

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

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

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

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

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

Introduction

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

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

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

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

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

Issues

1 composition of the Government

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

Article 28

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

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

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

28.4.3° *The Government shall prepare Estimates of the Receipts and Estimates of the Expenditure of the State for each financial year, and shall present them to Dáil Éireann for consideration.*

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

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

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

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

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

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

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

Recommendation

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

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

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

Conclusion

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

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

Article 28

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

Conclusion

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

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

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

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

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

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

Recommendation

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

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

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

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

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

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

Conclusion

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

- 1 any relaxation should be subject to the most stringent test of public interest, as judged by the High Court or Supreme Court, and should be confined to the context of a criminal prosecution against a member, or former member, of the Government (as is the case in the United States and Australia)
- 2 the context, specified at 1, could be unduly restrictive and it might be better to express any constitutional relaxation in less specific terms while still applying the test of overriding public interest as determined by the High Court or Supreme Court.

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

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

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

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

Recommendation

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

6 dissolution of the Government

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

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

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

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

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

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

a) constructive vote of no confidence

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

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

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

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

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

b) a fixed-term Dáil

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

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

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

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

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

Recommendation

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