi-denominational experience’).

All national schools are privately owned but publicly funded. In the case of the vast majority of schools, their owners are diocesan trustees (Roman Catholic, Church of Ireland, trustees nominated by other churches or, in the case of multi-denominational schools, a limited company or a trust). Every national school is ultimately controlled by a patron. (In the case of Catholic and Church of Ireland schools, the bishop is the patron; in the case of multi-denominational schools, the patron is a limited company. Most Gaelscoileanna are under the patronage of the local Catholic bishop but within the past three years Gaelscoileanna have set up their own patronage body which is a limited company and new Gaelscoileanna may now opt to be either under the patronage of the local bishop or under the patronage of

the local bishop or under the patronage of the new limited company). The patron of a national school is responsible for the nomination of the board of management of that school although parents and teachers have a role in electing representatives to the board – the names to be subject to the formal approval of the patron. The patron also plays an important role in setting up the selection board for a school principalship and for approving all appointments to a school. The patron also has the power under the *Rules and Constitution of Boards of Management* to assume management of a school in the event of unsatisfactory performance by a board of management.

There is no substantive legislation underpinning the national school system. The recently published White Paper on Education (1995) states, 'there has been no substantive legislation enacted in relation to first and second level education in the twentieth century, other than the Vocational Education Act 1930'. The School Attendance Act 1926 is the only legislation relating to primary school children passed in this century. Referring to this general lack of legislation in the case *O'Callaghan v Meath VEC* in November 1990 in the High Court, Costello J stated:

> It is a remarkable feature of the Irish system of education that the administration by the Department of Education is largely uncontrolled by statute or statutory instruments and that many hundreds, perhaps thousands, of rules and regulations, memoranda, circulars and decisions are issued and made by the Department and the Minister (dealing sometimes with the most important aspects of educational policy) not under any statutory power but merely as administrative measures. These measures are not of course illegal. But they have no statutory force, and the sanction which ensures compliance with them is not a legal one but the undeclared understanding that the Department will withhold financial assistance in the event of non-compliance.

The current rules of the Department of Education in relation to the administration of primary education are contained in two documents – *Rules for National Schools* (most recent edition 1965) and *Rules and Constitution of Boards of Management* (most recent edition mid-1980s). There are also myriad circulars and memoranda which complement both of these documents, but no complete set of circulars and memoranda is officially available.

The following table shows the numbers of national schools other than special schools for mentally and physically disabled pupils under the patronage of the various churches.

Table 1: Number and type of primary schools 1992-93

Categories	*Number*
Catholic _	2,988
Church of Ireland	190
Presbyterian	18
Methodist	1
Jewish	1
Multi-denominational	10
Muslim	1
Total	**3,209**

Source: Department of Education

_ the total for Catholic schools includes 138 all-Irish schools in the Gaeltacht and 69 all-Irish schools outside the Gaeltacht

This table refers to the situation in 1992. Since then a further four multi-denominational schools have opened. There are now fourteen such schools, one of which is an all-Irish school.

Although Article 42.2 states that, 'parents shall be free to provide this education in their homes or in private schools or in schools recognised *or established by the State*' (*emphasis added*), no national schools have been established by the State since 1922.

financing arrangements for national schools

In keeping with the principle of subsidiarity underlying the 1937 Constitution, a proportion of both the current and the capital costs of national schools must be provided from local sources. This requirement dates from 1831. In relation to capital funding the school patron/trustees must provide the full cost of the site on which the school is located and a proportion ranging from 5-15% of the cost of erecting and furnishing the school. In relation to current costs, the full costs of teachers' salaries is borne by the State. In relation to running costs, the State pays an annual capitation grant – currently £45 – subject to the proviso that a local contribution is first paid into the school account by the school's board of management. The current amount is £10. (However in her budget speech in January 1996 the Minister for Education indicated that the local contribution may be phased out.) The reality is that the State grant of £45 per pupil per annum is heavily subsidised by the local community to meet the full running cost of the school. The full running cost varies from school to school and to some extent reflects local wealth. In relatively affluent communities the total cost of running a school may be considerably higher than the total cost of running the same sized school in a less affluent community. Schools in less affluent communities are often much less well-equipped and less well-resourced than schools in better off areas. In recent years some efforts have been made by the Government to give extra support to schools in disadvantaged areas but even with this, such

support does no more than equalise the playing field in terms of basic physical resources.

Second level

The second level sector comprises secondary, vocational, community and comprehensive schools. There are just over 370,000 pupils in this sector attending a total of 782 publicly aided schools. Four hundred and sixty-one of these schools are secondary, 248 are vocational and 73 are community and comprehensive. There is a small number of other aided and non-aided schools, for example agricultural colleges.

secondary schools

Secondary schools, sometimes referred to as voluntary secondary schools, educate 61% of second level students. These schools are privately owned and managed. The majority are conducted by religious communities; some are run by diocesan authorities – Catholic diocesan colleges. Others are run by boards of governors – these are mostly under Protestant management and some have charters dating back to the seventeenth and eighteenth century. A small number of schools, both Catholic and Protestant, are owned by individuals.

Secondary schools, then known as intermediate schools, first became eligible for State financial aid under the Intermediate Education Act 1878. Under this Act schools could apply for grant aid from the Intermediate Board through a system of payment by results, in other words, schools were paid on the basis of the success of their students at end-of-year examinations conducted by the Intermediate Board, which was a statutory board set up under the 1878 Act. State aid was initially quite limited and no financial support was available for building or furnishing secondary schools. Such financial aid did not become available until 1964. During the past thirty years, financial grants ranging from 85% to over 90% of the cost of approved secondary school building have been available from the Department of Education. As in the case of national schools, the full cost of the site is paid by the school authorities. Consequently, the building is owned by the school authorities. As regards current costs, the total teachers' salaries are paid by the Department of Education. An annual capitation grant is paid in respect of each pupil attending a non fee-paying Catholic secondary school – this amount is currently about £160. In the case of Protestant secondary schools, the Department pays a block grant to the Protestant Secondary Schools Grants Committee. Some other specific grants are available at secondary level, especially in regard to courses funded from EU funds, for example the new Leaving Certificate Applied Programme. While in practice many secondary schools need to supplement the Government grant from voluntary or other contributions, there is no requirement on a secondary school to provide a local contribution in order to be eligible for receipt of State funding – unlike the national school situation. (Strictly speaking, secondary schools are responsible for paying a small proportion of a teacher's salary – this is called

the basic salary, currently the amount involved stands at £400 per annum per teacher – a secondary school salary scale starts at about £15,000 per annum. However, negotiations are currently underway to transfer the £400 payment from the school to the Department of Education.)

The Intermediate Education Act 1878 and the Intermediate Education (Amendment) Act 1924 are still relevant. The *Rules and Programme for Secondary Schools* is issued on a more or less annual basis, in accordance with the requirements of this legislation. There is little specific legislation governing the secondary school sector, apart from the Teachers Registration Council Act 1918 which established the Secondary Teachers Registration Council. This council is the competent body in relation to the registration and recognition of all teachers in secondary schools, including those seeking mutual recognition of qualifications from other EU countries.

vocational schools and community colleges

Vocational schools educate approximately 26% of all second level students and are administered by Vocational Education Committees (VECs). They are non-denominational schools and are funded up to 93% of the total cost of provision by the State. The balance is provided by receipts generated by the committees. Vocational education is regulated by the Vocational Education Act 1930 and subsequent amendments. Within the last ten years community colleges have been established under the general management of the VECs. Some vocational schools have now become community colleges.

community and comprehensive schools

These schools educate 13% of second level students and are allocated individual budgets by the State. The first comprehensive schools were set up in the 1960s and were originally set up by the State to provide second level education in areas where no previous provision was available. The original expectation was that comprehensive schools would be religiously inclusive, that is to say, that they would not be under the exclusive control of one religious denomination. However, it did not prove possible to gain the agreement of the churches to such an arrangement and comprehensive schools are either Protestant or Catholic. Apart from one Protestant school built in the late 1980s (East Glendalough in Wicklow), no further comprehensive schools were built after 1970. Instead, an almost identical type of school, now named a community school, replaced the comprehensive school. During the 1970s and 1980s a long and sometimes acrimonious debate went on between Church and State about the control and ownership of community schools. Eventually, concessions were made by the State to the Catholic Church in relation to the appointment of certain types of teachers (for example the church was given a veto over the appointment of Religious Education teachers); in addition, some places on the teaching staff were reserved for members of named religious orders; it was agreed that a chaplain nominated by the local bishop would be a permanent full-time paid member of the staff; a deed of trust was agreed between the Minister for Education

and the church and this deed of trust gave certain rights to the church (usually through a named religious order), including the right to nominate some of the members of the board of management.

In a recent High Court judgment – *Campaign to Separate Church and State v the Minister for Education* (1996) – Costello P has ruled that community schools set up under this model can be regarded as (a) denominational schools and (b) Catholic community schools 'in that the religious worship and religious instruction it provides are those of the Roman Catholic Church'. He has also ruled that it is constitutional for the State to pay the salaries of chaplains in such schools.

Constitutional provision for education

Provisions in relation to education in the Constitution are contained in Article 42 (sections 1, 2, 3, 4 and 5) and Article 44.2.4°. Discussion on education must also be considered in the broader context of fundamental rights and of Articles 41 (The Family) and 44 (Religion). It has been stated (see Kelly, *The Irish Constitution*, Dublin 1994, at p 1052) that Article 42:

> clearly reflects Roman Catholic social teaching inasmuch as it explicitly recognises, *inter alia*, the constitutional right and duty of parents to provide for the education of their children and the freedom to provide such education in private schools.

Article 42.1 acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

Article 42.2 states that parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State. Subsection 3 adds that the State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State. In this regard, it is of interest that the State has not established any primary (national) schools since 1937, nor indeed since the foundation of the State. There are a few Model Schools (owned by the State) still in use as primary schools but these were established before the foundation of the State in 1922.

Under the provisions of Article 42.3.2°, the State shall, as guardian of the common good, require, in view of actual conditions, that the children receive a certain minimum education, moral, intellectual and social.

The subsidiary role of the State in education is highlighted in Article 42.4 which reads, 'The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of

parents, especially in the matter of religious and moral formation.' The State regards itself as fulfilling the obligation to provide for free primary education by providing the greater part of the capital and current cost of schools, by paying the teachers' salaries, prescribing a curriculum and providing free transport to schools where necessary. (Presentation by the Department of Education to the National Education Convention, October 1993.)

There is a potentially important difference between the wording of the 1922 Constitution and the 1937 Constitution in relation to education. The 1922 Constitution of the Irish Free State contained the following provision (Article 10): 'All citizens of the Irish Free State (Saorstát Éireann) have the right to free elementary education'. The background to the insertion of the word 'for' in Article 42.4 may be summarised as follows. In May 1934 a top-level civil service review group under the chairmanship of John Hearne, then legal adviser to the Department of External Affairs (and later to be one of the chief drafters of the present Constitution), was established by the Government and this committee reported directly (and privately) to the Government in July of that year. The task of the committee was to indicate which provisions of the 1922 Constitution should be regarded as fundamental and recommend how they could be protected from change. The committee's recommendations formed the backdrop to the work on the present Constitution which took place between May 1935 and 1937. On the advice of Seosamh O'Neill, then Secretary to the Department of Education, the 1934 committee did not include Article 10 of the 1922 Constitution in its list of fundamental Articles, although it also recommended that the key principles underlying that clause be preserved.

O'Neill's reasoning is set out as an appendix to the 1934 report (SPO
s 2979):

> Article 10 has never been fully invoked and we have not so far obtained a legal interpretation of it, or of the obligation which it imposes. ... Apart, however, from the obligation that elementary education should be free, there are other claims that might possibly be made under the Article in question. These include:
>
> 1 whether a small number of children, say two, three or four, living on an island, or at a long distance from a national school could successfully claim the right to be transported daily to a national school or to have a school established for their use
>
> 2 whether the Article could be construed to put an obligation on the State not only to pay the teachers, but also to build, equip and maintain schools and provide free books and requisites for the schoolchildren. In my opinion, the present position is that the principle underlying the Article is fundamental and should be preserved, if possible, but in the absence of a clear definition of the State's obligation under the Article it would be undesirable to put it in such a position as to make it more

> difficult to deal by legislation with any problem that might arise thereunder.

The education Article in the first official draft of the Constitution circulated to Government Departments in March 1937 simply stated that, 'The State shall provide free primary education'. However, following representations by various Departments (including the Department of Finance), which echoed O'Neill's concerns lest this provision be interpreted as embracing the full cost of education, such as text-books and other requisites, the word 'for' was written in hand for the Second Revise (see de Valera Papers, 1079/3). Article 42.4 thus read:

> 'The State shall provide for free primary education...'

Article 42.5 recognises that, 'In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of parents, but always with due regard for the natural and imprescriptible rights of the child.' The implications of this Article, particularly in the context of the relative balance between parental and children's rights, are discussed in more detail in this chapter – section on 'The Family'.

In a general reference to the provisions on education in the Constitution, it has been stated by one noted commentator that, 'like some constitutional Rip Van Winkle they have lain dormant for the most part since their enactment in 1937': see Whyte, G, 'Education, and the Constitution' in D Lane (ed), *Religion, Education and the Constitution*, Dublin 1992, at p 84. Whyte continues:

> [Articles 42 and 44 were] drafted at a time when there was little or no demand for non-denominational education, these provisions reflected Roman Catholic social teaching by enshrining a principle of parental supremacy in respect of the education of children. Operating now in a different type of society to that of the 30s, this constitutional principle may have practical consequences which were never envisaged nor intended by the authors.

In the context of the issues which are raised below and in the section on Religion, it is germane to make reference to the most recent census figures (1991), particularly in so far as they highlight the growing number of people who do not belong to one of the main Christian churches. The following table shows the population classified by religion in the 1981 and 1991 censuses of population:

Table 2: Census figures (by religion) 1981 and 1991

Denomination	*1981*	*1991*
Catholic	3,204,476	3,228,327
Church of Ireland	95,366	89,187
Presbyterian	14,255	13,199
Methodist	5,790	5,037
Jewish	2,127	1,581
Other stated Religions	10,843	38,743
No Religion	39,572	66,270
Not stated	70,976	83,375
Total	**3,443,405**	**3,525,719**

As can be seen from these figures, about 6% of the population does not belong to a church which owns and manages national schools (including the 2.4% 'not stated'). Moreover, there is evidence from recent surveys that a growing number of parents would prefer, given a choice, to have their children educated in multi-denominational or non-denominational schools.

role of parents

In the 1930s when the Constitution was framed, it was generally accepted that the church leadership was acting on behalf of parents in negotiations relating to education. This is no longer the situation as was clear during the debate following the publication of the Green Paper on Education in 1992. The Report on the National Education Convention, which summarises the discussions which took place in Autumn 1993 on the then forthcoming White Paper on education and educational legislation, indicates the extent to which the role of the parents *qua* parents is now recognised by government. In submissions in relation to the control and management of schools at both primary and second level the views of parent bodies (National Parents' Council – primary and post-primary tier) did not coincide with the views of the Roman Catholic hierarchy, particularly in relation to the structure of boards of management. Parents in the 1990s expect to be consulted in their own right in relation to education and not to be consulted through intermediaries. The Minister for Education has accepted this and structures for consultation with parents are now in place. The growing demand for multi-denominational schools and all-Irish schools in recent years reflects the more assertive role being played by parents in education.

decrease in numbers in religious orders

Another significant change in the educational context, particularly at second level, relates to the shrinking number of religious (priests, nuns and brothers) teaching in secondary schools. In the 1930s, members of religious communities probably represented a substantial majority of those teaching in

secondary schools. As recently as 1966 members of religious orders as a percentage of secondary teachers was approximately 50%. The current proportion is less than 10% and is estimated to fall to less than 5% by the end of this decade.

equality and education

There is also a much greater awareness in the 1990s of the implications of educational inequality than there was in the 1930s. The implications of the failure of the education system to cater adequately for the needs of the less advantaged are serious – for the individual, the economy and society (see Breen, R and Shortall, S, 'The Exchequer Costs of Unemployment Among Unqualified Labour Market Participants' in Bradley et al (eds), *The Role of the Structural Funds: Analysis of Consequences for Ireland in the Context of 1992*, ESRI, Dublin 1992, for estimates of the costs to the exchequer of social welfare and other payments for unemployed people resulting from educational failure).

For a variety of historical and other reasons, the creation of wealth in Irish society is heavily dependent for the foreseeable future on the quality of education provided across all sectors of the economy. Moreover, knowledge, and increasingly the *credentialised knowledge* provided by formal education, is a major form of capital in its own right. Because of the central role which knowledge plays in determining the generation of wealth, it is extremely important that all people have access to education, and can participate and benefit from it so that they are not precluded from the process of wealth generation in society. As the Annual School Leavers Surveys conducted by the Department of Labour show, there is a positive correlation between the level of education attained and employment opportunities, and those who leave school without any formal credentials are severely disadvantaged in the labour market.

Education is also of crucial importance for both personal development and for the development of civil society. It is essential for the development of all the social, cultural and political institutions which contribute to the creation of an inclusive, dynamic and integrated democratic state. The failure to equalise access to and participation in education means that much of the talent and ability available in society is underutilised and alienation and detachment develops among those who are precluded from participation.

Despite the increased participation by all social groups in education over the last thirty years, there are still major differences in both access to education and participation in it, based on social class. The analysis of School Leavers Surveys for 1991-1993 shows that only just over half (52.5%) of the young people from unskilled manual backgrounds reach leaving certificate level while over 95% of those from professional backgrounds do (Higher Education Authority, *Report of the Steering Committee on the Future of Higher Education*, Dublin 1995, Table 12). A similar pattern obtains at third level. Professor Clancy's study, *Access to College: Patterns of Continuity and Change*, Higher Education Authority, Dublin 1995, shows that while there has been an increase in the rate of participation in higher education by all social groups in the last

twelve years, disparities in participation based on social class are still considerable: 38% of all higher education entrants come from the four highest socio-economic groups although these comprise only 21% of the relevant population while just 35% of entrants come from the five lowest socio-economic groups although these constitute almost 56% of the relevant age cohort. This contrast in participation rates at the upper and lower end of the class continuum is, however, much greater, with 89% of the children of higher professional parents going on to higher education compared with just 14% of those from unskilled and semi-skilled manual backgrounds (Clancy, op cit, pp 154-155). At present those who have most private resources can benefit most from all forms of education because their families can bear both the direct and indirect costs that prolonged participation in education demands. What this means in effect is that those with most private resources benefit most from State investment in education according as the cost of education rises from first level to third level (Tussing, 'Equity in the Financing of Education' in S Kennedy *One Million Poor*, Turoe Press, Dublin 1981). Education is now seen by many as playing a crucial role in determining access to the labour market and thereby access indirectly to wealth via wages, salaries and related benefits (Breen*, Education, Employment and Training in the Youth Labour Market*, ESRI, Paper No 152, Dublin 1991; Conference of Religious of Ireland Justice Commission, *Tackling Poverty, Unemployment and Exclusion*, Dublin 1994).

education as lifelong learning

When the 1937 Constitution was drafted, education was largely regarded as the preserve of the young. That perspective has changed in recent decades and the designation of 1996 as 'The Year of Lifelong Learning' by the European Commission is one indication of this change. The Government *White Paper on Education* (p 77) states:

> Learning is a lifelong process, building on the foundation of formal schooling. Access to lifelong learning and training is important for all people ... including those who for whatever reason, completed their formal education without reaching their full potential.

Adult education is a rapidly growing area in Ireland and is regarded as having significant potential to tackle educational disadvantage. There are sizeable numbers of adults who left school at or before the minimum school leaving age and who are seriously disadvantaged as a result of their low levels of educational achievement (Report of the National Education Convention). The Government recognises that it is important such adults should have an opportunity to return to the education system and that the system should be sufficiently flexible to cater for their needs. In this regard the White Paper states that, 'Adult education and training will be an integral part of the framework for the future development of education'.

Issues

Some issues in relation to the constitutional provisions for education have been raised in case law; others have been raised by the Department of Education both in chapter 18 of the White Paper on Education, *Charting our Education Future* (1995) and in its submission to the Constitution Review Group; yet others have been raised in various submissions from other bodies to the Review Group.

1 relative rights of the State, of parents and of the child

The relative rights of the State (Article 43.3.2°), of parents (Articles 42.1, 42.2 and 42.3.1°) and of the child (Article 42.5) in the area of education were discussed by the Review Group not just in relation to Article 44 but also in the context of Article 41 – The Family and Article 44 – Religion.

The Review Group is concerned that giving to the family rights which are described as 'inalienable or imprescriptible', even if they are interpreted as not being absolute rights, potentially places too much emphasis on the rights of the family as a unit as compared with the rights of the individuals within the unit. The Review Group considers that the description of any rights or duties specified in Articles 41 or 42 should not include the adjectives 'natural', 'inalienable', 'imprescriptible'. It also considers that, while it is desirable that the family should retain a certain authority and autonomy, this should not be such as to prevent the State or other third parties from intervening where the protection of the individual rights of one member of the family requires this.

Recommendation

Remove the adjectives 'natural', 'inalienable', 'imprescriptible' from Articles 41and 42.

2 whether the rights of parents in regard to education should be confined to married parents

A further consideration is that Article 42 as drafted envisages only what might be termed the straightforward case of a married couple and their children. Indeed, the reference to parents in Article 42.1 is confined to the family based on marriage: see, for example, *The State (Nicolaou) v An Bord Uchtála* [1996] IR 567. For all the reasons already set out in the discussion on Article 41 with regard to the position of non-marital parents, the Review Group is of the opinion that, consistently with these earlier recommendations, it is appropriate that the rights under Article 42 should apply to all non-marital parents, provided they have appropriate family ties and connections with the child in question.

Recommendation

Article 42.1 should be amended to apply to all non-marital parents, provided they have appropriate family ties and connections with the child in question.

3 compulsory school attendance

Articles 42.1 and 42.2 recognise that parents have an inalienable right and duty to provide for the religious and moral, intellectual, physical and social education of their children and that they shall be free to provide this education 'in their homes or in private schools or in schools recognised or established by the State'. In 1942 the Oireachtas passed the School Attendance Bill 1942 which attempted to supplement the earlier School Attendance Act 1926. The Bill proved to be controversial and was referred to the Supreme Court which ruled that it was repugnant to the Constitution: *In re Article 26 of the Constitution and the School Attendance Bill 1942* [1943] IR 334. Section 4(1) of the Bill would have ensured that children between the ages of six and fourteen would be deemed not to be receiving a suitable minimum education other than by attending school 'unless such education and the manner in which such a child is receiving it, have been certified...by the Minister [for Education] to be suitable'.

The Supreme Court examined the meaning of the phrase a 'certain minimum education' and concluded:

> What is the meaning and extent of this provision? What is referred to as 'a certain minimum education' has not been defined by the Constitution and, accordingly, we are of the opinion that the State, acting in its legislative capacity through the Oireachtas, has power to define it. It should, in our opinion, be defined in such a way as to effectuate the general provisions of the clause without contravening any of the other provisions of the Constitution. Subject to these restrictions, it seems to us that the State is free to act so long as it does not require more than a 'certain minimum education' which expression, in the opinion of this Court, indicates a minimum standard of elementary education of general application.

The court found the section to be unconstitutional on several grounds, among them that a Minister, even if acting on a reasonable construction of the section might:

> ... require a higher standard of education than could properly be prescribed as a minimum standard under Article 42.3.2°...We are further of the opinion that the standard contemplated by the section might vary from child to child, and, accordingly, that it is not such a standard of general application as the Constitution contemplates.

Moreover, the court also noted:

> Under subsection 1° not only the education, but also *the manner in which such child is receiving it* must be certified by the Minister. We do not consider that this is warranted by the Constitution. The State is entitled to require that children shall receive a certain minimum education. So long as parents supply this general standard of education we are of the opinion that the manner in which it is being given and received is entirely a matter for the parents and is not a matter in respect of which the State under the Constitution is entitled to interfere.

With regard to the former grounds, it has to be noted that these comments were made before the development of the doctrine of the presumption of constitutionality whereby it is presumed that all adjudications, discretions etc, conferred by an Act of the Oireachtas will be exercised in a constitutional fashion: *East Donegal Co-Operative Ltd v Attorney General* [1970] IR 317. If a modern-day version of the Bill were to be referred, there must be a good chance that the Supreme Court, applying this doctrine, would not find it unconstitutional on this ground: see Kelly, *op cit,* p 1055. Moreover, as Professor Casey has noted, the content and manner of education are not readily separable in the manner in which the Supreme Court suggested: see *Constitutional Law in Ireland,* London 1992, at p 527.

However, the court was surely correct when it hinted (although it did not have to decide the point) that the Bill as drafted was unconstitutional inasmuch as:

> One of the excuses under section 3 is that there is not a national school, a suitable school, or a recognised school accessible to the child which the child can attend and to which the parent of the child does not object on religious grounds to send the child. It is contended that the grounds of objection should not be restricted to religious grounds in view of the provisions of Article 42.3.1°...that the State shall not oblige parents in violation of their *conscience and lawful preference to send their* children to the schools named therein.

In other words, the Bill almost certainly violated Article 42.3.1° in not allowing for a defence on the ground that there was no accessible school for the child to which the parents did not object on grounds of conscience and lawful preference.

The Committee on the Constitution (1967) expressed concern about situations where parents might be failing to provide for their child, 'a certain minimum education, moral, intellectual and social'. The committee recommended that Article 42.3.2° might be replaced by a provision somewhat on the following lines:

> Laws, however, may be enacted to oblige parents who have failed in their duty to provide for the education of their children to send their children to schools established or designated by the State.

The Review Group considers that the right and duty of educating children should be vested in parents. This right ought, however, to be subject to the best interests of the child and the right of the State to ensure that children receive a minimum education. The entire question poses delicate issues of balancing between the respective rights and interests of parents, children and the State. In the opinion of the Review Group an amendment on the lines suggested by the Committee on the Constitution (1967) is neither necessary nor desirable. If such an amendment were introduced, difficulties could arise where a parent might claim that no suitable school was available and that the schools 'established or designated by the State' would be in 'violation of their conscience and lawful preference' (Article 42.3.1°).

A further consideration is the reference to 'in view of actual conditions' in Article 42.3.2°. The meaning of this phrase is obscure and difficult to interpret, but it seems to mean that the standard of minimum education on which the State can insist may vary according to circumstances prevailing in the family environment and in society at large. In one sense this is unexceptionable, but difficulties would arise if this minimum standard were judged solely by reference to the personal circumstances or expectations of each family. An example might help to illustrate the point. At some stage in the near future basic computer literacy might well be regarded as an essential feature of a minimum educational standard in that such knowledge might be a prerequisite for participation in society. If this were so, the parents who were educating their children at home should not be able to evade their duties to the child by pleading that they could not afford, or did not have the expertise, to give their children such training. In short, the Review Group considers that, having regard to the importance of education for all children, the rights of parents should, where necessary, give way to the right of the State to insist on – in the interests of the child itself (whose interests in such circumstances will have to be regarded as paramount if our recommendations concerning Article 41 are accepted) – a certain minimum education and this should not be contingent on 'actual conditions'.

Summing up, therefore, the Review Group considers that it is not necessary to amend Article 42.3.2° in the manner suggested by the Committee on the Constitution (1967). Instead, it considers that a fair balance may be struck between the interests of the child and the respective right of parents and the State by preserving the right of parents as provided for in Article 42.3.1°, while at the same time providing that the State is entitled to insist on a certain minimum education which would apply to all children.

The related question of the meaning of a 'certain minimum education' is considered at Issue 7 below.

Recommendation

In the case of Article 42.3.1°, no change is proposed. However, the words 'in view of actual conditions' should be deleted from Article 42.3.2° and, following the discussion at Issue 7 below, further amendments to this provision are suggested.

4 whether the Constitution should be amended to provide a more explicit statement of the obligations of the State to provide free education, and/or whether the rights of the child to education should be explicitly stated

The right to education is recognised in many international declarations and conventions, including the UN Universal Declaration of Human Rights (1948), the UN Declaration of the Rights of the Child (1959), and the UN Convention on the Rights of the Child (1989). The constitutions of many countries of the world also assert the right to education. These include countries as diverse as Spain (Article 270), Italy (Articles 33 and 34), the Czech Republic (Article 33), Macedonia (Article 44), the Russian Federation (Article 43), and Namibia (Article 20).

Concerning Article 42, the two major contemporary decisions are *Crowley v Ireland* [1980] IR 102 and *O'Donoghue v The Minister for Health* (1993). In the *Crowley* case the Supreme Court held by a majority that the duty laid upon the State by Article 42.4 was not to 'provide' but to 'provide for' free primary education – a distinction brought out by the Irish version. In his judgment, Kenny J stated:

> However, the State is under no obligation to educate. The history of Ireland in the nineteenth century shows how tenaciously the people resisted the idea of State schools. The Constitution must not be interpreted without reference to our history and to the conditions and intellectual climate of 1937 when almost all schools were under the control of a manager or of trustees who were not nominees of the State. That historical experience was one of the State providing financial assistance and prescribing courses to be followed at the schools; but the teachers, though paid by the State, were not employed by and could not be removed by it. This was the function of the Manager of the school who was almost always a clergyman... thus the enormous power which the control of education gives was denied to the State: there was interposed between the State and the child, the Manager or the committee or the Board of Management'.

However, in a more recent High Court case (currently being appealed to the Supreme Court) the State's obligation in relation to education is interpreted differently. In *O'Donoghue v Minister for Health,* the plaintiff, suing through his mother, was an eight-year-old mentally handicapped boy who sued the Ministers for Health and Education on the ground that, in failing to provide free primary education for him, they had deprived him of his rights under Article 42. O'Hanlon J acceded to this claim and granted a declaration that the respondents had deprived the plaintiff of his rights under Article 42.

Some submissions to the Review Group recommend that the rights of all children to education should be spelt out in the Constitution. On the other hand, some submissions seem to take the view that this right is already implicit in Article 42 and are concerned at the relatively limited obligation on the State to provide only free *primary* education.

In so far as the Department of Education's submission refers to Article 42.4, it expresses concern about the resource implications of the *O'Donoghue* judgment. It states that the ruling could, at least in principle, also be applied to an exceptionally talented child. The submission goes on to state: 'The net effect in either case might amount to an open-ended obligation on the State to provide for any and every facility which could demonstrably assist the child', and asks whether the Constitution Review Group might consider the extent to which it would be appropriate for the courts to adjudicate on the fairness of the distribution and allocation of public funds and to what extent the constraints and demands on public expenditure and the taxable capacity of the economy are relevant issues which should be considered by the courts.

The Review Group considered the points made in the various submissions and in particular addressed the issues of providing a more explicit statement of:

1) the obligations of the State to provide free education

2) the rights of the child to education.

In relation to the first point, some members of the Review Group would like to see the word 'for' (after 'provide') removed from Article 42.4. However, others felt that the removal of the word 'for' might be construed in such a way as to broaden the subsidiary role of the State in the provision of education.

It was agreed that the alternative approach of enshrining in the Constitution the right of the child to free primary education was preferable. A question arose whether this right should be extended to include the right to free second level education. Some reservations were expressed about this on the basis that it was proper that the resource implications should be determined by the Government and the Oireachtas. On the other hand, the point was made that it is now almost thirty years since free second level education was introduced, and from this year on fees for third level education will be abolished.

Finally, the Review Group considered that the language of Article 42.4 tended to constrain unduly the right of the State to provide 'other educational facilities or institutions'. It considers that the word 'where appropriate' should replace the existing words 'where the public good requires it'.

Recommendation

The right of every child to free primary education should be explicitly stated in the Constitution. The Oireachtas should also seriously consider extending this right to second level education as this may be defined by law. If the right is so extended, the new Article might read as follows:

> Every child has a right to free primary and second level education. The State shall provide for such education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, where appropriate, provide other educational facilities or institutions with due regard, however, for the rights of the parents, especially in the matter of religious and moral formation.

5 whether the right to education should be extended to all persons

In the context of the general commitment to lifelong learning at national and European level, the question arises whether the right to education should be extended to include all persons.

It was noted that the 1922 Constitution contained a provision that 'All citizens of the Irish Free State (Saortstát Éireann) have the right to free elementary education'. It was also noted that the right of persons to education (not 'free' education) is recognised

in many international declarations and conventions, though what it connotes is not clear.

The relationship between education and the creation of wealth has been highlighted earlier in this chapter. There is a high correlation between unemployment and lack of educational attainment and while it is recognised that there is a cost involved in correcting educational failure, this cost has to be compared to the price society eventually pays for educational failure in welfare, health and other costs.

Conclusion

Some members of the Review Group favour the extension of the right to education to all persons and argue that the right could be qualified so that it would not entail unrealistic financial or other demands. A majority of the Review Group, however, was against such an amendment because of its indefinite nature and unassessable implications.

6 whether there should be a specific provision in the Constitution promoting equality in education

Some members of the Review Group consider that, in view of the importance of education both in determining access to the labour market and for the personal development of the individual and the social, cultural and political development of society, there should be a provision in the Constitution that the State would promote equality of access to, and participation in, education. It was suggested that, without such a protection, there is no clear requirement on the Government or the legislature to disburse funds between individuals in education in an equitable manner.

'Equality in education', as described above, is an aspect of the general issue of greater economic equality in society. The majority of the Review Group is not persuaded that the attainment of either equality objective can be effectively advanced by means of a specific constitutional provision of this kind. Their attainment depends rather on such policies in the economic, social and fiscal areas as may be sanctioned by the Oireachtas, resourced with its approval from public funds, and effectively pursued over time. A provision as suggested would be more appropriate as a directive principle, if Article 45 is retained.

Recommendation

A majority of the Review Group does not favour the inclusion of any absolute requirement in the Constitution which would remove the necessary discretion of Government and Oireachtas in policy matters but would see no objection to a directive principle 'to promote equality of access to, and participation in, education' being included in Article 45, if retained.

7 whether there should be a definition of education including a definition of 'a certain minimum education'

Article 42.1 acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means for the religious and moral, intellectual, physical and social education of their children. Article 42.3.2° states, '... the State shall, however, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social'. While one can understand why the word 'religious' is omitted from Article 42.3.2°, it is more difficult to justify the inclusion of the word 'physical' in one and not the other. There may have been historical reasons for this but it is unlikely that such reasons are any longer valid.

At different times in history one can come up with good reasons why other aspects of education might be included, for example, creative, aesthetic, spiritual, ethical. The National Council for Curriculum and Assessment currently proposes the following as a statement of the general aim of education:

> The general aim of education is to contribute towards the development of all aspects of the individual, including aesthetic, creative, critical, cultural, emotional, intellectual, moral, physical, political, social and spiritual development, for personal and family life, for working life, for living in the community and for leisure.

In its submission to the Constitution Review Group, the Department of Education points out that the word 'education' itself in Article 42 leaves room for doubt and has been the subject of judicial interpretation.

The Department also raised the question of the definition of 'a certain minimum education' and expressed concern that the absence of a more precise definition could leave the State vulnerable, in enacting any future school attendance legislation, to a charge that it is seeking to impose a level of education which is greater than the minimum as envisaged by the Constitution, or that alternatively it might be argued that the level of education set by the State as a minimum was too low. The Department's submission suggests that a provision in the Constitution to the effect that it is for the Oireachtas to determine the level of education required as a minimum may avoid these potential difficulties.

In light of the foregoing discussion, the Review Group considers that it is better not to attempt to itemise the various aspects of education (for example 'religious', 'intellectual', 'social') and that Article 42 should simply refer to education. However, special arrangements should be made – as far as State intervention is concerned – in respect of religious and moral education, since it would be regarded as wrong if the State were to compel a child to receive a particular type of religious or moral education.

It is true that the term 'certain minimum education' is susceptible of a variety of interpretations, a point well illustrated by the Supreme Court's decision in the *School Attendance Bill* case. However, the Review Group considers that the Constitution should, where possible, endeavour to state propositions at a sufficient level of generality to permit of evolution and

development. The definition of a certain minimum education would nowadays include more than was understood by that term in 1937 and, sixty years hence, it will assuredly embrace even more than it does today. However, the Review Group considers that the Oireachtas should have the express power to define by law the meaning of this term. Any such legislative definition of the term would, however, be subject to possible review by the courts where it was plainly demonstrated that the Oireachtas had, under the guise of definition of minimum education, actually gone further than was ever envisaged by Article 42.3.2°.

Recommendation

The sections might thus be amended to read as follows:

Article 42.1	The State acknowledges that the primary educator of the child is the family and guarantees to respect the right and duty of parents to provide, according to their means, for the education of their children.
Article 42.3.2°	The State shall require that children receive a certain minimum education as may be determined from time to time by law, provided that the State shall at all times have due regard to the right of parents to make decisions concerning the religious and moral education of their children.

Private Property

40.3.2° and 43

40.3.2° *The State shall, in particular, 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.*

Article 43 – Private Property

43.1.1° *The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.*

43.1.2° *The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.*

43.2.1° *The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.*

43.2.2° *The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.*

Ownership of property in Ireland

Most people in Ireland (89%) own some form of property or assets apart from personal goods and artefacts (some of which are of no major wealth significance, but some of which are, for example yachts, jewellery, works of art, cars). The most common form of wealth ownership is home ownership with almost 80% of households being owner-occupiers. Wealth held in this form accounts for between 53% and 66% of all wealth held by 90% of wealth holders with the exception of the wealthiest 10%. Just over one in ten households however, own no wealth of any kind.

Farm land is the next most important form of wealth holding and 15% of households own some farm land. While just over half of all households have some financial assets in the form of deposits and/or government savings, only 4% possess financial assets in the form of equities and less than 2% in the form of gilts.

Although most people in Ireland own some wealth the greater part of productive wealth (land and capital in all forms) is concentrated in a small proportion of the population. Just 1% of households own 60% of all private, non-farming, business, while the wealthiest 5% of all households own 66% of all net wealth in the form of farm land (Nolan, B, *The Wealth of Irish Households,* Combat Poverty Agency, Dublin 1991).

No gender breakdown is available on the distribution of productive wealth across all sectors of the economy, but the limited data available indicate that not only are the ownership and control of productive wealth concentrated in small groups but within such groups men predominate. *The Census of Agriculture Survey 1991* (CSO 1994) shows, for example, that 90% of farm holders/owners are men.

Personal legal entitlements, for example pensions, benefits in the areas of health, education, social welfare and housing, would fall to be considered for inclusion in a comprehensive assessment of wealth and its distribution.

Provisions protecting private property in the fundamental rights section of the Constitution not only protect rights to the ownership of basic personal possessions, such as homes and personal goods, but may also, in the view of some members of the Review Group, tend (subject, of course, to the will of the Oireachtas) to protect major differentials in the ownership of productive wealth within Irish society. This underlines the importance of the constitutional qualification that property rights must be subject to regulation in accordance with the principles of social justice.

guarantee of the right to private property

The right to property is guaranteed by two separate provisions of the Constitution – Article 40.3.2° and Article 43. Broadly speaking, Article 40.3.2° may be said to protect the individual citizen's property rights, while Article 43 deals with the institution of property itself: see *Blake v Attorney General* [1982] IR 117. These have been criticised in a number of respects:

i) the fact that there are two separate constitutional provisions dealing with property rights has itself given rise to much confusion

ii) the language of Article 43 in particular is unhappy. Several commentators have drawn attention to the contrast between Article 43.1 and Article 43.2. In a famous dictum, Wheare contrasted the stress placed on the right of private property in Article 43.1 – 'calculated to lift up the heart of the most old-fashioned capitalist' – with that placed on the principles of social justice and the exigencies of common good in Article 43.2 – 'the Constitution of [former] Jugoslavia hardly goes further than this'. It was, he said, 'a classic example of giving a right on the one hand and taking it back on the other': see *Modern Constitutions,* Oxford, 1966, p 63. In addition, Mr Justice Keane has spoken of the 'unattractive language' and 'tortured syntax' of Article 43: see 'Land Use, Compensation and the Community' (1983), 18 *Irish Jurist* 23

iii) both Article 40.3 and Article 43 are particularly open to subjective judicial appraisal, with phrases such as 'unjust attack', 'principles of social justice' and 'reconciling' the exercise of property rights 'with the exigencies of the common good'.

The Review Group recognises that, whatever formulation might be devised to replace Article 40.3.2° and Article 43, it could probably not avoid entrusting a degree (even a high degree) of subjective appraisal to the judiciary. However, the Review Group considers that, for reasons examined below, it would be preferable to recast these provisions in a manner which provided for a more structured and objective method of judicial analysis.

Analysis

'natural right'

Article 43.1.1° contains an acknowledgment that man, by 'virtue of his rational being' has the natural right to private ownership 'of external goods'. Irrespective of whether this constitutional assertion is correct, it seems to the Review Group that this elaborate statement as to the origins of the right to property does not greatly assist either the Oireachtas or the courts in their attempts to protect the substance of the right.

Article 43.1.2° provides that, by reason of the existence of the foregoing natural right to property, the State 'accordingly' guarantees to pass no law abolishing the general right of private

ownership or the general right to transfer and bequeath property. This subsection contains – in contrast with Article 43.1.1° – a set of coherent principles which might usefully be retained in any recasting of Article 43.

social justice

Article 43.2.1° provides that the State recognises that the exercise of these rights ought to be regulated by reference to the principles of social justice. Article 43.2.2° provides that the State may delimit the exercise of these rights by law (although the Irish text simply refers to 'teorainn a chur') with a view to regulating their exercise so as to meet the exigencies of the common good.

In the opinion of the Review Group, few would argue with the principle underlying these provisions. If the State is to function, property rights must yield to a wide variety of countervailing interests, among them the redistribution of wealth, the protection of the environment, the necessity for consumer protection. This in turn means that the State must have extensive taxation powers, powers of compulsory acquisition and a general capacity to regulate (and even in some cases to extinguish) property rights.

difficulties

The language of Article 40.3.2° and Article 43 has given rise to difficult questions of interpretation, although it seems that some of these difficulties have been clarified by the contemporary case law. Contemporary judicial thinking seems to stress that, while the State may regulate and interfere with property rights, it may not do so in a manner which disproportionately interferes with such rights. As Costello P said in *Daly v Revenue Commissioners* [1996] 1 ILRM 122:

> But legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved. When, as in this case, an applicant claims that his constitutionally protected property rights referred to in Article 40.3.2° have been infringed and that the State has failed in the obligation imposed on it by that Article to protect his property rights he has to show that those rights have been subjected to an 'unjust attack'. He can do this by showing that the law which has restricted the exercise of his rights or otherwise infringed them has failed to pass a proportionality test...

There have been only about seven cases where a plaintiff has established an unconstitutional interference with his or her property rights and in nearly every such case the potential arbitrariness of the interference in question was fairly evident.

Thus, in the leading case of *Blake v Attorney General* [1982] IR 117, the Supreme Court invalidated the provisions of the Rent Restrictions Act 1946 because it was evident that such legislation operated in a palpably arbitrary fashion. The properties to which the legislation applied were selected on a haphazard basis; the rents for such properties were fixed by reference to either 1914 or, in some instances, 1941 monetary values and severely

inhibited the right of landlords to recover possession of such controlled dwellings. In the opinion of the Supreme Court these provisions restricted:

> ...the property rights of one group of citizens for the benefit of another group. This is done without compensation and without regard to the financial capacity or the financial needs of either group, in legislation which provides no limitation on the period of restriction, gives no opportunity for review and allows for no modification of the operation of the restriction. It is, therefore, both unfair and arbitrary.

Despite the fact that the meaning of Articles 40.3.2° and 43 has, to some extent at least, been clarified by judicial decision and that, contrary to some fears, the courts have refrained from endorsing an absolutist attitude to property rights, the Review Group does not consider that Article 40.3.2° and Article 43 are satisfactory in their present form.

Issues

1 whether the Constitution should provide for the protection of property rights

While it is true that the Constitution of the Irish Free State did not expressly provide for the protection of property rights, a majority of the Review Group is nonetheless of the opinion that the Constitution should contain such a protection. There are two principal reasons for this opinion:

i) while the State has legitimate reasons to control and regulate the exercise of property rights, it is necessary and desirable to provide protection against the risk of arbitrary or disproportionate deprivation or interference by the State. The prosperity of the State depends in substantial measure on property – whether land, building, equity or any other form of wealth – being available as a source of, or security for investment

ii) the right to property is one that has received international acknowledgment: see, for example, Article 17 of the United Nations Universal Declaration of Human Rights and Article 1 of the First Protocol to the European Convention on Human Rights.

However, some members of the Review Group do not favour the constitutional protection of property rights. In their view, the assertion of property rights has historically been associated with the protection of commercial and business interests and is not designed to ensure to everyone the material prerequisites for a life of dignity. They consider, therefore, that it has no place among the fundamental rights provisions of a constitution. Moreover, in their view, the constitutional protection of property rights may endorse major differentials in the ownership of productive wealth existing at the time of the adoption of the text.

Of course, the mere fact that the right to property is constitutionally acknowledged and protected does not mean that this right cannot be qualified, restricted or even (in certain special

cases) extinguished by law, provided always that the qualification, restriction, etc is proportionate and not arbitrary. Therefore, in line with recommendations in other areas of fundamental rights (see the recommendations in respect of Article 38.1 and Article 40.3.1°), a majority of the Review Group recommends that any new formulation of the protection of property rights should be accompanied by a clause which would allow the Oireachtas to qualify the exercise of such rights in the public interest and for reasons of social justice in cases where there are clear objective reasons for doing so and where the legislation is proportionate to the aim sought to be achieved. What the form of the new provision should be is outlined in the discussion of Issue 6 below.

Recommendations

1 The Constitution should expressly protect the right to property (majority view).

2 The Constitution should expressly provide that such property rights can be qualified, restricted etc by legislation where there are clear social justice or other public policy reasons for doing so.

2 whether the Constitution should provide for a 'dual protection' of property rights such as Article 40.3.2° and Article 43 provide

The textbooks attest to the tangled history of the interaction between the two clauses and the lack of clarity which attends them: see Kelly, *The Irish Constitution,* Dublin 1994, at pp 1061-1091; Casey, *Constitutional Law in Ireland,* 1992, at pp 531-551. This uncertainty remains despite some twenty or so major decisions where the courts have sought to grapple with the language of the provisions. In addition, the courts have found it more or less impossible to adhere to a strict categorisation of Article 40.3.2° in contrast with Article 43 property rights. Even if the utility of differentiating between the institution of property and the protection of individual property rights were clear, a majority of the Review Group believes it would be preferable to deal with property rights in a single self-contained Article.

Recommendation

Amend the Constitution so that the provisions dealing with property rights are in a single self-contained Article.

3 whether the protection of property rights should extend to legal persons, such as limited companies

Prior to the decision of Keane J in *Iarnród Éireann v Ireland* [1995] 2 ILRM 161 there was uncertainty as to whether the protections of Article 40.3.2° (which refers to 'citizen[s]') and Article 43 (which refers to 'man, in virtue of his rational being') extended to corporate entities. Indeed, the earlier case law might be thought to have inclined to the view that they did not enjoy such protection. Thus, in the High Court in *Private Motorists' Protection Society v Attorney General* [1983] IR 339 Carroll J

expressly held that legal persons could not invoke the protections of Articles 40.3 and 43, although the Supreme Court reserved its position on this question. The issue has been circumvented to some extent inasmuch as the Supreme Court held in that case that shareholders in the company were considered to have property rights protected by Article 40.3 and Article 43 against unjust attack. This stratagem was not readily available in *Iarnród Éireann* inasmuch as there were no shareholders beneficially entitled to dividends etc from the company. In that case Keane J agreed that such legal persons might not enjoy protection if the Constitution was read literally and concluded that a broader interpretation is required:

> Undoubtedly, some at least of the rights enumerated in Article 40.3.2° – the rights to life and liberty – are of no relevance to corporate bodies and other artificial legal entities. Property rights are, however, in a different legal category. Not only are corporate bodies themselves capable in law of owning property, whether moveable or immovable, tangible or intangible. The 'property' referred to clearly includes shares in companies formed under the relevant companies' legislation which was already a settled feature of the legal and commercial life of this country at the time of enactment of the Constitution. There would accordingly be a spectacular deficiency in the guarantee to *every* citizen that his or her property rights will be protected against 'unjust attack' if such bodies were incapable in law of being regarded as 'citizens', at least for the purposes of this Article, and if it was essential for the shareholders to abandon the protection of limited liability to which they are entitled by law in order to protect, not merely their own rights as shareholders, but also the property rights of the corporate entity itself, which are in law distinct from the rights of its members.

This judgment is under appeal. Having regard to the diversity of judicial views previously expressed on this issue, it may not represent the last word on the subject.

The Review Group also notes that Article 1 of the First Protocol to the European Convention on Human Rights expressly extends the protection of property to legal as well as natural persons. In *Pine Valley Developments v Ireland* (1992) 14 EHRR 319 (a case with admittedly very special facts) the European Court of Human Rights held that Ireland was in breach of Article 14 (non-discrimination) of the Convention and Article 1 of the First Protocol (property) in failing to extend to the company the benefit of a particular planning permission.

Arguments for extending the guarantee of property rights to legal persons

1 although the fundamental rights clauses are generally designed to protect individual human rights against unfair, disproportionate or arbitrary State action, it would be strange if this protection were not available for the property which corporate bodies are legally entitled to own

2 much transnational and national investment now depends on the security of property rights for the legal persons making the investment. Without that security much of that investment might not take place. Constitutional protection would be stronger than legislative protection

3 if legal persons do not enjoy constitutional protection in respect of their property rights, this will affect – either directly or indirectly – the property rights of natural persons who either own, control or have shareholdings in a corporate entity

4 irrespective of the decision in *Iarnród Éireann,* legal persons, in practice, have hitherto been permitted to rely on the property rights provisions, inasmuch as shareholder actions invoking these provisions have previously been entertained by the courts. The fact that such actions have been permitted does not appear to have had any material impact on the power of the Oireachtas to regulate, control or even extinguish the property rights of corporate bodies

5 the shareholder action is not a satisfactory substitute for according constitutional rights to legal persons in cases where there may be no shareholders, for example universities, trade unions and companies limited by guarantee

6 the right of legal persons is already protected by Article 1 of the First Protocol of the European Convention on Human Rights, so that it would be appropriate that the Constitution, rather than legislation, should accord a similar degree of protection.

Arguments against

1 the rights protected by the Fundamental Rights provisions of the Constitution are clearly intended to relate to the individual as a human person. It would be wrong to extend any of these provisions to legal persons

2 legal persons enjoy the privilege of limited liability and the other benefits of incorporation. They must, however, also accept some of the disadvantages of incorporation, among them the absence of any constitutional rights

3 if legal persons were accorded constitutional rights, including the constitutional right to the protection of property, it might mean that corporate resources and financial power could be employed to challenge the constitutionality of legislation, something which might have unwelcome legal, financial and social consequences

4 in any event, the use of the derivative action by shareholders provides adequate protection for the rights of individuals which may be indirectly affected by legislation impacting on the company

5 since legal persons are the creation of statute, the protection of the rights and interests of legal persons is a matter for the Oireachtas alone

6 there is no need to go further in order to emulate the provisions of Article 1 of the First Protocol of the European Convention on Human Rights.

Conclusion

A majority of the Review Group opposes affording constitutional protection of private property to legal persons

4 whether Article 40.3.2° (in so far as it concerns property rights) and Article 43 should remain unamended

The Review Group recognises that some of the difficulties of interpretation to which these provisions have given rise have now been clarified by case law. It further observes that some of the possible fears about an absolutist interpretation of these provisions, which would severely handicap the Oireachtas in areas such as planning law, have not been realised. Serious consideration was given to the suggestion that these provisions – for all their drafting imperfections – should be left unamended, largely because the law has been, to some extent at least, clarified through the case law. As already indicated, this suggestion was rejected because the present provisions were regarded as unsatisfactory. The Review Group is of the opinion that it ought to be possible to re-draft these provisions so that a more direct, self-contained clause would clearly set out the extent of the State's powers to regulate, control or even extinguish property rights. Any such re-draft might contain elements of the present provisions of Article 40.3.2° and Article 43, including those provisions which expressly subordinate the exercise of property rights to the requirements of social justice.

Recommendation

A majority of the Review Group considers that the property provisions should not remain in their present form. They favour the deletion of Article 43 and of the words 'and property rights' from Article 40.3.2°. They would replace these by a single self-contained Article dealing with property.

5 whether the text of Article 40.3.2° (in so far as it concerns property rights) and Article 43 should be replaced by the provisions of Article 1 of the First Protocol to the European Convention on Human Rights

The Review Group has already rejected the wholesale incorporation into the Constitution of international human rights conventions. It has decided it would be preferable to draw on these conventions where:

i) the right is not protected by the Constitution

ii) the standard of protection of such rights is superior to those guaranteed by the Constitution

iii) the wording of the clause in the Constitution protecting such a right might be improved.

Article 1 of the First Protocol to the European Convention on Human Rights provides that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Following a review of the case law on the provisions of both Article 40.3.2° and Article 43 on the one hand and Article 1 of the First Protocol on the other, the Review Group is of the view that there is a great deal of overlap as far as the substance of the respective guarantees is concerned (although a majority of the Review Group does not favour cover being extended to legal persons). While a detailed review of the respective case law would be unnecessary in the present context, an examination of the two leading cases arising respectively under the Constitution (*Blake v Attorney General*) and the Convention (*Spörrong v Sweden* (1983) 5 EHRR 35) reveals a striking similarity in terms of judicial reasoning and general approach to the issue of what constitutes an unjustified interference with property rights. Applying, therefore, the first two principles already mentioned, there is little of substance to choose between the Constitution and the Convention, as both protect the right to property and both envisage circumstances in which such rights can be restricted, qualified etc in the public interest, provided any such interference in the right is proportionate and required on objective grounds.

In terms of the third principle – clarity of language – the Convention scores heavily as compared with Article 43. The language of the Convention is simple and direct and rests on coherent principles. There is a single, self-contained guarantee in which the extent of the State's power to qualify, restrict, etc the exercise of property rights is made plain. There are, however, features of the wording of the Protocol which, in the opinion of the Review Group, render it inappropriate for automatic inclusion in the text of the Constitution. For example, the first paragraph guarantees that 'no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. The reference in this context to the general principles of international law indicates that the clause is designed essentially to prevent the nationalisation or expropriation of foreign-owned assets without the payment of fair compensation. A clause of this nature would, accordingly, be inappropriate to a Constitution principally designed to regulate the actions of the State vis-à-vis its own citizens.

Another difficulty concerns the wording of the second paragraph of the Protocol. This wording appears designed to ensure that the enforcement of both planning and fiscal legislation cannot be challenged on the grounds that it contravenes the Convention. If this wording were transposed into the Constitution, there might be a danger that this proviso would be interpreted as meaning that such legislation could not be impugned on the ground that it infringed an individual's property rights.

It should be noted that the European Court of Human Rights has ruled that while this part of Article 1 of the First Protocol 'explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure payment of taxes', such fiscal legislation cannot grant powers of 'arbitrary confiscation' and must also satisfy the proportionality test contained in the first sentence of Article 1: see *Gasus Dosier – und Fördertechnik GmbH v The Netherlands* (1995) 20 EHRR 403.

Conclusion

The Review Group cannot recommend the straightforward replacement of Articles 40.3.2° and 43 by the language of the First Protocol. As will be seen from a consideration of the next issue, there are aspects of Article 1 of the First Protocol which might, however, provide useful models for any re-wording of the constitutional protections.

6 what the elements of a new Article should be

A new self-contained Article on property might contain the following elements:

i) a statement that every natural person is entitled to the peaceable enjoyment of his or her own possessions and property

ii) a guarantee that no one shall be deprived of his or her possessions and property save in the manner envisaged by the new qualifying clause

iii) a guarantee that the State shall not pass any law attempting to abolish the general right of private ownership or the general right to transfer, bequeath, and inherit property

iv) a new qualifying clause which would provide that such property rights, since they carry with them duties and responsibilities, may be subject to legal restrictions, conditions and formalities, provided these are duly required in the public interest and accord with the principles of social justice. Such restrictions, conditions and formalities may, in particular, but not exclusively, relate to the raising of taxation and revenue, proper land use and planning controls, protection of the environment, consumer protection and the conservation of objects of archaeological and historical importance.

i) and ii) are based on the first paragraph of Article 1 of the First Protocol. iii) is a slightly amended version of Article 43.2.1° of

the Constitution. iv) the new qualifying clause is loosely based on, and adapted from, the qualifying clause contained in the free speech provision in Article 10.2 of the European Convention on Human Rights. While this clause would give the Oireachtas extensive rights to regulate and control the exercise of property rights, it would also provide a safeguard against the risks of disproportionate or arbitrary interference with such rights by the State, and would enable the courts to take into account the effect of the interference with the property rights of the individual in determining whether such interference was constitutionally valid or not in particular situations. Such a clause would indicate explicitly but in a non-exclusive manner the many kinds of circumstances in which property rights can be regulated by the State. Another possibility is to retain the present wording in Article 43.2.1° and 43.2.2° which also allows for the regulation of property rights by the State by virtue of the broad references it contains to the principles of social justice and the exigencies of the common good.

Recommendations

A majority of the Review Group favours the following:

1 Article 40.3.2° (in so far as it concerns property rights) and Article 43 should be deleted and replaced by a single self-contained Article dealing with property rights.

2 Article 1 of the First Protocol to the European Convention on Human Rights should not be directly transposed into the Constitution. However, a slightly recast version of the opening sentence of Article 1 of the First Protocol might usefully replace the existing Article 43.1.1° as follows:

> Every natural person shall have the right to the peaceable possession of his or her own possessions or property.

3 A slightly altered version of Article 43.1.2° should be included. This might provide:

> The State guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property.

(Some members of the Review Group felt a general right to 'bequeath and inherit' property should not be consolidated in the Constitution because of its potential effect of increasing wealth differentials in society. The majority, however, considered that legislative fiscal freedom and the constitutional provision that property rights may be regulated by reference to the principles of social justice were adequate qualifications.)

4 A new qualifying clause should be included on the lines of iv) above.

A minority of the Review Group favours the retention of Articles 43.2.1° and 43.2.2° in their present form.

Religion

Article 44

44.1 *The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.*

44.2.1° *Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.*

44.2.2° *The State guarantees not to endow any religion.*

44.2.3° *The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.*

44.2.4° *Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.*

44.2.5° *Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.*

44.2.6° *The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.*

Introduction

The subject of Article 44 is the free practice of religion. Apart from Article 44.1 (respect for religion), Article 44.2.1° (freedom of conscience and free practice of religion) and the now deleted provisions of Article 44 (dealing with the special position of the Roman Catholic Church and recognition of the other churches), Article 44 contains provisions which have a long constitutional pedigree. The key provisions – the non-endowment clause in Article 44.2.2° and the non-discrimination clause in Article 44.2.3° – echo not only provisions in Article 8 of the Constitution of the Irish Free State, but also provisions in Article 16 of the 1921 Treaty, which in turn had echoed provisions in the Government of Ireland Act 1920 and the Government of Ireland Bills of 1886 and 1893; see Mr Justice Keane, 'Fundamental Rights in Irish Law – A Note on the Historical Background' in O'Reilly (ed), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh,* Dublin 1992. Indeed, some of the provisions of Article 44.2.4°-6° (dealing with State aid for religious schools, the rights of religious denominations to organise their own affairs and the right to compensation in the case of the taking of property owned by religious bodies) have an even longer lineage. Not only was the substance of these provisions provided for in Article 8 of the Constitution of the Irish Free State, Article 16 of the Treaty, section 5 of the Government of Ireland Act 1920 (and the Government of Ireland Bills which preceded it), but the right of any child to attend a school receiving public money 'without attending religious instruction at the school' first received legislative recognition in section 7 of the Intermediate Education (Ireland) Act 1878. This right had already been recognised in the 'Stanley letter' of 1831, the foundation for the modern Irish educational system.

The deleted provisions of Article 44 (Article 44.1.2°-3°) recognised the special position of the Roman Catholic Church, but also recognised the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, the Jewish Congregation and 'the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution'. At the time of the enactment of the Constitution the minority churches were generally happy with this provision, whereas elements within the majority church were disappointed that the Constitution had not gone further in the direction of acknowledging the Roman Catholic Church as the 'one true Church': see, generally, Keogh, 'The Irish Constitutional Revolution: An Analysis of the Making of the Constitution' in Litton (ed), *The Constitution of Ireland 1937-1987*, Institute of Public Administration, 1988. Subsequently, however, these provisions of Article 44 gave rise to controversy and their deletion was recommended by the Committee on the Constitution (1967):

There seems to be no doubt that these provisions give offence to non-Catholics and are also a useful weapon in the hands of those who are anxious to emphasise the differences between North and South ... We feel that subsection 2 might profitably be deleted on the ground that our circumstances do not require any special mention of a particular religion in the Constitution. It was not intended to give any privilege to the Roman Catholic Church, and the Church never sought to have itself placed in a privileged position. The deletion of this provision would, in particular, dispel any doubts and suspicions which may linger in the minds of non-Catholics, North and South of the Border, and remove an unnecessary source of mischievous and specious criticism.

The provisions in question were deleted by the Fifth Amendment of the Constitution Act 1972 following a referendum where the proposal to delete them was carried by 721,300 votes to 133,430.

Broadly speaking, the existing provisions of Article 44 are satisfactory and have worked well. The key aspects of Article 44 – the guarantees of free practice of religion and the twin prohibitions of non-endowment and non-discrimination – are far-reaching and comprehensive. The Review Group is, of course, aware that it has been frequently suggested that the State has a confessional ethos which tends to favour the majority religion at the expense of religious minorities. If this is so, the fault lies elsewhere than with these provisions.

comparable provisions in other jurisdictions and in international agreements

The right to free practice of religion is almost universally recognised. The First Amendment of the US constitution guarantees that Congress 'shall make no law respecting an establishment of religion or prohibiting the free exercise thereof'. Continental constitutions also contain provisions guaranteeing the free exercise of religion: see, for example, Article 4 of the German constitution, Article 19 of the Italian constitution and Article 16 of the Spanish constitution, although this is often subject to a form of public order or morality restriction (for example, Article 19 of the Italian constitution provides that these guarantees do not apply 'in the case of rites contrary to morality'). Section 116 of the Australian constitution provides:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Article 9 of the European Convention on Human Rights provides:

> 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or in private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Indeed, Article 9(1) is taken directly from Article 18 of the Universal Declaration of Human Rights (1948) and Article 18 of the International Covenant on Civil and Political Rights (1966) has identical terms. Article 18(2) of the Covenant further provides:

> No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.

Article 18(3) contains the following saving clause:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

From a summary of these provisions, it appears that they guarantee substantially the same rights with regard to free practice of religion as those contained in Article 44.

Definitions and distinctions

'the homage of public worship'

Article 44.1 acknowledges:

> ... the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.

This provision has not received any elaborate judicial analysis. However, in *Quinn's Supermarket Ltd v Attorney General* [1972] IR 1 Walsh J said that this section acknowledges:

> the homage of public worship is due to Almighty God, but it does it in terms which do not confine the benefit of that acknowledgement to members of the Christian faith.

The reference to 'Almighty God' appears, however, to refer to God in terms which confine the reference to adherents of monotheistic faiths.

It is difficult to discern what exactly is meant by the phrase 'the homage of public worship is due to Almighty God'. Professor Casey suggests that 'the nature and extent of the obligation [which] Article 44.1 places on the State has not been explored and remains unclear': see *Constitutional Law in Ireland,* London 1992. One possible meaning of the first sentence of this section is that the State is under an obligation not only to permit but even to participate in divine worship in public (an interpretation borne out by the Irish language version which speaks of '...é a adhradh le hómós *go poiblí ')*. If this is correct, then, perhaps, it may

provide constitutional authority for some involvement by the State in public worship. Professor Casey further observes (op cit):

> The overwhelming allegiance to religion in Ireland is mainly – though not exclusively – a matter of private practice. Unlike that of the United States, the coinage bears no message that could be regarded as religious. But there are many public manifestations of religion – such as ceremonies at defence establishments, the daily broadcasting of the Angelus on radio and television – and these many people find objectionable ... It seems probable that any action [to challenge such practices] would fail, with the courts invoking Article 44.1 to uphold the impugned provisions.

However, Professor Casey notes that 'different considerations would arise if the relevant public manifestation of religion could be said to involve a State endowment, contrary to Article 44.2.2°'. Moreover, the Review Group notes that any State involvement in public religious ceremonies would have to be non-discriminatory in character: see Article 44.2.3°. The combined effect of Article 44.1 and Article 44.2.2° appears to be that if the State does involve itself with the public manifestation of religion, it must not be selective as between the different religions. It may be observed in passing that the right of private citizens to engage in the public manifestation of religion appears in any event to be expressly protected (subject, of course, to public order and morality) by Article 44.2.1°.

The second sentence of Article 44.1 is less obscure in its meaning, although it too might yet give rise to difficult questions of interpretation. In effect, this section imposes an obligation on the State to refrain from engaging in what might loosely be termed 'atheistic propaganda' and prevents the State from adopting a policy which is actively hostile to religion.

See Issue 1 below which discusses whether Article 44.1 should be amended.

'conscience'

Article 44.2.1° guarantees freedom of conscience and the free practice and profession of religion. The meaning of the word 'conscience' has yet to be fully explored, but there are dicta of Walsh J in *McGee v Attorney* General [1974] IR 284 to the effect that:

> It is not correct to say ... that the Article is a constitutional guarantee of a right to live in accordance with one's conscience subject to public order and morality. What the Article guarantees is the right not to be compelled or coerced into living in a way which is contrary to one's conscience and, in the context of the Article, that means contrary to one's conscience so far as the exercise, practice or profession of religion is concerned.

Notwithstanding the broadly satisfactory character of this clause, there are five issues which merit attention:

i) whether Article 44.2.1° should be amended to guarantee the right to worship in public

ii) whether the rights protected by Article 44.2.1° should be extended to non-citizens

iii) whether the expression of religious belief (as opposed to its existence) should alone be subject to public order and morality

iv) whether Article 44.2.1° should protect conscientious beliefs which are not necessarily religiously inspired

v) whether the State should be permitted to assist actively the practice of religion in some instances (by, for example, providing religious services in hospitals and prisons).

See Issues 2-6 below.

'discrimination' and 'endowment'

It must also be observed that Article 44.2.2°-3° has generated relatively little case law, although in view of the decision of Costello P in *Campaign to Separate Church and State Ltd v Minister for Education* (1996), this may be about to change. There have been seven reported instances of statutes, rules or administrative practices having been challenged on these grounds. The plaintiffs were successful in three.

In *Quinn's Supermarket Ltd v Attorney General* [1972] IR 1, the Supreme Court held that a statutory instrument which granted an excessively favourable dispensation to certain kosher shops infringed Article 44.2.3°. The Supreme Court held that the word 'discrimination' in that subsection should be read broadly so as to encompass any form of legislative distinction on the grounds of religion and rejected the suggestion that the word in that context simply meant 'discrimination against'. In *Mulloy v Department of Education* [1975] IR 88 the Supreme Court held that certain administrative rules granting lay teachers (but not members of religious bodies) incremental credit for service abroad in certain African countries amounted to a discrimination contrary to Article 44.2.3°. Finally, in *M v An Bord Uchtála* [1975] IR 81 Pringle J held that a provision of the Adoption Act 1952 forbidding the adoption of children by couples who were parties to a 'mixed' marriage constituted both a 'disability' and a 'discrimination' on the ground of religious 'profession, belief or status', contrary to Article 44.2.3°.

More recently in the *Campaign to Separate Church and State* case, Costello P upheld the practice whereby the State paid the salaries of school chaplains in community schools and rejected the suggestion that this practice constituted an unconstitutional endowment of religion. The reasoning of Costello P may be summarised as follows:

i) the decisions of the US courts interpreting the 'establishment' and 'endowment' provision of the First Amendment were of little assistance since the 'two

concepts are as a matter of Irish law distinct and different'

ii) moreover, the provisions of Article 44 have to be construed by reference to the provisions of Article 42

iii) Article 42.4 provides that the State shall endeavour to supplement and 'give reasonable aid to private and corporate educational initiative'

iv) the State was assisting the parents in the religious formation of their children by providing a chaplaincy service of this kind

v) finally, as the purpose of State financial aid was to assist in the protection of constitutionally protected rights, it was not constitutionally invalid to give such aid.

While clearly this decision is one of considerable constitutional importance, it may be thought that it leaves unanswered questions concerning the meaning of the word 'endowment' which may arise in other contexts, such as the provision of assistance by the State to religious charities. Moreover, this decision might be thought to carry the implication that it would be constitutionally permissible for the State to establish a particular religion, provided that it did not endow that religion.

As in the case of Article 44.2.1°, these provisions, are, broadly speaking, satisfactory. They provide a guarantee that the State will not discriminate or grant preferential treatment on the grounds of religious profession, belief or status, and they prevent the State from endowing any religion. The Review Group has nevertheless identified four issues which require further consideration:

i) whether, having regard to the uncertainties associated with the word 'endowment', a different form of wording should be employed

ii) whether institutions (such as schools or hospitals) which retain a religious ethos should be eligible for public funding

iii) whether the State should be permitted concurrently to endow religion

iv) whether Article 44 should provide a guarantee that the State will not establish a religion.

See Issues 7-10 below.

Article 44.2.4°

Article 44.2.4° deals with two distinct provisions. The first is that legislation providing for State aid for schools shall not discriminate between schools under the 'management of different religious denominations'. The principle of non-discrimination between religions is, of course, already dealt with in Article 44.2, but this subsection applies this principle in an educational context. Article 44.2.4° also provides constitutional authority for the State funding of denominational education (provided the

criteria specified in the sub-section are complied with, as otherwise it might be contended that such funding would amount to an endowment of religion, contrary to Article 44.2). In effect, therefore, the State is permitted to engage in the practice of what might be termed the concurrent endowment of the schools of all religious denominations, provided that:

a) this is achieved by legislation

b) there is no discrimination between the religious denominations

c) any school receiving public monies respects the right of each child to attend without receiving religious instruction at that school.

The only legislation authorising State funding of denominational education would appear to be via the annual Appropriation Acts. However, the drafters of Article 44.2.4° probably envisaged that the legislation in question would be specific in character and establish a permanent statutory scheme whereby such aid might be disbursed. The present system of disbursing aid where, although the individual education votes are sanctioned by the Appropriation Acts, the application of these moneys to individual schools is governed by a series of non-statutory rules and circulars is unsatisfactory. It probably conforms to the letter (but not the spirit) of Article 44.2.4°. The Review Group understands that it is likely to change with the forthcoming Education Bill.

The second provision is that a child has the right to attend a school which is in receipt of public money without attending religious instruction at that school. As the Review Group has already noted, this provision has its origins in the Stanley letter of 1831 which provided the administrative foundation for the National School system. The British Government had originally intended to establish a one school system for the children of different religious beliefs and, accordingly, the various pre-1922 Home Rule Bills and the Government of Ireland Act 1920 had sought to protect the rights of religious minorities by providing for a clause of this kind. Despite the fact that this clause was also contained in the Treaty, Article 8 of the 1922 Constitution and the present Article 44.2.4°, by 'the mid-twentieth century, the system of National Education in the Republic of Ireland was one which was *de jure* undenominational, but *de facto* denominational in 97 per cent of cases': see Appendix 24, Hyland – 'The multi-denominational experience'.

The efficacy of this constitutional guarantee was further undermined in 1971 with the introduction of an integrated curriculum, albeit unintentionally and for what were deemed to be excellent educational reasons. Curricular integration meant that the constitutional requirement of separate religious and secular instruction was no longer strictly observed. It may be noted that this change was in contrast to the pre-1922 Rules for National Schools which had sought to emphasise the non-denominational character of grant-aided national schools. Thus, Rule 13 of the 1890 Rules had provided:

> No emblems or symbols of a denominational nature shall be exhibited in the school-room during the hours of united instruction.

Section III of the Rules prescribed elaborate arrangements whereby secular and religious instruction were to be kept strictly separate with a view to preserving the entitlements of parents to exercise their right of withdrawing their children from religious instruction. For example, Rule 18 stipulated that the teacher was required, immediately before the start of religious instruction, 'to announce distinctly to the pupils' that the hour for religious instruction had arrived, and that the teacher 'must put up, and keep up, during the period allotted for such religious instruction, and within view of all pupils, a notification thereof containing the words "Religious Instruction" printed in large characters, on the form supplied by the Commissioners'.

Such solicitude for the right of religious minorities was not confined to the pre-1922 Rules. The Rules for National Schools 1926 had required that teachers exercise due regard for the right of children of minority religions when dealing with matters of religious sensitivity. This requirement was omitted from the Rules for National Schools 1965.

In Professor Hyland's words:

> Taken together, the Rules [for National Schools 1965] and the provisions of the 1971 curriculum created a new situation. The State now formally recognised the denominational character of the national school system .... It had removed the requirement for teachers to be sensitive to the religious beliefs of 'those of different religious persuasions'. According to the curriculum guidelines, all schools were expected to offer an integrated curriculum where religious and secular instruction would be integrated. While the rule under which parents were allowed to opt their children out of religious instruction still remained, the rule became effectively inoperable since religious and secular instruction would now be integrated.

With the increasing diversity of religious beliefs and secular views in the State, Article 44.2.4° clearly has the potential in the context of an integrated curriculum to give rise to difficulties. The Review Group draws attention to the kind of problems which may well yet arise (if, indeed, they have not already done so): suppose that there is one small national school (and therefore in receipt of public funds) which is run by a Catholic religious order and where the school population heretofore consisted exclusively of Catholic pupils. Members of the Islamic community move into the area and have no realistic alternative but to send their children to the local national school. The parents of these children not only insist on withdrawing their children from formal religious instruction but also object to the Roman Catholic ethos which permeates instruction in other subjects in the school and is also reflected in, for example, religious pictures and school holidays for religious feast days. Must a school which is in receipt of public moneys accede to these objections, or may it give preference to the wishes of the majority of parents who wish

the school to retain its Catholic ethos? These issues give rise to further difficulties. For example, may a school in receipt of public moneys retain its religious ethos by the appointment of co-religionists only as teachers or by giving preference to children of co-religionists in enrolment? Indeed, there may well be instances of where such preferential treatment may be necessary in order to ensure that the school will retain its original religious ethos by ensuring, for example, that the majority of the children present at the school are from that particular religious background. Or would these practices go beyond what is permitted by Article 44.2.4° and amount to a form of discrimination by the State on grounds of religion, contrary to Article 44.2.3°? While it might be argued that, where such discrimination occurs, it is done by the schools concerned (which are private bodies), the fact remains that it is the State which funds virtually all of their activities.

In summary, therefore, the present reality of the denominational character of the school system does not accord with Article 44.2.4°. The situation is clearly unsatisfactory. Either Article 44.2.4° should be changed or the school system must change to accommodate the requirements of Article 44.2.4°.

See Issue 11 below.

'diverted' and 'necessary works of public utility'

The object of Article 44.2.6° appears to be to protect the property of religious denominations and educational institutions against appropriation by the State, save where it appears that the acquisition is genuinely necessary for some work of 'public utility' and on payment of compensation. As we have already noted, similar provisions were contained in Article 16 of the Anglo-Irish Treaty and Article 8 of the Constitution of the Irish Free State. The corresponding provisions of the Government of Ireland Act 1920 (and the earlier Home Rule Bills) appear to have been prompted by 'the fears of the Church of Ireland that the great medieval cathedrals ... might be taken from them under the new regime': see Keane *loc cit*. The Attorney General's Committee on the Constitution (1968) drew attention to some drafting difficulties:

> The word 'diverted' is a euphemism, and is neither a suitable word nor a good translation of the Irish *'a bhaint díobh'*, which is accurate and straightforward. 'Diversion' appears wider than 'taking from'. The two texts are not seriously inconsistent, however, and conflict could arise only if the property was clearly 'diverted for a necessary work of public utility', but not 'taken from' the institutions concerned. It is difficult to visualise any practical example of this conflict arising.
>
> The whole provision is, perhaps inevitably, difficult to interpret. Presumably, property is not diverted because a tax is levied on it. In fact, there is very little property which is owned by a denomination as such, as distinct from an Order or Society, trustees for charitable purposes or a corporation sole.

The words 'necessary works of public utility' (which has yet to receive authoritative judicial interpretation) also give rise to

potential difficulties of interpretation. The construction of public works such as roads, drains and railways would all seem to come within the ambit of this section. Indeed, the original version of Article 8 of the 1922 Constitution referred expressly to 'roads, railways, lighting, water or drainage works or other works of public utility...' However, there appears to be some doubt whether housing provided by a local authority would always come within the ambit of this section: see, for example, Keane, *The Law of Local Government in the Republic of Ireland,* Dublin 1980, at pp 225-226. Thus, if a local authority had a choice between the compulsory acquisition of two properties for housing purposes, one of which was owned by a religious body or educational establishment, could it be said that in those circumstances the acquisition of the latter property amounted to a 'necessary' work of public utility within the meaning of Article 44.2.6°? In this regard it may be noted that the *Report of the Committee on the Price of Building Land,* 1973, Prl. 3632, ('the Kenny Report') concluded that a proposal to acquire land for the purpose of letting it to private builders would not come within the scope of the section.

Two issues accordingly arise in this context:

i) whether a different word should be used for 'diverted' in the English language version of Article 44.2.6°

ii) whether the words 'necessary works of public utility' should be further defined.

See Issues 12-13 below.

the religious ethos of schools and hospitals

At the date of the establishment of the Irish Free State in 1922, the State's role in the provision of education and health care was not as extensive as it is now. In many instances it was left to religious organisations to step in and provide essential facilities such as schools and hospitals. The religious ethos of these schools and hospitals was originally taken for granted, but in the last thirty years or so, with the growth of State funding of such institutions, questions bearing on Article 44.2.3° have been raised. If the State is precluded from endowing a religion, may it nonetheless fund the charitable activities of a religious organisation in such areas as schools and education? Of course, the funding of denominational schooling may be thought to represent a special case as it is expressly authorised (subject to certain conditions) by Article 44.2.4°.

The State and its citizens clearly owe a huge debt of gratitude for the tireless and selfless work of the religious institutions who provided such education and health care. Nevertheless, State funding of institutions with a religious ethos may give rise to certain constitutional difficulties. The difficulties arising in the educational context have already been noted, but parallel problems may arise in the area of health care. Assume, for example, that the only hospital in a remote rural area is one which is publicly funded but has a Roman Catholic ethos. The ethics committee of the hospital decides that it will not allow sterilisation procedures to be performed at the hospital and patients are required to travel a considerable distance to another

hospital for this purpose. Is it permissible for a publicly funded hospital to decline, for what amounts to religious reasons, to perform what is a lawful operation? On the other hand, it is obvious that no individual doctor could be compelled to perform the operation if it offends against his or her religious or (perhaps even) ethical beliefs, having regard to the guarantee of freedom of conscience and the free practice of religion in Article 44.2.1°.

See Issue 8 below.

Issues

1 whether Article 44.1 should be amended

As already noted, the precise legal significance of the first sentence of Article 44.1 is obscure. Despite the statement to the contrary in the *Quinn's Supermarket* case, the terms of the acknowledgment (with its reference to 'Almighty God') would appear to confine its benefits to members of the Judaeo-Christian faiths, or, at the very least, members of monotheistic faiths. If this first sentence of Article 44.1 were to be held to mean that the State was *obliged* through its representatives to engage in a form of open religious worship (even if the State did not discriminate between religious denominations), this would be regarded as objectionable by many. If, on the other hand, this sentence merely implies that the State is obliged to permit individuals to engage in public worship, this can be dealt with (if necessary) by a suitable amendment of Article 44.2.1° which would restate this principle in more direct language. (This is further considered at 2 below).

Similar considerations apply to the first lines of the second sentence ('It shall hold His Name in reverence...'). The legal dimensions of this statement are unclear; moreover, it reflects views which are not now universally held. At most, these words might be thought to afford some constitutional protection for laws dealing with blasphemy, but even this is far from certain. In any event, the Review Group has already dealt with the issue of blasphemy under Article 40.6.1°.i and has suggested a different approach to this question.

Words of this kind can, of course, give rise to misunderstandings and cause needless offence to members of some religious minorities and non-believers. Some of the language of Article 44.1 is so obscure and imprecise in its legal significance that it would in any event call for revision.

One approach would be simply to delete Article 44.1 in its entirety. Quite apart from the fact that the meaning of the section is in many respects uncertain, the Review Group is of the opinion that a clause of this kind – dealing as it does with the State and religion – is not appropriately placed in the Fundamental Rights section of the Constitution, which ought to be concerned exclusively with individual rights.

Recommendation

A majority of the Review Group favours deletion of Article 44.1. If that is not deemed desirable or politic, the section might be re-formulated as follows:

> The State guarantees to respect religion.

In so far as it may be necessary to deal with the issue of worship in public and the open manifestation of religious beliefs, the Review Group recommends that this might be better achieved through an amendment of Article 44.2.1°.

2 whether Article 44.2.1° should be amended to guarantee the right to worship in public

In the opinion of the Review Group this subsection probably already adequately guarantees the right to engage in public worship. However, any lingering doubts on this point should be removed.

Recommendation

Add to Article 44.2.1° the following sentence (modelled on Article 9(1) of the European Convention on Human Rights):

> These rights shall include the freedom, either alone or in community with others, and in public or in private, to manifest his or her religion or belief, in worship, teaching, practice and observance.

The right to engage in public worship cannot, of course, be absolute. Thus, the adherents of a particular religion cannot insist on the unqualified right to engage in public worship. This right must be subject to considerations such as public safety. The Review Group considers at 4 below the appropriate limitations on its exercise.

3 whether the rights protected by Article 44.2.1° should extend to non-citizens

In line with its other recommendations in the fundamental rights area, the Review Group recommends that Article 44.2.1° be amended.

Recommendation

Amend Article 44.2.1° by substituting the word ‘person’ for ‘citizen’.

4 whether the expression of religious belief (as opposed to its existence) should alone be subject to public order and morality

The wording of Article 44.2.1° is taken directly from Article 8 of the 1922 Constitution. The original wording of Article 8 contained no reference to the fact that the free practice of religion would be subject to ‘public order and morality’, but the clause

was inserted at the committee stage of the Dáil debate on the Constitution in order to preclude the invocation of this guarantee for religious practices which are illegal, with the example of Mormons and polygamy being specifically mentioned: see 1 *Dáil Debates* Col 695 (September 25, 1922). As Kohn observed (op cit 165):

> The arguments advanced in support of the [public order and morality] clause would seem to suggest that its sole purpose was to prevent the abuse of religious liberty by practices directly involving a breach of peace or offensive to public decency.

The Review Group considers that Article 44.2.1° should be formulated to ensure that it is only the *practice* of a particular religious belief – as opposed to the existence of the belief – that should be subject to the requirements of 'public order and morality'. While this distinction is a subtle one and the issue is unlikely to arise often in practice, the following hypothetical example serves to illustrate the point. Suppose that a particular religion permits the practice of polygamy. The adherents of that religion should be free to *believe* that the practice is divinely ordained, but it is the *practice* of the religious belief alone which should be subject to the requirements of public order and morality. The wording of Article 44.2.1° carries a risk – albeit a very slight risk and one which does not appear to have manifested itself in practice – that the adherents of a religion containing elements which offend against the requirements of public order and morality might not come within the scope of the constitutional guarantee.

There remains the question of whether the phrase 'public order and morality' is the appropriate test. It appears to the Review Group that this test is unsatisfactory in that it is at once too all-embracing and at the same time not wide enough. Also, just as in the case of Article 40.6.1°, the words 'public order and morality' might be thought to be too general and lacking the proportionality requirement which is expressly incorporated ('...necessary in a democratic society...') in the text of Article 9(2) of the European Convention on Human Rights.

Recommendation

A majority of the Review Group recommends that the qualifying language of Article 44.2.1° should be modelled on Article 9(2) of the European Convention on Human Rights:

> The exercise of these rights and freedoms may be subject only to such limitations as may be imposed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others.

5 whether amendment of Article 44.2.1°is required to protect conscientious beliefs which are not necessarily religiously inspired

From the sole judicial dictum on this point, it seems that the guarantee of freedom of conscience is confined to the religious

context: see the comments of Walsh J in *McGee v Attorney General* [1974] IR 284 where he said that the right simply means that a person is free:

> ...to profess and practise the religion of his choice in accordance with his conscience. Correlatively, he is free to have no religious beliefs or to abstain from the practice or profession of any religion.

These comments by Walsh J did not form part of the *ratio decidendi* of the *McGee* case. The Review Group respectfully considers that these comments are unlikely to be followed in a future case. In ordinary speech, freedom of conscience is not synonymous with freedom of religion. Because the drafters of the Constitution must be presumed to have intended that every word and phrase should carry a specific and separate meaning, 'freedom of conscience' must be taken to import something additional to the guarantee of free practice and profession of religion. The Review Group considers that the guarantee probably also extends to philosophical beliefs such as humanism and may possibly also extend to other moral and ethical belief systems (for example vegetarianism). Article 44.2.1° broadly corresponds to the guarantees contained in Article 9 of the European Convention on Human Rights. The Review Group considers that the extent of the present guarantee is satisfactory and that no change is required.

Recommendation

If the views of the Review Group as to the meaning of the words 'freedom of conscience' in Article 44.2.1° are correct and if the Review Group's earlier recommendation concerning the addition of an extra sentence to this subsection modelled on Article 9(1) of the European Convention on Human Rights is followed, no further change in Article 44.2.1° is necessary.

6 whether the State should be required to assist actively the practice of religion in some instances (by, for example, facilitating religious services in hospitals and prisons)

At present, the State assists in the practice of religion by providing facilities to persons who would not otherwise be in a position to practise their religious beliefs, for example, prisoners, members of the defence forces serving abroad, and patients in State hospitals. Thus, for example, section 39 of the Health Act 1970 obliges each health board to make arrangements for the provision of religious services in each hospital and home maintained by it. The constitutionality of such practices would probably be upheld on the ground that the State is not thereby promoting the practice of any religion (assuming always that there is no element of compulsion), but is rather facilitating the free exercise of religion by persons who, by reason of their own special circumstances, might not otherwise be in a position to do so: see the comments of Brennan J in *Abington School District v Schempp* 374 US 203 (1963) (as approved by Walsh J in the *Quinn's Supermarket* case) and those of Costello P in the *Campaign to Separate Church and State* case. The Review Group is of the opinion that the present situation is satisfactory and that no change is necessary. In so far as it might be

considered desirable to change the Constitution to cater expressly for this point, the Review Group draws attention to the provisions of Article 141 of the Weimar constitution of 1919 (which, by reason of Article 140 of the German constitution, remains an integral part of that constitution):

> To the extent that there exists a need for religious services and spiritual care in the army, in hospitals, prisons or other public institutions, the religious bodies shall be permitted to perform religious acts; in this connection, there shall be no compulsion of any kind.

The Review Group also draws attention to section 14(2) of the South African constitution which provides:

> ... religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.

Recommendation

No change is required.

7 whether, having regard to the uncertainties associated with the word 'endowment', a different form of wording should be employed in Article 44.2.2°

The word 'endow' appears to suggest that the State must not enrich a religion by, for example, transferring property to it or by providing it with an income. As this issue has scarcely been examined by the courts, it is not clear whether the guarantee of non-endowment precludes the State, for example, from making occasional donations to religious charities or from funding social services provided by religious organisations. It is probable that no *a priori* answer can be given to such questions, presenting as they do questions of degree as to the extent to which the State was funding religiously-motivated activities. Nevertheless, the guarantee against non-endowment has a long tradition in common law countries possessing constitutional guarantees of this character and any attempt to reproduce the substance of the guarantee by employing a different form of wording would be fraught with difficulties. Besides, the Review Group is of the opinion that the purpose of the provision – to ensure that the State remains separate from the individual churches by not funding them or their religious activities – is clear and that the application of these principles should be left to the courts in individual cases.

The related question of whether institutions which retain a religious ethos should be eligible for public funding is considered below.

Recommendation

No change is proposed.

8 whether institutions (such as schools and hospitals) which retain a religious ethos should be eligible to receive public funding

As the Review Group has already noted, there is something of a discordance between the constitutional prohibition on the endowment of religion and on discrimination on religious grounds by the State on the one hand and the maintenance of a religious ethos in a publicly funded institution on the other. For example, there seems to be no constitutional objection to the State funding a hospital run by religious orders (on the basis that such funding was not primarily designed for the advancement of religion), but there might well be were a publicly funded hospital to discriminate on religious grounds with regard to either employment or admissions policies. Thus, for example, if a publicly funded hospital were to give preference in its employment policies to adherents of a particular religious belief, this might well amount to a form of religious discrimination by the State. At the same time, if a hospital could not give preference in at least some instances to its own co-religionists, it might find it difficult to maintain its own religious ethos.

The Review Group considers that the complex questions raised by inter-related issues such as the prohibition on non-endowment, the maintenance of a religious ethos and the protection of the religious beliefs of individuals (such as members of the medical and nursing professions and their patients) are best addressed by a new clause in Article 44 which would seek to strike a fair balance between these competing rights and interests. In effect, what is proposed is that publicly funded institutions which retain a religious ethos should not be debarred from public funding, provided there is no discrimination on grounds of religious practice or belief save to the extent that the institution could show in any given case that this was necessary to maintain its own religious ethos. This could mean that a school with the religious ethos of a minority denomination might legitimately give preference in its admission policies to children of that denomination where it could demonstrate that this was necessary to maintain the religious ethos of the school. On the other hand, such a school might find it difficult to justify religious exclusivity in the case of the employment of, say, a language or mathematics teacher.

Recommendation

A majority of the Review Group considers that Article 44 should be amended to provide that institutions which retain a religious ethos should not be debarred from public funding, provided that they do not discriminate on grounds of religious practice or belief, save where this can be shown, in any given case, to be necessary in order to maintain their own religious ethos.

9 whether concurrent endowment of religion by the State should be permitted

Prior to the disestablishment of the Church of Ireland by the Irish Church Act 1869, the British Government had concurrently partially endowed the two other major religions in the country by providing a grant for the training of seminarians at Maynooth and by partially funding the salaries of Presbyterian clergymen. The

extension of this concept of concurrent endowment (for example, funding all religions on a non-discriminatory basis) was seriously considered as an alternative to the disestablishment of the Church of Ireland, but was ultimately rejected.

The Review Group is not in favour of amending the guarantee of non-endowment in order to permit the concurrent funding of all religions on a non-discriminatory basis. Quite apart from the fact that this might have considerable exchequer implications and that the proposal would probably be regarded as objectionable by non-believers, it would give rise to very considerable practical difficulties. How could a non-discriminatory method of allocating State funds be achieved? How would the religions with very small numbers of adherents (for example Jehovah's Witnesses and the various Orthodox churches) be funded? Moreover, the vitality and autonomy of the individual Churches might be undermined if they were to receive State funding.

Recommendation

No change is proposed.

10 whether Article 44 should provide a guarantee that the State will not establish a religion

Article 44.2.3° provides a guarantee that the State will not endow any religion, but does not expressly provide that the State will not establish a religion. While there is something of an overlap between the concepts of 'establishment' and 'endowment', there are also important differences between them. For example, the Church of England is the established church in England, but it is not endowed by the British government. On the other hand, while Article 4 of the German constitution forbids the establishment of any church, concurrent endowment of the major churches is permitted by the financing of clerical salaries from general tax revenues. At common law, the establishment of a particular church meant, in the words of Phillimore J in *Marshall v Graham* [1907] 2 KB 112 that:

> ...the State has accepted the Church as the religious body in its opinion truly teaching the Christian faith and giving it a certain legal position, and to its decrees, if rendered under certain legal conditions, certain civil sanctions.

As Costello P noted in his judgment in the *Campaign to Separate Church and State* case, a consideration of the historical background to this question is of some importance. Prior to the Irish Church Act 1869, the Church of Ireland was the established church. In the wake of disestablishment, the various Home Rule Bills contained a prohibition against making any law 'respecting the establishment or endowment of religion': see clause 4 of the Government of Ireland Bill 1886 and section 5 of the Government of Ireland Act 1920 which contained a similar prohibition. While the Treaty of 1921 provided that the Oireachtas of the Irish Free State would make no law endowing any religion, it made no reference to the question of establishment.

The Constitution does not expressly preclude the establishment of any religion by the State, but it might be thought to do so by implication, despite some *dicta* from Costello P in the *Campaign to Separate Church and State* case. Were the State to establish any religion in the manner in which, for example, the Church of England is established by law, this would almost certainly amount to discrimination on the ground of religious belief or status, contrary to Article 44.2.3°, and any such proposed establishment would be unconstitutional. On the other hand, the insertion of a formal non-establishment clause in the Constitution might result in consequences which many would consider absurd (for example, preventing State agencies from having Nativity cribs in their offices at Christmas or the saying of prayer at the start of each Dáil session). The US experience in this regard has been mixed. In *Lynch v Donnelly* 465 US 668 (1984) the US Supreme Court held that the establishment clause of the First Amendment did not prevent the equivalent of a local authority from staging a Nativity scene (along with other 'figures and decoration traditional at Christmas' such as Santa Claus and reindeer) on the basis that (as explained by Blackmun J in *County of Allegheny v American Civil Liberties Union* 482 US 572 (1989)) the government 'may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine'. However, in the *County of Allegheny* case the US Supreme Court found that a municipality had transgressed this line (and hence acted unconstitutionally) by allowing a Roman Catholic group to display a crib bearing the legend 'Gloria in Excelsis Deo' in a courthouse. These US examples could be much extended.

Conclusion

On balance, the Review Group is of the opinion that Article 44 does not require amendment to provide for a guarantee of non-establishment. Any attempt to establish a State church would be unconstitutional having regard to the provisions of Article 44.2.3°. If the Constitution went further – and expressly guaranteed non-establishment – it might lead to some extreme results.

11 whether Article 44.2.4° requires amendment

'legislation providing State aid for schools...'

As already noted, Article 44.2.4° appears to envisage that any State funding of denominational education must by sanctioned by Act of the Oireachtas. Article 44.2.4° cannot mean that the State may elect to fund schools on an administrative basis, still less that, if it does so, it would not be bound by the injunction not to discriminate between the schools under the control of religious bodies, because such an interpretation would strip this subsection of all purpose and effect. The Review Group is, of course, aware that the annual Appropriation Acts are the only such legislation which has been enacted to date providing for State aid to schools.

Recommendation

No change is proposed.

'...shall not discriminate between schools under the management of different religious denominations...'

This part of Article 44.2.4° is also satisfactory by providing for a guarantee of equality in relation to the funding of denominational schools. It is important to stress that the object of this part of Article 44.2.4° is to ensure that there is no discrimination on *religious grounds*. The Review Group considers that this is a special subsection of the Constitution dealing with a particular issue and there is no need to extrapolate this principle any further.

Indeed, if non-denominational schools were brought within the rubric of this subsection, it might work to their disadvantage. At this stage of the development of the school infrastructure the vast majority of the schools under the management of religious denominations have already been built and the existing parish structure means that their running costs tend to be lower. On the other hand, the construction of new schools is nowadays very expensive (and the majority of non-denominational schools have only been built in the last decade or so) and as non-denominational schools tend not to benefit from the established structures enjoyed by their denominational counterparts, experience has shown that extra State funding may be necessary. In addition, if the principle of Article 44.2.4° was extended further it might have the effect of preventing the differing treatment of schools on grounds *other* than religious grounds (by, for example, precluding additional financial support for schools in disadvantaged areas or for Gaelscoileanna).

Recommendation

No change is proposed.

'...nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school'

As already noted, this proviso is capable of giving rise to a number of difficulties stemming mainly from the fact that it was designed for a system of education which was supposed to be non-denominational, but with provision for separate religious instruction. As the Review Group has already noted, the reality is otherwise. The educational system is *de facto* denominational in character.

There appears to be something of an internal tension between the provisions of the Constitution dealing with denominational education. Article 42.3.1° envisages that parents can elect to choose denominational education: the opening words of Article 44.2.4° sanction (under certain conditions) State funding for denominational education. Yet it seems implicit in Article 44.2.4° that a school in receipt of public moneys cannot insist on a policy such as admitting only co-religionists as pupils, and the practice of an integrated curriculum would appear to be at variance with this guarantee. But if a school cannot at least insist on giving preference to children of a particular religious persuasion, the 'religious ethos' of the school might be undermined. However, if the school gives preference to children of a particular religion, this might be seen as a form of indirect discrimination by the State because the school is publicly funded,

especially if this meant that a child was thereby deprived of the opportunity of attending the nearest and most convenient school or even (to take a more extreme case) if he or she were denied any effective opportunity of attending school.

These and similar problems have been avoided to date largely by *ad hoc* and pragmatic responses to particular situations. But with an increasingly diverse and rights-conscious society, these problems cannot be ignored. Many of these difficulties are attributable to the fact that, unlike other countries, there is not a parallel system of non-denominational schools organised by the State which would cater for the interests of minorities in the examples already described. If such a system were in place, one major objection to any amendment of Article 44.2.4° would be removed and the way would be clear for State funding of denominational education per se (that is, integrated curriculum, preference for the admission of co-religionists etc). It would, however, be unrealistic to expect the State to provide such a system and, indeed, it could be wasteful of scarce resources were this to be done.

The present situation, therefore, presents a potential conflict of rights to which there is no satisfactory answer. The conflict lies between the right of the child (exercised through its parents) not to be coerced to attend religious instruction at a publicly funded school and the right of denominational schools in receipt of such public funding to provide for the fullness of denominational education through the medium of an integrated curriculum and other measures designed to preserve the religious ethos of a particular school. The provisions of Article 42.3.1° must also be borne in mind:

> The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

The Review Group does not favour the amendment of this part of Article 44.2.4° for the following reasons:

i) Article 44.2.4° may be thought to represent something of an exception to the general rule contained in Article 44.2.3° that the State shall not endow any religion. Accordingly, if a school under the control of a religious denomination accepts State funding, it must be prepared to accept that this aid is not given unconditionally. Requirements that the school must be prepared in principle to accept pupils from denominations other than its own and to have separate secular and religious instruction are not unreasonable or unfair.

ii) if Article 44.2.4° did not provide these safeguards, the State might well be in breach of its international obligations, inasmuch as it might mean that a significant number of children of minority religions (or those with no religion) might be coerced by force of circumstances to attend a school which did not cater for their particular religious views or their conscientious objections. If this were to occur, it would also mean that the State would be in breach of its obligations under Article 42.3.1°

iii) this aspect of Article 44.2.4° reflects an earlier commitment given on behalf of the State contained in the Treaty of 1921 and Article 8 of the 1922 Constitution which was designed to safeguard the rights of religious minorities. Any amendment at this stage would be a retrograde step – especially in the context of Northern Ireland – and would send the wrong signal concerning pluralism in this State.

Recommendation

No change is proposed.

12 whether Article 44.2.5° adequately preserves the autonomy of religious denominations

Article 44.2.5° is designed to preserve the autonomy of religious denominations and seems to do so satisfactorily. It is true that on a strictly literalist interpretation of this subsection it might not cover, for example, property held on trust for a religious body. The Review Group, however, agrees with Professor Casey's observations (op cit, 573) that the subsection should be accorded a purposive interpretation so that it covers 'property which, directly or indirectly, comes under the aegis of a religious denomination'. In these circumstances, no change is proposed.

Recommendation

No change is proposed.

13 whether a different word should be used for 'diverted' in the English language version of Article 44.2.6°

The Review Group agrees with the views expressed by the Attorney General's Committee on the Constitution (1968) to the effect that the word 'diverted' in the English language version does not correspond with the words 'a bhaint díobh' in the Irish language version. In any event, the use of the word 'diverted' in this context is euphemistic and unsuitable. The Review Group accordingly recommends that 'diverted' be replaced by 'compulsorily acquired'.

Recommendation

Delete the word 'diverted' in Article 44.2.6° and replace it by the word 'compulsorily acquired'**.** There is no need for a change in the Irish language version.

14 whether the words 'necessary works of public utility' should be further defined

Just as in other areas of the Constitution where words are used without definition (for example 'jury' in Article 38.5, 'endow' in Article 44.2.2°), the Review Group is of the opinion that it is best not to attempt a definition of such words and to leave their interpretation to the courts.

Recommendation

No change is required.

Directive Principles of Social Policy

The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.

45.1 *The State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.*

45.2 *The State shall, in particular, direct its policy towards securing:-*

i. *That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.*

ii. *That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.*

iii. *That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.*

iv. *That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole.*

v. *That there may be established on the land in economic security as many families as in the circumstances shall be practicable.*

Introduction

Article 45, under the heading 'Directive Principles of Social Policy', follows immediately upon a group of Articles dealing with fundamental rights mainly of a civil and political nature (Articles 40-44). In contrast, this Article sets out principles for the State to apply towards the promotion of the welfare of the people as a whole in the socioeconomic field. Whereas it is appropriate that fundamental rights are enforceable by the courts, these principles, by their nature, fall to be implemented through the political process which determines, under the influence of the electorate, the progress that can be made from time to time in their application. In the Dáil debate on the Article, Mr de Valera said Article 45 was intended to be 'a constant reminder to the legislature of the direction in which it should work'. Accordingly, the application of these principles is declared, in the introductory paragraph of the Article, to be the care of the Oireachtas exclusively, and not to be cognisable by the courts. Likewise the language of the principles, which are set out in sections 1-4, is such as to avoid prescriptive effect.

The Article has been referred to in several court cases. For some time the courts accepted complete exclusion of the principles from their consideration (*Buckley v Attorney General* [1950] IR 57; *Byrne v Ireland* [1972] IR 241). Later, while accepting that the principles could not be taken into account in determining whether post-1937 legislation was constitutional, they have held that the principles could be looked at for other purposes. Thus they have consulted the principles in regard to identification of an unenumerated constitutional right (*Murtagh Properties Ltd v Cleary* [1972] IR 330, *Attorney General and the Minister for Posts and Telegraphs v Paperlink Ltd* [1984] ILRM 373), examination of the constitutionality of a pre-1937 statute (*Landers v Attorney General* (1975) 109 ILTR 1), and the construction of a common law rule (*Kerry Co-Operative Creameries Ltd v An Bord Bainne* [1991] ILRM 851). The question has not, however, been fully considered by the Supreme Court.

In the *Paperlink* case the High Court followed the line that Article 45 could be considered for the purpose of identifying unenumerated rights. But it refused to hear evidence as to whether the operation of a state monopoly (the postal service) could be reorganised to meet the requirements of the common good, maintaining that this was a matter for the Oireachtas to determine. Thus a private litigant was not allowed to invoke the content of Article 45 to impugn legislation. If this line is confirmed by the courts it will presumably involve a corresponding acceptance that the State may not rely on assistance from Article 45 in defence of legislation which is under attack on the basis of other provisions of the Constitution. This would raise doubts as to the usefulness of Article 45 even as a source of guidance for the Oireachtas.

45.3.1° *The State shall favour and, where necessary, supplement private initiative in industry and commerce.*

45.3.2° *The State shall endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.*

45.4.1° *The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged.*

45.4.2° *The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength.*

Issues

1 whether Article 45 should be deleted

Arguments for deletion

1 it is inappropriate to have an Article in the Constitution which is merely aspirational and expressed not to be cognisable by the courts

2 the principles relate to objectives which (except for one or two of special Irish relevance) are the conventional objectives of modern democracies and their inclusion in the Constitution is unnecessary

3 it is now the practice of Governments to publish programmes which set out the measures they propose to take in relation to such objectives

4 the principles are couched in general language and are thus of limited use as guidelines

5 any statement of principles in this field inevitably tends to include some ideas peculiar to contemporary thinking which are accordingly not of long-term relevance

6 it is unclear how far the Article has influenced the Oireachtas in its legislative process over the years

7 in so far as the Article has been resorted to for identification of unenumerated, enforceable, personal rights, these rights should appropriately be included in Articles 40-44

8 several of the principles are comprised in justiciable EU legislation (for example Article 119 in the Social Chapter of the EU Treaty) while others (for example Article 45.2.v) might not be consistent with EU obligations.

Arguments against

1 the Article provides relevant guidance to the Oireachtas on the generally accepted objectives of the State for the welfare of its people; it would be even more apt if directed also to the Government (see Issue 2 below)

2 in particular, the Article asserts principles of continuing relevance and importance in a democratic society, such as

a) primacy of concern for the interests of all the people (that is, for social inclusiveness) over sectoral interests, however powerful their political influence

b) securing and protecting a social order informed by justice and charity

c) concern for distribution of the ownership and control of material resources so as best to subserve the common good

d) safeguarding the economic interest of the weaker section of the community.

3 the Article gives constitutional expression to a general recognition that people have rights in the socioeconomic field which, unlike fundamental personal rights, cannot be guaranteed by the State, but whose implementation should be a State objective

4 the Article reflects partly (and with amendment could reflect more fully) the obligations undertaken by the State as party to certain international instruments (see Issue 4 below). It thus tends to facilitate implementation of these international obligations

5 it is useful that the Article has been available to the courts as an aid to the interpretation of other provisions of the Constitution and of other legal rules, while not being taken into account on the question of the constitutionality of post-1937 legislation

6 deletion of the Article after almost sixty years in force might suggest that the principles set out were being abandoned, notwithstanding their renewed acknowledgment in the context of membership of the European Union.

Recommendation

Views were divided in the Review Group as to whether Article 45 should be deleted or retained in an amended form.

2 whether the Article (if retained) should be amended so that the principles would be for the guidance of the Government as well as the Oireachtas

It is arguable that the principles should be taken into account by the Government, not only as the main initiator of legislation, but also as the source of executive action to implement policy. The principle that the directive principles are not cognisable by any court should, however, remain.

Recommendation

A majority of the Review Group considers that the Article (if retained) should be amended so as to indicate that the principles are for the guidance of the Government as well as the Oireachtas and relate to executive action as well as to the making of laws.

3 whether the language of the Article (if retained) should be revised

Although the Review Group was of the view that the language in some parts of the Article is outmoded (for example section 2.ii, subsections 4.1° and 2°), opinions differed as to whether it should be revised. On one view, the thrust of the provisions is clear and satisfactory and it is not necessary to change to contemporary language. On another view, the language of the principles does

not adequately reflect modern concerns and should be amended to do so. (See also Issue 4 below and recommendation.)

4 whether further principles should be added (if the Article is retained)

In the event of retention, the Review Group is of the opinion that further principles should be added to reflect modern concerns in regard to socioeconomic rights. In this respect suggestions submitted to the Review Group could be a useful aid to identification of additional principles (for example, elimination of poverty, promotion of justice and equality of opportunity). Obligations accepted by the State as party to international instruments in that field could also be a source. These instruments would include, for example, the UN International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Rights of the Child, and the Council of Europe Social Charter

Recommendation

The Article, if retained, should be amended by the addition of further principles to reflect modern concerns in regard to socioeconomic rights. In that process the language of the existing provisions could, as far as necessary, be revised.

Amendment of the Constitution and the Referendum

Article 46.1 *Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article.*

46.2 *Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.*

46.3 *Every such Bill shall be expressed to be 'An Act to amend the Constitution' .*

46.4 *A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal.*

46.5 *A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law.*

Article 47.1 *Every proposal for an amendment of this Constitution, which is submitted by Referendum to the decision of the people shall, for the purpose of Article 46 of this Constitution, be held to have been approved by the people, if, upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law.*

Introduction

Amendment of the Constitution, whether by way of variation, addition, or repeal, may be effected in the manner provided by Article 46.

Reference to the people for a decision is not the only, nor even the most common, method adopted by states to amend their basic law. In Ireland the referendum has been provided for in both the previous and the present Constitution and is valued by the people because it gives them a direct input into amendment of the Constitution.

Issues

1 whether some provisions of the Constitution are so fundamental that they should not be open to amendment

For historical reasons, some continental constitutions have Articles which are declared to be immutable. Examples are the free democratic nature of the state in the German constitution and the republican status of the state in the Italian constitution. Moreover, some people propose that there are primal laws, such as the natural law, whose pervasive, formative influence must be recognised by, and reflected in, all man-made law and whose principles cannot be modified – and that therefore they and their eternal, transcendent character should be asserted in the Constitution. Others propose that some of the more fundamental human rights provisions should be put beyond the reach of constitutional amendment.

The Review Group considers that the right which one generation gives itself to write, amend, or replace a constitution can be reasonably and readily claimed by another. Furthermore, while ideas may be eternal and perfect, the form in which they are expressed cannot be, and it is futile to seek to endow any form of words with an immutable character.

Recommendation

There should be no provisions of the Constitution which are not open to amendment.

2 whether provisions ensuring minority rights should be exempt from amendment

There are no minority rights as such in the Constitution, but protection for minorities is available through those provided for individuals. The arguments and recommendations at 1 above apply equally here.

47.2.1° *Every proposal, other than a proposal to amend the Constitution, which is submitted by Referendum to the decision of the people shall be held to have been vetoed by the people if a majority of votes cast at such Referendum shall have been cast against its enactment into law and if the votes so cast against its enactment into law shall have amounted to not less than thirty-three and one-third per cent of the voters on the register.*

47.2.2° *Every proposal, other than a proposal to amend the Constitution, which is submitted by Referendum to the decision of the people shall for the purposes of Article 27 hereof be held to have been approved by the people unless vetoed by them in accordance with the provisions of the foregoing sub-section of this section.*

47.3 *Every citizen who has the right to vote at an election for members of Dáil Éireann shall have the right to vote at a Referendum.*

47.4 *Subject as aforesaid, the Referendum shall be regulated by law.*

3 whether a qualified majority in a referendum should be required to amend certain provisions of the Constitution

Democracy works on the basis of a decision by the majority. In a referendum under the Constitution a proposal for amendment is submitted for a 'yes' or 'no' answer and a simple majority is required, that is, the proposal is carried if a majority of the valid votes cast favours a 'yes' answer. The Review Group considered whether proposals for amendment of certain provisions of the Constitution should be carried only if they achieve a qualified majority, that is, not only most of the votes cast, but also a specified proportion of them (for example, sixty-six per cent).

A qualified majority has a superficial attraction, for example, for the protection of fundamental rights. But it is an unfair provision because it allows to be enshrined by a simple majority what could be removed only by a qualified majority. Moreover, the use of a qualified majority would make it extremely difficult to remove provisions that might, with the efflux of time, be seen to operate against the best interests of the people. In any event, experience shows that those who wish to change the Constitution find it difficult to muster any majority. The Review Group considers that qualified majorities should not be required for any changes in the Constitution.

4 whether amendments to the Constitution (i) of a purely stylistic or technical nature not involving a change of substance or (ii) involving minor or insignificant changes of substance, should be made by a mechanism not involving a referendum

The Review Group agreed that the procedure for amendment provided in Article 46 sections 2 to 5 (passage of a Bill by both Houses of the Oireachtas followed by reference to the people in a referendum) was appropriate in the case of proposals for amendments other than those at (i) and (ii) above. However, it thought it desirable to consider the current procedure in the case of (i) and (ii).

Examples of an amendment of a purely stylistic or technical nature not involving a change of substance would be modernisation of the Irish spelling in the Constitution or the removal of the reference to the President of the Executive Council of Saorstát Éireann (Article 31.2.ii). An example of a minor or insignificant change of substance would be the correction of the description of elections for the President by the deletion of the words 'and on the system of proportional representation' from Article 12.2.3°.

Arguments for change

1 the lengthy and expensive procedure of Article 46 is excessive for some amendments whose significance is not such as to merit submission for the verdict of the people

2 it is clear that some such amendments, although desirable, have not been attempted because of the cumbersome procedures required, and this is likely to be a recurring feature

3 an alternative mechanism can be devised for such amendments with sufficient safeguards to ensure that such an alternative could

not be abused in such a way as to allow the undertaking of amendments of greater significance. Safeguards might include (a) a requirement that the nature of the proposed amendment be certified by a constitutional officer(s) and/or (b) a requirement that the amendment be passed by a qualified majority in the Dáil/both Houses of the Oireachtas.

Arguments against

1 because the Constitution was adopted by the people, its amendment is also a matter for decision by the people

2 any substantive amendment, even of minor significance, is a matter for decision by the people

3 there is a difficulty in defining objectively what is a minor or insignificant change of substance

4 even an amendment which is apparently of a purely stylistic or technical nature might be interpreted subsequently as having substantive effect

5 it would not be possible to establish watertight safeguards against abuse or error. The certification requirement mentioned would inappropriately vest in a select group special powers of control over constitutional amendments. A qualified majority requirement would not necessarily guarantee the exclusion of amendments which did not properly fall into the (i) or (ii) categories.

Recommendation

A majority of the Review Group does not favour the addition of a new provision which would permit by Act of the Oireachtas amendments of a purely stylistic and technical nature. It concluded that stylistic and technical amendments should be submitted collectively to the people by referendum at intervals, as convenient, and that the first such submission might comprise those stylistic and technical amendments identified as desirable in the course of the current review. The same view is taken of amendments involving minor or insignificant changes of substance.

5 whether there should be a provision prohibiting the submission of a Bill containing a number of proposals for amendments which have different substantive effects for decision by the people in a referendum by means of a single vote

The Review Group noted that such a prohibition, if adopted, should apply only to a package of amendments aimed at achieving different substantive changes but subject collectively to only one vote and not to either more than one proposal for amendment with separate votes or a package of interconnected

amendments aimed collectively at achieving a cohesive substantive change. In the absence of such a provision a voter might be faced unfairly with having to vote either for both of two disparate amendments tied together in a single bill, or against both of these, in a situation in which he or she favours one amendment but opposes the other.

Conclusion

The Review Group considered that the good sense of the Houses of the Oireachtas could be relied upon to use the Article 46.4 provision in a manner which respects the voters' right of choice. It did not consider it necessary to provide for such prohibition.

6 whether provision should be made for a popular initiative to amend the Constitution otherwise than by the existing provisions of Articles 46 and 47

The Constitution may be amended only in accordance with Articles 46 and 47. These do not provide for a popular initiative. The Constitution of the Irish Free State (Article 48) provided for a popular initiative both for amendment of the Constitution and for enactment of non-constitutional legislation. For a history of this provision and commentary on it see Appendix 28.

The Review Group considered whether it is either desirable or necessary to recommend a change to provide for a popular initiative for amendment of the Constitution.

Arguments for

1 the initiative enables the people to propose constitutional amendments directly as well as through elected representatives, a facility that should be available in a democracy

2 the initiative has proved to be a practicable and popular method of effecting changes, particularly in some states of the United States

3 it enables a section of the people to submit to a referendum a proposal for amendment on a matter on which it feels the Houses of the Oireachtas are not responsive to its concerns; where a minority perceives that its concerns are not receiving adequate attention it may resort to undesirable action to secure that attention.

Arguments against

1 the by-passing of the Houses of the Oireachtas, comprising the elected representatives of all the people, in submitting a proposal for amendment is inappropriate to a representative democracy

2 there is no indication that people perceive the existing provisions for amendment to be inadequate

3 the initiative tends to favour the objectives of well-organised and well-funded pressure groups who have a disproportionate capacity to mobilise both proposers and voters for an amendment

4 the initiative carries the risk of enabling majoritarian concerns to be incorporated into the Constitution at the expense of minorities

5 as compared with a proposal for amendment emanating from the Houses of the Oireachtas one that arises from an initiative has several disadvantages, for example:

i) it lacks the quality of deliberation which the elected representatives could bring to bear upon it and is therefore less likely to command a majority

ii) it lacks the benefit of the assistance provided by Government services in the analysis of issues and the refinement of proposals

iii) the amendment proposal may lack the precise drafting required to ensure both that it is clear to the voter and that it achieves the objective of the initiative

6 a heavy administrative burden would be imposed by the need to check the authenticity of the proposers of the initiative because a substantial number would presumably be required.

The initiative therefore involves the dual risks of effecting inadequate or undesirable amendments to the Constitution and of leading to many fruitless and expensive referendums.

Conclusion

The consensus in the Review Group is that there should be no provision to allow constitutional change to be proposed either directly or indirectly by means of an initiative.

7 whether provision should be made for amendment of the Constitution by way of a preferendum instead of/as well as a referendum

A preferendum differs from a referendum in that the voter is given a choice between three or more proposals (including a 'no change' choice) rather than a choice between supporting or opposing a single proposal.

Preferendums have been used in some of the states of the United States of America. A preferendum was also used in Newfoundland in 1951 to determine whether or not that state should (among other options) join the Canadian federation.

In Ireland, there have been occasions when the complexity of the issue put to the people admitted of more than one appropriate response. This point might be illustrated by the 1992 referendum on the 12th Amendment of the Constitution Bill 1992 dealing

with the 'substantive issue' of abortion in the wake of the Supreme Court's decision in *Attorney General v X* [1992] 1 IR 1. In that referendum the electorate were asked to amend Article 40.3.3° of the Constitution by inserting the following clause:

> It shall be unlawful to terminate the life of the unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.

It is plain that there was a substantial body of opinion which was unhappy with the proposal on the basis that it did not offer the electorate a 'real' choice in that it did not offer the possibility of voting to insert a complete and absolute ban on abortion in the Constitution. There were, then, at least four separate possibilities:

a) insert a complete and absolute ban on abortion into the Constitution

b) modify the decision in the *X* case by allowing abortion where the life of the mother was at risk in all cases other than suicide

c) accept the decision in the *X* case

d) admit of abortion in cases where the life or health of the mother was substantially put at risk by the continuation of the pregnancy.

An illustration of how voting in a preferendum might work is contained in a memorandum prepared by Gerard Hogan (see Appendix 27).

Argument for

It would give the voter a wide range of choices within which to express his or her preferences. At the moment the referendum system offers the voter a 'yes' or 'no' option on complex issues which may not admit of a simple yes or no. The voter should therefore be offered the option of voting on a reasonable range of the possible responses such complex issues evoke.

Arguments against

1 the referendum system offers the voter the right to say 'Yes' or 'No' to an option formulated by the Oireachtas. It is the task of the Oireachtas to draft the precise wording of the Bill to amend the Constitution which is put before the people and the Oireachtas may be relied upon to define the precise issue for the referendum

2 at a referendum there is a majority one way or the other on the issue before the people. A preferendum might result in an option, which had never obtained the support of a majority of the electorate, being nonetheless adopted following the vote

3 with referendums on complex issues, it is often necessary to formulate the proposal in a particular way so that the electorate can vote 'Yes' or 'No'. Preferendums introduce more complexity and the possibility of confusion

4 the referendum system has worked well in practice and does not require change

5 it is not clear who would formulate the range of proposals to be put to the electorate and how they would be so formulated

6 because there are three or more proposals, the terms in which each is formulated could be used to manipulate or distort the choices to be made, by, for instance, splitting a proposal supported by a majority into a number of proposals and leaving a proposal supported by a minority intact and therefore predominant.

Conclusion

The referendum system has worked well in practice and should not be changed. While the Review Group agrees that a cogent theoretical argument could be made in favour of the preferendum system, it believes there is no pressing need for change. However, it is an issue which might usefully be kept under review, especially having regard to the potentially complex nature of future proposals to amend the Constitution.

8 whether the Constitution should be amended to provide that a Bill to amend the Constitution must be submitted to a referendum within a specified period after its passage by both Houses of the Oireachtas

Article 47.4 provides that, subject to the constitutional provision, the referendum shall be regulated by law. Under the Referendum Act 1994, the Minister for the Environment is required to set a date for the referendum within a specified period after the relevant Bill has been passed by both Houses of Oireachtas: see s 10. The Act also directs that, if an election is called before that date, the referendum will be held on the same day as the general election: see s 11.

Recommendation

The Review Group feels that since the system is operating satisfactorily no constitutional provision is required.

9 whether there should be an amendment to permit State funding of support for a proposal for an amendment

Exchequer funding to promote, and to seek to secure the passage of, proposed amendments to the Constitution occurred in relation to a number of amendments which were accepted by the people. These included the 1972 amendment to authorise entry into the EEC and subsequent amendments approving ratification of the Single European Act and the Maastricht Treaty. Public funding was also used in 1992 to support the series of referendums concerning Article 40.3.3°, relating to the rights to life, travel and

information. Recently, the question of public funding in relation to a referendum became a matter of controversy resulting in litigation. The use of public funding was initially upheld by a decision of the High Court in *McKenna v An Taoiseach (No 1*) [1995] 2 IR 1 and (it seems) also by the Supreme Court in the case of *Slattery v An Taoiseach* [1993] 1 IR 286. However, in *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 it was ruled that the provision and use of such funding in order to seek to secure the passage of the divorce amendment was unconstitutional. This decision was handed down a week prior to the referendum taking place and gave rise to a petition to the court seeking to overturn the result of the referendum.

The Review Group has considered whether the Constitution should authorise the use of such public funding and, if so, in what circumstances.

A possible approach would be to extend Article 47.4 (which reads, 'Subject as aforesaid, the Referendum shall be regulated by law') on the following lines:

> Such law may provide for limited public funding in relation to any proposed amendment and shall entrust the equitable distribution of such funding to an independent body.

Arguments for

1 it appears unreasonable that a Government with a programme of constitutional reform approved by the Oireachtas may not spend public money in order to promote that reform

2 a political party may campaign and be elected on the basis of advocating constitutional change either generally or specifically and may form a Government on this basis. The position following the *McKenna* case appears to be an unreasonable hindrance to the fulfilment of democratic objectives already sanctioned by the people

3 apart from any constitutional reform resulting from the current review, circumstances now unforeseen or some interpretation of existing provisions of the Constitution may create a popular demand for constitutional amendment and it would be unreasonable that the Government could not expend public monies, voted by Dáil Éireann, in seeking to secure such changes

4 on one view of the logic of the *McKenna* case, namely, that the public should not have their money spent in an effort to persuade them against their will in relation to the merits of any particular proposal, the result might be to impede any meaningful discussion of a constitutional amendment in so far as it was publicly funded, either directly or indirectly.

Arguments against

> the arguments against the proposal were fully canvassed in the *McKenna* case and are set out in the majority judgments of the Supreme Court. They need not be reproduced in full here. They include respect for the equality of the voting

power of the citizens, the right not to be forced to finance the enactment of views contrary to one's own wishes, fairness of procedure, equality of treatment, respect for the democratic rights of citizens, the alleged lack of any Government role in ensuring the passage of the amendment proposed.

Recommendation

There ought not to be a constitutional barrier to the public funding of a referendum campaign *provided* that the manner of equitable allotment of such funding is entrusted to an independent body such as the proposed Constituency Commission. The total sum to be allotted should be subject to legislative regulation. Article 47.4 should be amended accordingly. Such a constitutional safeguard meets the principal objection to the old funding arrangements identified in the *McKenna* case by ensuring that the Government does not spend public money in a self-interested and unregulated fashion in favour of one side only, thereby distorting the political process.

Since an extension of the logic of the *McKenna* judgment could possibly render unconstitutional proposals to fund political parties from the public purse, the constitutionality of public funding for political parties may also need to be similarly addressed

Repeal of Constitution of Saorstát Éireann

Article 48

The Constitution of Saorstát Éireann in force immediately prior to the date of the coming into operation of this Constitution and the Constitution of the Irish Free State (Saorstát Éireann) Act, 1922, in so far as that Act or any provision thereof is then in force shall be and are hereby repealed as on and from that date

Introduction

This Article provides for repeal of both the Constitution of Saorstát Éireann and the Act which had enacted it. That Constitution was, of course, replaced by this Constitution.

Issues

The Review Group is divided as to whether this Article should be deleted as being spent, or be retained to ensure legal continuity. In this respect the Review Group refers to its report on Article 49 where it sets out the differing views as to whether Article 49.3 and other transitory provisions (such as this Article) should be deleted or retained.

Succession to the Prerogative

Article 49

49.1 *All powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Éireann immediately before the 11th day of December, 1936, whether in virtue of the Constitution then in force or otherwise, by the authority in which the executive power of Saorstát Éireann was then vested are hereby declared to belong to the people.*

49.2 *It is hereby enacted that, save to the extent to which provision is made by this Constitution or may hereafter be made by law for the exercise of any such power, function, right or prerogative by any of the organs established by this Constitution, the said powers, functions, rights and prerogatives shall not be exercised or be capable of being exercised in or in respect of the State save only by or on the authority of the Government.*

49.3 *The Government shall be the successors of the Government of Saorstát Éireann as regards all property, assets, rights and liabilities.*

Introduction

The purposes of Article 49 may be said to be as follows:

i) to transfer to the people 'all powers, functions, rights and prerogatives whatsoever exercisable in or in respect of Saorstát Éireann immediately before the 11th day of December 1936' (Article 49.1)

ii) to provide that, save to the extent to which provision is made by the Constitution or 'may hereafter be made by law for the exercise of such power, function, right or prerogative' by any organs established by the Constitution, such powers are exercisable only by or on the authority of the Government (Article 49.2)

iii) to provide that the Government shall be the successor of the Government of Saorstát Éireann as regards 'all property, assets, rights and liabilities' (Article 49.3).

The significance of the date, 11 December 1936, derives from the fact that that was the day on which the Dáil (which was then the only House of the Oireachtas) passed the Constitution (Amendment No 27) Act 1936 which removed the Governor-General from the then Constitution of the Irish Free State, and with him practically all trace of the Crown. (King Edward VIII had abdicated the British throne on the previous day, 10 December 1936.)

Issues

1 whether Articles 49.1-2 should be deleted

i) ... powers, functions, rights and prerogatives

With the exception of prerogative rights – which are considered in detail below – the Review Group has not identified any such 'powers, functions' [and] 'rights' which might have residual legal force or efficacy and which have not been expressly provided for elsewhere.

ii) succession to the prerogative: some contemporary difficulties

The prerogative may be defined as embracing 'those rights and capacities which the King alone enjoys in contradistinction to others': see Blackstone, *Commentaries on the Laws of England*, Vol 1, p 239. As noted by Hogan and Morgan, *Administrative Law in Ireland,* London, 1991, at p 701:

> In the United Kingdom many of the former prerogative rights have been uprooted, qualified or superseded by statute, or shrivelled by desuetude. Nevertheless, the prerogative still covers a diverse bundle of rights, powers, privileges etc, most of which are exercised by the Crown on the advice of the responsible ministers. In Ireland, by contrast, the former prerogative has been largely superseded in that much of the ground which the prerogative covers in the United Kingdom is regulated by the Constitution or, to a lesser extent, by statute. Thus, for instance, when the President appoints or removes Ministers or dissolves the Dáil, she does so on the authority of Articles 13.1 and 13.2 and 28.9.4°, respectively. The prerogative of mercy has been overtaken by the right of pardon and remission of punishment vested in the President by Article 13.6; whilst the prerogative to declare war is now grounded in Article 28.3.1° (which reserves this right to the Dáil). In the case of certain of the other prerogatives, their content is such as actually to conflict with the Constitution.

The drafters of Article 49 evidently considered that the prerogative had survived (at least in some form) both the enactment of the Constitution and the earlier Constitution of the Irish Free State of 1922. To quote again from Hogan and Morgan, op cit, at p 702:

> [Article 49.1] makes the inquiry turn on the antecedent question of whether the prerogative existed in Saorstát Éireann before December 11, 1936. The significance of this date lies in the fact that it was the day when the Irish Free State Constitution was amended to extirpate the King (formerly the head of state in whom all executive authority was vested under Articles 41, 51, 55, 60 and 68 of the Irish Free State Constitution). Prior to the Supreme Court's decision in *Byrne v Ireland* [1972] IR 241, it had been assumed that the presence of the King drew with it the prerogative. This argument was rejected by the majority in *Byrne* on [the ground that] the King's powers could be confined to those actually specified in the 1922 Constitution: there was no necessary reason why they had to be identical with those which the Crown enjoyed in the United Kingdom or in pre-independence Ireland.

Further aspects of the prerogative were considered in three major decisions of the Supreme Court. The first of these, *Webb v Ireland* [1988] IR 353, concerned the question of the continued existence of the prerogative of treasure trove. The Supreme Court, affirming the reasoning of Walsh J in the *Byrne* case, held that none of the royal prerogatives had survived the enactment of the Constitution. This trend was subsequently continued by the Supreme Court's decision in *Howard v Commissioners of Public Works* [1994] 1 IR 101. Here a majority of the court confirmed that none of the former Crown prerogatives had survived the enactment of the Constitution and that because the former rule, whereby it was presumed that the State was not bound by the application of statute, could not be divorced from its prerogative origins, it too had failed to survive the enactment of the Constitution.

The first hint that the Supreme Court might be prepared to draw back somewhat from the position it had taken in such cases as

Webb and *Howard* may be found in the judgment of O'Flaherty J in *Geoghegan v Institute of Chartered Accountants* (1995). In this case the court appears implicitly to have acknowledged that the former prerogative power to establish a corporation by letters patent or by charter had not survived the enactment of the Constitution. At the same time the court confirmed that a charter body established prior to 1922 by virtue of the royal prerogative which was then in existence had nonetheless survived the enactment of the Constitution. There were also some judicial hints that aspects of the *Byrne* and *Webb* cases might need to be reconsidered.

Conclusions

Given the underlying uncertainties associated with the question of whether any dimension of the former Crown prerogative rights has survived the enactment of the Constitution, the Review Group is of the opinion that Article 49.1 is perhaps not yet completely spent. It is, however, divided as to the appropriate response to this situation. On one view, the present constitutional position is unsatisfactory. It is undesirable that any uncertainty should persist regarding the possible survival of some potentially important rules which historically derived from the prerogative – random examples of which include aspects of wardship jurisdiction, the rules permitting the seizure or destruction of private property in time of war or imminent danger (albeit on payment of compensation), the law relating to charter bodies and the granting of patents of precedence to counsel. Moreover, it seems inappropriate that the royal prerogative might still be the basis for legal rules in the State more than seventy years after the achievement of independence and almost sixty years after the removal of virtually all trace of the Crown from Irish constitutional law. Those holding this view consider that steps should be taken to identify those remaining areas of the prerogative which may still have a continuing existence with a view to the enactment of a present-day equivalent of the Executive Powers (Consequential Provisions) Act 1937. Such legislation could recast such of the traditional prerogative rules as may have vestigial existence in a modern legislative form and specify the circumstances under which such rights might be exercised and by whom. If that were done, Articles 49.1 and 49.2 would have become redundant and might be deleted.

Another view is that, by reason of the amorphous nature of the prerogative, if such legislation were enacted it might inadvertently reduce the coverage given in Article 49.1-2. It would be safer, therefore, not to delete these provisions.

2 whether Article 49.3 is spent

This section was designed to provide for a smooth transition of the property and assets and the rights and liabilities of the Government of Saorstát Éireann to the Government established by the 1937 Constitution. It might properly have been placed at the time in the Transitory Provisions of the Constitution but it was not**.** The Review Group is divided as to whether it is spent. One view is that, on the coming into force of the Constitution, this section operated to pass title from the former Government to

the new Government to all such property, assets, etc and, having done so, it is now clearly spent and its deletion is appropriate. Such deletion could not operate so as to divest the Government for the time being of property, assets etc to which it had succeeded in 1937 and which it has been dealing with as the lawful successor to the Government of Saorstát Éireann.

In so far as there may be any lingering concerns that the deletion of Article 49.3 (and other similar transitional provisions) might cause difficulties for the State in establishing a 'root of title' in respect of pre-1937 property, assets etc, or legal continuity generally, a new, simpler clause could be enacted. This might provide (analogous to section 2 of the Statute Law Revision Act 1983) that the courts might nonetheless have regard to such of the transitional provisions as were repealed in the wake of the Review Group's recommendations for the purposes of preserving legal continuity.

A contrary view is that the section should be retained to maintain the Government's title by succession to property, assets etc and that its deletion would remove at least the proof of that succession. It would be unsafe to delete this section or other transitional provisions where the preservation of legal continuity is in question. The suggestion that such concerns could be met by enactment of a new, simpler clause enabling the courts to continue to have regard to the relevant provisions after their deletion is less than compelling. There would be no merit in holding a referendum proposing to replace existing satisfactory provisions with a new provision.

Continuance of Laws

Article 50

50.1 *Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas.*

50.2 *Laws enacted before, but expressed to come into force after, the coming into operation of this Constitution, shall, unless otherwise enacted by the Oireachtas, come into force in accordance with the terms thereof.*

Introduction

This Article provides in section 1 for the carrying over, and continuation in force, in the new legal order established by the Constitution, of the body of laws in force in Saorstát Éireann, in so far as such laws were consistent with the Constitution. This body of laws comprised:

i) laws enacted by the Oireachtas of Saorstát Éireann between 1922 and 1937

ii) laws enacted by the Parliament of the United Kingdom of Great Britain and Ireland between 1801 and 1922

iii) laws enacted by the Parliament of Ireland from 1310 to 1800

iv) laws enacted by the Parliament of England and applied to Ireland by Poyning's Law 1495

v) common law rules applicable in Ireland in 1937.

Article 50 parallels a similar provision (Article 73) in the Saorstát Éireann Constitution.

Article 50.2 makes provision for the special situation of the limited number of statutes enacted before the coming into operation of the Constitution but which had not entered into force at that time. They were therefore not covered by section 1. Section 2 confirmed that they would come into force in accordance with their own provisions.

Issues

1 whether section 1 is spent and should be deleted

Conclusion

Replacement of laws originating not only before 1937 but also before 1922 is an ongoing process. However, a substantial body of such laws still survives. It would be unrealistic to expect that these laws could be replaced by legislation by the Oireachtas for many years. Deletion of this section would render that body of laws inoperative and deprive the community of a very substantial body of legal rules in important fields of law, for example, in criminal law and the law of property. Accordingly, retention of section 1 is necessary.

2 whether the pre-1922 laws carried over by section 1 included legislation other than that relating directly or indirectly to matters bearing on the State

This issue is not of great importance – most pre-1922 legislation which did not relate directly or indirectly to matters bearing on the State would be inapplicable and/or now spent. The question is whether the body of laws carried over is limited to laws relevant to the State or also includes, for example, pre-1922 United Kingdom laws not dealing with matters bearing on Ireland. The issue was raised in a number of pre-1937 cases in regard to Article 73 of the Saorstát Éireann Constitution. The decisions in these cases did not follow a consistent line. In *Donegal Fuel & Supply Co Ltd v Londonderry Port and Harbour Commissioners* [1994] 1 IR 24 in which account was taken both of this Article and its 1922 predecessor (Article 73), Costello J held that Article 50 carried over only such pre-1922 legislation as could properly have been enacted by the present Oireachtas. Thus pre-1922 United Kingdom legislation concerning internal affairs of the present United Kingdom was no longer extant in this State. It would not, therefore, appear necessary to amend the section to limit the scope of the laws it carried over.

3 whether section 1 covers not only statutory law but also common law and judicial decisions interpreting legislation and developing common law

This issue arises from the use of the term 'laws' in section 1. However, although the judicial decisions are not quite unanimous on this question, their clear thrust has been that the body of law carried over by section 1 (and that previously carried over by Article 73 of the Saorstát Éireann Constitution) was not limited to legislation but included common law rules and judicial decisions. In these circumstances there is no need to amend section 1.

4 whether non-statutory law, particularly common law rules, if carried over by section 1, is frozen in its 1937 stage of development and changeable only by the Oireachtas and not by decisions of the courts

This issue arises from the wording of the later part of the section which envisages continuance in force of carried-over laws until repealed or amended by the Oireachtas. While this formulation has been invoked in support of a contention that section 1 must have been intended to cover statutory law only, that contention is contrary to the thrust of judicial decisions (see issue 2 above). However, the formulation relates only to the continuance in force of laws and would not appear to exclude the function of the courts to interpret laws or, in the case of non-statutory law, to identify or elaborate the rules. Again the clear thrust of the judicial decisions is that common law rules carried over are not excluded from development by means other than legislation. A recent example of the courts adopting this view was the decision in the *Government of Canada v Employment Appeals Tribunal and Burke* [1992] 2 IR 484.

5 whether section 2 is spent

Conclusion

There were nine statutes which had been enacted by the Saorstát Éireann Oireachtas but which had not come into force before the coming into operation of the new Constitution. They have long since entered into force and some remain in force. The Review Group is divided as to whether this section should be deleted on the grounds that it is spent or needs to be retained to ensure legal continuity. In this respect the Review Group refers to its report on Article 49 where it sets out the differing views as to whether Article 49.3 and other transitional provisions (such as this section) should be deleted or retained.

Transitory Provisions

Article 51

51.1 Notwithstanding anything contained in Article 46 hereof, any of the provisions of this Constitution, except the provisions of the said Article 46 and this Article, may, subject as hereinafter provided, be amended by the Oireachtas, whether by way of variation, addition or repeal, within a period of three years after the date on which the first President will have entered upon his office.

51.2 *A proposal for the amendment of this Constitution under this Article shall not be enacted into law, if, prior to such enactment, the President, after consultation with the Council of State, shall have signified in a message under his hand and Seal addressed to the Chairman of each of the Houses of the Oireachtas that the proposal is in his opinion a proposal to effect an amendment of such a character and importance that the will of the people thereon ought to be ascertained by Referendum before its enactment into law.*

51.3 *The foregoing provisions of this Article shall cease to have the force of law immediately upon the expiration of the period of three years referred to in section 1 hereof.*

51.4 *This Article shall be omitted from every official text of this Constitution published after the expiration of the said period.*

Article 52

52.1 This Article and the subsequent Articles shall be omitted from every official text of this Constitution published after the date on which the first President shall have entered upon his office.

Introduction

Article 51 provides, as an exception to the requirement that amendments to the Constitution must be submitted to the decision of the people (Article 46.2), that amendments may be effected by the Oireachtas, through legislation, but only within the period of three years following the date of entry into office of the first President. Articles 52-61 were designed to ensure continuity in the authority and effectiveness of organs and institutions of the State in the course of transition from Saorstát Éireann to the State established by the Constitution. Articles 62 and 63 provided respectively for the coming into operation of the Constitution and for the enrolling of the official copy in the office of the Registrar of the Supreme Court. (Enrolment of amendments and of the latest text of the Constitution is provided for in Articles 25.4.5° and 25.5.2°).

Conclusion

The Review Group notes (a) the provisions (Articles 51.4 and 52.1) for omission of all of these Articles from future official texts of the Constitution and (b) that Article 51 has long since ceased to have the force of law (Article 51.3) but that Articles 52-63 continue to have the force of law (Article 52.2). The Review Group is divided as to whether the Articles should be deleted as being spent (their objectives having long since been accomplished) or be retained to ensure legal continuity and as a matter of historical record. In this respect the Review Group refers to its report on Article 49 where it sets out the differing views as to whether Article 49.3 and other transitional provisions (such as these Articles) should be deleted or retained.

52.2 *Every Article of this Constitution which is hereafter omitted in accordance with the foregoing provisions of this Article from the official text of this Constitution shall notwithstanding such omission continue to have the force of law.*

Article 53

53.1 *On the coming into operation of this Constitution a general election for Seanad Éireann shall be held in accordance with the relevant Articles of this Constitution as if a dissolution of Dáil Éireann had taken place on the date of the coming into operation of this Constitution.*

53.2 *For the purposes of this Article references in the relevant provisions of this Constitution to a dissolution of Dáil Éireann shall be construed as referring to the coming into operation of this Constitution, and in those provisions the expression "Dáil Éireann" shall include the Chamber of Deputies (Dáil Éireann) established by the Constitution hereby repealed.*

53.3 *The first assembly of Seanad Éireann shall take place not later than one hundred and eighty days after the coming into operation of this Constitution.*

Article 54

54.1 *The Chamber of Deputies (Dáil Éireann) established by the Constitution hereby repealed and existing immediately before that repeal shall, on the coming into operation of this Constitution, become and be Dáil Éireann for all the purposes of this Constitution.*

54.2 *Every person who is a member of the said Chamber of Deputies (Dáil Éireann) immediately before the said repeal shall, on the coming into operation of this Constitution, become and be a member of Dáil Éireann as if he had been elected to be such member at an election held under this Constitution.*

54.3 *The member of the said Chamber of Deputies (Dáil Éireann) who is immediately before the said repeal Ceann Comhairle shall upon the coming into operation of this Constitution become and be the Chairman of Dáil Éireann.*

Article 55

55.1 *After the coming into operation of this Constitution and until the first assembly of Seanad Éireann, the Oireachtas shall consist of one House only.*

55.2 *The House forming the Oireachtas under this Article shall be Dáil Éireann.*

55.3 *Until the first President enters upon his office, the Oireachtas shall be complete and capable of functioning notwithstanding that there is no President.*

55.4 *Until the first President enters upon his office, Bills passed or deemed to have been passed by the House or by both Houses of the Oireachtas shall be signed and promulgated by the Commission hereinafter mentioned instead of by the President.*

Article 56

56.1 *On the coming into operation of this Constitution, the Government in office immediately before the coming into operation of this Constitution shall become and be the Government for the purposes of this Constitution and the members of that Government shall without any appointment under Article 13 hereof, continue to hold their respective offices as if they had been appointed thereto under the said Article 13.*

56.2 *The members of the Government in office on the date on which the first President shall enter upon his office shall receive official appointments from the President as soon as may be after the said date.*

56.3 *The Departments of State of Saorstát Éireann shall as on and from the date of the coming into operation of this Constitution and until otherwise determined by law become and be the Departments of State.*

56.4 *On the coming into operation of this Constitution, the Civil Service of the Government of Saorstát Éireann shall become and be the Civil Service of the Government.*

56.5.1° *Nothing in this Constitution shall prejudice or affect the terms and conditions of service, or the tenure of office or the remuneration of any person who was in any Governmental employment immediately prior to the coming into operation of this Constitution.*

56.5.2° *Nothing in this Article shall operate to invalidate or restrict any legislation whatsoever which has been enacted or may be enacted hereafter applying to or prejudicing or affecting all or any of the matters contained in the next preceding sub-section.*

Article 57

57.1 *The first President shall enter upon his office not later than one hundred and eighty days after the date of the coming into operation of this Constitution.*

57.2 *After the date of the coming into operation of this Constitution and pending the entry of the first President upon his office the powers and functions of the President under this Constitution shall be exercised by a Commission consisting of the following persons, namely, the Chief Justice, the President of the High Court, and the Chairman of Dáil Éireann.*

57.3 *Whenever the Commission is incomplete by reason of a vacancy in an office the holder of which is a member of the Commission, the Commission shall, during such vacancy, be completed by the substitution of the senior judge of the Supreme Court who is not already a member of the Commission in the place of the holder of such office, and likewise in the event of any member of the Commission being, on any occasion, unable to act, his place shall be taken on that occasion by the senior judge of the Supreme Court who is available and is not already a member, or acting in the place of a member, of the Commission.*

57.4 *The Commission may act by any two of their number.*

57.5 *The provisions of this Constitution which relate to the exercise and performance by the President of the powers and functions conferred on him by this Constitution shall apply to the exercise and performance of the said powers and functions by the said Commission in like manner as those provisions apply to the exercise and performance of the said powers and functions by the President.*

Article 58

58.1 *On and after the coming into operation of this Constitution and*

until otherwise determined by law, the Supreme Court of Justice, the High Court of Justice, the Circuit Court of Justice and the District Court of Justice in existence immediately before the coming into operation of this Constitution shall, subject to the provisions of this Constitution relating to the determination of questions as to the validity of any law, continue to exercise the same jurisdictions respectively as theretofore, and any judge or justice being a member of such Court shall, subject to compliance with the subsequent provisions of this Article, continue to be a member thereof and shall hold office by the like tenure and on the like terms as theretofore unless he signifies to the Taoiseach his desire to resign.

58.2 *Every such judge and justice who shall not have so signified his desire to resign shall make and subscribe the declaration set forth in section 5 of Article 34 of this Constitution.*

58.3 *This declaration shall be made and subscribed by the Chief Justice in the presence of the Taoiseach, and by each of the other judges of the said Supreme Court, the judges of the said High Court and the judges of the said Circuit Court in the presence of the Chief Justice in open court.*

58.4 *In the case of the justices of the said District Court the declaration shall be made and subscribed in open court.*

58.5 *Every such declaration shall be made immediately upon the coming into operation of this Constitution, or as soon as may be thereafter.*

58.6 *Any such judge or justice who declines or neglects to make such declaration in the manner aforesaid shall be deemed to have vacated his office.*

Article 59

On the coming into operation of this Constitution, the person who is the Attorney General of Saorstát Éireann immediately before the coming into operation of this Constitution shall, without any appointment under Article 30 of this Constitution, become and be the Attorney General as if he had been appointed to that office under the said Article 30.

Article 60

On the coming into operation of this Constitution the person who is the Comptroller and Auditor General of Saorstát Éireann immediately before the coming into operation of this Constitution shall, without any appointment under Article 33 of this Constitution, become and be the Comptroller and Auditor General as if he had been appointed to that office under the said Article 33.

Article 61

61.1 *On the coming into operation of this Constitution, the Defence Forces and the Police Forces of Saorstát Éireann in existence immediately before the coming into operation of this Constitution shall become and be respectively the Defence Forces and the Police Forces of the State.*

61.2.1° *Every commissioned officer of the Defence Forces of Saorstát Éireann immediately before the coming into operation of this Constitution shall become and be a commissioned officer of corresponding rank of the Defence Forces of the State as if he had received a commission therein under Article 13 of this Constitution.*

61.2.2° *Every officer of the Defence Forces of the State at the date on which the first President enters upon his office shall receive a commission from the President as soon as may be after that date.*

Article 62

This Constitution shall come into operation

i. *on the day following the expiration of a period of one hundred and eighty days after its approval by the people signified by a majority of the votes cast at a plebiscite thereon held in accordance with law, or,*

ii. *on such earlier day after such approval as may be fixed by a resolution of Dáil Éireann elected at the general election the polling for which shall have taken place on the same day as the said plebiscite.*

Article 63

A copy of this Constitution signed by the Taoiseach, the Chief Justice, and the Chairman of Dáil Éireann shall be enrolled for record in the office of the Registrar of the Supreme Court, and such signed copy shall be conclusive evidence of the provisions of this Constitution. In case of conflict between the Irish and the English texts, the Irish text shall prevail.

New Provision

The Ombudsman

Introduction

The word 'Ombudsman' is Swedish in origin and originally meant representative of the people. The concept has evolved over two centuries, from being a reaction to State absolutism and an assertion of the rights and dignity of the individual, to becoming a unique method of strengthening democratic control in society. Because of its special meaning, the title Ombudsman has been imported without translation into some languages but has been rendered as Parliamentary Commissioner or some similar vernacular title in others. The word 'Ombudsman' is not intended to have a gender connotation and was the title used in the Ombudsman Act 1980 which established the office here. Some members of the Review Group take the view that there could be misunderstanding on this point and would prefer a gender-neutral term.

The majority of Western European democracies provide for an Ombudsman in their constitutions. In addition, Article 138 of the Treaty of Rome (as inserted by the Maastricht Treaty) provides for the establishment of the office of Ombudsman in relation to the European Union. In the new democracies emerging in Eastern Europe, Africa and Latin America, the institution of Ombudsman is being included in their new constitutions, often with a role in relation to fundamental human rights. The concept came to attention in Ireland with the publication in 1969 of the report of the Public Services Organisation Review Group, which recognised the need for the development of new means of redress for an aggrieved citizen in the light of that Group's central recommendation relating to a restructured public service. The subsequent establishment of an all-party committee provided the impetus which led to the 1980 Act. It is clear that in recent years a consensus has emerged in the two Houses of the Oireachtas about the desirability of not only maintaining the institution of Ombudsman but strengthening and developing it.

The Constitution confirms various personal and other rights which are protected by the courts. Without prejudice to this basic and general protection, additional protection is available in defined areas through recourse to the Ombudsman and this can be of particular advantage to those who are poor and without social position. An effective democracy requires that public servants should be held accountable for their actions and that citizens be protected from maladministration by public officials.

The Constitution already provides for the office of Comptroller and Auditor General. That office monitors financial accountability by ensuring that moneys raised by, or given to, public authorities are used not only properly, but also in an efficient and effective manner. Similarly, the office of the Ombudsman monitors administrative accountability by ensuring that public service activities and, in particular, the exercise of discretionary decision-making powers are carried out in a manner consistent with fairness and good administrative practice. The role of the office will become all the more necessary if devolution and delegation within the public service develops as envisaged.

Functions

The Ombudsman Act 1980 entitles the Ombudsman to investigate any administrative action taken by or on behalf of a Department of State or other specified persons or bodies which appears to have had an adverse effect and may have been faulty on one or other of seven grounds. The Ombudsman may follow up the investigation by seeking reasons for the action, by requiring the matter to be further considered or by recommending measures to remedy, mitigate or alter the adverse effect of the action.

The office of the Ombudsman operates in the area of administrative accountability – the process of ensuring that public service activities and, in particular, the exercise of decision-making powers, whether discretionary or otherwise, are carried out not only in a proper legal manner but fairly and consistently with good administrative practice. The Ombudsman gives the citizen the capacity to question the administration and may, in many instances, be an avenue of last resort for a citizen aggrieved by actions of the public service. The office has also developed a role in contributing to the elimination of the root causes of many of the complaints encountered, and to raising standards of public administration by identifying the underlying causes of maladministration and suggesting improvement.

As is the case in most countries, the legislation provides for areas where the writ of the Ombudsman does not run. These can be summarised as follows:

– the presidency, the courts and Seanad Éireann

– prisons

– Garda Síochána

– matters relating to national security or intergovernmental activity

– matters on which an appeal can be made to independent tribunals

– public service recruitment

– public service personnel matters.

Section 5(3) of the Ombudsman Act 1980 provides that a Minister may direct the Ombudsman to cease any investigation into matters within his or her departmental remit. This discretion has never been exercised. Should it be exercised, the Ombudsman may make a special report on the matter to the Oireachtas.

Independence is the foundation stone upon which the office of the Ombudsman is based. The Ombudsman must be able to operate without being influenced by Government action. It is not enough for him or her to be independent in fact – he or she must also be seen as such by those who use the office. A constitutional guarantee for this independence would reinforce freedom from conflict of interest, from deference to the executive, from influence by special interest groups, and it would support the freedom to assemble facts and reach independent and impartial conclusions.

New Provision

Recommendation

A new Article should be inserted in the Constitution confirming the establishment of the office of the Ombudsman, providing for the independent exercise of such investigative and other functions of the office in relation to administrative actions as may be determined by law, and making other provisions similar to those applying to the Comptroller and Auditor General and consistent with the 1980 Act, as amended.

New Provision

Local Government

Introduction

The Review Group received a number of representations in favour of constitutional recognition being given to local government.

Article 2 of the Council of Europe European Charter of Local Self-Government states:

> The principle of local self-government shall be recognised in domestic legislation and where practicable in the constitution.

Article 4 states:

> The basic powers and responsibilities of local authorities shall be prescribed by the constitution or by statute.

Ireland is not yet a signatory of the Charter.

Rights to local self-government are constitutionally recognised in most western European countries, including Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, The Netherlands, Spain, Portugal, Sweden and Switzerland. Most of these countries are unitary as opposed to federal states, and some of them are considerably smaller than Ireland. With the exception of the United Kingdom, Ireland currently has the largest local authorities in western Europe, measuring these in terms of average population per local authority area.

A 1988 Council of Europe survey found that a range of functions and services, which are probably better performed at local rather than national level, were the responsibility of most European local government systems. Core functions of local government in at least fourteen of the fifteen European countries surveyed include: construction and upkeep of primary and post-primary schools; roads; local planning; building and demolition permits; refuse collection; social assistance; homes for the elderly; library services; tourism promotion; sports facilities; fire service; water supply; sewage disposal; waste disposal; cemeteries; cultural and artistic heritage conservation; subsidised housing; museum services; parks and recreation facilities. Local authorities in Ireland perform all of these functions (except those related to primary and most post-primary schools) but can raise only limited local taxes**.**

Views in favour of constitutional recognition

1 while the Constitution is not, of course, a textbook on all aspects of the running of the country, it does set out the fundamental rules governing the key political institutions of the State. In virtually every modern constitution, one of these basic rules concerns the relationship between central and local government. The omission of any mention of this relationship

from the Irish Constitution is unusual and may reflect a preoccupation at the time with the central organs of government and a taking-for-granted of the inherited local government system. More recently, the trend in many countries has been towards decentralising decision-making with the consequence that local government, outside Britain and Ireland, has increased rather than decreased in importance

2 there is thus a more general appreciation of the special importance of local government as a basis for a fully participative democracy and as a practical expression in the sphere of government of the principle of subsidiarity – the devolution of functions to the lowest levels of organisation at which their fair and efficient exercise is practicable

3 local government in Ireland has suffered as a result of its lack of constitutional protection. Obvious examples include the postponement by the central government, on occasion, of local government elections – something that would be almost unthinkable in most democratic systems – and the promised abolition during a Dáil election campaign of one of the main sources of local government revenue, domestic rates

4 the downgrading of the importance of local government in Ireland, only possible as a result of its lack of constitutional protection, has meant that local people often have no effective local redress for their grievances. This in turn forces them to put pressure on their national representatives to put right what are essentially local problems more appropriately dealt with by an effective local government system. Many analysts have identified this as at least one of the causes of excessive constituency pressure on local TDs (see Appendix 4: 'Electoral systems')

5 local government could, therefore, appropriately receive the cachet and protection of express constitutional recognition. This is the norm almost everywhere else in Europe, where it clearly presents few problems. The main country where it is not the norm is Britain where, despite protestations that local government was protected by the 'unwritten' constitution, local government has recently come under persistent attack from central government, leading, for example, to the jailing of local councillors and the unilateral abolition of the entire Greater London Council. As a result, local government has become the subject of political controversy in Britain.

Views against constitutional recognition

1 local government in Ireland is already recognised in a substantial volume of statute law. In this way the requirements of the Council of Europe Charter are met. Local authorities are already responsible for all the functions mentioned in the Council of Europe survey, except primary and most post-primary schools**.** This has occurred without specific constitutional 'recognition'. There is no constitutional bar on the development of smaller – or larger – local authorities, or more or less local authorities, with greater or lesser powers. Local government in Ireland exhibits a high degree of professionalism and in the

statutory management system has developed a uniquely Irish contribution to administrative development, again without constitutional backing

2 the Constitution should not be lumbered with unnecessary provisions. Ireland is smaller than many European countries – and even than regions in Europe. Regional autonomy may be a basic requirement of good government in those countries. Countries with more 'local government' than Ireland generally have fewer representatives in Parliament per head of population. With 166 members in the Dáil elected from constituencies all over the country, sixty members in the Seanad and up to 1,500 local authority members in about 150 authorities, there is already, without constitutional recognition, a very large degree of representative democracy in the State. Constitutional 'recognition' would not affect the position of local government in this context one way or another

3 the statutory basis for local government allows Parliament to decide the forms and procedures for local government. The administrative system in Ireland is subject to change and with developments in technology and in Europe this is likely to continue. Thus justice, once the concern of Grand Juries, which were local authorities, is now centrally administered. The old system of public assistance, once administered by local authorities, has become the modern centralised welfare system. Health, which used to be a local government function, is now administered regionally by health boards. National roads administration is developing similarly. Thus, over time, the organisation of government *by area* has *not* been found to be the best way of delivering a service. The tendency in Ireland, as elsewhere, has been to develop by reference to *functions*: and this tendency is reinforced, in fact often made imperative, by EU requirements**.** Further developments, at present unforeseeable**,** could be necessary, for example, in the event of an 'agreed Ireland'. The 'recognition' of local government in the Constitution could impose an unnecessary rigidity on the system – subjecting any change to the possibility of judicial review

Indeed, any constitutional clause with teeth could give rise to new separation of powers issues between government and regions (a fruitful source of litigation in countries such as the USA and Germany). It could also lead to the invalidation of a whole range of central government controls (examples might include controls to secure the soundness of local finances, control of bye-laws etc) and might require the insertion of a specific equalisation clause similar to Article 107 of the German constitution allowing the redistribution of local government income (rates, service charges etc) to poorer local authority regions

4 Parliament has always had the authority to abolish and vary taxes**.** Rates were abolished, partly because they were assessed on a proportion of the population – the 'occupiers' of property – without, in effect, reference to ability to pay, and on an inequitable system of valuations. They were in most areas increasing more rapidly than incomes or inflation

5 whether or not a constitutional provision should determine the timing of local elections is arguable

6 the government of the day will, in practice, under the Irish political system and culture, be held accountable in the Dáil for the operation of the local government system and for the application of more or less agreed standards of service throughout the country. The 'recognition' of local government in the Constitution is unlikely to change this or to affect the degree of clientelism in the Irish political system.

Form of recognition

Basic issues concerning the future of local government are at present under examination by two commissions: one, set up under the Local Government Act 1994, is due to report shortly to the Minister for the Environment on the reorganisation of *town* local government; the second, set up by the Taoiseach in July 1995, is to make recommendations on the phased devolution of significant additional functions to local authorities, and these recommendations are to be considered by a Cabinet committee chaired by the Taoiseach. The question of Ireland becoming a signatory of the Council of Europe European Charter of Local Self-Government is also expected to be decided in this context.

Recommendation

The Review Group considered, by a majority, that a form of recognition in principle of local government should be inserted in the Constitution. Whether or not this should be accompanied by extensive provisions might be decided when the reports of two commissions have been received and considered but with due advertence to the arguments above.

New Provision

The Environment

Background

In recent decades in the world at large, growing numbers of people, appalled by a series of disasters resulting from human negligence or error in the use and management of natural resources and fearful of the grave climatic implications of wholesale destruction of the rain forests and gas emissions causing ozone layer depletion, realise that the quality of the natural environment is of fundamental national and personal interest and that its protection is an obligation essential to the health, quality of life and economic well-being of both present and future generations.

This public concern has been reflected in formal instruments, both international and domestic. The Rio Declaration on Environment and Development, adopted at the relevant UN Conference (June 1992), established basic principles intended to be reflected in national constitutions and/or legislation. The Rio Principles include the following:

1 human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature
...

3 the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations

4 in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it
...

10 environmental issues are best handled with the participation of all concerned citizens, and on the basis of appropriate citizen access to information
...

13 the State shall enact effective environmental legislation, including provisions on liability and compensation for the victims of pollution and other environmental change
...

15 in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation

16 national authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting trade and investment.

New Provision

In all, twenty-seven principles are set out in the Rio Declaration.

The basic statement of European Union policy on the environment is in Article 130r of the Treaty establishing the European Community (as amended at Maastricht), the first paragraph of which declares that this policy 'shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment
- protecting human health
- prudent and rational utilisation of natural resources
- promoting measures at international level to deal with regional or world-wide environmental problems'.

Other paragraphs reiterate the Rio Principles regarding precautionary action, polluter liability, balanced development, and transnational co-operation. It is understood that the current Intergovernmental Conference (IGC) of the European Union will consider the need to strengthen these provisions or make them more explicit. Ireland will be supporting proposals to clarify and strengthen the objectives of sustainable development and integration of environmental considerations into other policies.

'Sustainable development' is an evolving concept, which was described in the Report (1992) of the UN World Commission on Environment and Development as:

> development that meets the need of the present without compromising the ability of future generations to meet their own needs.

Various constitutions adopted in recent decades have specific provisions relating to the environment, including such elements as:

i) everyone has the right to a healthy environment and is obliged to protect the environment and the cultural heritage (sometimes stated to include natural areas or objects of beauty and distinction)

ii) the State shall ensure a balanced ecology and the effective protection of the environment

iii) everyone has the right to full, up-to-date information on the state of the environment.

Irish national environmental policy has been based on the key principles of sustainable development, precautionary action, integration with all other policies, polluter liability and the necessity for broadly-shared public responsibility. Some of these have been given legal expression in Section 52 of the Environmental Protection Agency Act 1992. The provisions relating to environmental impact assessment of proposed developments and to environmental audit are of special significance.

Discussion

Ireland's commitment to a progressive environmental policy is well established and, as a member of the European Union, the State is bound by EU policy on the environment as stated in Article 130r of the Treaty of Rome (as amended at Maastricht).

Although the Review Group as a whole recognises the importance of environmental protection, some members would not favour constitutional provisions at this stage, preferring to rely on an evolutionary legislative process which has already afforded significant protection.

It would, in any case, be incautious to insert forthwith in the Constitution unqualified personal rights in relation to the environment. The consequences would be unpredictable. The gates might be opened to a flood of claims on public funds for damage attributed to alleged defects in air, water, roads or other aspects of the environment.

Subject to this risk being avoided, the majority of the Review Group favours a basic constitutional statement of the State's responsibility in relation to the environment.

Recommendation

The majority of the Review Group favours the inclusion in the Constitution of a duty on the State and public authorities as far as practicable to protect the environment, to follow sustainable development policies, and to preserve special aspects of our heritage.

Such a provision could constitute a new Article or be incorporated in Article 10. Legislation would remain the chief source of specific provisions aimed at safeguarding the environment.

New Provision

Human Rights Commission

Introduction

If one were drafting the fundamental rights provisions of an entirely new Constitution for Ireland, there would be significant differences between the existing provisions, Articles 40-44, and the new. The new provisions would be more rights-focused in their formulation, individual human beings would be more clearly identified as the holders of these rights, the limitations on the exercise of the rights would be specified with greater precision, and the list of rights would be longer.

The fundamental rights provisions bear the historical imprint of the 1930s. World events since that time have highlighted the need for strong legal protection of human rights and have generated action at both the national and the international levels to achieve this. In particular, the massive human rights violations during World War II and immediately preceding it meant that the promotion and protection of human rights and fundamental freedoms was a major concern of the peace settlement. States committed themselves to the pursuit of this policy, and with the establishment of the United Nations in 1945, respect for human rights became one of the pillars of the new international order.

International action has included the adoption of international instruments and procedures specifically designed to afford legal protection to human rights. The instruments range from general bills of rights to texts which deal in detail with the rights of persons belonging to specific groups such as women and children and with rights in specific contexts such as employment and education. The procedures range from the reporting by states to an international body on their human rights performance to complaints procedures whereby individuals may seek a remedy for alleged violations of their rights. Ireland is party to many of these instruments and procedures: see Appendix 20, which lists Human Rights treaties to which Ireland is party.

National action has included the incorporation in constitutions adopted since 1945 of extensive bills of rights, various legislative and administrative measures and, in recent years, the establishment in a number of countries of human rights commissions either of a general kind or dealing with particular human rights matters.

In considering the extent to which human rights are protected by the Irish Constitution, the courts have occasionally sought to keep pace with developments in other countries and with international practice by affording a liberal interpretation to various provisions so as to supplement the protection explicitly provided. This has been achieved notably by the evolution of the doctrine of unenumerated personal rights under Article 40.3 and, in the criminal sphere, by an identification of the elements of a fair trial under Article 38.1. Although welcome, these developments have not been entirely satisfactory, dependent as they have been on particular issues which have arisen before the courts and lacking in consistency because they reflect the predilections and views of individual judges.

In its work the Review Group has chosen to base its examination of human rights matters on the existing text of the Constitution rather than to approach the subject afresh. In doing so, it has not ignored the relevant international texts and provisions of other constitutions and has drawn on these in deciding whether or not to recommend the inclusion in the Constitution of additional rights or the better formulation of existing rights. It is nonetheless conscious of the fact that, within the time-frame available to it, it could not realistically address in as comprehensive and thorough a fashion as they deserve all the issues which arise in this connection.

The Review Group has, however, thought it appropriate within the context of its general review of the Constitution to consider whether it is desirable that provision should be made in the Constitution for the establishment of a human rights body or commission, the principal task of which would be to keep a watching brief on this area.

Human rights commissions

Human rights commissions of a general kind exist in a number of European and other western democracies. Perhaps the best known in Ireland of these bodies is the Northern Ireland Standing Advisory Commission on Human Rights, which publishes annual reports. This commission advises the Secretary of State for Northern Ireland on the adequacy and effectiveness of the law for the time being in force in preventing discrimination on the ground of religious belief or political opinion and in providing redress for persons aggrieved by discrimination on either ground: section 20(1) of the Northern Ireland Constitution Act 1973. Commissions also exist in other countries, including Australia, Canada, France and South Africa.

The remit of some of these bodies is limited, as is that of the Northern Ireland Standing Advisory Commission on Human Rights, to matters of discrimination and equality of opportunity, but others enjoy a mandate with regard to all human rights matters. Similarly the powers and functions of the bodies vary enormously. None is narrowly circumscribed but the scope of the functions of some bodies is much broader than that of others. Among the commissions which enjoy more extensive powers, duties and functions is the Australian Human Rights and Equal Opportunity Commission. It was established in 1986 and has described its functions in broad terms as follows at pages 11-12 of its 1993-94 *Annual Report:*

> The Commission inquires into acts or practices that may infringe human rights or that may be discriminatory. In the event that infringements are identified, the Commission recommends action to remove them. The Commission fosters public discussion and also undertakes and co-ordinates research and educational programs to promote human rights and eliminate discrimination.
>
> The Commission both advises on legislation relating to human rights and monitors its implementation. It reviews existing and proposed legislation for any inconsistency with

human rights or for any discriminatory provision which impairs equality of opportunity or treatment in employment or occupation. It examines any new international instruments relevant to human rights in order to advise the federal government on their consistency with other international treaties or existing Australian law. The Commission may also propose laws or suggest actions that the Government should take on matters relating to human rights and discrimination.

In order to be able to carry out these functions the Commission is, for example, empowered to:

- conduct inquiries into individual complaints, either on its own initiative or as the Attorney General may request, with a view to conciliation
- require individuals to produce information or documents or appear before the commission to give evidence
- report to the Government on any matters arising in the course of its functions
- establish advisory committees
- formulate guidelines which ensure Governments act in conformity with human rights rules
- intervene in court proceedings involving human rights matters
- conduct national inquiries into issues of major importance.

In addition to these broad functions, individual commissioners have specific areas of responsibility, for example in the areas of privacy and discrimination on the grounds of disability, race or sex.

A constitutional provision?

Many human rights commissions have a legislative basis, but some have been afforded constitutional status. South Africa is one of the countries which has opted to afford its commission such status. Article 106 of the new draft constitution establishes several state institutions to strengthen constitutional democracy in that country. After listing these institutions in paragraph 1, the Article continues:

2 These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.

3 Organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.

New Provision

4 No person and no organ of state may interfere with the functioning of these institutions.

5 These institutions are accountable to Parliament, and must report on their activities to Parliament at least once a year.

The constitution also addresses the functions of the Commission. Article 109 provides:

1 The Human Rights Commission must promote –

a) respect for human rights

b) the development, protection and attainment of human rights; and

c) the development of a culture of human rights in the Republic.

2 The Human Rights Commission has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, to investigate and to report on the observance of human rights, to take steps to secure appropriate redress where human rights have been violated, to carry out research, and to educate.

3 The Human Rights Commission has the additional powers and functions prescribed by national legislation.

The Review Group has drawn attention to the weaknesses in the existing fundamental rights provisions of the Irish Constitution and most members are of the opinion that there is a need for an ongoing review of whatever new provisions may be adopted in order to keep abreast of social change, international developments and advances in our understanding of human rights matters. The task of conducting such a review might be entrusted to a general human rights commission.

Some members of the Review Group favour constitutional provision for such a commission:

1 constitutional status would have certain advantages. Because the protection of human rights is fundamental to the operation of a democratic society, the establishment of a formal institution such as a human rights commission at the constitutional level to monitor the protection of human rights would provide the organisational structure which is necessary to ensure the effective implementation of human rights principles in a wide range of areas over time

2 moreover, a constitutionally established commission would to a large extent be insulated from the vagaries and pressures of the normal political process and could not be discarded without an expression of popular opinion to that effect in a referendum. Legislation can be repealed and consequently any body entirely dependent thereon can be abolished at the will of Parliament

New Provision

3 it would, furthermore, be appropriate for a body entrusted with the task of monitoring the fundamental rights provisions of the Constitution itself to have constitutional status.

These members of the Review Group also think it important that the constitutional provision include a guarantee of independence for the commission so that it does not become simply another instrument of government policy or vulnerable to particular pressure groups or political influence.

Other members of the Review Group would prefer that the commission should have, at least initially, a legislative basis. If, as with the office of the Ombudsman, its worth is proven over time, consideration could be given to affording it constitutional status (see this chapter – section on 'The Ombudsman'). The considerations in favour of an initial legislative basis include:

1 the case for constitutional status is less strong in Ireland than in countries such as the United Kingdom where there is no constitutionally-entrenched bill of rights and where the courts do not enjoy the power, as in Ireland, to rule on the constitutionality of Bills and Acts of Parliament

2 legislation could include a guarantee of independence

3 it would be politically difficult for any Government to abolish the commission or to erode its independence.

The Review Group does not envisage the Human Rights Commission having as wide a range of functions and powers as the Australian Human Rights and Equal Opportunity Commission. Its principal role would be to keep under review the constitutional and legal protection afforded human rights, to assess the adequacy of this protection and to make recommendations to government for amendment of the Constitution and reform of the law, as appropriate. In carrying out these tasks, it might engage in empirical and other research and perhaps consult with the public before making any specific recommendations for change. It would not have an adjudicative role. Complaints of human rights violations should continue to be determined by the courts, but consideration might be given to conferring upon the commission by law the competence to take a constitutional action on behalf of persons who allege that their rights have been violated and to act as *amicus curiae* in litigation. Nor does the Review Group envisage that the commission would have the power to vet proposed legislation for compatibility with the fundamental rights provisions of the Constitution, a role presently fulfilled by the Office of the Attorney General.

New Provision

Recommendation

A majority of the Review Group considers that a Human Rights Commission should be established to maintain an overview of the extent to which human rights are protected at both the constitutional and legal levels, to assess the adequacy of this protection and to make recommendations to government for the better protection of these rights, as appropriate. The preferred view is that the commission should have legislative rather than constitutional status and that, if a legislatively-based commission is established and performs well over a number of years, the desirability of affording it constitutional status should be further considered.