

Eighth Progress Report

Government

COISTE UILE-PHÁIRTÍ AN
OIREACHTAIS AR AN MBUNREACTH

THE ALL-PARTY OIREACHTAS
COMMITTEE ON THE CONSTITUTION

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The All-Party Oireachtas Committee was established on 17 December 2002. Its terms of reference are:

In order to provide focus on the place and relevance of the Constitution and to establish those areas where Constitutional change may be desirable or necessary, the All-Party Committee shall complete the full review of the Constitution begun by the two previous committees. In undertaking this review, the All-Party Committee will have regard to the following:

- a the Report of the Constitution Review Group*
- b participation in the All-Party Committee would involve no obligation to support any recommendations which might be made, even if made unanimously*
- c members of the All-Party Committee, either as individuals or as Party representatives, would not be regarded as committed in any way to support such recommendations*
- d members of the All-Party Committee shall keep their respective Party Leaders informed from time to time of the progress of the Committee's work*
- e none of the parties in Government or Opposition, would be precluded from dealing with matters within the All-Party Committee's terms of reference while it is sitting.*

The committee comprises ten TDs and four senators:

Denis O'Donovan, TD (FF), *chairman*
Pádraic McCormack, TD (FG), *vice chairman*
Barry Andrews, TD (FF)
James Breen, TD (IND)
Senator Brendan Daly (FF)
Senator John Dardis (PD)
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Peter Power, TD (FF)
Trevor Sargent, TD (GP)
Senator Joanna Tuffy (LAB)

The secretariat is provided by the Institute of Public Administration:

Jim O'Donnell, *secretary*

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

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Foreword

This report completes our survey of the Articles in Bunreacht na hÉireann that deal with the major institutions of the State.

It addresses the issues arising from the terms of Articles 28 (Government), 29 (International Relations) and 30 (Attorney General). Proposals for renumbering Article 28A have already been made in the *Seventh Progress Report*.

Denis O'Donovan TD
chairman
February 2003

GOVERNMENT

Chapter 1

Government

In its *Seventh Progress Report: Parliament* the Lenihan committee was concerned with the modern phenomenon of the Executive State – the tendency of democratic governments to gather power into their own hands to the detriment of parliament. Its recommendations were concerned in part to strengthen the position of the two Houses of the Oireachtas vis-à-vis the government.

However, modern states must act in conditions where globalisation and the operations of supra-national bodies, such as in our case the European Union and the United Nations, require decisive and speedy responses from government to secure national interests. The committee's concern here is largely to ensure that the Articles of the Constitution relating to the government are such as to make for responses that are decisive and speedy, yet meet democratic requirements.

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.

Article 28.1 and 28.7.1° – 2°: composition of the government

The operations of government are necessarily affected by how many and what kind of people form it.

The Constitution provides that there must be at least seven and at most fifteen members of the government. It stipulates that most ministers must be members of the Dáil and that the Taoiseach, Tánaiste and the Minister for Finance must always be so. Not more than two members of the government may be senators.

The Government Chief Whip attends cabinet on an administrative basis, as do some junior ministers from time to time. This system does not have, nor does it seem to require, a constitutional basis.

The Constitution Review Group recommended the retention of the limit of fifteen members. Given the core concerns of government, that number is ample. A bigger cabinet would make co-ordination and management more difficult. It would make for less efficient administration without bringing any real improvements. Conceivably, unless a limit were specified the number of cabinet posts might rise to gratify the wishes of more of the large numbers seeking such posts.

The committee agrees that the provision for the number of members of the government should not be changed.

28.3.3° *Nothing in this Constitution other than Article 15.5.2° 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 sub-section '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 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.*

The Constitution Review Group also considered whether persons who are not members of either the Dáil or Seanad might be appointed to the government. Governments in some countries contain 'executive experts'. The Constitution Review Group presented the arguments on both sides as follows:

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.

It concluded:

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 Constitution 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.

The committee agrees with this.

There is no necessity for a constitutional framework for Ministers of State, who would continue to be regulated by law.

The committee has considered the possibility of instituting a system of parliamentary private secretaries along the lines of the UK model, so that government TDs might gain some experience of ministerial work and assist ministers with parliamentary activity without the necessity to create further posts at Minister of State level. The committee considers that this proposal merits further consideration. However no constitutional change is required in this regard.

Likewise matters such as the allocation of portfolios, the relations between departments and between ministers and civil servants, and the recruitment, accountability and conduct of civil servants or special advisers are matters best left to legislation.

The committee is conscious that, where functions are devolved from the civil service proper to state bodies, a degree of ministerial control and accountability is removed.

State bodies are established by government to carry out prescribed functions on behalf of the people of Ireland. They are independent

28.4.3° *The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter—*

- i in the interests of the administration of justice by a Court, or*
- ii by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the Government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance.*

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

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.*

of the civil service because they need a greater measure of freedom than could be assured to them in the context of the civil service. They are wholly owned or substantially owned by the state, but are controlled by independent boards which are appointed by and are responsible to ministers and government.

State bodies enjoy freedom from interference in day-to-day operations but they must conform generally to government policy and operate in a manner that serves the best interests of the people. Each state body comes under the control of a minister and his or her department. The reporting arrangements must be such as to allow the minister to account to Dáil Éireann with confidence about the policies and performance of the state body in support of government strategy on behalf of the people.

The government has sought to deal with the problem of how to give state bodies the greater degree of freedom which it is felt they should have while at the same time securing the level of accountability that every state body should provide. It has issued the *Code of Practice for the Governance of State Bodies*. The *Code*, introduced on 4 October 2001, is mandatory. In effect it requires the boards of state bodies to ensure that a system of reporting and auditing is installed in each body such that its board can assure itself that the body is operating effectively and efficiently. In turn, this corporate governance system can be used to enable ministers to assure themselves that the bodies under their departments are working effectively and efficiently.

A minister is obliged to attend the Dáil or one of its committees from time to time to answer questions on the problems, conduct or performance of state bodies reporting to his or her department. A minister is expected to have a commanding knowledge of the affairs of the body. Board members, including the chairperson, the chief executive officer as well as representatives of the sponsor department, may also be summoned to appear before Oireachtas committees.

The committee welcomes this system of corporate governance and wishes to see it deeply embedded throughout the public service because that would enable members of the Houses of the Oireachtas to assure themselves on behalf of the people 1) that corporate objectives of state bodies were being pursued efficiently and effectively and 2) that consumers of the services of state bodies would enjoy a well-articulated complaints system (that is an important element in the corporate governance system), whose final appeal would be to the Houses of the Oireachtas.

Recommendation

Article 28.1 and Articles 28.7.1° – 2°

No change is proposed.

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*

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*

Article 28.2: executive power of state

No change is necessary in this provision.

Recommendation

Article 28.2

No change is proposed.

Article 28.3.1° and 2°: war and neutrality

Article 28.3.1° makes the consent of Dáil Éireann necessary before Ireland can participate in any war. Article 28.3.2° provides that in the case of actual invasion the government has unlimited powers necessary to protect the state.

Declaring war has largely become an outmoded formality. The Constitution Review Group observed:

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 committee agrees with this approach in principle. However in practice the issue may not be of major significance since Irish involvement in international armed conflict is submitted for Dáil approval in major instances. As an alternative to the constitutional amendment suggested by the Review Group, legislation could be introduced to the same effect.

The Constitution Review Group also considered whether neutrality should be written into the Constitution. Articles 29.1- 4 commit the state to the peaceful resolution of conflict and provide that the executive power of the state in its external relations shall be exercised by or on the authority of the government. The Constitution Review Group observed:

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.

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.*

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.*

The Constitution Review Group concluded that neutrality in Ireland has always been a policy as distinct from a fundamental law or principle. It saw no reason to propose a change in this position.

As against this position it is clearly desirable that the people would have a say in this fundamental aspect of the state's international relations. Indeed having regard to decisions such as the *Crotty* case, it could be argued that neutrality, in the sense of non-membership of a military alliance involving a mutual defence commitment, is already an implicit feature of the constitutional scheme of sovereignty.

The issue of neutrality assumed a greater importance with the defeat of the first Nice referendum on 7 June 2001 when an opinion survey taken afterwards showed that it was the principal concern of those voting against the treaty.

In the second Nice referendum on 19 October 2002, which was approved by the people, the amendment included the following provision:

9° The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 1.2 of the Treaty referred to in subsection 7° of this section where that common defence would include the State.

This subsection prevents the state from adopting a decision to establish a common defence pursuant to Article 1.2 of the Treaty of Nice where that common defence would include Ireland. To adopt such a decision would require a referendum to delete this subsection. This subsection therefore reflects the commitment given in the National Declaration made at Seville on 21 June 2002.

As regards Article 28.3.2°, the Committee notes that in the Irish text there is no word corresponding to the word 'actual' in the English text.

The 1967 Committee considered that the term 'actual' in any event was too narrow and should be widened to include 'apprehended' attack. They stated:

In considering this question of emergencies, it is necessary to look also at the wording of Article 28.3.2°. This provision gives power to the Government to take whatever steps may be necessary for the protection of the state in the case of actual invasion. Our attention has been drawn to the fact that in view of developments in long-range warfare since the Constitution was enacted, the expression 'in the case of actual invasion' is no longer appropriate. We agree that an

amendment should be introduced to cover also apprehended attack by un-manned missiles or other modern weapons which might not necessarily involve the presence of human enemies on the national territory.

The committee agrees with this.

Recommendation

Article 28.3.2°

After 'actual' insert 'or apprehended'.

Article 28.3.3°: state of emergency and time-limit

The emergency powers given in Article 28.3.3° belong to the legislature rather than the executive and they need not depend on a war or armed rebellion in Ireland but can be invoked in the case of conflicts occurring abroad if each House of the Oireachtas resolves that the 'vital interests of the State' are affected. Once these emergency powers are adopted the Constitution cannot be relied on to invalidate any Act which invokes the state of emergency. If literally interpreted, as well as suspending individual rights, the Article 28.3.3° procedure could in theory lead to the rewriting of the Constitution.

The 1967 Committee on the Constitution considered this provision and concluded that a time limitation should be introduced on resolutions under this Article. They stated:

Article 28.3.3° of the Constitution as adopted in 1937 provided, in effect, for the suspension of certain provisions of the Constitution in time of war or rebellion. By an amendment made in 1939 the expression 'time of war' was amplified to include a time of armed conflict outside the State provided each House of the Oireachtas resolves that a national emergency arises out of such conflict. By a further amendment made in 1941 the period during which these powers can be availed of was extended to go beyond the end of hostilities until such time as the Houses of the Oireachtas resolve that the national emergency has ceased to exist.

The Emergency Powers Acts were founded on these constitutional provisions. Those Acts have now gone out of force but the relevant resolutions by the Dáil and Seanad still continue in being. The Oireachtas could, therefore, enact into law at the present time Emergency Powers measures similar to those which were in operation during the War. In effect,

this means that the Government has power to suspend certain provisions of the Constitution in peace time, although it must be borne in mind that the approval by resolution of the Seanad as well as the Dáil must be obtained. This situation has given rise to a good deal of criticism particularly on the part of constitutional lawyers and we have carefully examined the views offered in this connection.

We think it relevant to explain, in regard to the fact that resolutions of the Dáil and Seanad declaring a national emergency during World War II are still in existence, that international conditions have influenced successive Governments on this particular subject. In the absence of formal peace treaties between the contestants involved in the war, it has always been deemed prudent to maintain a state of readiness for emergency conditions in this country. The annulment of the resolutions might, possibly, also have given rise to some political misunderstandings in relation to some of the belligerent countries and this was regarded as a further reason for leaving the matter rest. We are of the opinion, however, that the time has now come to devise a formula which will answer in some way the complaints which have been made against the continuance in effect of the relevant resolutions.

We considered, in particular, a suggestion that provision should be made for allowing judicial determination of the question whether or not an emergency has ended. We have come to the conclusion, however, that the matters at issue here are of such a nature that the involvement of the courts is unlikely to provide a satisfactory solution. In our view, political rather than judicial considerations are relevant here, and if any improvement in Article 28.3.3° is to be effected, it must be on the basis of a political formula. We recommend, accordingly, that consideration should be given to the question of adding to Article 28.3.3° a clause providing that resolutions declaring an emergency shall have effect for a period of three years only unless renewed by further resolutions of the Dáil and Seanad. Some special interim arrangements would, of course, have to be made in relation to the existing resolutions. It would probably also be necessary to make some provision for a situation in which the Oireachtas is unable, because of emergency conditions, to meet at the end of the proposed three-year period.

The Constitution Review Group also considered 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 the preservation of certain rights during that period. The Constitution Review Group observed:

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 Constitution Review Group noted that the current provision of 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.

The committee agrees with this.

The list of fundamental rights to be protected will certainly include the right to protection from torture. Since the establishment of the Committee, the Constitution has been amended to provide that the emergency legislation may not include introduction of the death penalty. The committee has not at this stage formulated a full catalogue of entrenched fundamental rights, as this matter would require consideration in the context of a review of the rights provisions of the Constitution.

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.*

15.5.2° *The Oireachtas shall not enact any law providing for the imposition of the death penalty.*

Recommendation

Amend Article 28.3.3° to read:

3° Nothing in this Constitution other than Article 15.4.2° and Article 15.5.2° 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

other armed conflict or armed rebellion, or to nullify any act done or purporting to be done in time of war or other armed conflict 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 other armed conflict 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 Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist or until the resolution ceases to have effect in accordance with this subsection. A resolution of a House of the Oireachtas pursuant to this subsection shall have effect for the period specified therein not being a period greater than one year, and such resolution may be renewed by another resolution subject to that requirement.

Article 28.4.1°: responsibility of Government to Dáil Éireann

This provision is satisfactory and does not require change. The responsibility of the Government to Dáil Éireann does not exclude the possibility that the Government could be called to account in other fora such as the Seanad, as it is at present through for example adjournment debates or a possible question time in the Seanad. In the UK, government responsibility to the House of Commons has not been found to be incompatible with a regular question time in the Lords.

Recommendation

Article 28.4.1°

No change is proposed.

Article 28.4.2° – 3°: cabinet confidentiality

Article 28.4.2° provides that the government shall meet and act as a collective body and shall be collectively responsible (to the Dáil) for the departments of state, administered by the members of the government. This provision for the collective responsibility of government reflects the practice which now predominates in Europe and many other parts of the world. The need for cabinet confidentiality, that is to say for the maintenance by each member of the cabinet of confidentiality in regard to the discussions leading to cabinet decisions, is a requisite of collective responsibility.

Cabinet responsibility is achieved through a weave of three principles:

- 1 *the confidence principle*: this principle allows a cabinet to continue in office so long as it maintains the confidence of a majority in the Dáil.
- 2 *the unanimity principle*: because confidence rests in a cabinet, that is to say a collective body, the decisions of the cabinet must be presented as unanimous ones – the only way to record dissent from a government decision is to resign.
- 3 *the confidentiality principle*: this principle ensures that discussions in cabinet about government decisions are absolutely confidential.

Cabinet confidentiality supports the unanimity principle and in turn supports the confidence principle and is a feature of European cabinet government (see Appendix 1).

Cabinet confidentiality became an issue in 1992 when the Supreme Court in the case of *The Attorney General v Hamilton* held that absolute confidentiality applied to the details of discussions at cabinet meetings. The case suggested that the privilege was not capable of being waived by individual members.

This ruling prevented the Beef Tribunal from considering any evidence relating to cabinet discussion of the credit insurance scheme for beef exports. The ruling would apply to subsequent tribunals including the one that the Oireachtas proposed to establish in relation to payments to politicians.

The government wished to allow tribunals access to pertinent cabinet deliberations on a tightly controlled basis so that they could carry out their work successfully. In 1997, it introduced a constitutional proposal to govern cabinet confidentiality as follows:

The confidentiality of discussions at meetings of the Government shall be respected in all circumstances save only where the High Court determines that disclosure should be made in respect of a particular matter -

- i in the interests of the administration of justice by a Court
or
- ii by virtue of an overriding public interest, pursuant to an application in that behalf by a tribunal appointed by the government or a Minister of the Government on the authority of the Houses of the Oireachtas to inquire into a matter stated by them to be of public importance.

The proposal was accepted by the people in the referendum of 30 October 1997.

On its passage through the Oireachtas the proposal attracted criticism. The major criticism was that it was too restrictive:

- 1 a minister, resigning on foot of matters discussed in cabinet, could not give a public explanation
- 2 a minister would be prevented from disclosing cabinet discussions in a memoir
- 3 documents relating to discussions which took place at cabinet meetings could not be released under the thirty-year rule
- 4 doubt would attend the propriety of ministers briefing their advisors and civil servants on decisions taken by the cabinet.

In November 1997 and again in February 1998, the Taoiseach indicated that he would be willing to entertain changes at a later stage on the basis of any recommendations made by the All-Party Oireachtas Committee on the Constitution.

The committee's concern here therefore is to examine the criticisms listed above. In the committee's view the criticisms are sufficiently weighty to require a response. The response might take either of two forms:

- a) each of the exceptions could be provided for specifically

This approach would make for clarity but also rigidity because in the course of time other circumstances might become apparent where cabinet confidentiality would be undesirable from the point of view of the common good.

- b) exceptions might be treated generically, leaving it to legislation to specify exceptions from time to time

This approach would make for both clarity and flexibility. It was the approach favoured by the Labour Party in the Dáil debate. It proposed that the amendment should be introduced by the expression. 'Except in such limited cases as may be prescribed by law'. This approach also would have the value of cohering with the general constitutional approach, namely to lay down principles in the Constitution and leave to legislation the specification of how they are to be applied.

The committee favours the second form of response.

Recommendation

Delete Article 28.4.3° and substitute:

3° The confidentiality of discussions at meetings of the Government shall be respected save in such limited cases as may be prescribed by law.

Article 28.4.4°: estimates

This Article is satisfactory and does not require amendment.

Recommendation

Article 28.4.4°

No change is proposed.

Article 28.5 and 28.6.1°: Taoiseach and Tánaiste

The terms of Article 28.5 are largely repetitive of Article 13.1.1°. The only new element introduced therein is the statement that the head of Government shall be ‘called’ the Taoiseach, although Article 13.1.1° simply refers to him or her as the Taoiseach.

It would be desirable if this repetition could be cleared up by an appropriate amendment of either or both of these provisions.

The wording of Article 28.5.2° is satisfactory. Likewise Article 28.6.1° does not give rise to difficulty.

Recommendation

Article 28.5 and/or Article 13.1.1° should be amended to remove the repetition in the provisions.

Article 28.6.2°-3°: arrangements for continuity

Article 28.6.2°-3° provides for the Tánaiste to act for the Taoiseach in certain circumstances. It makes no disposition for a situation in which the Taoiseach and the Tánaiste are unable to act. The Constitution Review Group recommended that an express constitutional amendment should be made for the nomination of a senior minister should such a situation arise.

The committee agrees with this.

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.

Recommendation

Add a further subsection to Article 28.6 as follows:

28.6.4° Where both the Taoiseach and the Tánaiste have died or have become permanently incapacitated, or during the temporary absence of both the Taoiseach and Tánaiste, the senior available member of the Government shall act for or in the place of the Taoiseach, and for the purposes of this subsection, seniority shall be defined in accordance with a procedure prescribed by law.

Article 28.8 to 28.12: right to attend the Oireachtas, procedures for resignation

These provisions are satisfactory and do not require amendment. The Constitution Review Group was attracted to consideration of a procedure for a constructive vote of no confidence. They stated:

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 could 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.

However the existing provisions work well and the committee sees no need for change.

Recommendation

Article 28.8 to 28.12

No change is proposed.

Chapter 2

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.

29.4.1^o 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^o 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

In the Constitution the government is given the responsibility of formulating Ireland's foreign policy and conducting its relations with other states. In carrying out this responsibility the state 'accepts the generally recognised principles of international law as its rule of conduct' (Article 29.3) and 'pledges itself to the pursuit of peace and friendly co-operation among nations based on international justice and morality' (Article 29.1).

Article 29.1 and 2

The Constitution Review Group regarded these sections of Article 29 as uncontroversial and recommended no change. The committee agrees.

Recommendation

Articles 29.1 and 2

No change is proposed

Article 29.3

Section 3 of Article 29 provides that the state accepts the generally recognised principles of international law as its 'rule of conduct' in its relations with other states.

The Review Group was fundamentally divided on the issue of whether the status of international law should be strengthened.

The committee considers that the state should, in general, comply with international law or at least the generally or universally recognised principles of international law, as opposed to regarding international law as a guideline. At the least, international law should be binding on the state in its international relations and in Irish law unless there is a provision of domestic law to the contrary. This would retain necessary flexibility while promoting international legality. This option is not considered in the report of the Review Group. Furthermore international law – once thought to apply to relations only between states – now frequently confers rights directly on individuals, and we consider that the wording of the section should reflect that new reality.

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 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° *The State may ratify the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts signed at Amsterdam on the 2nd day of October, 1997.*

29.4.6° *The State may exercise the options or discretions provided by or under Articles 1.11, 2.5 and 2.15 of the Treaty referred to in subsection 5° of this section and the second and fourth Protocols set out in the said Treaty but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.*

Recommendation

Add to Article 29.3 after 'States'

and in its relations with individuals, and shall be bound by those principles save where provision is made by law to the contrary.

Article 29.4.1° and 2°

Section 4 of Article 29 provides in subsection 1° that the executive power of the state is to be exercised by or on the authority of the government in connection with international relations.

The Review Group considered that no change was necessary, stating:

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.

The committee agrees.

Subsection 2° however is obsolete because it was designed to facilitate membership of the Commonwealth. The deletion of the provision would not in any event introduce an obstacle to the membership by the state of any international organisation. The Review Group proposed deletion, stating:

29.4.7° *The State may ratify the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts signed at Nice on the 26th day of February, 2001.*

29.4.8° *The State may exercise the options or discretions provided by or under Articles 1.6, 1.9, 1.11, 1.12, 1.13 and 2.1 of the Treaty referred to in subsection 7° of this section but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.*

29.4.9° *The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 1.2 of the Treaty referred to in subsection 7° of this section where that common defence would include the State*

29.4.10° *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.*

29.4.11° *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 29.4.2° 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.

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 and 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.*

29.7.1° *The State may consent to be bound by the British-Irish Agreement done at Belfast on the 10th day of April, 1998, hereinafter called the Agreement.*

29.7.2° *Any institution established by or under the Agreement may exercise the powers and functions thereby conferred on it in respect of all or any part of the island of Ireland notwithstanding any other provision of this Constitution conferring a like power or function on any person or any organ of State appointed under or created or established by or under this Constitution. Any power or function conferred on such an institution in relation to the settlement or resolution of disputes or controversies may be in addition to or in substitution for any like power or function conferred by this Constitution on any such person or organ of State as aforesaid.*

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.

29.8 *The State may exercise extra-territorial jurisdiction in accordance with the generally recognized principles of international law.*

29.9 *The State may ratify the Rome Statute of the International Criminal Court done at Rome on the 17th day of July, 1998.*

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.

The committee agrees with the first of these proposals and recommends the deletion of Article 29.4.2°.

The Review Group rejected the proposal to provide an express protection for making international treaties. They stated:

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.

The committee agrees with this.

The Review Group however went on to recommend change in connection with the UN by making an express provision for membership:

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.

However the committee finds the arguments against more compelling. Such an amendment is in the committee's view legally unnecessary having regard to the strong provisions of Article 29.1 and 29.2. Furthermore such an amendment could create legal ambiguity where none exists over the past membership of the UN or other organisations.

No change is therefore proposed in connection with UN membership.

Recommendation

Delete Article 29.4.2°.

Article 29.4.3° to 11°: membership of the European Union

The committee strongly supports continued Irish participation in the European Union, for the benefit of our own economy and society as well as for the benefit of our partners and in particular the candidate countries of Eastern Europe.

A major constitutional issue that arises in connection with the EU is implementation of EU law.

The Constitution provides cover for measures of EU bodies or 'necessitated' by membership, and for the exercise of certain options under the EU treaties.

In practice however this has enabled many EU measures to be transposed through regulations, rather than by way of Bills in a transparent fashion. This is clearly an undesirable practice which

should not be used in any case of importance or where primary law is being amended.

Article 29.5 and 6

These provisions underpin our ‘dualist’ system of international law.

The Review Group considered a proposal to delete Article 29.5.3°. They stated:

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.

The Review Group recommended that Article 29.5.3° be amended 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. The Review Group in short favoured a hybrid proposal whereby only those technical and administrative agreements involving a charge on public funds would go before the Dáil. The committee feels that this is unsatisfactory and overcomplicated and recommends the simple deletion of Article 29.5.3°.

Recommendation

Delete Article 29.5.3°.

The Review Group saw no need for change in Article 29.6, stating:

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.

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.

The committee agrees that no change is necessary.

Chapter 3

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.*

Article 30: the Attorney General

In its analysis of the office of the Attorney General, the Constitution Review Group made one recommendation for constitutional change, namely, that the constitution should expressly permit delegation of the Attorney General's functions to another senior lawyer with the approval of the Taoiseach.

The Review Group argued:

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 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

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.*

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.*

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.

The committee disagrees with this. Indeed the recommendation is strikingly at odds with the position regarding for instance delegation of ministerial functions. In that case, there is no provision for delegation and the Review Group made no such recommendation.

There can be no possible argument that the functions of Attorney General cannot be delegated – indeed such functions are frequently delegated, as are the functions of most if not all other constitutional officers.

For this reason we see no need to provide express mention of the possibility of a deputy Attorney General or an assistant Attorney General, because such positions could if thought desirable be established by law or indeed even administratively.

The Review Group also addressed the issue of whether the Attorney General should be answerable to the Oireachtas and concluded that because the Attorney General's relationship to the government is that of lawyer to client, accountability should be to the Taoiseach and not to the Houses of the Oireachtas.

The committee agrees with this.

The issue of whether the Attorney General should be a member of the Oireachtas was examined by the Review Group. Its conclusion was that in view of the nature of the role of legal adviser to the government the selection for the office should be made from the widest possible range of candidates and that therefore the Attorney General could be but need not be a member of the Oireachtas.

The committee agrees.

Finally the Review Group turned its attention to the role of the Attorney General as 'guardian of the public interest', deriving from section 6 of the Ministers and Secretaries Act 1924 which mentions 'the assertion and protection of public rights'.

In considering whether the responsibilities of 'guardian of the public interest' should be borne by someone other than the Attorney General the Review Group concluded as follows.

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.

For the purposes of clarity it should be stated that such a lawyer would act on behalf of the Office of the Attorney General instructed by an appropriate official in that office, and not in some free-floating position.

No change in the Constitution is required to facilitate the carrying on of the public interest role in such circumstances.

Recommendation

Article 30

No change is proposed.

Chapter 4

Summary of recommendations and conclusions

Government

Article 28.1 and 28.7.1° – 2°: composition of the government

Recommendation

Article 28.1 and Articles 28.7.1° – 2°
No change is proposed.

Article 28.2: executive power of state

Recommendation

Article 28.2
No change is proposed.

Article 28.3.1° and 2°: war and neutrality

Recommendation

Article 28.3.2°
After 'actual' insert 'or apprehended'.

Article 28.3.3°: state of emergency and time-limit

Recommendation

Amend Article 28.3.3° to read:

3° Nothing in this Constitution other than Article 15.4.2° and Article 15.5.2° 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 other armed conflict or armed rebellion, or to nullify any act done or purporting to be done in time of war or other armed conflict 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 other armed conflict 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 Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist or until the resolution ceases to have effect in accordance with this subsection. A resolution of a House of the Oireachtas pursuant to this subsection shall have effect for the period specified therein not being a period greater than one year, and such resolution may be renewed by another resolution subject to that requirement.

Article 28.4.1°: responsibility of Government to Dáil Éireann

Recommendation

Article 28.4.1°

No change is proposed.

Article 28.4.2° – 3°: cabinet confidentiality

Recommendation

Delete Article 28.4.3° and substitute:

3° The confidentiality of discussions at meetings of the Government shall be respected save in such limited cases as may be prescribed by law.

Article 28.4.4°: estimates

Recommendation

Article 28.4.4°

No change is proposed.

Article 28.5 and 28.6.1°: Taoiseach and Tánaiste

Recommendation

Article 28.5 and/or Article 13.1.1° should be amended to remove the repetition in the provisions.

Article 28.6.2°-3°: arrangements for continuity

Recommendation

Add a further subsection to Article 28.6 as follows:

28.6.4° Where both the Taoiseach and the Tánaiste have died or have become permanently incapacitated, or during the temporary absence of both the Taoiseach and Tánaiste, the senior available member of the Government shall act for or in the place of the Taoiseach, and for the purposes of this subsection, seniority shall be defined in accordance with a procedure prescribed by law.

Article 28.8 to 28.12: right to attend the Oireachtas, procedures for resignation

Recommendation

Article 28.8 to 28.12

No change is proposed.

International Relations

Article 29.1 and 2

Recommendation

Article 29.1 and 2

No change is proposed

Article 29.3

Recommendation

Add to Article 29.3 after 'States'

and in its relations with individuals, and shall be bound by those principles save where provision is made by law to the contrary.

Article 29.4.1° and 2°

Recommendation

Delete Article 29.4.2°.

Article 29.4.3° to 11°: membership of the European Union

The committee strongly supports continued Irish participation in the European Union, for the benefit of our own economy and society as well as for the benefit of our partners and in particular the candidate countries of Eastern Europe.

A major constitutional issue that arises in connection with the EU is implementation of EU law.

The Constitution provides cover for measures of EU bodies or 'necessitated' by membership, and for the exercise of certain options under the EU treaties.

In practice however this has enabled many EU measures to be transposed through regulations, rather than by way of Bills in a transparent fashion. This is clearly an undesirable practice which should not be used in any case of importance or where primary law is being amended.

Article 29.5 and 6

Recommendation

Delete Article 29.5.3°.

Attorney General

Article 30: the Attorney General

Recommendation

Article 30

No change is proposed.

APPENDICES

Appendix 1

Cabinet confidentiality in some other countries

A survey undertaken in February 1995 of the legal and constitutional protections given to cabinet discussions in a number of other countries showed that our EU partners mostly observed rather strict regimes. In some countries, such as France and Denmark, the practice is derived from custom or convention, while in others such as Germany and Spain the rule is more formal, having been established either by law, the constitution or through the courts.

Austria

There is a requirement of qualified rather than absolute confidentiality attached to deliberations of the government. The qualified requirement derives from the provisions of the constitution relating to official secrecy. These impose the obligation of secrecy on officials of organs of government, federal, regional and local; this includes members of the cabinet.

The matters to which the obligation of secrecy applies are those which officials (and ministers) become aware of exclusively from the discharge of their offices. Secrecy required is (a) for the preparation of decisions involving maintenance of public peace, order and security; defence in all its aspects; foreign relations; the commercial interest of a body constituted by public law; or (b) in the predominant interests of the parties.

There exists also a corresponding obligation in the constitution on officials (including ministers) to divulge information within their area of responsibility to the extent not forbidden by official secrecy.

Under the secrecy legislation

- the opinions expressed by cabinet members in dealing with cabinet business may never become the subject of interrogation or questioning
- ministers and state secretaries, ex-ministers and ex-state secretaries may only be questioned on decisions/resolutions and on the basis for such decisions taken at a cabinet meeting if the cabinet, at the request of a commission (established by parliament), has waived the obligation to secrecy

- with regard to ex-ministers and state secretaries where the case involved took place during their time in office, this reaffirmation is made by the prime minister.

Denmark

There are no specific constitutional or statutory provisions relating to cabinet confidentiality. The only potentially relevant statutory provisions relate to criminal use of classified information which might damage national security.

The Danes accept that the functioning of government requires confidentiality of cabinet proceedings. There is therefore a political convention that cabinet discussions/differences should not be made public. While Danish governments are almost invariably coalitions, the practice is that only the prime minister briefs journalists on the outcome of cabinet meetings. (An official in the prime minister's office however agreed that, in practice, cabinet divisions are on occasion made known to journalists.) Moreover, the very open and widely applied Danish freedom of information statutory provisions apply neither to documents prepared for cabinet nor to the conclusions drawn up after cabinet meetings. These documents are not therefore available to the public.

Finland

The laws governing cabinet confidentiality apply also to the whole administration and are based on the principle that every citizen is entitled to access to all materials handled by the administration, an exception being relations with foreign countries. The law dates from the time before 1808 when Finland was part of the Swedish kingdom.

In practice, the situation is as follows.

There is a formal meeting of the cabinet (at which the president may or may not be present) every Friday. When a decision is taken the public is informed (by way of a press release) of the decision, of the background leading to the decision, and, in the event of a vote, of who voted, how and why. Occasionally an individual member of the cabinet, including the president, or a group of members, may give a public explanation of a vote. This usually happens only when serious rifts emerge involving a difference of view between the president and the government. This system does not apply to matters which are classified as secret or as top secret but does apply, according to the prime minister's office, to 95% of cabinet discussions, including many aspects of foreign relations.

It should be noted that the practice is only applicable to decisions taken in formal cabinet meetings and that agenda items are confidential until decisions are taken.

A different regime applies to the informal weekly cabinet meetings (so called 'evening schools'). These, as well as the matters discussed in cabinet committees, which form an integral and extensive element in government, are confidential. However, occasionally word will leak of the deliberations of the informal cabinets. Such leaks are tolerated and a perpetration of a leak would only be prosecuted if the leak involved fundamental national security issues in a crisis. In addition, the work of the cabinet committees is usually discussed at some stage in the full formal cabinet, leading to decisions and eventual disclosure. It is extremely rare that foreign or defence policies are leaked, though in the fullness of time reference is made to them in memoirs, etc.

France

There are no specific constitutional or statutory provisions relating to cabinet confidentiality. There is a convention whereby absolute confidentiality is accorded to cabinet discussion. This convention may only be broken by agreement between the president and the prime minister. This happens extremely rarely.

Germany

The Federal Constitutional Court in 1984 determined that the responsibility of government to parliament and people involves a core area of executive responsibility into which neither has a right of enquiry. Included in this core area is the elaboration of informed opinions by the government, involving discussions in cabinet, preparation of these discussions and minutes of these meetings. Neither parliament nor the courts therefore, can require the government to disclose its business. This principle is strictly observed and the confidentiality of cabinet proceedings remains absolute for 30 years.

The application of the principle is governed by government and ministerial rules of procedure which allow the Federal Chancellor to decide the extent to which government proceedings may be disclosed. Cabinet meetings on Wednesday mornings are followed by government question time in the Bundestag (when it is in session) at 1 pm and by a press conference at 3 pm. At question time the relevant ministers may answer questions on government business to the extent permitted by the Chancellor. This involves a positive presentation of the matter on hand and ministers must avoid issues which gave rise to controversy in cabinet. The

Bundestag has no right as such to information, but it is deemed desirable in the interests of as much openness as possible in government that the house should be informed as far as it is expedient to do so. The present system of government question time has been in effect since October 1988.

The same principle of positive presentation is employed at the press conference. This is held by the government spokesman who enjoys a general authority from the Chancellor to reveal at his own discretion as much as is expedient. Here, too, controversial issues at cabinet are not disclosed.

The minutes of government meetings are treated with strict confidence. The keeper of the minutes may reveal government decisions, but only does so in such cases where these decisions are final and not provisional in character. As regards the minutes themselves, these are strictly confidential and only reproduced in seventy copies which are made available to different ministers. They are then seen by state secretaries and subsequently retained in ministerial cabinets where they may be consulted by heads of division so that they can determine what action needs to be taken. Division heads may not take copies of the minutes but may take notes for their own guidance.

Greece

There are no constitutional provisions relating to cabinet confidentiality, but the Council of Ministers Act 1990 contains regulations governing it.

It provides:

- 1) the official records of the Council of Ministers are confidential and remain so for thirty years. The keeping of confidential records is an obligation of the secretary of the Council and of all the personnel of the secretariat
- 2) the official records are bound books, which are filed annually under the title 'Official Records of the Council of Ministers' and are kept in the secretariat of the Council. The official records of top secret matters are kept by the prime minister himself
- 3) the secretary of the Council of Ministers may supply extracts from the official records of the Council of Ministers upon relevant application by the members of the government and ministers of state
- 4) the extracts from the official records, shall consist of the date of the meeting, the presences and absences during the meeting,

the name of the secretary of the Council and the extracts of Acts of Decisions taken by the Council of Ministers.

The regulations essentially provide that the proceedings of government meetings must remain confidential for a period of thirty years. This is an absolute law in the sense that the proceedings may not be publicised for that period. However, extracts from the record of the proceedings may be made available to members of the government (for information purposes) subject to certain conditions.

Italy

There is no constitutional or legislative provision for cabinet confidentiality. Cabinet confidentiality is governed by a decree of the president of the Council of Ministers (prime minister) entitled 'Internal Regulations of the Council of Ministers' (10/11/93). Article 13 of this decree, entitled 'Publicity of official acts', states:

- 1 the minutes of the Council of Ministers are a reserved item. Those who may see them at any time are ministers but also presidents of regions with special status and of the autonomous provinces of Trento and Bolzano on agenda items at which they were present.
- 2 the president of the Council of Ministers may authorise other persons to view the minutes, also in relation to particular points on the order of business, except where the Council of Ministers has taken a contrary decision.

The confidentiality rule is therefore qualified. Apart from the specific rights of ministers and presidents of the regions with special status and of the presidents of autonomous provinces (who have rights in relation to attendance at government meetings in certain circumstances), in practice the president of the Council (prime minister) makes cabinet minutes available, on request, to:

- a) the courts, but only in relation to administrative decisions, never in relation to political discussions
- b) professors and students to assist historical studies.

Norway

There are no specific constitutional or statutory provisions relating to cabinet confidentiality. There is a political convention that current cabinet proceedings are kept confidential. It appears to be fairly strictly observed particularly when seen in the context of the

very open Norwegian governmental system. There is also a long-established political convention that cabinet papers belong to the prime minister of the day who could, in theory, choose to make them public at any time. However, according to an official in the Norwegian prime minister's office, papers with any operational significance are not released.

Portugal

The regime governing cabinet confidentiality stipulates:

- 10.1 Any proposals to be submitted, or which have been submitted, to the cabinet may not be made public.
- 10.2 With the exception of what is provided for under provision 7 (see below) the agendas, the views, the discussions, the decisions and the summing up of cabinet meetings will be confidential.
- 10.3 The cabinets of members of the government must take the necessary steps to prevent any infringement of this confidentiality.

The secretary of state of the prime minister's office prepares a final communiqué of each cabinet meeting and forwards it to the media.

Portugal in practice applies a fairly rigorous system of cabinet confidentiality. The communiqué issued after each cabinet meeting is a bland affair, stating, for example, that the government decided to officially sign or ratify a certain convention. It gives no information on policy issues which may have been discussed or on matters on which no decisions were taken. The daily newspapers publish the communiqué without comment.

Spain

There is no constitutional provision for cabinet confidentiality. However, the law governing the confidentiality of cabinet deliberations is absolute (Royal Decree 707/79 of 5 April, 1979). As a matter of practice the government spokesman, in briefing the media each Friday, from time to time in reply to journalists' questions, may indicate in a general way that 'such a minister made such a point and that such and such a consensus emerged ...' This is, however, seen as authorised routine leaking of policy by the spokesman on behalf of the government as a whole and is at a distinct remove from the individual ministers themselves who may make no comments.

Sweden

There is a constitutional principle in Sweden, going back to 1766, that anyone – a Swedish citizen or an alien – has the right to ask any public authority to be shown any document kept in its files, whether the document concerns him personally or not. The document must be released unless a restriction on access is necessary by reference to a limited number of exceptions specified by law. In addition, an official may inform a journalist orally about any public document, including one which is restricted, as an exercise of the general right to freedom of expression and without risk of sanction, but may not, in the case of a restricted document, give out the document itself. A distinction is made between restricted and secret documents: the latter may not be revealed by a civil servant either verbally or in writing. Investigations into leaks are prohibited and the media must not reveal their informants.

Cabinet decisions are kept in two series. Series A is open to the public, although appendices may be classified. Series B is secret. In practice, the vast majority of cabinet decisions are accessible. The rule is that no decision has been taken unless it is recorded. Access may in certain cases be given on request even to a decision in series B, for example a decision relating to an international issue may be revealed after the international negotiations to which the decision related have been completed.

No minutes are kept of cabinet discussions. The constitutional fiction is that the cabinet always acts unanimously. There are no government memoranda as we know them. What is placed before the cabinet is an (agreed) decision, legislative proposal, regulation etc. Accordingly, a cabinet document will never contain any indication of the different views of departments or ministers.

It is the practice for the members of the cabinet who are not otherwise engaged to meet daily for lunch in the prime minister's dining-room. In practice, much of the consultation between ministers takes place in this forum. No record is kept of these lunch-time discussions.

So far as disclosure is concerned, ministers enjoy, at a minimum, the same freedom of expression as civil servants. In addition, where matters relating to decisions in Series B are concerned, ministers who are members of parliament would come under the special rule for MPs which states that, if there is not an explicit decision by a parliamentary committee or by the government to the contrary, MPs have the right to speak about secret matters. In practice, this rule is at most loosely observed. The deliberations of the Foreign Affairs Advisory Council, which is chaired by the king and which includes the prime minister, foreign minister and the party leaders, constitute the most secret area of Swedish

government. Yet, week in, week out, participants speak freely to the press about what was discussed.

The Netherlands

The constitution provides that ‘the Council of Ministers shall consider and decide upon overall government policy and shall promote the coherence thereof. The Netherlands applies through ‘General Instructions with regard to Cabinet and Council Business’ a system of absolute confidentiality with regard to cabinet minutes except where parliament requests otherwise. Only ministers are allowed to view the minutes of meetings, unless ministerial permission has been given to allow top civil servants to view relevant sections where this is necessary for the implementation of government policy. Under no ordinary circumstances are the positions expressed by members of the cabinet allowed to become public knowledge. (The cabinet minutes in Holland contain extensive details on who said what at cabinet.)

The only exception to this regulation is where a parliamentary enquiry (enquete) is initiated into a specific subject. In this case a parliamentary committee must request a waiver of the obligation to secrecy on cabinet business.

To date only five parliamentary enquetes have requested and been granted access to specific minutes.

United Kingdom

No constitutional or statutory provisions. However, the Ministerial Code, a code of conduct and guidance on procedures for ministers issued by the prime minister, imposes cabinet confidentiality:

The internal process through which a decision has been made, or the level of committee by which it was taken, should not be disclosed. Decisions reached by the cabinet or ministerial committees are binding on all members of the government. They are, however, normally announced and explained as the decision of the minister concerned.

On occasions it may be desirable to emphasise the importance of a decision by stating specifically that it is the decision of Her Majesty’s Government. This, however, is the exception rather than the rule.

Collective responsibility requires that ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of

opinions expressed in cabinet and ministerial committees should be maintained. Moreover cabinet and committee documents will often contain information which needs to be protected in the public interest. It is therefore essential that, subject to the guidelines on the disclosure of information set out in the *Code of Practice on Access to Government Information*, ministers take the necessary steps to ensure that they and their staff preserve the privacy of cabinet business and protect the security of government documents.

The principle of collective responsibility and the need to safeguard national security, relations with other countries and the confidential nature of discussions between ministers and their civil servants impose certain obligations on former ministers who are contemplating the publication of material based upon their recollection of the conduct of government business in which they took part. They are required to submit their manuscript to the secretary of the cabinet and to conform to the principles set out in the Radcliffe Report of 1976.

Appendix 2

Extract from *Report of the Constitution Review Group*

Article 28

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*

The Government

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

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 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^a *The Government shall be responsible to Dáil Éireann*

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

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

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 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

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.*

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*

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 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

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.*

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.*

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.

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

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.*

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.

Article 29

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.

International Relations**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.

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 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 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*

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

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.*

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 Láigheis* 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^o-6^o 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^o. 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^o (now Article 29.4.5^o).

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^o 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

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

Article 30

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.*

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.*

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.

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.

Appendix 3

Extract from *Report of the Committee on the Constitution, 1967*

Article 28 – Emergency Powers

Article 28.3.3° of the Constitution as adopted in 1937 provided, in effect, for the suspension of certain provisions of the Constitution in time of war or rebellion. By an amendment made in 1939 the expression “time of war” was amplified to include a time of armed conflict outside the State provided each House of the Oireachtas resolves that a national emergency arises out of such conflict. By a further amendment made in 1941 the period during which these powers can be availed of was extended to go beyond the end of hostilities until such time as the Houses of the Oireachtas resolve that the national emergency has ceased to exist.

The Emergency Powers Acts were founded on these Constitutional provisions. Those Acts have now gone out of force but the relevant resolutions by the Dáil and Seanad still continue in being. The Oireachtas could, therefore, enact into law at the present time Emergency Powers measures similar to those which were in operation during the War. In effect this means that the Government has power to suspend certain provisions of the Constitution in peacetime, although it must be borne in mind that the approval by resolution of the Seanad as well as the Dáil must be obtained. This situation has given rise to a good deal of criticism particularly on the part of constitutional lawyers and we have carefully examined the views offered in this connection.

We think it relevant to explain, in regard to the fact that resolutions of the Dáil and Seanad declaring a national emergency during World War II are still in existence, that international conditions have influenced successive Governments on this particular subject. In the absence of formal peace treaties between the contestants involved in the war, it has always been deemed prudent to maintain a state of readiness for emergency conditions in this country. The annulment of the resolutions might, possibly, also have given rise to some political misunderstandings in relation to some of the belligerent countries and this was regarded as a further reason for leaving the matter rest. We are of the opinion, however, that the time has now come to devise a formula which will answer in some way the complaints which have been made against the continuance in effect of the relevant resolutions.

We considered, in particular, a suggestion that provision should be made for allowing judicial determination of the question whether or not an emergency has ended. We have come to the conclusion, however, that the matters at issue here are of such a nature that the involvement of the courts is unlikely to provide a satisfactory solution. In our view, political rather than judicial considerations are relevant here, and if any improvement in Article 28.3.3° is to be effected, it must be on the basis of a political formula. We recommend, accordingly, that consideration should be given to the question of adding to Article 28.3.3° a clause providing that resolutions declaring an emergency shall have effect for a period of three years only unless renewed by further resolutions of the Dáil and Seanad. Some special interim arrangements would, of course, have to be made in relation to the existing resolutions. It would probably also be necessary to make some provision for a situation in which the Oireachtas is unable, because of emergency conditions, to meet at the end of the proposed three-year period.

In considering this question of emergencies, it is necessary to look also at the wording of Article 28.3.2°. This provision gives power to the Government to take whatever steps may be necessary for the protection of the State in the case of actual invasion. Our attention has been drawn to the fact that in view of developments in long-range warfare since the Constitution was enacted, the expression “in the case of actual invasion” is no longer appropriate. We agree that an amendment should be introduced to cover also apprehended attack by un-manned missiles or other modern weapons which might not necessarily involve the presence of human enemies on the national territory.