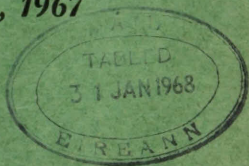




OIREACHTAS ÉIREANN
NOT TO BE REMOVED

*Report
of the
Committee on the Constitution
December, 1967*



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INFORMAL COMMITTEE ON THE CONSTITUTION

INTRODUCTION

1. In August, 1966, the three political parties represented in Dáil Éireann agreed that an informal Committee should be set up to review the constitutional, legislative, and institutional bases of Government. The following persons were designated for membership of the Committee:—

David Andrews, T.D.,
Don Davern, T.D.,
Senator James Dooge,
Seán Dunne, T.D.,
Denis Jones, T.D.,
Robert Molloy, T.D.,
Senator Michael O'Kennedy,
T. F. O'Higgins, T.D.,
Senator Eoin Ryan,
Gerard Sweetman, T.D. and
James Tully, T.D.

George Colley, T.D., Minister for Industry and Commerce, acted as Chairman of the Committee. In November, 1966, Seán F. Lemass, T.D., was nominated a member of the Committee in place of Deputy Don Davern, who had been appointed Parliamentary Secretary to the Minister for Agriculture.

2. It was agreed between the political parties that participation in this Committee would involve no obligation to support any recommendations which might be made, even if made unanimously. It was also agreed that the members of the Committee, either as individuals or as party representatives, would not be regarded as committed in any way to support such recommendations.

3. The first meeting of the Committee took place on 12th September, 1966, and we have held in all 17 meetings.

4. Apart from the suggestions put forward by our own members, we have received submissions from a number of other individuals and bodies and we would like to record our gratitude for the interest taken in our proceedings. The announcement of the establishment of the Committee also gave rise to some discussion in different

journals about various provisions of the Constitution, and we have taken note of the views expressed on these matters. The legal points listed in Annex 27 were considered by the Committee and were referred to the Attorney General for examination by a legal committee under his chairmanship. Presumably, their opinion on these matters will be made available in due course.

Membership of the European Economic Community would, of course, involve changes in the Constitution. We did not deem it appropriate to include any reference to this in our report as an official examination of the Constitutional implications of this is proceeding at present.

5. Early on in our deliberations we decided that, where it was not possible to reach unanimity on any matter, we would set out the substantial arguments for and against each provision under consideration, leaving it to the Government of the day to decide the items which should be selected for inclusion in any legislative proposals that may emerge. It is our belief that, presented in this way, our report will be of assistance to the public at large in appreciating the nature of the issues involved and will also facilitate the members of both the Dáil and Seanad in the event of any Bill to amend the Constitution being submitted for their consideration. We wish to emphasise that, where this procedure has been followed, the inclusion of any argument for or against a proposal is not to be taken as an expression of the view of the Committee as a whole or of any member or group of members.

6. We have now reached finality in regard to a number of major provisions of the Constitution, and we think it appropriate to produce an interim report at this stage. Before proceeding with the general body of this report, we think it desirable to mention that in the course of our deliberations we examined a great deal of material relating to foreign constitutions. While there is always something to be gained by studying the manner in which other nations manage their affairs, we feel obliged to say that we were aware of the need to avoid any dangerous assumptions as to the manner in which systems imported from abroad might operate here. Political systems depend for their effectiveness on the entire complex of national characteristics, attitudes and history and what may be useful in one country may be quite dangerous in another. While taking careful note of such lessons as are to be learned from the comparative history of constitutions in action, it is, then, a matter for each country to mould its institutions to suit its own particular needs, relying more than anything else on the realities of its own political life and experience. As a general proposition, therefore, it might be said that our inclination was to adhere to the constitutional provisions which have worked well in practice, and to consider changes only in the case of those provisions which, from experience, might be regarded as not adequately fulfilling their purpose.

7. The basic elements of our Constitution are, broadly, the following:—

- (i) All powers derive, under God, from the people.
- (ii) For the purpose of enacting laws and taking other major decisions the people periodically elect representatives to sit in the principal house of the Oireachtas, the Dáil, which is free to take whatever decisions it thinks proper within the limits set by the provisions (including the preamble) of the Constitution.
- (iii) Every person over 21 has the right to vote in these elections and to seek a seat in the Dáil.
- (iv) In addition to the Dáil, the Oireachtas consists of a President elected directly by the people and an indirectly elected Seanad.
- (v) The President, who is the Head of State, has prescribed functions in relation to the protection of the Constitution.
- (vi) The day-to-day administration of the nation's affairs is entrusted to an executive body known as the Government; this is chosen by the Dáil and is responsible to that house only.
- (vii) The Government goes out of office on losing support in the Dáil.
- (viii) The interpretation and application of the laws by judicial decision is entrusted to the courts which are independent and subject only to the Constitution and the law; these courts also have the function of determining whether any law is in keeping with the Constitution; trial by jury for ordinary criminal offences is guaranteed.
- (ix) Certain fundamental rights of the individual are guaranteed such as personal liberty, equality before the law, freedom of expression (including criticism of the Government), freedom of assembly and association, rights relating to family, education, dwelling and property, and religious freedom. *Ex post facto* legislation may not declare any action to be an offence.
- (x) Certain principles of social policy are set out for the guidance of the Oireachtas.
- (xi) Certain provisions of the Constitution may be suspended in times of emergency in accordance with procedures set out in the Constitution.

- (xii) The Constitution may be amended only by vote of the people in a referendum.

8. Whatever may be said about subsidiary aspects of these provisions we are not aware of any public demand for a change in the basic structure of the Constitution. The republican status of the State, national sovereignty, the supremacy of the people, universal franchise, fundamental rights such as freedom of speech, association, and religion, the rule of law and equality before the law, were all part and parcel of this nation's struggle for independence and it is not surprising, perhaps, that, in the minds of the people, they are now to be regarded as virtually unalterable. There are, however, other aspects of the Constitution in respect of which less inflexibility might be expected, particularly in relation to the form of Government and the Parliamentary framework. But here, again, there appears to be general acceptance among the people at large of the institutions provided by the present Constitution. There is, for example, no apparent desire on the part of any significant number of persons for a departure from the cabinet system of government and it would appear that the immediate responsibility of the Government to the popularly elected house is a requirement which the people would not wish to relinquish. Nor is there any evidence of an inclination by the people to endow the second house of the Oireachtas with any greater powers than it has at present. We did not, therefore, see the need to consider any major departure from the existing principles. This review of the Constitution has, however, in our view, been well worth while, and we hope that similar reviews will take place after suitable intervals in the future.

9. While there may be no need to depart from the existing principles of the Constitution, the matters with which we deal in our report are of importance for the future good government of this country. Indeed many of them are of such significance that it is our earnest wish that every citizen, and particularly every public representative, will analyse most carefully the arguments for and against the propositions which we have considered. To ensure the widest possible circulation of our report we recommend that an adequate number of copies be published without delay, and that the sale price should be nominal. In order to facilitate the reading of the report we have consigned as much of the data as possible to the annexes.

10. This approach has made it necessary for us to express ourselves in fairly general terms without attempting to indicate the precise wording required to give full effect to any proposals which we considered; we hope that our meaning is, nonetheless, clear in all cases and that, in the event of any of these matters being submitted for determination in accordance with the prescribed legislative process, no difficulty will be found in drawing up the necessary statutory provisions.

11. We wish to record our deep appreciation of the exceptional services rendered to this Committee by our Secretary, Mr. J. C. Holloway. As a result of his thorough and detailed research we received a great deal of documentation for our consideration and his industry and knowledge were of considerable assistance to us at all stages of our work. We have pleasure also in expressing thanks to our Assistant Secretary, Mr. K. Drake, for his valuable help.

Seoirse Ó Colla, *Chairman*,

David Andrews

James Dooge

Seán Dunne

Denis F. Jones

Seán F. Lemass

Robert M. Molloy

Michael O'Kennedy

Thomas F. O'Higgins

Eoin Ryan

Gerard Sweetman

James Tully.

J. C. Holloway,

Secretary,

14 December, 1967.

ARTICLE 3—EXTENT OF APPLICATION OF THE LAWS

12. Article 3 of the Constitution provides as follows :—

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

We have given careful consideration to the wording of this provision. We feel that it would now be appropriate to adopt a new provision to replace Article 3. The wording which we would suggest is as follows :

1. The Irish nation hereby proclaims its firm will that its territory be re-united in harmony and brotherly affection between all Irishmen.
2. The laws enacted by the Parliament established by this Constitution shall, until the achievement of the nation's unity shall otherwise require, have the like area and extent

of application as the laws of the Parliament which existed prior to the adoption of this Constitution. Provision may be made by law to give extra-territorial effect to such laws.

13. The reason for the final sentence of the suggested re-draft is that we have borne in mind the possible implications of the extension of certain national laws to extra-territorial areas surrounding our coasts, known as the "Continental Shelf". This matter is regulated by the 1958 Geneva Convention on the Continental Shelf, the purpose of which was to set out more clearly the rights of states in regard to the "Continental Shelf" under international law. We think it desirable that the opportunity should now be taken to establish beyond all possibility of doubt the right of the State to avail of the provisions of the Convention in the matter of laws having extra-territorial effect. It occurs to us that considerations relating to the Continental Shelf may also be relevant in relation to Articles 2 and 10 of the Constitution; if any changes of wording are necessary or desirable in relation to those Articles we would recommend that appropriate action be taken at this stage to rectify the position.

ARTICLE 4—THE NAME OF THE STATE

14. Article 4 provides as follows :—

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

Throughout the years since 1937 the term "Éire" has been widely misused in English as the name of the State. Those who so use it can point to the Article itself as their justification, arguing that the word "or" in the English text of the Article indicates that "Ireland" is merely an alternative English form of the name. There is, perhaps, at least an ambiguity in the Article that provides a colourable pretext for this misuse. In the light of past experience we feel that the opportunity might now be taken to remove this difficulty by declaring in the Irish text "Éire is ainm don Stát" and in the English text "The name of the State is Ireland". There would seem to be no objection to this simplification since both texts are of equal validity (except in a case of conflict), and the word "Ireland" is the English equivalent of the Irish word "Éire".

ARTICLE 5—REPUBLICAN STATUS AND EXTERNAL FUNCTIONS

15. Article 5 states that Ireland is a sovereign, independent, democratic state. It does not, however, proclaim that Ireland is a Republic nor does any other Article of the Constitution, despite the fact that

many of its provisions have all the hallmarks one would expect to find in relation to a Republican State. The omission of this proclamation of a Republic in the Constitution of 1937 was deliberate. In dealing with the draft Constitution in the Dáil in 1937, the President of the Executive Council stated that were it not for the Northern problem the Constitution would in all probability contain a flat, downright proclamation of a Republic. The Republic of Ireland Act, 1948, declared that the description of the State should henceforth be the Republic of Ireland. It repealed the Executive Authority (External Relations) Act, 1936, and endowed the President with the necessary powers and functions of the State in connection with external affairs.

16. The State is, therefore, a Republic, and internationally recognised as such, but a statement to this effect is not to be found in the Constitution. It is not, of course, essential that the Constitution should specifically deal with our Republican status, and it is worth noting in this connection that there is no provision to this effect in some other republican constitutions. Nowadays, however, it is the practice of constitution-makers to adopt an appropriate clause to dispose of this point; see, for example, the Constitutions of Italy, Finland, France and West Germany. In fact, in the French, Italian and West German Constitutions, the Republican status of the State is declared to be unalterable. On balance, therefore, we think it desirable to alter Article 5 of the Constitution so as to provide that the State is a sovereign, independent, democratic Republic.

17. This would, in effect, achieve the same object as section 2 of the Republic of Ireland Act, 1948. The only other provisions of any significance in that Act are the declaration in section 3 that the President may exercise the executive power of the State in relation to foreign affairs (this is in pursuance of the powers given under Article 28.2 which provides that the executive power of the State will be exercised by or on the authority of the Government) and the repeal by section 1 of the Executive Authority (External Relations) Act, 1936. In order to complete the tidying-up process, we feel that Article 12 should now be amended so as to endow the President with the power to discharge executive functions on the advice of the Government. This could be done by replacing section 1 of Article 12 by the following:—

Article 12

1.1° There shall be a President of Ireland (*Uachtarán na hÉireann*) who shall take precedence over all other persons in the State.

2° The President may exercise the executive power of the State or any executive function of the State only on the advice of the Government and shall exercise and perform the other powers and functions conferred on the President by this Constitution and by law.

ARTICLE 12.1—THE OFFICE OF PRESIDENT

18. Article 12.1 provides that there shall be a President of Ireland who shall take precedence over all other persons in the State and exercise the functions conferred on him by the Constitution and by law. We considered a proposal that the separate office of President should be abolished and the arguments adduced for and against are set out hereunder.

ARGUMENTS ADDUCED IN FAVOUR OF ABOLITION OF SEPARATE OFFICE

19. (a) Examination of the powers and functions of the President (See Annex 1) reveals that he is largely a figure-head. In most matters he can act only on the advice of the Government or some other body.

(b) The President's formal duties as Head of State could, without difficulty, be discharged by the Taoiseach, who could act both as Head of Government and Head of State.

(c) The abolition of the separate office of President would give rise to substantial financial savings.

ARGUMENTS ADDUCED IN FAVOUR OF RETENTION OF SEPARATE OFFICE

20. (a) In view of the President's function as guardian of the Constitution, it would not be realistic to allow the Taoiseach to hold that office. One of the President's principal functions is to assist in ensuring that legislation repugnant to the Constitution does not become law.

(b) The duties of the two offices of President and Taoiseach would impose a severe burden on any single individual.

(c) Even if the two offices were combined, expenditure relating to the function of Head of State would have to be incurred and there would, therefore, be little or no financial saving.

ARTICLE 12.2—METHOD OF ELECTING THE PRESIDENT

21. Article 12.2 provides that the President shall be elected by direct vote of the people. Every citizen who has the right to vote at an election for members of Dáil Éireann has the right to vote at an election for President.

22. Some information is given in Annex 1 in regard to the President's functions under the Constitution. The methods of election adopted by other countries are also described therein.

23. We have considered a proposal that the President should be elected instead by an electoral college and the arguments adduced for and against this idea are set out in the following paragraphs.

ARGUMENTS ADDUCED IN FAVOUR OF ELECTION BY ELECTORAL COLLEGE

24. (a) In so far as matters of practical importance are concerned, the President of this country in the exercise of his powers must give effect to the wishes of the legislature or of the Government. As regards other matters, where he might be regarded as having certain functions to safeguard the Constitution, experience has shown that very little need for the exercise of the President's powers has arisen during the last thirty years. A President elected by an electoral college could just as effectively exercise these functions.

(b) There is always some danger of conflict arising where different organs of Government are chosen by direct vote of the people in separate elections.

(c) As matters stand at present, a person cannot hope to secure election to the Presidency without the assistance of one of the political parties. Since the participation of the parties is inevitable, it could be regarded as a logical step to eliminate the unnecessary complication of an election by the people and to introduce instead a more simplified method of election by electoral college based largely on membership of the Dáil and Seanad.

(d) The present Constitutional arrangements, which require a large-scale electioneering campaign over the whole country, involve the danger of hostility to an elected President being engendered in substantial numbers of people and this could seriously militate against his recognition as the representative of the entire population.

(e) In order to ensure that there would be no misunderstanding on the part of the public of the reasons for any departure from the present method of popular election, any Constitutional amendment would have to be so drawn as to take effect, not in the next Presidential election, but in the following election. An arrangement on these lines would eliminate any possibility of misapprehension on the part of the public that the proposal was influenced by considerations relating to individual personalities.

(f) The burden imposed by the present system on the political parties ought to be taken into account. In addition to the consider-

able expenditure involved for the parties in campaigning for Presidential candidates, the strain on the human resources of the parties has been recognised on all sides. In any event, it could be said that with Parliamentary, Local Government and Presidential elections, the present demands on the parties are too great.

ARGUMENTS ADDUCED IN FAVOUR OF THE PRESENT SYSTEM

25. (a) If the election of the President is entrusted to an electoral college consisting of party politicians, the respect which the public at large have for the office will be diminished, even if it can be demonstrated to them that this is the method of election which prevails in some other countries.

(b) The people might feel that they were being deprived of an institution which was clearly provided for them under the 1937 Constitution. The design of the present Constitution clearly envisages that the President would represent the people as a whole, protect them and the Constitution against any possible failings on the part of the legislature, and be a permanent reminder of the distinction between the Government and the State. The people might not regard a President elected by the legislature as being sufficiently independent to discharge these functions and they could logically take the view that, if the President is to represent them, then he must be elected directly by them.

(c) It is not logical to suggest that merely because the President's powers have been so little used, then these powers are not of very great importance. Indeed, it could be maintained that, as in many other cases, the mere existence of these protecting devices has prevented situations arising in which it would have been necessary to bring them into operation.

(d) Members of the Oireachtas are elected for their attachment to particular policies which, if they secure the necessary majority, they will have the opportunity as a Government of putting into effect. The President is not, however, elected for any policies which he puts before the people, but rather to represent them as Head of State in all respects. His election by the political parties might not be regarded as being compatible with the position which he is designed to occupy in the Constitutional framework.

(e) As regards the possibility of friction between the President and the Government, it could be argued that such a situation was more likely to arise when election to the Presidency is directly related to party strength rather than popular appeal.

ARTICLE 12.4—NOMINATION FOR PRESIDENTIAL ELECTION

26. Article 12.4.2° provides that a candidate for election to the office of President, other than a former or retiring President, must be nominated either by not less than twenty members of the Oireachtas, or by the Councils of not less than four administrative Counties.

27. Article 12.4.4° provides that former or retiring Presidents may become candidates on their own nomination. In our view sub-section 4° of Article 12.4 should be deleted from the Constitution. This would give rise to a consequential change in sub-section 2° of Article 12.4.

ARTICLE 13.1—SELECTION OF TAOISEACH

28. Article 13.1 provides that the President shall, on the nomination of the Dáil, appoint the Taoiseach. We have considered the question of making some change in the requirement that the Taoiseach can only be appointed on the nomination of the Dáil, and have taken note of the provisions of other Constitutions in this respect. An extract from the Inter-Parliamentary Union publication *Parliaments* (1966) is given in Annex 2. This gives a summary of the general situation of Head of Government in the 55 countries covered by the I.P.U. survey.

29. In view of the possibility that no party leader would be able to secure nomination by a Dáil majority after some future general election, we have considered the introduction in this country of an arrangement involving the granting of discretionary powers to the Head of State in this connection. The position under such an arrangement would be that after a general election, or the relinquishment of office by a Taoiseach, the President would designate to be Taoiseach the member of the Dáil whom he considered most likely to secure the confidence of the House, and appoint Ministers on his nomination, these appointments to remain effective until there is a vote of no confidence in the Dáil. The main purpose of the change would be to eliminate the danger of the country being without effective Government for a lengthy period while different candidates strove for a majority in the Dáil. The arguments adduced for and against the proposal are set out hereunder.

ARGUMENTS ADDUCED IN FAVOUR OF THE PROPOSAL

30. (a) It is not difficult to imagine a situation arising in which the three main political parties are so represented in the House that

each of their candidates for the office of Taoiseach can be defeated by the combined strength of the other two. If candidates are put forward in circumstances of this kind under the existing Constitutional provisions, an acrimonious debate might well take place which might reduce considerably the possibility of any agreement being subsequently arrived at by the parties. Such a debate might not arise in the event of the President being given the power to appoint the person most likely to secure the confidence of the House.

(b) Even when the outcome of a general election leaves no doubt as to which candidate will have a majority, a system on the lines proposed would have the advantage of enabling the Dáil to consider an entire Government (Taoiseach and Ministers) and its policies rather than single individuals for the office of Taoiseach as at present.

(c) Where no party has secured an overall majority, it would also have the effect of placing the onus of finding a suitable Government on the politicians rather than by having a further general election.

(d) It seems clear that if such a power were to be given to the President, it would be necessary, in order to avoid an early collapse of the new Government, to prohibit a dissolution for a short period. While the possibility of a general election encourages responsible behaviour, the prohibition of a dissolution for a short period after the approval of the new Government could not have serious consequences. The President should, however, have the right to require a general election to be held if at any time, except during the period referred to, the Government lost the confidence of the House, but the Taoiseach did not resign or seek a dissolution.

ARGUMENTS ADDUCED AGAINST THE PROPOSAL

31. (a) The proposed addition to the powers of the President would hardly be compatible with the position which he is traditionally regarded as occupying in this country. It might, perhaps, be seen as involving the President directly in party politics and thus changing the nature of his office entirely.

(b) There would be no point in giving the President power to intervene only in the event of a stalemate arising since such intervention would be useless after positions had been adopted in a Dáil vote. If he were to have an effective role at all, the President would have to be endowed with the right to designate the Taoiseach in any circumstances.

(c) The utility, as a stabilising factor, of the arrangement in question might also be questioned in the light of the history of those countries where it already operates.

(d) In any event, where an overall majority does not emerge from a general election, the good sense of the parties could be relied on to secure agreement beforehand on a candidate who would succeed in procuring nomination by majority at the time of voting in the Dáil. It should be possible for the political leaders to make their own arrangements in this connection without the intervention of the President.

(e) As regards the proposal that there could be no dissolution until a specified period had elapsed after the approval of the new Government by the Dáil, it could be contended that experience in other countries seemed to suggest that the effect of such a prohibition might well be to prolong any political stalemate arising, and it could be pointed out in this connection that the disciplining effect of possible exposure to another general election has been well demonstrated in the comparative history of European parliaments.

General

32. Under Article 28.11 of the present Constitution it is provided that the members of the Government in office at the date of dissolution of Dáil Éireann shall continue to hold office until their successors have been appointed. Despite the provisions of Section 7 of the same Article this seems to enable the old Government to carry on even though some or all of its members might have lost their seats in the general election. The Taoiseach of such a Government would also seem to have the same right as an ordinary Taoiseach in the matter of seeking a dissolution, etc. In considering the possibility of a stalemate arising after a general election, some attention might be paid to the provisions relating to the continuance in office of the old Government. It might, perhaps, be desirable to provide that the Government would remain in office while attempts are being made to find a successor but that it would not have the right, without an order of the House, to seek a dissolution for a period of a few months; unless some candidate is approved within that period, however, a further general election would have to be held. The situation which can arise where the Taoiseach resigns without a dissolution (see Art. 28.11.1°) would also have to be looked at. The granting of some powers to the President to ensure that these provisions are adhered to might be necessary.

ARTICLE 13.2.3°—POWER OF PRESIDENT TO CONVENE MEETING OF HOUSES OF THE OIREACHTAS

33. Under Article 13.2.3° the President is empowered at any time, after consultation with the Council of State, to convene a meeting of either or both of the Houses of the Oireachtas.

34. We recommend that this should be extended to provide that a specified number of members of the Oireachtas should have the right to require the President to convene a meeting of either or both Houses.

ARTICLE 15.10—PARLIAMENTARY PRIVILEGE

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

36. The wording of this provision presents some difficulties and it is not easy to determine from it the nature of the powers with which it was intended to endow the Oireachtas. It will be observed, first of all, that it says nothing about the non-application of other provisions of the Constitution in relation to the matters at issue. In the absence of such an exclusion clause, it must be assumed that other provisions of the Constitution such as Articles 34, 37, 38 and 40 are not brushed aside as they are, for example, in the case of Article 28.3.3°. If they continue to operate with full force, then it necessarily follows that the powers of the Houses are not at all as wide as those of some other Parliaments such as the British. It will be noted, furthermore, that the powers given by Article 15.10 to impose penalties extend only to the rules and standing orders of each House, and there seems to be no power to punish offenders for the other matters dealt with by the section, such as the protection of each House and its members against interference, molestation and attempts to corrupt. If the Houses of the Oireachtas were intended to have penalty powers in relation to these matters, it would have been a very simple matter to draft the section on a different basis. Finally, in regard to the particular question of improper press comment, it is not clear whether the powers of the section are such as to enable the Houses of the Oireachtas to take action to deal with offences in this category; it depends entirely on the interpretation which is to be placed on the expressions "interfering with", "molesting" and "attempting to corrupt".

37. Some additional information has been provided in this connection in Annex 3 to this Report and there are certain lessons to be learned from experience up to the present in this country and in a number of others (particularly Australia, Canada and India) in respect of which details are available. As regards improper press comment, it will be noted that the Dáil in the past has treated this as an interference, but in over forty years it has dealt formally with only

three cases, two of which involved statements by members themselves. In the third case, involving an article in a weekly newspaper, the Committee on Procedure and Privileges decided that the dignity of the House was best served by ignoring the matter.

38. From the information provided in relation to other countries, it is clear that the British pattern is by no means universally followed. The Parliaments in other countries do not, generally, have the power to deal themselves with offences committed by outsiders against their privileges. Some of them have, however, the right to carry out preliminary investigations and subsequently to request the public prosecutor to take appropriate action under the relevant statutory enactments.

39. Our Parliament can operate only within the confines laid down in the present Constitution, which was intended to provide the charter for all aspects of public affairs in this country. That Constitution has been very careful to outline detailed provisions about the court system to be established, the procedure for the trial of offences and the fundamental rights of the citizens, including the right to personal liberty and freedom of expression. If it had been the intention from the beginning that the powers enjoyed by the Oireachtas were not to be restricted by any safeguards of this kind, there would surely have been a great deal more comment about the nature and effect of Parliamentary Privilege than has heretofore been the case. As already indicated, the wording of Article 15.10 itself suggests that this was not the intention.

40. We have, therefore, come to the conclusion that Article 15.10 ought to be regarded as empowering the Houses of the Oireachtas to deal with internal matters of procedure and discipline only, and to punish its own members for breaches of its rules; it should, of course, also be open to each House to withdraw any privileges from any such persons as transgress any regulations of the House. In addition, each House should have power to deal effectively with persons who endeavour to disrupt its proceedings. All other offences against Parliament and its members should, in our view, be dealt with by a special Act of the Oireachtas on the same lines as the legislation passed by other countries. If so desired, the Chairman of each House could be empowered to make complaints to the Attorney General requesting that particular matters be investigated with a view to prosecution. If any amendment of Article 15.10 is required to enable these matters to be dealt with in this way, then we recommend that the change should be made.

41. The adoption of a system on the lines generally set out above would enable the Houses of the Oireachtas to deal more confidently with offences than has been the case in the past. Under such a system the offences would be clearly specified by law, and the nature of the penalties to be imposed would be known. The dangers of conflict

with constitutional safeguards would disappear. Most important of all, however, the deciding authority, as in the case of all other criminal offences under the Constitution, would be the courts, and there could, therefore, be no criticism to the effect that the Houses of the Oireachtas were capable of deciding issues in which they themselves and their members are directly involved.

42. Reference is made in Annex 3 to the possibility of difficulties arising in connection with the refusal of witnesses to attend or give evidence before the Houses of the Oireachtas. In preparing any legislation of the kind referred to above, the opportunity could be availed of to settle any questions which arise under this heading. This matter is, in fact, quite clearly dealt with in Acts of Parliaments passed by other countries. Arrangements could also be made to give suitable protection to such other organs of Government as may be deemed appropriate.

43. The freedom of speech enjoyed by members also arises under Article 15, but this aspect of Parliamentary Privilege would seem to fall mainly within the second category of our activities (i.e. Parliamentary Procedure) and will be dealt with later.

ARTICLE 16.1.2°—QUALIFYING AGE FOR VOTING

44. Article 16.1.2° provides that every person who has reached 21 shall have the right to vote in a Dáil election. A proposal was submitted to us that the minimum age should now be reduced to 18 years. We agreed to consider the two alternatives only, 21 years as at present and 18 years as proposed. Some international comparisons are given in Annex 4.

ARGUMENTS ADDUCED IN FAVOUR OF REDUCING THE AGE TO 18 YEARS

45. (a) As a general proposition, maturity in all matters is now reached at an earlier age than formerly and, consequently, the minimum of 21 years which had been fixed a very considerable time ago is now out of date.

(b) Persons of 18 are eligible to enlist in the Army, are obliged to pay taxes, and can get married; it may be asked why they can not also be trusted to behave responsibly at the polls.

(c) It is sometimes argued that young people as a whole do not at present seem to be very interested in exercising their voting rights. This might be due in part to the fact that for some years

after leaving school they are not permitted by the Constitution to vote in Parliamentary or Presidential elections. This restriction may have a psychological effect in deterring many individuals from voting even when they ultimately became entitled to do so. The introduction of the right to vote at the age of 18 might, therefore, have the effect of increasing considerably the percentage of young people who vote, including those over 21.

(d) Even if an all round reduction in the age qualification to 18 years were not possible, there is a very strong case for an extension of the right to vote to married people who had reached that age.

(e) Attention might also be drawn to the fact that as the electoral laws at present operate in this country, a person could be several years older than 21 before he is actually in a position to vote at an election.

ARGUMENTS ADDUCED IN FAVOUR OF THE PRESENT LIMIT

46. (a) It is clear that many of the countries which grant the right to vote at 18 are not of a kind on which we would wish to model ourselves; most of the highly-developed democratic countries have the same age limit as this country.

(b) The proposal could also be regarded, to a certain extent, as academic, since the general impression seems to be that many young people do not see the relevance of voting, even when they are entitled to do so after reaching the age of 21; there might not, therefore, be much point in granting to further numbers of young people a right which they apparently did not seek to have.

(c) Whatever is to be said about the natural entitlement of individual persons to vote, the retention of the voting age at the present limit does not create a different political situation than would otherwise be the case; in other words, altering the age is thought unlikely to make any significant change in the nature of our political life.

ARTICLE 16.2.2°—NUMBER OF PERSONS PER MEMBER OF PARLIAMENT

47. The Constitution provides (Article 16.2.2°) that the total number of Dáil members shall be not less than one member for each 30,000 of the population, or more than one member for each 20,000. We gave some consideration to the question of enlarging the membership of Dáil Éireann. Some information about the situation in other countries is given in Annex 5.

ARGUMENTS ADDUCED IN FAVOUR OF AN IMMEDIATE INCREASE IN THE NUMBER OF DEPUTIES

48. (a) On the basis of present Dáil membership, the Deputies supporting the Government are likely to number 70 or so. As many of these would, for one good reason or another, be unable to take up Ministerial office, the Taoiseach is, in effect, left with some 35/40 Deputies out of whom he must find about 20 Ministers and Parliamentary Secretaries. This imbalance ought to be rectified, and there is a strong case for an immediate increase in the total membership of the Dáil.

(b) Most Deputies, and particularly rural ones, are considerably burdened with constituency work and are unable to discharge adequately their normal functions as Parliamentarians.

(c) There is also the possibility that the Dáil might, in future, dispose of more of its business through Committees and any extension of Committee work could hardly be considered with existing numbers.

ARGUMENTS ADDUCED AGAINST ANY IMMEDIATE INCREASE

49. (a) There would probably be some opposition on the part of the public to any increase in the number of Dáil members. While each country must settle the number of its Parliamentary representatives in accordance with its own special requirements and the business of Government here, despite our small size, is no less complicated than it is in the major developed countries, there appears to be a feeling among the people at large that the present Dáil is large enough for current needs.

(b) As regards the burden of work on Deputies, there are various alternative remedies such as:—

- (i) the provision of secretarial services;
- (ii) the revision of the electoral system, with, perhaps, the introduction of single-seat constituencies;
- (iii) improving the remuneration of Deputies.

(c) The burden on some city Deputies is, in any event, not less than that which rural Deputies have to bear.

General

50. Although there was a divergence of views on a proposal to increase immediately the total size of Dáil Éireann, we feel that the upper limit of 30,000 persons specified by Article 16.2.2° has lost its

significance, since it has always been the practice in dealing with constituency matters by Act of the Oireachtas to adhere as closely as possible to the lower limit of 20,000 persons (See Annex 10 in this connection). We think a more realistic tolerance would be the range 22,500/17,500 persons and we recommend that the Constitution be changed accordingly.

ARTICLE 16.2.3°—DELIMITATION OF CONSTITUENCIES

51. Article 16.2.3° provides that the ratio between the number of members to be elected for each constituency and the population of each constituency shall, so far as it is practicable, be the same throughout the country.

52. In 1959 the constituencies were revised (in accordance with Article 16.2.4°) to take account of the changes in population revealed by the 1956 Census. In introducing the Electoral (Amendment) Bill, 1959, the Minister for Local Government expressed the view that, in applying Article 16.2.3°, the Oireachtas should have regard to geographical, topographical and economic factors and that, for these reasons, the Bill erred on the side of leniency so far as rural representation was concerned.

53. These statutory provisions were ultimately found to be unconstitutional by the High Court. Relevant extracts from the High Court judgement are reproduced in Annex 6. It will be noted in particular that the Court found that there was no indication in the Constitution that it was intended that any of the difficulties as to the working of the parliamentary system should be taken into consideration on the question of practicability and that the difficulties to which the legislature should have regard are those of an administrative and statistical nature. It also pointed out that there was nothing in the Constitution about constituencies being based on Counties.

54. The problem of rural representation has also arisen in other countries with a declining ratio of rural population and various formulae have been adopted in order to deal with it. (See Annexes 7 and 8).

ARGUMENTS ADDUCED IN FAVOUR OF A CHANGE

55. (a) As already pointed out, under the Constitution as it stands at present, population is the sole factor to be taken into account in determining the size of constituencies and this interpretation has been rigidly laid down by the Courts. This is not logical since there are many other physical and social factors which affect the adequate

representation of the people, particularly in rural areas. It would be desirable to make a change in the Constitution now which would enable these additional factors to be taken into account, as is done in other countries with first class political institutions.

(b) The object of this exercise would not be to make a rural vote more valuable than an urban one, but to arrange for a more equitable representation of the community as a whole.

(c) On the basis of the last census, the existing Constitutional provisions would require a further loss of seats in the West ; if this trend continued it would not be long until the province of Leinster had an unbalanced representation in the Dáil, and it could be contended that the people as a whole would not wish this situation to come about.

(d) If this proposal were accepted, it would be necessary to give in the Constitution a clear indication that factors such as density of population, community of interest, etc., might be taken into account in fixing the boundaries of constituencies.

(e) As regards population ratio, a maximum difference of about 25% between constituencies should be permitted. This would, in effect, involve the incorporation in the Constitution of a rule providing for the establishment of a national average as is done in other countries, with a provision permitting a departure from the average of $\pm 12\frac{1}{2}\%$. With a national average of about 20,000 persons per Deputy, as is the case here in Ireland at present, this rule would permit a lowest point of 17,500 people per Deputy and a highest point of 22,500 per Deputy.

(f) It could then be indicated in the Constitution that in re-drawing constituencies, the tendency should be to have higher representation for sparsely populated areas and lower representation for others.

(g) If considered necessary, a further provision designed to permit constituencies of the same type to differ from each other on a population basis by about 10% could also be inserted in the Constitution.

ARGUMENTS ADDUCED AGAINST ANY CHANGE IN THE PRESENT SYSTEM

56. (a) The drift from the land is not unique to this country. While we might regret this movement to the cities, it hardly seems appropriate to endeavour to avert it by making changes in the law relating to Parliamentary representation.

(b) The people would object very strongly to any proposal to give greater voting power to rural constituencies as it would be a serious contravention of the "one man, one vote" principle.

(c) Whatever might have been said about difficulties of communications, etc., in rural areas in the past, there is now no justification, in view of improved travel facilities, for regarding them as being any different for electoral purposes from urban areas.

(d) The objective of the electoral system should be to give votes to persons and not to geographical areas.

General

57. Certain members felt that, even under the existing system, it was desirable to establish a Commission to determine the delimitation of the Constituencies. Though this view was not acceptable to all members, the Committee were unanimous that, in the event of any Constitutional change, a Commission should be established to determine the delimitation of the constituencies. Commissions of this kind are a regular feature of the electoral law of other countries. The final say on the question whether or not the findings of such a Commission should be accepted ought, however, properly rest with the Oireachtas. Furthermore, it would be reasonable to require that the Commission in putting forward its findings should be obliged to give the reasons for its decision in each case. We have deliberately refrained from expressing views as to the composition of the Commission as this would be a matter which would be determined by legislation.

ARTICLE 16.2.5°—THE ELECTORAL SYSTEM

THE PRESENT SYSTEM, ITS ORIGIN AND RESULTS

58. Article 16.2.5° of the Constitution provides that the members of the Dáil shall be elected on the system of proportional representation by means of the single transferable vote. In order to operate this system it is necessary to have multi-member constituencies, and the object is to ensure that, in a constituency of x seats, any interest which manages to get about $1/x$ of the votes will secure representation. This number of votes is called the quota. In practice the quota is nowadays established by dividing the total valid poll, not by the number of seats x , but by $x + 1$ and then adding one to

the result. The formula, therefore, is $\frac{\text{Valid Poll}}{\text{Seats} + 1} + 1$. The logic of this formula is best seen by applying it to a case where there are four seats and 1,000 votes have been cast. The quota is then $\frac{1,000}{4+1} + 1 = 201$. If four candidates get 201 votes each, there will

be a total of only 196 for all other candidates. Only four quotas are, therefore, obtainable under this formula, and when they have been obtained the contest is closed because all the seats have been filled.

59. Bearing in mind the object to establish a direct relationship between votes obtained and seats won, the transferability of votes is an essential feature of the system. In the example given above, if a candidate received 400 votes he would clearly be entitled to a seat; if, however, no further processing were done in respect of his votes, the proportionality of the system would be upset. For only 201 votes are needed for election and the essentials of the system are such that, once this figure has been reached, the voters who have given him further votes are taken as expressing the wish that their votes are now to be counted in favour of the next choice indicated on their ballot papers. In that way their votes become effective. Transfer of surplus votes of successful candidates and also of all votes given to candidates who have no hope of being elected must, therefore, be provided for in the counting process.

60. In Annex 9 will be found some information about the history of proportional representation in this country. Annex 10 gives information about the size of the constituencies, number of Dáil members and total population throughout the years.

Annex 11 gives the results achieved under the S.T.V. system of P.R. in this country since 1923.

Annex 12 gives, in relation to each general election since 1922, the number of seats available and the number of candidates nominated.

Annex 13 gives data relating to invalid votes and percentage of the electorate which voted.

Annex 14 shows the number of new members elected at each election and the percentage of the total membership which they comprised.

Annex 15, relating to constituencies and population, is reproduced from the 1966 Census of Population.

61. The question of adopting a different electoral system for Dáil elections was considered by the Committee. The substitution of the present system of proportional representation by the Alternative Vote was proposed and the arguments adduced for and against are set out hereunder.

ARGUMENTS ADDUCED IN FAVOUR OF A CHANGE

62. (a) Under the existing electoral system it is exceedingly difficult for any party to secure an overall majority. This is apparent

from Annex 11 which indicates that in 10 out of 15 elections since 1923 the most successful party secured less than 50% of the seats.

(b) Failure on the part of any single party to secure an overall majority militates against the prospect of securing stable Government.

(c) In any event, of its very nature, P.R. is an electoral system which attaches importance, not to the function of electing a Government, but to ensuring representation in Parliament of minority interests. This is clear from the writings of those persons who have been advocating the adoption of P.R. in various parts of the world.

(d) The need for special representation for minority groups in Parliament, to which such great importance is attached by those who favour P.R., is highly questionable. In the case of any minority element it will be found that its interests are not totally at variance with those of all other groups. Much of what is acceptable to others will also find favour with them, and the most that can be done by any Parliament is to pursue the policies that are generally acceptable. It is significant that, although the adoption of P.R. was favoured by the religious minority in the early years of the State, they have not sought to make any use of it in order to secure special representation for their interests in the Dáil.

(e) It is also necessary to point out that the interests of minorities do not remain unalterable for all time and this has been demonstrated in our own recent history. Quite often the objects for which minorities may originally set out are achieved through the activities of larger parties expressing the general will.

(f) The constitutional history of the State since its establishment indicates that, in going to the polls, the people have in mind, primarily, the election of a Government rather than the formation of a legislative assembly representing diverse interests. Under P.R. however, the legislative assembly may produce a Government the composition and policies of which were quite unknown to the people on election day.

(g) It has been contended that, throughout the world, proportional representation has a disintegrating effect because it encourages the formation of sectional groups. In a democracy the object of the electoral system should be, not to underline the distinctions between the different elements which go to make up the society, but rather to help promote common aims.

(h) To eliminate the splintering or disintegrating effect of P.R., the primary objective should be to abolish the multi-member constituencies, which have been the cause of a good deal of dissatisfaction in the past, and to introduce instead single-seat constituencies which would permit of a more direct connection between individual Deputies and the people whom they represent.

(i) The adoption of single-seat constituencies would also reduce substantially the geographical area which each Deputy is required to cover and also the total population of the electoral area which he is expected to serve. He would thus be enabled to devote more time to important Parliamentary business in the Dáil.

(j) In addition, the single-seat constituency would eliminate certain forms of undesirable competition between Deputies, including Deputies of the same party, which are a feature of the present system.

(k) The various methods which might be adopted for filling single-seat constituencies are referred to in detail in Annex 17. The one most likely to find favour with the public is the Alternative Vote. Under this system candidates would be put forward by the various parties to contest the single seat in each constituency, and the electors would be able to indicate their preference in respect of each candidate. It would, therefore, have the distinct advantage of retaining the preferential voting element with which the public are now quite familiar under the existing system.

(l) There would be no difficulty whatever in explaining the Alternative Vote to the public since it is, in effect, identical with the arrangements adopted in this country for contesting by-elections.

(m) The elector would have the consolation of knowing that, as under the present system, in the event of his vote being ineffective in respect of one candidate it could then be transferred to another candidate who was one of his subsidiary choices. Thus the transferability feature of the existing system would be retained. The "wasted vote" phenomenon would not arise.

(n) The calculation of the quota would be the same as that adopted for the present system i.e. $\frac{\text{Valid Poll}}{\text{No. of Seats} + 1} + 1$. In effect, this would mean that in order to secure election a candidate would have to receive at least 50% of the votes cast either in first preferences or transfers.

(o) Many electors do not understand how the existing system of P.R. operates. The Alternative Vote is a much simpler system and the public would be in no doubt that it is a fair and accurate method of arriving at a decision in regard to the wishes of the majority of the people.

(p) The Alternative Vote system does not suffer from the fragmenting effects of P.R. and it should, therefore, help to secure effective Government.

(q) One of the most serious objections raised in the past against the first-past-the-post system as an alternative to P.R. was

that it could give rise to a Government which does not have the support of the majority of the electorate (this arises out of the fact that a member is elected simply because he has been given more votes than any other candidate, even though he may not have secured more than 50% of the total poll). This could not arise under the Alternative Vote system since each candidate must receive a majority of the effective votes before he can be successful.

(r) The Alternative Vote system does not operate as harshly against small parties as the first-past-the-post system, and experience elsewhere indicates that it does not unduly restrict the emergence of new parties.

(s) If the Alternative Vote were introduced here it would, of course, be necessary to re-draw the electoral boundaries in order to produce single-seat constituencies. This task could be entrusted to a Commission of the kind discussed in the earlier part of this report dealing with constituency delimitation.

(t) Under the Alternative Vote the parties would be obliged to nominate a larger number of candidates than under the present system and this would open the door to political life for more young people.

ARGUMENTS ADDUCED AGAINST MAKING A CHANGE

63. (a) The limited form of P.R. adopted by this country has not, in fact, led to a multiplicity of parties. There is no evidence that P.R. has had a distintegrating effect or a divisive influence either in Ireland or elsewhere.

(b) Despite the fact that the most successful party has often secured less than 50% of the seats, our Governments have been sufficiently stable to last for reasonable periods of time (see Annex 11). Failure of a single party to secure an overall majority has not, in fact, militated against stable Government in Ireland. The same is true of many other countries.

(c) While favouring the larger parties to some extent, the system has generally ensured fairly equitable distribution of seats in relation to votes secured.

(d) The people are by now quite familiar with the system and know how to operate it without, perhaps, fully understanding the complications of the counting process.

(e) Although the Alternative Vote has many of the characteristics of the present system of voting, the use of single-seat constituencies would reduce the chances of minority interests securing parliamentary representation.

(f) If single seat constituencies are introduced, the electors who would normally support a party other than that of which the successful candidate is a member may find themselves in a difficult position. Rather than approach the deputy to whose party they are opposed, they may feel obliged to seek redress for their grievances from some person outside their own electoral area or, alternatively, remain without adequate parliamentary representation. In a multi-member constituency every elector has a better chance of putting his case to a deputy of his own choice and representing his own area.

(g) Proportional representation with multi-member constituencies provides for the supporters of a particular party a choice of candidates from their own party, whereas under the Alternative Vote no such choice may be available.

(h) Under the Alternative Vote, a candidate could be nominated to contest a seat, not because he represents the area in question in any special way, but simply because it is a safe seat for his party.

(i) Far from lightening the burden borne by a deputy, the single seat constituency may, in fact, increase it, because he will be the sole representative for that area.

(j) While it may be inconvenient to have more than one deputy representing a particular party in a constituency, this is not sufficient reason for altering the Constitution.

(k) Under the Alternative Vote, the transfer of the votes of the lowest opposition candidate would often go to some other opposition candidate and this would lessen the Government's prospects of success at an election. This system might, therefore, lead to less stability of Government than at present.

(l) If the Oireachtas decides now to reject P.R. it will, in effect, be going against the decision of the people as indicated in the 1959 Referendum.

ARTICLES 18 AND 19—THE SEANAD

64. Like most modern democracies the legislature in Ireland has two houses, a lower (or first) and an upper (or second) house. The lower house is the more important part of the legislature and under the provisions of the Constitution its decisions, in effect, must prevail over those of the upper house. The lower house, known as the Dáil, consists of members elected by direct universal suffrage while the upper house, the Seanad, consists partly of indirectly elected members and partly of nominated members.

65. The history of the Irish Senate is set out in Annex 18 together with information about the existing Constitutional and statutory provisions relating to its composition and powers, and material regarding developments since 1937. Further supplementary information is given in Annexes 19, 20, 21, 22 and 23.

IS THE SEANAD NECESSARY ?

66. It is necessary to ask, first of all, whether it is essential for this country to have a second chamber at all. There have been different views on the utility of a bicameral legislature for several centuries past and the volume of literature on the subject is very considerable. It is clear that the constitutions of the world are by no means unanimous in regard to second chambers, their powers, and the methods by which they are to be elected. While constitution-makers and political theorists seem in general to prefer a bicameral legislature, the problem of devising the perfect second chamber has proved to be almost insoluble and there is no formula which is likely to prove acceptable to all people. The recognition of the fact that perfection cannot be achieved, has not, however, deterred the majority of countries from making the attempt to devise some system which is considered to be, at least, of some utility in their particular circumstances. It is true also, of course, that some countries have abolished their second chambers.

67. While we have examined this whole matter at great length we do not think it necessary to go into detail about the conclusions which can be drawn from the literature on the subject or from the experiences of other countries. We are satisfied that what most countries expect in providing a second house is that they will thereby have a safeguard against ill-considered or hasty action on the part of the first house. A second group of public representatives will have the opportunity of examining legislation and commenting upon it. The first house will thereby be given time for reflection on the utility of the measures which it has proposed. Furthermore, a reasonable opportunity will be given to affected interests to organise public opinion in relation to controversial matters. In addition, important technical matters may receive in the second house more comprehensive treatment than it has been possible to give them in the first house.

ARGUMENTS ADDUCED IN FAVOUR OF RETAINING THE SEANAD

68. (a) The majority of the population of this country are probably in favour of a bicameral legislature and would feel some uneasiness about any suggestion to do away with the Seanad.

(b) Despite the criticisms of the Seanad that have been made

in the past, it has done work of value in the amendment of Bills and discussion of matters of public interest. (See Annexes 22 and 23).

(c) It must be remembered, too, that in considering this question of the Seanad, the functions of that body in the entire framework of the Constitution must be borne in mind. If the Seanad were to be abolished it would be necessary to go through the Constitution from start to finish and to make alternative provision for all those safeguards resting upon the existence of the Seanad which are already contained therein.

(d) For a short period in the thirties the Oireachtas consisted of one House only, but the 1937 Constitution reverted to a bicameral legislature.

ARGUMENTS ADDUCED AGAINST RETAINING THE SEANAD

69. (a) It has been contended that on its past record, the Seanad has not justified its existence and that we could manage quite satisfactorily with a single-house legislature as other countries have done.

(b) Apart from the saving in money which this would allow, it would also be possible to expedite the legislative process by eliminating the unnecessary second House.

(c) Any alternative safeguards required to guard against the enactment of ill-considered legislation could be incorporated either in the Constitution or in the Standing Orders of the Dáil.

CHANGES IN THE EXISTING SEANAD

70. If the Seanad is to be retained it does not necessarily have to remain unaltered in matters relating to its composition and method of election. In this connection we think it necessary to point out, first of all, that in the Constitution as at present drafted, extreme flexibility is allowed in the basic provisions relating to the Seanad, such as the composition and strength of the panels, the nature of the electorate, the method of voting (subject to the provisions of Article 18.5), and the timing of elections. A great many fundamental changes in relation to the Seanad can, therefore, be brought about simply by the enactment of ordinary legislation. For that reason, we have not felt obliged to consider each and every existing provision relating to the Seanad, since we are, at this stage, primarily concerned with the Constitution. None the less, we have considered various possibilities for meeting the criticisms which have been expressed from time to time in relation to the Seanad and our views thereon are briefly summarised in the following paragraphs.

THE VOCATIONAL AND FUNCTIONAL PRINCIPLE

71. The clear intention of Article 18.7 was that the elected element of the Seanad should be composed on a functional or vocational basis; indeed, Article 19 envisages the possibility that functional or vocational groups might be given by law the right to elect directly their representatives in the Seanad.

72. We think it necessary to stress, as the Seanad Electoral Law Commission, 1959, already have done, that the duties of the Seanad are political and the decisions which it is required to take will always be political no matter how it is composed. The purpose of the Seanad is to deal with the affairs of the community as a whole and not to look after the interests of any special groups or associations. The individual Senators should be capable of taking a broad view of public affairs as a whole, and not restrict themselves to their own sectional interests.

73. The fact that the elected element of the Seanad is intended to be composed largely on a functional or vocational basis does not necessarily eliminate the possibility of suitable persons with an interest in national affairs as a whole securing seats in that house, but we think it is necessary always to guard against any suggestion that the members of the Seanad should not be in the fullest sense politicians rather than delegates of particular interests in the national life. The extent to which success can be achieved on these lines will depend largely on the nature of the statutory provisions which are enacted in relation to the election and composition of the Seanad, and the need for fundamental changes in the very flexible provisions of the Constitution on this point has not, in our view, been proven. Our conclusion is, therefore, that the principle of a second chamber composed on vocational or functional lines should be preserved; however, the possibility of improving the composition and calibre of the Seanad by ordinary legislation within the framework of the Constitution should be reviewed from time to time.

GEOGRAPHICAL COMPOSITION AND METHOD OF ELECTION

74. We have considered a variety of proposals relating to the geographical composition of the Seanad. This could be arranged on a provincial or county basis as in other countries. Regional representation could be adopted with or without the present functional/vocational structure and, furthermore, the Senators could be elected on a number of different kinds of franchise. We have come to the conclusion, however, that the political and historical reasons for this kind of representation which apply in other countries have no relevance here and that there would be no advantage for us in

adopting this formula. Indeed, we would be inclined to feel that any arrangement which allocated Senators on a geographical basis might, possibly, tend to create disharmony between different regions of the country.

75. We considered the possibility of altering the electorate. Article 18.5 provides that Seanad elections shall be held on the system of proportional representation by means of the single transferable vote and by secret postal ballot; it was obviously contemplated in drafting this provision that direct election by the public would not be appropriate. We have given some further thought to this question of direct popular election of Senators. Various possibilities for simplification arise under this heading, such as prescribing a higher age qualification for citizens entitled to vote in Seanad elections, or permitting only householders to vote. Furthermore, the direct election process need not apply to the entire body of Senators; it could be arranged that half of the Seanad would be elected directly by the people and half by some electoral college.

76. It would appear that there would be no insuperable difficulties in arranging for direct election of some or all of the members of the Seanad. One of the advantages would be that elections to the Seanad could take place at the same time as the Dáil elections. An incoming Taoiseach would not, therefore, have to wait some months, as at present, to ascertain the composition of the Seanad; he would have this information just as soon as the Dáil returns are available and this would make it easier for him to decide whether he wanted any Senators in his Government.

77. In general, however, we are opposed to the idea of direct election of Senators by the people. We should like to point out, first of all, that this was tried in 1925 with most unsatisfactory results; while there were special difficulties attached to that particular election which might be overcome by adopting different procedures, the general feeling since then has been that it is inadvisable to try to involve the public directly in Seanad elections. Combining Seanad elections with Dáil elections could also, in our view, lead to confusion in the minds of the people in exercising their franchise. We feel too that, whatever Constitutional provisions may be enacted to the contrary, there is always the possibility of conflict arising when each of two different houses of the legislature is elected directly by the people, and thus in a position to claim an equal mandate.

78. We have examined with considerable interest the report of a Committee of the New Zealand Parliament (published in 1952) in connection with the possibility of creating a Senate in that country. That Committee put forward the recommendation that a 32-member Senate should be created with powers of a nature which would not be regarded as novel in this country. As regards the method of appointing the Senate, they came to the conclusion that the political

parties should have the right to nominate the members in proportion to their strength in the first chamber. The recommendations of this Committee were never accepted and New Zealand is still operating on a unicameral basis. Although we have found the report of interest we cannot see that the adoption of the nominative procedure recommended would produce a better Seanad in this country; there is, indeed, the danger that it would give rise simply to a Seanad which was merely a replica on a smaller numerical basis of the Dáil.

TERM OF OFFICE

79. An arrangement often adopted in relation to second chambers is that the term of office of the members is longer than that of the members of the first chamber. If this pattern were followed here, it could be arranged, for example, that only half of the Seanad seats would be vacated on the dissolution of the Dáil and this would, in effect, ensure that half the Senators would hold office for the period of two Dáils. While this might add to the stature of the Seanad and would also contribute to that stability which is often regarded as a desirable feature of a second chamber, we are satisfied that it should not be adopted in this country. The principal danger we see is that the personnel of the Seanad might not adequately reflect changes in public opinion which would be represented to a fuller extent in the more recently elected popular chamber. This could, possibly, give rise to a situation in which the two houses of the legislature find themselves frequently at loggerheads.

ELECTION OF NOMINATING BODIES CANDIDATES

80. As will be seen from Annex 18 the existing statutory allocation of members between the Nominating Bodies sub-panels and the Oireachtas sub-panels, combined with the nature of the electorate prescribed by law, has given rise to a situation in which the nominees put forward by the nominating bodies are in a permanent minority of 16 to 27. This situation has been strongly criticised in the past and some of the recommendations put forward by the 1959 Commission were designed to improve the position. This, of course, is a matter which can be rectified by an ordinary Act of the Oireachtas but we wish, nevertheless, to place on record our view that further consideration might now be given to the possibility of increasing the minimum representation attainable by the candidates put forward on behalf of the nominating bodies.

DIRECT ELECTION BY NOMINATING BODIES

81. As mentioned earlier, Article 19 of the Constitution states that provision may be made by law for the direct election by any

functional or vocational group of so many members of the Seanad as may be fixed by such law in substitution for an equal number of the members to be elected from the corresponding panels of candidates constituted under Article 18. It has frequently been suggested that this constitutional power should be availed of in order to give certain Nominating Bodies the right to directly elect their own representatives in the Seanad and certain recommendations to this effect were put forward by the 1959 Commission. We are unanimous in the view that all suggestions of this kind should be rejected, mainly on the ground that if such an arrangement were introduced the political parties would find it necessary to take a much greater interest in the internal affairs of the Nominating Bodies. The dangers of introducing unnecessary party-political activity in commercial, professional, vocational and cultural bodies has often been adverted to in the past and we are fully satisfied that it should be avoided at all costs. For similar reasons we would be opposed to any suggestion that the electorate for the Seanad should be extended to include the membership rolls of the Nominating Bodies.

UNIVERSITY SENATORS

82. Recent developments relating to the Universities may require some consultation with interested bodies as to the allocation of the six University seats between the different colleges. The Constitution at present provides that three shall be elected by the National University of Ireland and three by the University of Dublin; all other matters relating to the election of University representatives are to be provided for by law (Article 18.6). We think it would be advisable now to change the wording of Article 18.4 so as to provide that six representatives shall be elected from the Irish Universities in a manner prescribed by law without any specific reference to particular Universities.

83. As regards the history of University representation it is of interest to recall that it was intended to give representation to the Universities in the first Senate but during the debates on the Constitution Bill in 1922 this was altered to provide them with Dáil representation instead. In 1935 this representation was abolished and the 1937 Constitution reverted to the original arrangement of Senate representation.

ARGUMENTS ADDUCED AGAINST UNIVERSITY REPRESENTATION

84. Whatever historical reasons there may have been for special representation for the Universities in the Dáil or Senate in the past, this can no longer be justified today and the Constitution should now be amended to abolish it.

ARGUMENTS ADDUCED IN FAVOUR OF UNIVERSITY REPRESENTATION

85. On the whole, University representatives in the Seanad have shown, on past performance, that the arrangement is fully justified and the special provision for six University seats should be retained. University Senators have, generally, been of high calibre as legislators; the elimination of these Senators would, therefore, disimprove the quality of the Seanad.

POWERS OF SEANAD

86. It is sometimes suggested that the Seanad should have far greater powers than it has at the moment, the most extreme view being that it should have the right to prevent the enactment of legislation. It is doubtful, however, if there is any substantial number of persons who would wish to have a situation in which there would be two Houses of the Oireachtas each having powers which would inevitably lead to conflict. It seems clear to us that the vast majority of the people would strongly support the view that the Dáil, elected as it is entirely by direct universal suffrage, and consisting of persons who carry the major burdens of public affairs, should have superior authority over the other House. In this connection it is of interest to note that a comparative study of the structure and functioning of representative institutions in 55 countries published in 1966 for the Inter-Parliamentary Union, revealed that almost all the constitutions of unitary states which have a bicameral legislature endow the first house with authority superior to that of the second.

ARTICLE 21 ET SEQ.—DISTINCTIONS BETWEEN DIFFERENT KINDS OF BILLS

87. Annex 24 contains information in connection with provisions relating to different kinds of Bills under Articles 21, 23, 24, 26 and 27. It is clear from this material that in the case of a Money Bill Articles 23, 26 and 27 do not apply.

88. We are unanimous in the view that it is necessary to place Money Bills in this unique position. The need to give the Dáil special powers in relation to financial matters has been recognised since the establishment of the State and a similar situation is found in relation to the popularly elected chamber in many other democracies. We think it necessary to point out, too, that the constitutionality of a Money Bill can be contested in the Courts under the provisions of Article 34.3.2°.

89. We are also satisfied that no change should be made in relation to Bills passed under Article 24. The constitutionality of such a Bill can also be challenged in the Courts in the ordinary way under Article 34.3.2°. There is also the point that the object of the urgency procedure provided by Article 24 could be negated if such Bills were to be made subject to Articles 26 and 27. There is, therefore, everything to be said in favour of excluding these Bills from Articles 26 and 27.

90. Later in this report we will deal further with Bills to amend the Constitution, which are in a very special category. It is relevant to point out also that we will probably have a good deal to say about the actual processing of Bills in the Dáil and Seanad when we come to consider the working of the legislative machinery of the Oireachtas. That is, however, a matter for subsequent enquiry and at present we are concerned only with the Constitutional provisions.

ARTICLE 23.1—DÁIL RESOLUTION DEEMING BILL TO HAVE BEEN PASSED BY BOTH HOUSES

91. Article 23.1 enables the Dáil to limit to ninety days the amount of time available to the Seanad for consideration of ordinary Bills. After this period has expired (or an agreed extension thereof) the Dáil may resolve that the Bill is deemed to have been passed by both Houses; such a resolution must, however, be passed within 180 days of the expiry of the initial or extended period. The expression "stated period" is used in the Article to cover both the initial ninety day period or any extended period agreed upon between the Houses.

92. It seems clear enough to us from the wording of the provision that any proceedings in the Seanad are valid until the Dáil moves its resolution, even if the stated period has passed. The view has, however, been expressed that the intention of the Article was that where the stated period was in danger of being exceeded the Seanad would take the initiative for an agreed extension under Article 23.1.2°. We feel that there is no point in arguing about the proper interpretation of these provisions and that if there is any doubt about the Seanad's powers the matter should now be clarified by amendment. This could be done by declaring that the Seanad can continue with its consideration of a Bill, after the expiry of the stated period, until the Dáil passes its resolution. Such a procedure can be defended on the ground that where the Dáil has not seen fit to assert its supremacy at the end of the ninety days, then it must be assumed that there is agreement between the two Houses for an undefined (but not unlimited) extension.

93. Whatever may be said about the stated period, it is not clear to us what form of the Bill "is deemed to have been passed" when the Dáil passes its resolution. The list of amendments made by the Seanad may include Ministerial amendments which the Dáil is most anxious to accept and others which it wants to reject. Among other questions, it may be asked whether, in the event that the Houses are unable to agree, the Dáil can pass a resolution deeming a Bill to be passed with certain Seanad amendments only.

94. It would, in our view, be desirable to amplify Article 23 so as to provide that the resolution passed by the Dáil may specify the amendments passed by the Seanad which are to be made in the Bill and that the Bill as so amended shall, subject to any further Dáil amendments arising out of the Seanad amendments, be the one which is deemed to have been passed by both Houses.

ARTICLE 26—REFERENCE OF BILLS TO THE SUPREME COURT BY THE PRESIDENT

95. Article 26 provides that, subject to certain exceptions, any Bill may be referred by the President to the Supreme Court for a decision on the constitutionality of its provisions. Prior consultation with the Council of State is required of the President. By an amendment made in 1941 to Article 34 of the Constitution it was provided that once a Bill has been referred to the Supreme Court under Article 26 no Court whatever shall have jurisdiction to question the validity of the provisions in question (Article 34.3.3°). Once a provision has been approved under Article 26 by the Supreme Court it is then unassailable for all time.

96. The President's powers under Article 26 have been exercised in three cases—the Offences against the State (Amendment) Bill, 1940, the School Attendance Bill, 1942 and the Electoral Amendment Bill, 1961. Certain provisions of the School Attendance Bill were found to be unconstitutional. It may be said, therefore, that these powers have not been extensively operated. It has now been suggested that these powers should be abolished, mainly on the ground that by virtue of Article 34.3.3°, Supreme Court decisions under Article 26 cannot be re-opened in later proceedings.

97. The purpose of Article 26 is to provide machinery for settling at an early stage the position of Bills which are alleged to be of doubtful constitutionality. We feel that, on the whole, this kind of provision is useful in the Constitution and we are unable to agree, therefore, that it should be deleted. While we are unanimous in this opinion that Article 26 should be retained we feel that some changes are necessary, but we have been unable to agree on the best approach to the problem.

ARGUMENTS ADDUCED IN FAVOUR OF ABOLISHING ARTICLE 34.3.3°

98. The constitutionality of an enactment should be capable of being challenged at any time, regardless of a Supreme Court decision under Article 26. This approach would be justifiable particularly in view of the abandonment of *stare decisis* for ordinary proceedings, including proceedings for constitutional validity under Article 34. If the Supreme Court is free to review at any time its decisions in ordinary proceedings, then it should have equal freedom in the case of decisions under Article 26. The acceptance of this proposal would, then, involve the deletion of Article 34.3.3°.

ARGUMENTS ADDUCED IN FAVOUR OF RELAXING THE PRESENT RULE

99. The deletion of Article 34.3.3° would defeat the whole object of Article 26 since the constitutionality of any Bill to which the prescribed process has been applied could not be regarded as having been settled for any period of time. While it is true that in the case of a law which is challenged for validity in ordinary proceedings under Article 34, further proceedings can be taken at any time, the kind of measure to which Article 26 was intended to apply is in a very special category since its validity is in doubt before it ever reaches the Statute Book. Some attempt at reaching stability, for some period of time, in relation to such a measure must be permitted. The best solution would be to retain the existing provisions with an amendment to the effect that the Supreme Court decision could be challenged in further legal proceedings after a period of, say, seven years. This would provide some answer to the criticism that the existing arrangements have the effect of calcifying the law for all time, and it would be in harmony with the abandonment of *stare decisis* for ordinary proceedings. The waiting period would have the advantage of enabling the courts to have a further look at provisions approved under Article 26 after they have been in actual operation for a period of time; under these conditions the decision of the courts would be more realistic than the decision *in vacuo* which must be taken under Article 26.

OTHER MATTERS ARISING UNDER ARTICLE 26

100. Article 26.2.2° and Article 34.4.5° provide that the decision of the Supreme Court on the constitutionality of a Bill or law must take the form of one judgment only (that of the majority) and that no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be

disclosed. These clauses were, in the main, inserted in the Constitution by special amendment in 1941. In the case of ordinary proceedings, it is now clear that the Supreme Court will not regard itself as being bound by earlier decisions. In the case of Bills referred to the Supreme Court under Article 26 we have indicated earlier that the constitutional prohibition on reviewing the original decision of the Court could at least be relaxed. It could be contended, therefore, that in view of the possibility of decisions being reviewed at a later stage, a case could be made for allowing the disclosure of opinions other than that of the majority. In our view, however, it is the majority opinion which really matters and any publication of other opinions would only tend to create uncertainty in the minds of the people on matters of constitutional importance. It could be contended that the object in introducing these particular clauses into the Constitution was to eliminate uncertainty of this kind and that, therefore, they should be retained in their present form.

101. Under Article 26.3.1°, where the Supreme Court decides that any provision of a Bill referred to it is repugnant to the Constitution, the President must decline to sign the entire Bill. We considered a suggestion that where only part of a Bill is held to be invalid by the Supreme Court, the remainder might be signed by the President and thus brought into operation. On balance, however, we feel that since all the provisions of a Bill are usually bound up with each other, the most satisfactory procedure for the Government to adopt in the case of a Bill which has not been fully passed by the Supreme Court under Article 26 is to have it re-drafted in an acceptable form and then re-submitted to the Oireachtas.

ARTICLE 28—EMERGENCY POWERS

102. 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.

103. 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.

104. 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.

105. 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.

106. 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.

ARTICLE 38—SPECIAL CRIMINAL COURTS

107. Article 38 provides that no person shall be tried on any criminal charge save in due course of law and with a jury. An exception to this rule is, however, provided by Article 38.3 which states that special courts may be established by law for the trial of offences in cases where it is determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. There is a further exception under Article 38.4 which provides for the establishment of military tribunals to deal with a state of war or armed rebellion. Article 38.6 provides that the provisions of Articles 34 and 35 of the Constitution shall not apply to the special courts and tribunals referred to above. The effect of this latter provision is that various safeguards applicable to the ordinary courts, such as the independence of the judges concerned, may be denied in the case of special courts and tribunals set up under Article 38; all the provisions relating to the structure and proceedings of such special courts and tribunals may, in fact, be determined by ordinary law.

108. Under Section 39 (3) of the Offences Against the State Act, 1939, a person cannot be appointed to a Special Criminal Court unless he is a judge, a barrister, a solicitor or an officer of the Defence Forces. This has been criticised on the ground that it gives the Government the right to appoint a court consisting entirely of non-legal persons. We think that it is a matter for the Government or the Oireachtas to decide in any given set of circumstances what would be the appropriate kind of personnel for a Special Criminal Court, within the limits specified by these provisions. Different situations would call for different kinds of court and we do not think it would be appropriate to interfere with the flexibility provided by the existing law. We do not recommend, therefore, that any constitutional restrictions should be introduced in relation to the composition of these courts. There is, however, another way of dealing with this matter to which we refer later in paragraph 111 of our report.

109. Under the provisions of Article 34 there is a constitutional right of access to the High Court in all ordinary criminal proceedings. As already indicated, however, that Article is excluded from application to Special Criminal Courts by Article 38.6 so that the right of appeal from decisions of such courts could be refused by law. We have given careful consideration to this particular point and

we feel that it would be desirable to add to Article 38.6 a proviso to the effect that any legislation enacted in relation to Special Criminal Courts cannot deny the right of appeal on questions of law from the decisions of such courts.

110. We have considered a suggestion that the question of the adequacy or otherwise of the ordinary courts should be capable of being determined by the courts themselves. It could be contended that this approach is not feasible, bearing in mind, particularly, the kind of situations with which the Special Criminal Courts were intended to deal. Political considerations are primarily involved here and the decision to bring these Courts into operation must, in our view, be a political one. However, while we are not disposed to recommend judicial determination of this question, we feel that some other restriction on Article 38.3 might be considered. Having compared this provision with Article 28.3.3°, it would, we think, be logical to provide that the powers provided by Article 38.3 cannot be availed of unless either :

- (a) a state of war or armed rebellion exists, or
- (b) an emergency has been declared under Article 28.3.3° or
- (c) each House of the Oireachtas has resolved that the Special Courts should be established for a specified time.

111. This limitation of the powers available to the Government would, we feel sure, meet all reasonable criticisms which have been expressed in relation to the existing constitutional provisions. As regards item (c), we contemplate the possibility that in the event of resolutions being passed by the Oireachtas in this connection, one or both of the two Houses might wish to indicate how the Special Criminal Court should be composed, and this would be a further safeguard against arbitrary action.

ARTICLE 40.4.1.°—RESTRICTIONS ON PERSONAL LIBERTY

112. Article 40.4.1.° provides that no citizen shall be deprived of his personal liberty save in accordance with law. The expression "save in accordance with law" has given rise to very considerable difficulties of interpretation over a long period of time. In 1940 the Supreme Court approved of the Offences against the State Bill (which provided, *inter alia*, for internment without trial) on the ground that the provisions contained therein were "in accordance with law" as enacted by the Oireachtas, and it declared that it had no right to question the propriety of such law in view of the terms of the Constitution.

113. There has, however, been a tendency in recent years by the Supreme Court to adopt a less rigid attitude and our attention has been drawn in particular to the High Court judgment in the case of *Ryan v. Attorney General* (1965, IR294) in which the juridical effect of Article 40.3 was discussed. That Article guarantees that the State will in its laws respect, defend and vindicate the personal rights of the citizen and, in particular, protect and vindicate his life, person, good name and property. It was held in the case referred to that Article 40.3 of the Constitution could be judicially enforced and that "the rights therein enumerated are not confined to those specified but include all those rights which result from the Christian and Democratic nature of the State." The Supreme Court later agreed specifically with this part of the High Court judgment. Attention has also been drawn to the case of *Macauley v. the Minister for Posts and Telegraphs* (1966, IR345) which again demonstrated that Article 40.3 could and would be used actively by the Courts.

114. In view of these recent developments, we have come to the conclusion that no action to amend the Constitution is called for since the Supreme Court may now be prepared to adopt towards the expression in question an attitude different from that which influenced it in the case of the *Offences Against the State Bill* and other proceedings.

115. We think it relevant to point out here, too, that in recent years the Supreme Court has decided that it will not be bound by earlier decisions so that judicial determination of such vital questions as fundamental rights can be reviewed from time to time in the light of changing circumstances. Earlier in our report we have recommended some changes in the matter of decisions taken by the Supreme Court under Article 26, with the object of ensuring that a somewhat similar flexibility of approach can be adopted in respect of such decisions. In this particular instance, we are satisfied that a solution of the problem we are discussing can only be found by judicial decision since we see no hope of devising suitable constitutional provisions which would guarantee the right to personal liberty and at the same time indicate in detail the circumstances in which it can be denied by law.

ARTICLE 40—TRADE UNION ISSUES

116. In *National Union of Railwaymen v. Sullivan* (1947, IR77), the Supreme Court decided that Part III of the Trade Union Act, 1941, was in its main principles repugnant to the Constitution and therefore invalid. Part III provided for the setting up of a Trade Union Tribunal with the function, *inter alia*, of determining applications by trade unions to be given the sole right to organise workers

of any particular class. The Constitution (Article 40.6.1°) lays down the right of citizens to form associations and unions but provides that laws may be enacted for the regulation and control in the public interest of the exercise of this right. The Supreme Court held, apparently, that Part III went beyond regulation and control by restricting the right of citizens to join unions of their choice.

117. In the *Educational Company of Ireland v. Fitzpatrick* (1961. IR345) a union which was endeavoring to secure that all employees of the firm should be members of the union called a strike and placed a picket on the firm. The firm took proceedings to obtain an injunction to restrain and remove the picketing. The matter eventually came before the Supreme Court which decided that picketing to coerce persons into joining a union against their wishes was inconsistent with the provisions of Article 40.6.1° of the Constitution.

118. The purpose of Part III of the Trade Union Act, 1941, was to institute machinery which would afford some protection against proliferation of unions, and inter-union disputes arising from efforts by more than one union to organise workers in the same class of employment. Discussions have taken place between the Department of Labour and the Irish Congress of Trade Unions and the Federated Union of Employers about a series of amendments of Trade Union law, certain of which are designed to go some way towards achieving the purpose which was in mind when Part III of the 1941 Act was framed. Briefly, the relevant provisions include prescription of a minimum number of members and increased deposits for unions seeking negotiation licences. There is also provision for the issue of group negotiation licences to groups of unions covering all the workers in a particular employment or a group of workers forming a homogeneous negotiation unit. The proposal is that, where such a group negotiation licence is in force, constituent unions would not have statutory protection in regard to picketing in pursuance of a strike unless the picketing had been authorised by the group in accordance with the group's rules and constitution.

119. It is understood that the Minister for Labour now proposes to proceed with legislation which will include provisions on the lines indicated in the previous paragraph. The question of amending the Constitution to deal with the difficulty arising out of the 1947 decision does not, therefore, arise at this stage.

120. As regards the *Educational Company of Ireland* case, the position is that, following discussions in 1962 between the Government and the Irish Congress of Trade Unions, a working party was set up to consider how, without conflicting with the Supreme Court's judgement, the freedom of a trade union to take action, including picketing, to try to enforce union membership could be restored. The Working Party, under the Chairmanship of the then Attorney General, produced a scheme of a Bill for this purpose. The text

of a Bill was later drafted and forwarded to the F.U.E. and I.C.T.U. The Bill was not introduced as it was desired to take it about the same time as the proposed legislation relating to industrial relations and trade union law.

121. If the Bill is passed by the Houses of the Oireachtas there is a possibility that the President may consult the Council of State and decide to refer the Bill to the Supreme Court in view of the previous decision by the Court on the constitutional issue of picketing to enforce union membership.

122. The Minister for Labour considers that it would be preferable to deal with the issue raised in the Educational Company of Ireland case in the manner proposed rather than to seek a constitutional amendment, though such an amendment would have to be considered if the Supreme Court decided that the proposed Bill is, in any respect, repugnant to the Constitution. We are in agreement with this view, particularly as it would be very difficult to draft a constitutional amendment to cover this point without going into a degree of detail in regard to trade union activities which would be inappropriate in the text of a Constitution.

ARTICLES 41.3 AND 44.2—PROVISIONS RELATING TO MARRIAGE

123. Article 41.3.2° provides that "no law shall be enacted providing for the grant of a dissolution of marriage". This universal prohibition has been criticised mainly on the ground that it takes no heed of the wishes of a certain minority of the population who would wish to have divorce facilities and who are not prevented from securing divorce by the tenets of the religious denominations to which they belong. It is also argued that the Constitution was intended for the whole of Ireland and that the percentage of the population of the entire island made up of persons who are Roman Catholics though large, is not overwhelming. The prohibition is a source of embarrassment to those seeking to bring about better relations between North and South since the majority of the Northern population have divorce rights under the law applicable to that area. It has also been pointed out that there are other predominantly Catholic countries which do not in their Constitutions absolutely prohibit the enactment of laws relating to the dissolution of marriage. Finally, attention is sometimes drawn in discussing this subject to the more liberal attitude now prevailing in Catholic circles in regard to the rites and practices of other religious denominations, particularly since the Second Vatican Council.

124. It would appear to us that the object underlying this prohibition could be better achieved by using alternative wording which

would not give offence to any of the religions professed by the inhabitants of this country. An example of such an alternative would be a provision somewhat on the following lines :—

“In the case of a person who was married in accordance with the rites of a religion, no law shall be enacted providing for the grant of a dissolution of that marriage on grounds other than those acceptable to that religion.”

It would probably be necessary to add a clause to the effect that this was not to be regarded as contravening any other provision of the Constitution prohibiting religious discrimination. This wording would, we feel, meet the wishes of Catholics and non-Catholics alike. It would permit the enactment of marriage laws acceptable to all religions. It would not provide any scope for changing from one religion to another with a view to availing of a more liberal divorce regime. While it would not deal specifically with marriages not carried out in accordance with the rites of a religion, it would not preclude the making of rules relating to such cases.

125. In coming to this conclusion we have examined a great deal of published material on the subject, and in particular the decisions reached at the recent Vatican Council. It is important to note in this connection that the existing prohibition of dissolution of marriage deprives Catholics also of certain rights to which they would be entitled under their religious tenets. There are several circumstances in which the Catholic Church will grant dissolutions of valid marriages or will issue declarations of nullity. We understand that many thousands of cases are dealt with under these provisions every year either at Rome or by diocesan and metropolitan courts throughout the world. The absolute prohibition in our Constitution has, therefore, the effect of imposing on Catholics regulations more rigid than those required by the law of the Church. This conflict is referred to in a number of publications by Catholic authors.

126. It can be argued, therefore, that the existing Constitutional provision is coercive in relation to all persons, Catholic and non-Catholic, whose religious rules do not absolutely prohibit divorce in all circumstances. It is unnecessarily harsh and rigid and could, in our view, be regarded as being at variance with the accepted principles of religious liberty as declared at the Vatican Council and elsewhere. It would seem, therefore, that there could be no objection from any quarter to an amendment of the Constitution on the lines which we have indicated in Paragraph 124 above, and we unanimously recommend that such an amendment be made.

127. If this basic change were made in subsection 2° of Article 41.3, it would be necessary to look again at the provisions of subsection 3°. That subsection reads as follows :—

“No person whose marriage has been dissolved under the civil

law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved."

The wording of this provision created some difficulties during the passing of the Constitution in 1937 and it has been the cause of some confusion since that time. The position of divorced persons who re-marry in this State and of their partners and offspring is, of course, of vital importance in relation to the Succession Act and other matters, and it is desirable that any cause of doubt be removed. In the case of *M.-P. v. M.-P.* (1958. I.R.336) two Supreme Court judges discussed its effect in regard to the recognition in this country of an English decree as valid to dissolve a marriage and, unfortunately, their views differed very considerably from each other. We have considered these views carefully and have also noted with interest the subsequent decision of the English courts in *B. v. B.* (1961. 3 All E.R.225). In addition, we have examined the findings of a working party representative of the Attorney General's Office and the Department of External Affairs which reported in 1940 on this provision. We are led to the conclusion that the best course is to delete subsection 3° entirely; in that event, the recognition of foreign divorce decrees will be a matter for determination in accordance with private international law, the principles of which have been fairly well established. It is worth noting in this connection that in Article 29.3 of the Constitution this country specifically accepts the principles of international law.

128. Article 44.2.3° provides that

"The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."

Under the Marriage Acts different conditions are prescribed for marriages performed in accordance with the rites of (I) the Church of Ireland, (II) the Presbyterian Church, (III) other Protestant Churches, (IV) the Jewish religion. These conditions relate to prior residence, district where the marriage is to be celebrated and place and time of the marriage. No similar conditions are laid down in connection with Roman Catholic marriages. It appears that the Marriage Acts are now being revised but that it may be necessary to continue with the differentiation between the different kinds of marriage ceremonies. The abolition of the conditions relating to the marriage of non-Catholics is not regarded as an advisable step as some of the smaller denominations are not sufficiently organised to ensure that parties who present themselves for marriage are, in fact, free to marry.

129. The opinion has been expressed that these provisions constitute discrimination on the grounds of religious profession or belief within the meaning of Article 44.2.3° and that at least the penal provisions of the existing code would be declared not to have been carried over under the Constitution. We recommend that this difficulty be removed by adding a suitable provision to this part of the Constitution to the effect that the prohibition on religious discrimination shall not prevent the enactment of different procedural rules relating to different kinds of marriage ceremonies with a view to ensuring that all legal rules are complied with by the parties concerned.

ARTICLE 42.3.2°—SCHOOL ATTENDANCE

130. Under Article 42.2 of the Constitution parents are free to provide for the education of their children in their homes or in private schools or in schools recognised or established by the State. Article 42.3.1° provides that the State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State. Article 42.3.2° provides that the State shall require that children receive a certain minimum education, moral, intellectual and social.

131. After the coming into force of the Constitution an effort was made to enact suitable provisions to implement Article 42.3.2°. The Bill included a clause to the effect that where a child was being given education otherwise than by attending school, such alternative education could be tested by the Minister for Education and certified as being suitable. The Minister and his advisors at the time were satisfied that an appropriate minimum would need to be ascertained in relation to individual children. The Bill was passed by both Houses, but on reference to the Supreme Court under Article 26 (1943. IR334), was held to be repugnant to the Constitution because, *inter alia*, the standard provided for by the Bill might vary from child to child and was not such a minimum standard of elementary education of general application as Article 42.3.2° contemplated.

132. The Supreme Court indicated that in its opinion the expression "a certain minimum education" meant "a minimum standard of elementary education of general application". Subsequently, an attempt was made to redraft the legislation to bring it into conformity with this interpretation. Serious difficulties arose in this connection, however, in ascertaining the full significance of the Supreme Court interpretation and the legislation was accordingly abandoned.

133. Conditions have changed a good deal since 1943 and the desire of parents to have their children educated in recognised establishments is now greater than it has ever been. The enforcement of education requirements is not, therefore, a major difficulty but, despite this, we think it desirable to try to eliminate the difficulty posed by the Supreme Court decision. To this end we would suggest that the existing subsection 2° of Article 42.3 might be replaced by a provision somewhat on the following lines:—

“2° Laws, however, may be enacted to oblige parents who have failed in their duty to provide for the education of their children to send their children to schools established or designated by the State.”

In putting forward this suggestion we do not wish to infringe the rights of parents under Article 42.2.

ARTICLE 44.1—RECOGNITION OF RELIGIONS

134. Article 44.1 of the Constitution provides, *inter alia*, as follows:—

2° The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.

3° The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation of this Constitution.

135. The significance of these provisions has subsequently been touched upon in a number of court decisions but their legal effect has not been conclusively pronounced upon. The general view of commentators on the Constitution is, however, that these provisions are of no juridical effect and do not give any special privilege to the Catholic Church under the Constitution. The prevailing view is that sub-section 2° merely recognises the statistical fact that the Catholic Church is the guardian of the Faith professed by the great majority of the citizens; other provisions (in Article 44 and elsewhere) of the Constitution prohibit religious discrimination of any kind so that there can be no preference for any particular religion. Not only legal experts but Catholic theologians support this view.

136. There seems, however, to be no doubt that these provisions give offence to non-Catholics and are also a useful weapon in the hands of those who are anxious to emphasise the differences between North and South. They are also defective in that they make no

provision for religious denominations which did not exist in Ireland at the time the Constitution came into operation, in contrast to later provisions of the Article which apply universally to all denominations.

137. The decisions taken at the Second Vatican Council have a bearing on this subject for Catholics. The most relevant documents are the "Declaration on Religious Freedom" and the "Pastoral Constitution on the Church in the Modern World." We have examined these documents in detail, together with various commentaries which have been published in relation to them.

138. It is clearly to be inferred from these documents, and the comments made on them by competent persons, that the Catholic Church does not seek any special recognition or privilege as compared with other religions and that her primary interest is to see that all citizens enjoy equal freedom in the practice of their religion whatever it may be.

139. We feel that subsection 2° might profitably be deleted on the ground that our circumstances do not require any special mention of a particular religion in the Constitution. It was not intended to give any privilege to the Roman Catholic Church, and the Church never sought to have itself placed in a privileged position. The deletion of this provision would, in particular, dispel any doubts and suspicions which may linger in the minds of non-Catholics, North and South of the Border, and remove an unnecessary source of mischievous and specious criticism. Similarly, sub-section 3° could be deleted on the ground that the list of religions given therein is restrictive, giving rise to doubts in regard to other denominations. The deletion of these two sub-sections would also help to promote ecumenism and it is of interest to note, in this connection, that one of the four reasons given for the making of the Declaration on Religious Freedom by the Vatican Council was "for the sake of ecumenism".

140. We accordingly recommend, unanimously, that sub-sections 2° and 3° be deleted from the Constitution.

ARTICLE 45—DIRECTIVE PRINCIPLES OF SOCIAL POLICY

141. Article 45 sets out the principles of social policy which are intended for the general guidance of the Oireachtas. It provides that the application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognizable by any court under any of the provisions of the Constitution.

142. Our view is that this Article, in setting out the directive

principles of social policy, should include a provision establishing the principle of equal pay for men and women for work of equal value.

ARTICLES 46, 47—AMENDMENT OF THE CONSTITUTION

143. Article 46 provides that the Constitution can be changed only by decision of the people in a referendum. In the case of a rigid Constitution like ours, it is to be expected that, since the law of the Constitution is basic and fundamental, and superior to other law, the provisions of the Constitution itself should not be capable of being changed by the ordinary legislative process. Examination of a number of modern Constitutions which are of interest to us reveals that there are numerous formulae which may be adopted for the purpose of permitting constitutional changes to be brought about while at the same time maintaining the essential supremacy of the Constitution over ordinary law. Some information on this subject is given in Annex 25.

144. We have considered a proposal for some relaxation of the rigid rule laid down in Article 46, and arguments adduced for and against a change in the existing system are set out in the following paragraphs.

ARGUMENTS ADDUCED IN FAVOUR OF A CHANGE

145. (a) It may be concluded from Annex 25 that Article 46 of our Constitution is, on the whole, rather more rigid and restrictive than the arrangements generally adopted in other European countries.

(b) Unnecessary rigidity is to be avoided since if it is difficult to bring about a change in a Constitution it may, in the course of time, become hopelessly out of date and unsuited to the needs of the people.

(c) There is also the possibility that where the machinery for change is inadequate, those whose interests are being ignored because of some constitutional strait-jacket may resort to other means to achieve their ends.

(d) Were it not for the fact that the referendum is the only amendment procedure at present permissible, certain changes would have been made long ago in a number of our Constitutional provisions. The difficulty and expense involved in carrying out a referendum has caused these revisions to be delayed for a considerable time.

(e) The most satisfactory arrangement to adopt in this country would be the following :—

- (i) the less important provisions of the Constitution would be capable of being amended by a Bill which had secured the consent of four-fifths of the full membership of both Dáil and Seanad;
- (ii) the fundamental provisions of the Constitution could be changed only by referendum or, alternatively, by a law passed in identical terms in two successive parliaments, in the second of which a four-fifths majority of the full membership of each House is obtained.

(f) In order to provide an additional safeguard in relation to amendment of the Constitution, it could be provided that in the event of a petition being submitted by 100,000 electors, a referendum must be held regardless of any decisions reached by Parliament.

(g) The matters to be classified as fundamental would include questions relating to sovereignty, territorial jurisdiction, voting rights and electoral system, the composition and powers of Parliament, the judicial system and basic rights.

ARGUMENTS ADDUCED IN FAVOUR OF THE PRESENT PROVISIONS

146. (a) Whatever may be said about the practice in other countries, the people of Ireland are particularly attached to the idea that the Constitution is a charter which only they can adopt, enact, and give to themselves.

(b) The public would be violently opposed to the suggestion that the Oireachtas should have power to alter that document even by a procedure involving a general election and exceedingly high voting majorities in each of the two Houses.

(c) The Irish Constitution must be regarded as fundamental law which is to be changed only after fairly lengthy intervals of time and only with the specific approval of the people in a referendum.

(d) The proposal to have two forms of Constitutional amendment would involve the designation of what are the major and the minor items in the Constitution. This designation would present considerable difficulties, would itself require a referendum and would not necessarily be permanent.

General

147. A view was expressed that Article 46.4 should be so amended as to provide that more than one substantive Constitutional change could not be included in a proposal to amend the Constitution save with the consent of two thirds of both Houses.

148. It will be noted from Article 47 that a proposal for the amendment of the Constitution requires for its approval a mere majority of the votes cast at the referendum. We have considered whether any safeguard should be introduced to deal with a situation in which only a small percentage of the electorate turns up at the polls. On balance we do not think that any change is necessary in this connection as it is reasonable to assume that a proposal to amend the Constitution would always generate sufficient interest to ensure a substantial public vote for or against.

SPENT MATTER

149. In going through the Constitution we have observed a certain number of matters which are now obviously spent. We do not think it necessary to endeavour to list these but we would recommend that, wherever possible, the opportunity should be taken to eliminate them from the Constitution.

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ANNEX 1

**FUNCTIONS OF THE PRESIDENT OF IRELAND AND
PRESIDENTIAL ELECTIONS IN OTHER COUNTRIES****Functions of the President of Ireland**

1. Article 26 enables the President, after consultation with the Council of State, to refer any Bill (with certain exceptions) to the Supreme Court for a decision as to its constitutionality.

2. Under Article 27 a petition may be addressed by members of the Dáil and Seanad to the President requesting him not to sign a Bill until the will of the people has been ascertained. This applies only to Bills in respect of which the Seanad has been overruled by the Dáil in exercise of the powers given by Article 23. The President can act only after consultation with the Council of State. Where the President accepts a petition the Bill cannot become law until it has been approved by the people at a referendum or by resolution of the Dáil passed after a dissolution and reassembly.

3. Another important power is given to the President by Article 13, which enables him at any time, after consultation with the Council of State, to convene a meeting of either or both of the Houses of the Oireachtas. There is also the very wide power given by the said Article 13 which enables the President, in his absolute discretion, to refuse to dissolve the Dáil on the advice of a Taoiseach who has ceased to retain the support of a majority in Dáil Éireann. Where he does so refuse, presumably the Taoiseach concerned would have to resign and the Dáil would then have an opportunity of nominating a successor. As regards this particular power, the observations of Michael McDunphy (formerly Secretary to the President) in his book "The President of Ireland" are, perhaps, worth quoting:—

"The phrase 'in his absolute discretion' used in connection with the first of these powers, viz., the right of the President to refuse a dissolution to a Taoiseach who has failed to retain the support of a majority in Dáil Éireann, stresses the very wide difference between this and the merely formal functions discussed in the earlier part of this chapter. Here we find the President endowed with an authority entirely his own, independent of the Taoiseach, independent of the Government, independent of the Oireachtas, not answerable even to the Supreme Court, which is the final authority on matters of Constitutional validity. The President's power in the matter is absolute; in its exercise he is governed only by his personal judgment of what is best for the people, and his decision, when made, is final and unchallengeable. . . . This power is unique in the Irish Constitution. It is the only case in which the

President has an absolute and unquestionable right to act in direct opposition to a constitutional request from the Head of the Government, to reject an advice which in other matters is equivalent to a direction, which must be complied with as a matter of course."

4. Article 22 may also be mentioned in this connection; it enables the President at the request of the Seanad to refer the question whether a Bill is or is not a Money Bill to a Committee of Privileges.

5. Finally, under Article 24 he is given the power to decide whether any shortening of the time to be allowed to the Seanad for consideration of a Bill should be imposed.

6. It is important to consider how the President's functions have actually been exercised since the 1937 Constitution came into operation. Taking the relevant provisions in the order in which they are referred to above :—

Article 26 : These powers of referral to the Supreme Court have been exercised in three cases. The Offences Against the State (Amendment) Bill, 1940, the School Attendance Bill, 1942 and The Electoral Amendment Bill, 1961.

Certain provisions of the second of these were found to be unconstitutional.

Article 27 : No Bill has so far been referred to the people under these provisions.

Article 13 : The power of convening a meeting of the Houses of the Oireachtas has not been exercised. In so far as dissolution of the Dáil is concerned there is no indication that the President has declined to act on the advice of the Taoiseach on an occasion on which the support of a majority in the Dáil was lost.

Article 22 : There has been no request from the Seanad for the establishment of a Committee of Privileges to consider whether or not a Bill is a Money Bill.

Article 24 : No attempt appears to have been made to avail of the powers given by this Article to abridge the time for consideration of Bills by the Seanad.

7. Article 13.9 of the Constitution provides that the powers and functions of the President are to be exercised on the advice of the Government except where it is specified that he is to act in his absolute discretion or after consultation with the Council of State or on receipt of a communication from some other person or body. The effect of this provision is that in the case of important appointments and decisions the President does not act at his own discretion, but only on the advice of the Government. For example, judges cannot be

appointed except on that advice. There are also important provisions in the Constitution which specifically require the initiative of some other person or body before action can be taken by the President. For example, the Comptroller and Auditor General can only be appointed on the nomination of the Dáil (Article 33), while the Attorney General is appointed on the advice of the Taoiseach (Article 30). It should be noted too that in the case of removal of persons from these offices, the Constitution imposes emphatic obligations on the President to act as requested by the appropriate authorities. He must terminate the appointment of the Attorney General on the advice of the Taoiseach, and the Comptroller and Auditor General and judges on the resolution of the Dáil and Seanad.

8. The care taken to ensure that effect will be given to the wishes of the elected representatives of the people is also manifest from a variety of other provisions in the Constitution of which the following are examples : Under Article 12.9 the President cannot leave the State without the consent of the Government. Under Article 13.1 the President can appoint the Taoiseach and other members of the Government only with the approval of the Dáil, while he is required to terminate Ministerial appointments on the advice of the Taoiseach. He is also required by the provisions of Articles 13.3.2° and 25.2.1° to promulgate every law made by the Oireachtas except where reference to the people or the Supreme Court is involved. Although the supreme command of the Defence Forces is vested in the President by Article 13.4, this is followed by a provision requiring that the exercise of this command is to be regulated by law, i.e. by the legislature. Under Article 13.6 the President has the right to pardon offences etc. but by virtue of Article 13.9 he can exercise this power only on the advice of the Government. While he is empowered by Article 13.7.2° to address messages to the nation, after consultation with the Council of State, the next subsection stipulates that every such message must have the approval of the Government. Article 13.10 permits the conferring by law of additional powers and functions on the President but Article 13.11 states that no such power or function shall be exercisable except on the advice of the Government. Finally, it is noteworthy that in the declaration of war or emergency no function is allotted by the Constitution to the President under Article 28.3.

9. More important, perhaps, than any of the foregoing provisions is Article 12.10 of the Constitution which effectively establishes the supremacy of the legislature over a President which it deems to be unfit for office. This provides that a charge can be made against him by either House, and if sustained by the prescribed two-thirds majority, the President may be removed from office.

McDunphy comments on this power as follows:—

“ It will be noted that the Constitution does not define ‘ stated misbehaviour ’ or specify or in any way limit the nature of the

charge to be brought against the President. It provides, however, that in addition to proving the charge, the House responsible for the investigation must also pass a resolution that the misbehaviour the subject of the charge was such as to render him unfit to continue in office.

“ This elasticity leaves it to the wisdom of that House to decide whether the particular charge, if proved, is or is not, in the special circumstances of the case, such as to render the President unfit to continue in office.”

Presidential elections in other countries

10. The fact that quite a number of European countries are monarchies reduces substantially the field of current constitutions which might provide comparative material in relation to election to the office of President. Those which provide for direct election by the people are:—

Austria The President is elected by absolute majority in a nation-wide constituency.

Iceland The President is elected by simple majority in a nation-wide constituency.

Finland The President is elected by an electoral college of 300 members. This electoral college is itself elected by the people in the same way as the National Parliament, the candidates being nominated by voters' associations formed in the constituencies. Although it is a two-stage operation, this may, perhaps, be described as direct election of the President by the people.

France The original Constitution of the Fifth Republic (1958) provided for the indirect election of the President by an electoral college of about 80,000 people consisting of members of Parliament, members of overseas legislative councils, mayors and municipal councillors. In 1962, this particular provision was altered to provide for the direct election of the President by the people. However, for the present purposes, the French Constitution can be disregarded since, though it retains many of the forms of parliamentary government, it also has certain characteristics of the presidential system. The Constitution of the Fourth Republic (1946-1958) provided for the election of the President by members of Parliament.

11. The following European countries provide for indirect election of the President:—

- Germany* The President is elected by a specially convened body known as the Federal Convention. This is composed of Members of the Bundestag (Lower House) and an equal number of representatives elected by proportional representation by the assemblies of the Lander (individual States). Not a great deal of importance should be attached to the German Constitution in this respect since it is Federal in structure.
- Italy* The President is elected by the two Houses of Parliament and three delegates elected by each regional council (one only for the Val d'Aosta).
- Switzerland* The executive power is in the hands of a Federal Council elected by the two Houses of Parliament. One of the members of the Council is elected in the same manner to be President of the Confederation and Head of State for one year only. Here again, it must be remembered that this is a Federal State.

It will be noted in the case of both Germany and Italy that, although the President is elected indirectly, there is provision for the participation in the election of persons other than members of Parliament. There are two non-European countries, India and South Africa, which are of some interest in view of their Parliamentary history:—

In India the President is elected by an Electoral College which is composed of members of Parliament and members of the various State legislatures.

In South Africa the President is elected by the members of Parliament.

Countries like the United States, and others whose constitutions are modelled on hers, are not of any significance in this connection since they have Presidential systems of government differing very substantially from the Parliamentary system.

12. In *Parliaments* (1966), a comparative study published for the Inter-Parliamentary Union, it is stated that

“The republican tradition has not always looked with favour on a Head of State elected by universal suffrage in as much as it may promote personal power. That is why in many Constitutions the function of Head of State is regarded as one of moral leadership. The need for this quality is clear; but it is also important to prevent any autocratic leanings. One method is to make Parliament responsible for his appointment. Election by Parliament reassures Parliament about its own sovereignty and

has the advantage of being simple. So the primary manifestation of Parliamentary control over the Executive is the appointment by Parliament of the Head of State."

ANNEX 2

HEAD OF GOVERNMENT—SELECTION SYSTEMS IN OTHER COUNTRIES

Extract from "Parliaments"—I.P.U. Publication (1966)

2. *The Head of Government and Ministers*

In régimes of the presidential type the functions of Head of State and head of the government are fused in one and the same person who is elected by universal suffrage. Parliament has no part in this process. Moreover ministers do not constitute a coherent, collective entity: they simply help the Head of State who appoints and dismisses them as he wishes. Again Parliament is not concerned. This is the position in the United States, Argentina, Brazil, Chile and the Philippines, and in several African States such as Cameroon, the Central African Republic, Senegal and Tunisia. In the United States the President's cabinet, consisting of the departmental heads, has no statutory existence. It is not mentioned in the constitution and it can wield no legal authority. It is merely customary to have a cabinet though its membership and functions vary at the discretion of the President. But the appointment of members of his cabinet is not at the President's discretion; appointments must be made on the advice and with the consent of the Senate. This provision, which is one of the classical "checks and balances" of the constitution of the United States and is unusual in view of the separation of powers, makes sense if appointments are regarded as an administrative rather than a political action. This is how they should be regarded, for it has to be remembered that secretaries of state are in principle civil servants. Congress has laid down special qualifications for some posts, and has provided that some posts may not be held at the same time as others. In practice when a nomination is submitted to the Senate by the President, it is referred to the permanent commission which deals with the department concerned. The committee at public hearings and private meetings considers the candidate's qualifications. In practice the Senate exercises only the power to approve or disapprove and not the power to propose an alternative candidate. In the Philippines too the appointment of the members of the cabinet must also be approved by a parliamentary body, namely, the commission on appointments, consisting of twelve members of the House of Representatives and twelve senators with the President of the Senate as chairman.

In Pakistan where there is also a presidential type of regime, the sole obligation laid on the President who is elected by an indirect form

of universal suffrage is to choose his ministers from persons who are eligible for membership of the National Assembly. The original character of the institutions of Ghana has already been noted: here the President has to choose ministers from among members of Parliament. In Ethiopia and the United Arab Republic ministers are appointed at the discretion of the Head of State but they are individually responsible to Parliament.

In all other countries where the government is separated from the Head of State, Parliament plays a part either direct or indirect in the procedure for designating the head of the government and the cabinet and so exerts authority to a greater or less degree over the government.

The method of direct election ensures the closest dependence of the government on Parliament. Government by delegation from Parliament is a feature of the Soviet constitution. At the first session of each legislature the Supreme Soviet in a joint sitting of both Chambers appoints the president of the council of ministers of the U.S.S.R. by an absolute majority of the votes in each Chamber. The members of the government are then proposed by the president of the council of ministers and approved by the Supreme Soviet according to the same procedure. Side by side with the power of appointment are equally broad powers of individual or collective dismissal. This machinery throws light on the procedure of the downward delegation of powers found in the Soviet system. The highest authority is the Supreme Soviet. When it is not sitting it delegates its powers to the Presidium which exercises them, particularly over the council of ministers which is the executive and administrative organ of power though the personality of the president of the council frequently helps to raise its prestige as an institution. In Albania, Bulgaria, Hungary, Poland and Rumania the procedure for appointing the government closely resembles that followed in the U.S.S.R. In Rumania candidates for the post of president of the council must be proposed either by the Council of State or by the Bureau of the Grand National Assembly.

In Czechoslovakia and Yugoslavia proceedings differ from those in other People's Democracies in that the President of the Republic resembles in many respects the Head of State of the classical type of parliamentary regime. In Yugoslavia however the President of the Republic merely proposes to the Federal Assembly a candidate for the office of president of the federal executive council. When he has been appointed he submits a list of ministers who have to be chosen from members of the Assembly. The committee on elections and appointments gives its views on these candidates which have then to be confirmed by the Assembly.

In Czechoslovakia the method of appointing the government resembles more closely the procedure that applies in systems of cabinet government. The President of the Republic appoints the head and the other members of the government before any action is taken by Parliament. When the government has taken office it must appear before Parliament, outline its programme and obtain a vote of confidence.

This procedure brings out one of the main features of the parliamentary system of government, namely, the joint action of the Head of State and of Parliament in appointing the government. The problem is to decide when and how the approval of Parliament as the necessary authority for the investiture of the government, is to be given: should it come before or after the formal act of appointment by the Head of State? Should it be explicit or simply a matter of tacit consent? The replies given to these questions exemplify two related but differing concepts of the role of Parliament: one is academic and might almost be called radical; the other empirical and traditional.

According to the first concept there is a clear intention that the cabinet should be appointed by election; the part played by the Head of State is purely formal. In Ireland the Head of State appoints the prime minister only after a resolution has been agreed to by the Dáil. Similarly he appoints the other members of the government on the recommendation of the prime minister, when the prime minister has taken office, but after the approval of the Dáil has been signified by resolution.

In Japan too Parliament expresses its views before the formal act of nomination takes place. The Diet appoints the prime minister from among its own members and the Emperor has to approve this appointment. Motions to appoint the prime minister are moved in both Houses; but if the House of Representatives and House of Councillors cannot agree on the person to be appointed or if the House of Councillors does not give its views within ten days of the resolution being agreed to in the House of Representatives, the views of the House of Representatives are deemed to be those of the Diet. The prime minister himself appoints the ministers of state who form the cabinet. According to the constitution a majority of them must be members of the Diet.

In Israel the Head of State has more important duties. He consults with representatives of the various parties and then entrusts a member of the Knesset with forming a government. Once it is formed, that member comes before the Knesset, outlines his programme and asks for a vote of confidence which must be obtained before the Cabinet may legally take office. After a general political debate the President of the Knesset puts the motion of confidence to the vote. If it is passed, the new ministers take the oath. Only at that moment is the new ministry constituted. This procedure and the form of the oath ("I pledge myself . . . to abide by the decisions of the Knesset") underline the dependence of the government on the Knesset.

In the Federal Republic of Germany the procedure is more complex, but it belongs to the same category. The chancellor is elected without debate by an absolute majority of the membership of the Bundestag on the proposal of the Federal President. The Bundestag is not bound to agree to this proposal. It can set aside the proposed candidate and elect another during the fourteen days after the first vote, also by an absolute majority. If the Bundestag does not succeed in electing a chancellor in this way, another vote is taken

immediately, and the candidate obtaining the largest number of votes is elected. If this number is more than a majority of the members of the Bundestag, the federal president has to appoint this candidate within seven days of the election. If the candidate obtained a simple majority only the federal president then has two courses open to him: he can either appoint the person elected within seven days or dissolve the Bundestag. The federal chancellor chooses his cabinet after talks with the parliamentary groups and submits them to the President for formal appointment. Members of the government then take the oath before the Bundestag.

Another way of ensuring that Parliament has a preponderant influence is to require the government, once appointed by the Head of State, to submit itself to Parliament in order to obtain a vote of confidence. This is the rule in Greece, Italy and Turkey, and it is the custom in Belgium and the Lebanon.

In Turkey the President of the Council must appear before the National Assembly within one week of his appointment by the President of the Republic. In Greece the government must as soon as it is constituted seek a vote of confidence from the Chamber. If parliamentary business has been interrupted because of the formation of the government, the Chamber must be convened within fifteen days in order to express its views on the new government. In Italy also the government is appointed before there is any vote by Parliament, but the constitution provides that the government must obtain the confidence of both Houses within ten days. It is interesting to note that the cabinet must be acceptable not only to the lower House but also to the Upper House. This is also true of Belgium. The King names a person to form a cabinet, and then appoints as ministers the persons whose names are submitted to him by the prime minister. As soon as the government is in office, the prime minister outlines his programme to each House. If the programme does not obtain the approval of a majority of each House, the prime minister hands in his government's resignation to the King.

In the Lebanon the Constitution provides only that the President of the Republic is to appoint and dismiss ministers and select one of them as president of the council of ministers. In practice when the government is formed after the various shades of political opinion have been consulted the president of the council of ministers appears as soon as possible before the assembly to obtain a vote of confidence. If he does not obtain it, the government must resign.

In these last examples the decision of the Head of State is by itself enough to appoint the government. The agreement of the two Houses flows from a general belief that Parliament ought to take some part in the appointment. This is the only respect in which there is some resemblance to the method of appointing the government in countries which have followed the British model. In Great Britain, the principle is simple. Members of the government are appointed by the Crown. In theory the prime minister can remain at the head of the

government against the express wishes of both Houses. But he could only do so for a limited period because he has to seek each year the necessary supply to carry on the government and he must obtain the agreement of both Houses to continue in force the Army Act which gives the executive the right to maintain a standing army in time of peace. In practice the prime minister receives the tacit support of the House of Commons as soon as he assumes office until an adverse vote by the House on a matter held to be important by the government entails its resignation. Parliament plays no formal part in the matter. In practice the Monarch chooses the prime minister from the party which has a majority.

The absence of a formal investiture of the government before Parliament is a feature of this system. It is found in countries influenced by British institutions such as Australia, Canada, Ceylon, India, New Zealand, Nigeria and Sierra Leone; in parliamentary monarchies such as Denmark, Libya, Luxembourg, the Netherlands, Norway and Sweden; and in some republics such as Austria, Finland, France and Iceland where the Head of State has a position of importance by virtue of his election by universal suffrage. In some of these countries however the method of appointing the head of the government differs from the British system because of the multiplicity of parties and of the Head of State's right to choose a prime minister from outside Parliament.

The feature common to all these procedures, as to those providing direct election by Parliament, is that every government must have the confidence of Parliament if it is to be able to govern. This is one of the principles of parliamentary government. This particular aspect of parliamentary control leads into the more general problem of ministerial accountability which is at the heart of parliamentary life.

ANNEX 3

PROTECTION OF PARLIAMENT

The matter is the subject of an Inquiry by the Association of Secretaries General of Parliaments. A summary of the position as given by a representative number of Parliaments which are participating in the Inquiry is set out in an Appendix.

It will be seen that there are two methods of dealing with offences against Parliament. One derives from the United Kingdom practice where it is considered that powers are inherent in the Houses to protect themselves against any interference with their proceedings, to deal with offences and to impose penalties on offenders. The concept has its origin in the fact that early English Parliaments were, amongst other things, the King's highest court of justice. Accordingly, each House today as a descendant of the High Court of Parliament retains absolute jurisdiction in matters affecting its own internal discipline

in the same way as the courts do in matters affecting them. These special rights that each House enjoys are referred to as its "privileges". Canada and Australia which were originally British colonies follow closely the United Kingdom practice.

In other Parliaments while Members possess immunities of freedom of speech and freedom from arrest the concept of privileges attaching to the Houses is unknown. Offences against the Houses by outside persons are dealt with by the ordinary courts either under special laws which protect public authorities or under the ordinary rule of law. In some countries, however, in the case of certain offences the Houses may initiate or sanction prosecutions.

The Constitution of Ireland follows in the main the United Kingdom practice and appears to vest each House of the Oireachtas with powers under which it can deal with offences committed against it and punish offenders. Article 15.10 of the Constitution of Ireland provides that:

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

The provision was taken over from Article 20 of the Constitution of Saorstát Éireann.

Each House has power under Article 15.10 to protect itself and its members from interference, molestation and corruption. There are reasonably clear ideas as to what constitutes "molestation" and "corruption" but the position is not so clear as to what may be considered an "interference". Each House of the British Parliament has the power to punish for breaches of its known privileges but it also will punish for actions which, while not breaches of any specific privilege, are offences against its authority or dignity. These latter are often referred to as "contempts". Erskine May's Parliamentary Practice defines contempts as follows:—

"any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any Member or officer of such House in the discharge of his duty or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence."

Accordingly what is considered by the British Houses to constitute an obstruction of or interference with them lies largely in their discretion. In particular are included misbehaviour of witnesses and improper press comment which are two matters of special interest here.

In the case of witnesses before the Houses of the Oireachtas or their Committees the penalties for perjury are applied by the Oireachtas Witnesses Oaths Act, 1924, and it is an offence to intimidate a witness under the Witnesses (Public Inquiries) Protection Act, 1892. If a witness refuses to appear or on appearing refuses to answer a question there appears to be no offence unless the expression "interference" in Article 15.10 can be construed in as wide a sense as it is in the British Parliament. The matter is one of practical importance and the position should be made clear.

Speech or writings reflecting on the Houses are considered in the United Kingdom to be an interference with the Houses because they obstruct them in the performance of their functions by diminishing the respect due to them. However, it is this class of contempt that gives rise to the most problems. Free expression of opinion is a vital part of democracy and in proceeding to deal with what it considers to be abuses arising therefrom Parliament generally finds itself in embarrassment and difficulty. Particularly is this so when the offending matter has a political content so that the views of individual Members in relation to it are far from unanimous. A further difficulty is that attacks on Parliament and abuse of the Members often come from persons of no special responsibility and a Parliamentary reaction to them gives them wider publicity and greater significance than they otherwise would have. If action is taken on them the accusation most commonly heard is that Parliament is judge and jury in its own cause.

The Dáil has treated improper comment in the press as an "interference" but in over forty years it has dealt formally with only three cases. Two of these involved statements of Members and the proceedings were in relation to the Member rather than the newspaper. The third concerned an article which was abusive of Members in the performance of their duties. Following consideration of the article by the Committee on Procedure and Privileges the House on 27th June, 1956, adopted a Report from the Committee which recommended no action, affirming that in ignoring such occurrences the dignity of the House was best served.

It will be seen that the Dáil has not been specially sensitive about comment in the press particularly as its powers have not been made clear. If it chooses in any particular case to react the most it can hope for is to receive an apology from the source and the most it can do is to seek to apply some indirect sanction, e.g. non-admission of the representatives of the paper to the Press Gallery, call for withholding of State advertising. An aggravated attack on either House might come under the Offences against the State Act, 1939, which provides penalties for seditious documents; a seditious document is defined as one containing matter calculated to undermine order or the authority of the State.

In the period that the Constitutional provisions enshrined in Article 15.10 have been in force four unsuccessful attempts have

been made by the Government to have defined clearly the powers that the Houses have and how they can be enforced. These were—

- (1) Resolution of the Dáil of 11th March, 1947, that it was expedient to set up a Joint Committee to examine and report generally on the position. There was no corresponding Resolution of the Seanad.
- (2) Motion set down on Dáil Order Paper by Taoiseach on 22nd October, 1952, which did not come up for discussion.
- (3) Motion moved by Taoiseach in Dáil on 19th July, 1963, and withdrawn.
- (4) Motion set down by Taoiseach on Dáil Order Paper on 23rd October, 1963, which did not come up for discussion.

APPENDIX TO ANNEX 3

PART I—UNITED KINGDOM AND COMMONWEALTH COUNTRIES

UNITED KINGDOM

Powers of Parliament

The powers are based on traditional privilege recognised by the Courts. Since the decision of the Privy Council in *Kielley v. Carson* (1842), it has been held that the power to punish for contempt is inherent in the House of Commons and the House of Lords as the descendants of the High Court of Parliament, by virtue of the *lex et consuetudo parliamenti*.

Each House has absolute jurisdiction to deal with offences against itself, but where a breach of privilege is also a criminal offence, it may choose to hand over jurisdiction to the criminal courts. In taking this decision it would be guided by the nature of the offence and the adequacy of the penalties which it was itself empowered to inflict.

There is no right of appeal against a decision of the House in such matters. A person held in custody by order of the House may apply for a writ of *habeas corpus*, but if the actual grounds of committal are not stated in the return, the courts have no power to question the House's right to exercise its accepted privileges.

Offences

It may be stated generally that any act or omission on the part of a Member or stranger which obstructs or impedes either House of

Parliament in the performance of its functions, or which obstructs or impedes any Member or Officer of such House in the discharge of his duty, or which has a tendency directly or indirectly, to produce such results may be treated as a contempt.

A more detailed classification of the various forms such offences may take would include :—

- (a) disorderly or disrespectful conduct in the presence of the House;
- (b) disobedience to rules or orders of the House;
- (c) attempts to deceive or mislead the House or its Committees;
- (d) misconduct by Members or Officers of the House;
- (e) speeches or writings reflecting on the House as a whole or on its individual Members;
- (f) obstructing Members or Officers in the discharge of their duties.

Punishment of Offences

The House of Commons itself decides whether an offence has been committed and what penalty, if any, should be imposed.

If the contempt is committed within the actual view of the House, it proceeds at once to punish the offender, without hearing him except by way of apology.

When a complaint is made by a Member of an alleged breach of privilege by an outsider, the Speaker decides whether a *prima facie* case of breach of privilege has been made out. If he decides that it has, the usual practice is for the matter to be referred to the Committee of Privileges. If the complaint is founded on a document the document should first have been handed in to the Speaker and the offending passages read to the House. It is the duty of the Member concerned to follow up his complaint with a motion.

If a complaint is made against a Member, it is customary to give him notice; he will then be ordered to attend in his place. He should be heard in explanation as soon as the question founded on the motion is proposed, and then ordered to withdraw while the matter is debated by the House.

Though the House itself tries the offender, the evidence in the case is taken before the Committee of Privileges, who report their findings to the House. The Committee consists of fifteen Members, chosen from the major parties in proportion to their numerical strength in the House, with the Leader of the House in the Chair. The Attorney-General takes the leading role in the examination of witnesses. The parties immediately concerned in the case are heard as witnesses on the facts themselves.

The Committee reports whether in its view a breach of privilege has been committed, and whether further action should be taken. In most cases it does not specify a suggested penalty, and the House is at liberty to disagree with its recommendations.

Little attempt is made in the Committee of Privileges to observe judicial forms. Persons accused of contempt of the House are not as a rule allowed to be defended by counsel, though in a few cases the House has given leave for an exception to be made. The Committee of Privileges usually hears only the parties concerned and the Clerk of the House.

When the Committee of Privileges has reported on the facts of the case, the House decides whether or not it agrees with the Committee's recommendations. If a serious breach of privilege is reported, the House then considers, after hearing the advice of the Leader of the House, what penalties to impose, and may order the offender to attend at the Bar of the House to have judgment pronounced upon him.

The House of Commons has the power to commit Members or non-Members either into the custody of its own Officers or to one of Her Majesty's prisons. The House does not now commit for a specified term, and the term would not in any case extend beyond the current session. Prior to 1666 the House exercised the power to fine. In recent practice the usual penalty on a Member has been either suspension or expulsion from the House, while non-Members have been brought before the Bar of the House to be admonished or reprimanded.

The House of Lords observes and applies very much the same procedure in dealing with contempts. On the occurrence of a contempt the House refers the matter to the Committee of Privileges which consists of 16 Lords and 4 Law Lords. The Committee hears the evidence of the accused and may allow him to be represented by counsel, but it need not strictly observe judicial forms. It reports its recommendations to the House and the House may or may not accept the recommendations. The House can impose imprisonment, fine or reprimand. There is no limit to the punishment that can be so imposed. An offence which is a breach of the law is punishable in the ordinary courts.

Improper Comment in Press

No actual rules exist but in 1701 the House of Commons resolved that to print or publish any books or libels reflecting on its proceedings is a high violation of the rights and privileges of the House. Reflections on Members are equivalent to reflections on the House.

If the Speaker of the Commons decides that a *prima facie* case of breach of privilege has been made out, the matter is referred to the Committee of Privileges. They report whether in their view the matter constitutes a contempt and make recommendations as to the

appropriate action that should be taken. Their advice is normally accepted by the House.

The Committee frequently recommends that the dignity of the House would best be upheld if no further action be taken, especially when the offender has offered an unconditional apology. The House may, however, order him to appear at the Bar of the House to be reprimanded.

An example is given to illustrate the position. In 1956 a complaint was made by a Member of the Commons of an article in the "Sunday Express" alleging that Members of Parliament were receiving an unfairly large allocation of petrol at a time when petrol was rationed. The matter was referred to the Committee of Privileges, who concluded that the Editor was guilty of a serious contempt of the House and recommended that he should be severely reprimanded. The House agreed and the Editor was ordered before the Bar of the House and reprimanded.

In the House of Lords a person adjudged guilty of contempt by speech or writing would be dealt with in the usual way but it is stated that no action under this heading has been taken for a century.

Witnesses

The following Sessional Orders are passed by the House of Commons with regard to witnesses:

"(1) That if it shall appear that any person hath been tampering with any Witnesses, in respect of his evidence to be given before this House, or any committee thereof, or directly or indirectly hath endeavoured to deter or hinder any person from appearing or giving evidence, the same is declared to be a high crime and misdemeanour; and this House will proceed with the utmost severity against such offender.

"(2) That if it shall appear that any person hath given false evidence in any case before this House, or any committee thereof, this House will proceed with the utmost severity against such offender."

As an example, in 1947 two journalists, Dobson and Schofield, appearing as witnesses before the Committee of Privileges, refused to answer a question on the ground that to do so would involve a breach of journalistic etiquette. They were summoned before the Bar of the House where they made their apologies, and the House decided to take no further action as they had agreed to answer.

The position in the House of Lords is similar.

AUSTRALIA

Powers of Parliament

The Commonwealth of Australia was constituted by the Commonwealth of Australia Constitution Act, 1900. Section 49 of the Constitution provides—

“The powers, privileges and immunities of the Senate and of the House of Representatives, and of the Members and the committees of each House, shall be such as are declared by the Parliament, and until declared, shall be those of the Commons House of Parliament of the United Kingdom, and of its Members and committees, at the establishment of the Commonwealth.”

No comprehensive declaratory Act has been passed, and consequently the powers, privileges and immunities are similar to those of the House of Commons.

Offences

They are not formally classified but they include those regarded as offences in the House of Commons of the United Kingdom.

Punishment of Offences

The procedure and punishment are the same as those in the United Kingdom.

Improper Comment in Press

The privileges of the British House of Commons apply. Generally, however, instead of proceeding by formal motion in the House, the Chairman calls on the newspaper to publish an apology. If one be not given he excludes representatives of the newspaper from the precincts of the House until the apology is given.

The first occasion on which the House of Representatives used its power of committal since its establishment is of interest. A weekly newspaper alleged that a Member of the House “was mixed up in what can only be described as an Immigration Racket”. Upon motion of the Member concerned the complaint was sent to the Committee of Privileges. The proprietor of the newspaper and a journalist were called before the Committee for examination. It was found that the proprietor had employed the journalist at a special fee for the express purpose of attacking the Member. The Committee reported to the House that the proprietor and journalist were guilty of a serious breach of privilege and recommended that the House take appropriate action. The accused were summoned to appear before the Bar of the House which resolved that both be imprisoned for three months. A motion for *habeas corpus* was brought before the Courts and was rejected and leave to appeal to the Privy Council

was refused. There was, however, considerable criticism in the press on all aspects of the case. The main points of comment were that—

- (i) No specific charge was made against the offenders—they were called merely as witnesses before the Committee.
- (ii) The hearing was not in open Court. The Committee has a discretionary power regarding the admission of strangers during the hearing of evidence. On this occasion (and in accordance with usual practice) strangers were excluded.
- (iii) Legal representation was not allowed the offenders before the Committee and before the House.
- (iv) The offenders were given no right to confront or cross-examine their accusers.
- (v) So far as the House of Representatives were concerned, the accused had no right of appeal.

Other viewpoints expressed by the press were—

That the Parliament, by invoking “these ancient and out-moded sanctions of privilege” and applying them so harshly, risked making martyrs of the two persons and did itself a dis-service in the public esteem.

That the perpetrators of the offence were unaware of the penalties they might be incurring because no precedent or precise rules existed.

That the verdict was reached and the penalty fixed (by majority vote) in an end-of-the-session atmosphere of haste utterly unsuited to the importance of the matter.

That the House should have had access to the whole of the evidence, and not merely to selected portions of it, before it made up its mind.

That the committal should not have been for a fixed period but for the “pleasure of the House” as is the later Commons’ practice.

Witnesses

The refusal or neglect of a witness to attend either House or a Committee of either House, or the refusal to answer a question may be punished. Any act by any person which operates to the disadvantage of a witness on account of evidence given may also be punished.

In the case of certain committees special provision has been made by statute for penalties for witnesses refusing to be sworn, false evidence, etc.

CANADA

Powers of Parliament

By the terms of section 18 of the *British North America Act*, 1867, as amended in 1875, it was provided that :—

“ The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are from time to time defined by Act of Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act, held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof.”

Pursuant to this constitutional provision, section 4 of the *Senate and House of Commons Act*, chapter 249 of the Revised Statutes of Canada, 1952, reads as follows :—

“ The Senate and House of Commons respectively, and the members thereof respectively, shall hold, enjoy and exercise,

- (a) such and the like privileges, immunities and powers as, at the time of the passing of the *British North America Act*, 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom, and by the members thereof, so far as the same are consistent with and not repugnant to the said Act; and
- (b) such privileges, immunities and powers as are from time to time defined by Act of the Parliament of Canada, not exceeding those at the time of the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof respectively.”

There has been no Canadian statute altering this basic position, so that, in Canada, offences against Parliament stem from the ancient custom of Parliament, the *lex et consuetudo parliamenti*, as that body of doctrine had developed in England in 1867.

The Houses possess the right to punish persons for offences against them and have not delegated its exercise to the courts.

Offences

Offences against the Houses are identical with those which were offences against the British House of Commons in 1867. There exists no catalogue of them. Canada has followed the example of

the United Kingdom and avoided any definition or catalogue of them which might limit the rights of either House in the future.

Certain offences, e.g. corruption, acts of violence to intimidate, are also offences against the criminal code and punishable by the courts.

Punishment of Offences

A question of privilege, including an allegation that an offence against the House has been committed, will be acted upon by the House only if the member raising the question makes an appropriate motion to that effect. No notice of such a motion is necessary and it has become accepted that in cases of urgency the proceedings of the House may be interrupted to deal with a matter of privilege.

Should the House wish to examine a witness at the Bar, the complaining member moves "that Mr. Speaker do issue his warrant summoning _____ to the Bar of this House". A specific date may be set, or the term "without delay" used. The cause of summons may or may not be added to the motion or included in the summons. At the appropriate time, the Sergeant-at-Arms of the House reports on the presence of the culprit or witness. If he is not present, a motion is made for the Sergeant-at-Arms to take him in custody and that "Mr. Speaker do issue his warrant accordingly".

When the culprit or witness arrives at the Bar, the Clerk of the House reads the original complaint, and the examination begins. When a charge has been laid against a person, he may request, and is generally granted, counsel to advise and speak for him. Any member may question but each question is in the form and nature of a separate motion, properly moved and seconded, put to the House by the Speaker and, if passed, put by the Speaker to the person at the Bar.

The ordinary rules of debate apply, and accordingly these "motions" are debatable and amendable. If the House desires to discuss any procedural point, or if the examination is completed, the person at the Bar is ordered to withdraw. He is also excluded while the House considers its verdict, but may be recalled when the Speaker delivers the message of the House.

It is stated that the whole system is admittedly cumbersome, archaic and anachronistic. The worst feature of it is the partiality of at least a portion of the court. The charge involved is generally of a political nature, e.g., an attack made in a newspaper. It is hardly surprising therefore that one side of the House should have a crusading zeal and the other a determination that little should be done. Verdicts of the Houses, however, are generally justified though little of the impartiality of the British House of Commons has been used in arriving at them. In consequence, the procedure is invoked increasingly rarely.

Punishments include reprimand at the Bar. In an extreme case the offender could be committed to Carleton County jail for such term

as the House may direct. The right to fine has not been exercised, but the Speaker, in 1956 suggested this form of punishment.

Improper Comment in Press

The House may punish any person for a scandalous or malicious libel upon it, its members or organs. The sequel of an investigation of such an offence may be a simple declaratory motion that there has been a breach of privilege; also, the offender might be summoned to the Bar and reprimanded. He could, of course, be imprisoned.

It is stated, however, that the current practice is a very superficial one and that today, the House is not particularly sensitive to criticism from without. Usually the Member involved rises on a question of privilege, reads the article, criticises it and resumes his seat without moving any motion..

Witnesses

It is a breach of privilege to induce a witness not to attend or to withhold evidence or to give false evidence. A witness guilty of a breach of privilege could be taken into custody of the Sergeant-at-Arms.

INDIA

Powers of Parliament

Under the Constitution of India the powers, privileges and immunities of each House of Parliament are, until defined by Parliament by law, the same as those of the House of Commons of the United Kingdom. Accordingly the Lok Sabha and the Rajya Sabha have the power to deal with offences against them and punish offenders.

Offences

They are not formally classified but they include those regarded as such in the House of Commons of the United Kingdom.

Punishment of Offences

A question involving a breach of privileges or contempt may be raised in the House by a Member after obtaining the consent of the Speaker. The House, after hearing the Member, may consider the question and come to a decision on it or refer it to the Committee of Privileges for examination, investigation and report. Before taking a decision, it is usual for the House or the Committee of Privileges to give an opportunity to the accused party to explain his conduct

and he may be permitted to have legal assistance. It is for the House to take the final decision in the matter including any penalty to be imposed on the offender.

The following punishments may be imposed by the House in cases of breaches of privilege and contempts :

- (i) Admonition at the Bar of the House.
- (ii) Reprimand at the Bar of the House.
- (iii) Imprisonment till the prorogation of the House.

In the case of contempts committed against the House by its Members, two other penalties are also available, viz. (i) suspension from the service of the House and (ii) expulsion from the House.

Improper Comment in Press

There are no special rules. The offender would be dealt with in the same way as in the case of any other contempt.

An example given illustrates the position. On April 20th, 1961, a Member raised a question of privilege in the Lok Sabha regarding a news report published in the *Blitz* news-magazine, casting reflections on a Member on account of his speech and conduct in the House. After a brief debate, the House referred the matter to the Committee of Privileges for consideration and report. The Committee of Privileges decided that in the first instance, the Editor and Correspondent of the *Blitz* should be asked to state what they desired to say in the matter and to appear personally before the Committee, if they so wished. The Editor and the Correspondent made their submissions to the Committee in writing. The Committee of Privileges came to the conclusion that both were guilty of committing a gross breach of privilege and contempt of the House. The Committee recommended that the Editor should be reprimanded at the Bar of the House, while the Lok Sabha Press Gallery Card and the Central Hall Pass issued to the Correspondent be cancelled and be not issued again until he had tendered to the House an adequate apology. The House agreed with the report of the Committee. The Editor of the *Blitz* was accordingly summoned to appear at the Bar of the House and was reprimanded by the Speaker in the name of the House on the 29th August, 1961. The Lok Sabha Press Gallery Card and the Central Hall Pass of the Correspondent were cancelled. The Correspondent subsequently tendered an unqualified apology to the House and his Card and Pass were restored.

In March, 1964 one Keshav Singh was sentenced by the Speaker of the Uttar Pradesh Legislative Assembly to seven days imprisonment for a contempt. The Allahabad High Court was appealed to and Singh was released on bail. The Legislature passed a resolution demanding Singh's re-arrest and the appearance under custody at

the Bar of the House of two High Court judges to answer charges of contempt. The judges moved the High Court to quash the resolution. The President of India intervened in this involved situation and sought under the Constitution an advisory Opinion from the Supreme Court of India. The Supreme Court in general upheld the actions of the Allahabad High Court and stated that Legislatures in India do not function in a judicial capacity and that the procedure by which English Courts treat a warrant of the Speaker of the British House of Commons as a warrant issued by a superior court of record does not apply in India. It stated also that the Fundamental Rights in the Indian Constitution were not intended to be subordinated to the privileges of the Legislature.

The privileges of Legislatures in India, according to Article 105 (3) and 194 (3) of the Constitution "shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees at the commencement of this Constitution", until defined by the Legislatures by law. No Indian Legislature has as yet defined its privileges, nor do they seem inclined to do so, arguing that definition involves limitation. Furthermore, the statute detailing the privileges would certainly be subject to judicial scrutiny and review. However, one could well question whether the Constitution can be taken literally, for it seems that these privileges are only applicable in their full extent in a unitary state where Parliament is sovereign. In the Singh case the constitutional provision led to a sharp conflict between the Legislature and the Courts, but the constitutional situation in India would seem to invite also further conflicts about privilege between the various Legislatures.

The Constitution contains a chapter on Fundamental Rights which are judiciable. If a Legislature in the exercise of what it considered its privileges were to infringe a Fundamental Right granted to the citizen, it appears that the Courts would not only have jurisdiction to grant redress to the petitioner but also to declare unconstitutional the exercise of a particular privilege.

The crisis in India demonstrated convincingly that the granting to Indian Legislatures of the powers, privileges and immunities of the British House of Commons does not fit easily into the constitutional scheme. It is unlikely that the present British *modus vivendi* between Parliament and the Courts could be securely established in India. The Supreme Court, in its Opinion, suggested codification of privileges, but there seems little likelihood of this happening. The Legislatures in India have shown themselves to be much alarmed at the Supreme Court's Opinion and there may be a move for a constitutional amendment to protect them from judicial interference in matters of privilege. It would be difficult, however, to frame such an amendment without opening the way to arbitrary actions on the part of the Legislature which might threaten the rights of the citizen and the rule of law.

On a previous occasion in Madras, open conflict between the High

Court and the Legislature on an issue of privilege was averted by the prorogation of the State Assembly.

Witnesses

A witness who refuses to appear before the House or a Committee of the House or, if appearing, refuses to answer a Question or gives false evidence would be punished for contempt.

GHANA

(Information was supplied in March, 1965)

Powers of Parliament

The National Assembly may try and punish persons for all offences but it has limited powers of imposing penalties. It cannot fine or imprison an offender.

Offences

The following are set down as contempts of Parliament in the National Assembly Act, 1961:

Assault, obstruction, molestation or insult of a Member or officer of the staff in the precincts of or on his way to or from the Assembly.

Improper influence of a Member in the exercise of his functions.

Violence or injury to or restraint on a Member for anything done in the exercise of his functions.

Acceptance by Member of benefit in return for his services.

Creation of disturbance interrupting or likely to interrupt proceedings of Assembly.

Sitting or voting by a stranger in Assembly.

Persistent obstruction of proceedings of Assembly by Member.

False evidence by witnesses.

Intimidation of witnesses.

Disobedience to order of Assembly to a person to attend before it.

Publication of evidence or documents in contravention of Standing Orders.

Disobedience by Member to order of Chairman.

Improper acts of visitors in precincts of Assembly.

Speeches or writings reflecting scandalously on Assembly or its Members.

Contempt is defined as any act which impedes or tends to impede the Assembly in the exercise of its functions and the generality of the definition is not affected by the citation in the Act of particular contempts.

Punishment of Offences

The House decides to take action against a person for an offence against it. The trial may be either by the House itself or by a court. If it is by the former proceedings take place before the Committee of Privileges which is empowered to request the Attorney General to attend upon it to give such assistance as is necessary. The Committee presents its report to the House and it is up to the latter to adopt or reject the report and to impose any punishment recommended or vary it. Reprimand and exclusion from precincts of House for a maximum period of nine months are the punishments imposed by the House. The Assembly may, however, order the Attorney General to prosecute a person in the courts. In this case the offender is liable to a fine not exceeding one hundred pounds or imprisonment for one year or both.

Improper Comment in Press

The National Assembly Act, 1961 provides that it is a contempt of Parliament for any person to make a statement or otherwise publish any matter which falsely or scandalously defames the Assembly or the Speaker, a Member or officer in his capacity as such or which contains a gross or scandalous misrepresentation of any proceedings of the Assembly. Punishment is as for other contempts.

Witnesses

The National Assembly Act, 1961 provides that disobedience by witnesses is a contempt of Parliament and punishable accordingly.

NIGERIA

(Information was supplied in June, 1965)

Powers of Parliament

The House of Representatives has no direct power to punish for offences by outside persons committed against it. Offences against the House are set out in the Legislative Houses (Powers and Privileges) Ordinance, 1958 and it is on information given by the President of the Houses that prosecutions take place.

Offences

The Legislative Houses (Powers and Privileges) Ordinance, 1958, regulates the conduct of Members and other persons. Offences under the Ordinance include—

- Refusal by witness to attend before a Committee or to answer a question.
- Fabrication of evidence.
- Strangers entering into Chamber or precincts of House without permission.
- Obstruction of Members on business of House.
- Creation of disturbance which interrupts proceedings of House.
- Sitting or voting in House by a stranger.
- Bribery of Members.
- Intimidation of Members.
- Acceptance of bribes by Members.
- Contempt of House by Members.
- Speeches or writings reflecting on House.
- Printing of false copies of laws or proceedings.

Punishment of Offences

Prosecutions under the Legislative Houses (Powers and Privileges) Ordinance, 1958, are instituted by the Attorney General on information given to him by the President (Chairman) of the House. The prosecutions are before the ordinary courts. Penalties up to 2 years imprisonment or £200 in fine or both may be imposed for certain offences.

Improper Comment in Press

The Legislative Houses (Powers and Privileges) Ordinance, 1958, s.24 provides—

“(1) Any person who—

- (a) publishes any statement, whether in writing or otherwise, which falsely or scandalously defames a Legislative House or any committee thereof; or
- (b) publishes any writing reflecting on the character of the President of a Legislative House or the Chairman of a Committee of a Legislative House in the conduct of his duty as such President or Chairman; or
- (c) publishes any writing containing a gross, wilful or scandalous misrepresentation of the proceedings of a Legisla-

tive House or of the speech of any Member in the proceedings of a Legislative House;

shall be guilty of an offence and shall be liable on conviction to a fine of one hundred pounds or to imprisonment for twelve months, or to both such fine and imprisonment.

(2) In this section "publish", in relation to any writing, means exhibiting in public, or causing to be read or seen, or showing or delivering, or causing to be shown or delivered, with the intent that the writing may be read or seen by any person."

The decision to prosecute is at the discretion of the Attorney General.

Witnesses

The Legislative Houses (Powers and Privileges) Ordinance, 1958, s.11 provides—

"Any person who—

- (a) fails without reasonable excuse, the proof whereof shall be upon him, to attend before a committee when so required by an order made under the provisions of section 4; or
- (b) refuses to be examined before, or to answer any question put by, a committee, or to produce any paper, book, record or other document which he has been required to produce by an order made under the provisions of section 4, unless such question or paper, book, record or other document is not, in the opinion of the Chairman, material to the subject of the inquiry of the committee or such refusal is allowed under the provisions of section 8,

shall be guilty of an offence and shall be liable on conviction to a fine of twenty-five pounds or to imprisonment for three months or to both such fine and imprisonment."

s.12 provides—

"Any person who presents to a committee of a Legislative House any false, untrue, fabricated or falsified document with intent to deceive the committee shall be guilty of an offence and shall be liable on conviction to a fine of one hundred pounds or imprisonment for twelve months or to both such fine and imprisonment."

PART II—OTHER COUNTRIES

BELGIUM

Powers of Parliament

The House of Representatives and the Senate have no power to deal with persons guilty of offences against them.

Offences

Offences against Parliament by outsiders are set out in the penal code and certain other laws. They embrace—

Offensive acts, words or threats against a Member or against the Houses.

Assault on a Member.

Speeches or writings attacking the rights or the authority of the Houses.

Entry by strangers into Members' accommodation without permission : disorderly conduct in precincts.

The law makes a distinction according as the act has been perpetrated at a sitting or otherwise and, if an assault has been committed, whether it has caused effusion of blood, a wound or illness.

Punishment of Offences

Offences are prosecuted by the public prosecutors under the Minister of Justice before the ordinary courts. In the case of offensive acts or words against a Member or against the Houses action is taken on the complaint of the Member or on the denunciation of the House concerned.

Improper Comment in Press

Speeches or writings reflecting on the Houses are punished under a Decree on the Press of 20th July, 1831, which states that whoever mischievously and publicly attacks either the constitutional authority of the King, the inviolability of his person, the constitutional rights of his dynasty or the rights or authority of the Houses of Parliament will be punished by imprisonment from six months to three years. It is the public prosecutor who decides whether a speech or a writing has gone beyond the limit of reasonable criticism.

Witnesses

Under a Law relating to Parliamentary Inquiries of 1880 it is provided that witnesses summoned before Committees of the Houses are under the same obligations and penalties as they would be if summoned before a court.

FINLAND

Powers of Parliament

The Parliament or its organs have no jurisdiction to deal with persons guilty of offences against them. Parliament, its organs, its members, officials and employees enjoy in general the same protection against criminal action as do other public authorities and officials on duty.

Offences

These are found in the penal code. They include violence or threats of violence against the Houses or their Committees and an assault on a Member going to or proceeding from the House or as a result of his performing his parliamentary duties.

Punishment of Offences

All crimes are brought to trial exclusively in the general courts of law. The inquest of suspected crimes is handled by the police authorities and the instigation of legal proceedings is decided by the public prosecutor.

Improper Comment in Press

A provision of the penal code is that any person who publishes by writing or in any other manner false statements to denigrate the Government, Parliament or a parliamentary commission or a public authority, or who discredits their decisions or the social order legally established will be punished by a fine. If the object of the action has been to imperil public order the punishment will be a fine or maximum imprisonment of a year. The instigation of legal proceedings is decided on by the Minister for Justice. It is stated that there has never been a case of this kind.

Witnesses

The matter of witnesses is stated to be not applicable to the Parliament.

FRANCE

Powers of Parliament

The National Assembly has no power to deal with persons guilty of offences against it.

Offences

The concept of an offence against Parliament is unknown and there is no special law.

Punishment of Offences

The ordinary rule of law appears sufficient and an offence is not punishable unless it would be punishable if committed against any individual or other organisation.

Improper Comment in Press

Seditious or scandalous speeches and writings against the Houses or its Members are punished. A law of 1881 on the Liberty of the Press provides that defamation of constitutional bodies, of which Parliament is one, is punishable by imprisonment or fine or both.

GREECE

Powers of Parliament

The Chamber of Deputies has no power to deal with persons guilty of offences against it.

Offences

These are classified in the penal code.

Punishment of Offences

The ordinary courts deal with offenders. Punishments vary according to offence and go up to ten years imprisonment.

The prosecution appears to be conducted in certain cases at the suit of the President (Chairman) of the House.

A Member is punished like any other person guilty of an offence under the penal code and this may result in a loss of his Parliamentary mandate.

Improper Comment in Press

Any person who publicly proffers insults against the House is liable to a maximum penalty of three years imprisonment under the penal code. The prosecution takes place on demand of the House.

Witnesses

A witness who refuses to appear before the Chamber or its Committees, or appearing refuses to answer a question, or who is guilty of perjury is punished under the penal code. Penalties are the same as in case of a witness before the courts.

ITALY

Powers of Parliament

The Chamber of Deputies and the Senate have no power to punish persons who have committed offences against them.

Offences

Offences under the penal code include—

Violence against constitutional organs (including the legislative assembly),

Insults against the Republic, constitutional institutions (including the legislative assembly) and the armed forces.

Other offences are subject to the ordinary law.

Punishment of offences

The prosecution of an offender in case of insult does not take place until the demand for it by the public prosecutor has been examined by the appropriate committee in the House which reports to it a recommendation on the matter. The decision to prosecute or not belongs to the House itself.

Improper comment in press

Speeches or writings reflecting on the House are punished as an offence under the penal code. An example given illustrates the procedure.

On the 27th December, 1960, the Minister for Justice transmitted to the Chairman of the Chamber of Deputies a request for the prosecution of Mr. Giovanni Durando, the responsible Director of the weekly *La Voce Della Giustizia* and Paolo Collo, the author of the articles published in the aforementioned weekly. Among the different epithets addressed to the Government one read specially the following phrase :— “ The empty nutheads which populate Montecitorio and Palazzo Madama, selected with meticulous care by the illiterates and the idiots of Italy on election day.”

The Commission on Parliamentary Immunities, on the 29th March, 1962, granted the demand for prosecution for the offence against Parliament and the *rapporteur*, M. Berlinguer, revealed in the report to the Assembly the reasons according to which the authorisation ought to be granted, the intention of the offenders being clearly to injure the moral authority of the legislative assembly.

At the sitting of the 24th July, 1962, the Chamber granted the authorisation of prosecution and on the 28th July of the same year the file was sent back to the Minister for Justice.

It being admitted that the insult was offensive to the two Chambers, the authorisation of prosecution had been previously addressed to the Senate which with an analogous procedure had granted the authorisation of prosecution against the aforementioned accused.

The prosecution did not take place, the offence having been pardoned on the 5th February, 1963, by the *Cour d'Assises* of Genoa following an amnesty.

JAPAN

Powers of Parliament

The Diet has no power to deal with persons who have committed offences against it.

Offences

There are no provisions directly governing offences against Parliament. The following can be punished under the provisions of general laws and regulations—

Disorder in streets adjoining House.

Speeches or writings reflecting on House.

Interference with property of House.

Punishment of Offences

Where the offences constitute crimes under the ordinary laws they are punished in the same manner as other criminal offences, that is, the offenders are indicted by the public prosecutor and tried in the courts. No recommendation of the Diet is required.

Improper Comment in Press

There are no laws or rules directly dealing with speeches or writings of a false, scandalous or seditious nature against the House, its Members or organs. Such acts may, however, fall within the crimes of Defamation and Insult provided for in the penal code.

Witnesses

The law relating to Oaths and Testimony, etc., by Witnesses in the House provides for the punishment of a witness who refuses to appear or, if appearing, refuses to answer a question or who is guilty of perjury. For the first two offences a maximum imprisonment of a year or a maximum fine of 10,000 yen or both may be imposed.

For perjury a witness may be imprisoned at forced labour for not less than three months and not more than ten years.

NETHERLANDS

Powers of Parliament

Neither the First nor the Second Chamber of the States-General has any power to deal with persons who have committed offences against it.

Offences

The penal code contains provisions setting out the classes of offences against Parliament or its Members which are punishable. These include breaking up of a meeting of either House by violence, removing a Member from a meeting, preventing a Member from attending and speaking or writing in insulting form about either House.

Punishment of Offences

The district attorney who is a Government official and for whose action or absence of action the Minister of Justice is responsible to Parliament prosecutes offences. They are tried and punished by the ordinary courts.

Improper Comment in Press

An article of the penal code forbids the speaking in insulting form about public bodies and the expression "public bodies" includes each Chamber and Parliament as a whole. The punishment is a maximum penalty of two years' imprisonment or a fine of 600 florins. A further provision is directed against anyone who spreads utterances in insulting form concerning a public body and it forbids publication of such utterances and the keeping in store of such publications deliberately. It also forbids the making of such utterances audible by way of radio, discs, etc.

Witnesses

There is a law on parliamentary inquiries. Under this law when a House sets up a committee of inquiry, a witness if he refuses to appear may suffer a maximum penalty of 6 months' imprisonment; if he refuses to answer a question he may be detained until he is willing to answer, which detention lasts for 12 days but may be prolonged; and if he is found guilty of perjury he may undergo a maximum penalty of 6 years' imprisonment.

ANNEX 4

QUALIFYING AGE FOR VOTING

The following information about the law in other countries has been extracted from "Parliaments and Electoral Systems" published in 1962 by the Institute of Electoral Research. The information given therein was checked against the 1966 edition of *Parliaments* published by the Inter-Parliamentary Union and corrections made where appropriate. The latter publication does not, however, contain information about all the countries dealt with in the former. It may well be that changes have since occurred in countries in respect of which 1962 data only is available but this is hardly a matter of significance.

18 Years

Albania
 Argentina
 Brazil (voter must be able to write his name)
 Bulgaria
 Burma
 Ceylon
 China
 Czechoslovakia
 Dominican Republic
 Equador (voter must be literate)
 El Salvador
 German Democratic Republic
 Guatemala
 Honduras (if literate or married, otherwise the qualifying age is 21)
 Hungary
 Indonesia
 Israel
 Jordan (males only)
 Korea (North)
 Laos
 Liechtenstein
 Mongolia
 Poland
 Rumania
 Somalia
 United Arab Republic
 Uruguay
 U.S.S.R.
 Venezuela
 Vietnam (North)
 Vietnam (South)
 Yugoslavia

20 Years

Austria
 Costa Rica (married people and teachers may vote at 18)
 Japan (voter must be literate)
 Korea (South)
 Switzerland (generally males only)
 Tunisia

21 Years

Afghanistan
 Australia
 Belgium
 Bolivia
 Cambodia
 Cameroon
 Canada
 Central African Republic
 Chile
 Colombia (voter must be literate)
 Congo (males only)
 Congo Republic
 Cyprus
 Dahomey
 Ethiopia
 Finland
 France
 Gabon
 German Federal Republic
 Ghana
 Greece
 Guinea
 Haiti
 Iceland
 India
 Ireland
 Iran (25 for Upper House)
 Italy (25 for Senate elections)
 Ivory Coast
 Lebanon (males only)
 Liberia
 Libya (males only)
 Luxembourg
 Madagascar
 Malaya
 Mali
 Mauretania
 Mexico (18 for married persons)
 Morocco
 Nepal

21 YEARS (contd.)

Netherlands
 New Zealand
 Nicaragua (18 for literate males)
 Niger
 Nigeria (males only)
 Norway
 Pakistan
 Panama
 Paraguay (males only)
 Peru (voter must be literate)
 Philippines (voter must be literate)
 Portugal (if literate or taxpayer)
 San Marino
 Senegal
 Sierra Leone
 South Africa (Europeans only, with minor exception)
 Spain (for referenda only, otherwise restricted to heads of families)
 Sweden
 Tchad
 Togo
 Turkey
 United Kingdom
 United States (Georgia and Kentucky---18)
 Volta

23 Years

Denmark

Extract from "Parliaments" (page 16)

The franchise requires that male and female electors should have reached an age at which they are fully aware of their civic duties and are capable of expressing a reasonable opinion on political matters. As a rule this age coincides with that of legal majority. In other words it varies very little from one country to another, ranging from a minimum of eighteen to a maximum of twenty-three years, though exceptionally for elections to the upper House of some countries, such as Iran or Italy it is as much as twenty-five. The age adopted in most codes of electoral law is twenty-one. New governments or governments of a revolutionary type are the most apt to grant the franchise at an early age, as in the People's Democracies and the nations which have attained independence relatively recently.

ANNEX 5

NUMBER OF PERSONS REPRESENTED BY EACH MEMBER
OF PARLIAMENT

The following information has been extracted from a number of publications and, in some instances, from the constitution of the particular country in question:—

On average each member of the Lower House represents about:—

Albania	...	...	...	8,000	inhabitants
Finland	...	...	...	20,000	"
Ireland	...	...	...	20,000	"
Switzerland	...	...	...	24,000	"
Bulgaria	...	...	...	25,000	"
Greece	...	...	...	25,000	"
New Zealand	...	...	...	25,000	"
Hungary	...	...	...	32,000	"
Argentina	...	...	...	33,000	"
Belgium	...	...	...	43,000	"
Canada	...	...	...	64,000	"
Britain	...	...	...	80,000	"
Italy	...	...	...	80,000	"
France	...	...	...	93,000	"

ANNEX 6

HIGH COURT DECISION ON CONSTITUENCY
DELIMITATION

Extracts from Judgment in the Case of John O'Donovan v. Attorney General bearing on the question of the permissible difference between the highest and lowest ratios of population per member in any constituency revision.

The Article in the Constitution to which these extracts relate is as follows:—

“3° The ratio between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as it is practicable be the same throughout the country.”

“I should say that I agree also with Counsel for the Attorney General that the Legislature has all the experience in these matters ‘(revising constituencies and allocating members to them)’ and that *a reasonable latitude should be allowed to it in the performance of its important functions as an organ of state.*” (Page 17.)

"That context therefore calls for giving the phrase '(sa mhéid gur féidir é)' a *liberal, common sense construction*, and, in my view that involves construing the phrase as limiting the principle of near equality of ratio between members and population in the constituencies by what is 'feasible' or 'practicable' as distinct from any notion of mathematical accuracy." (Page 22.)

"I proceed therefore on the basis that the sub-clause properly construed means that the ratio specified must be the same throughout the country 'so far as it is practicable'. Lord Goddard, L.C.J., in *Lee v. Nursery Furnishings Ltd.* 61 TLR 263 accepted the meaning of 'practicable' as contained in the *Oxford Dictionary* as 'capable of being carried into action, feasible' and I do likewise. Applying that to sub-clause 2.3° *I therefore reject the view that an all but mathematical parity of ratio is to be attained* and I construe the sub-clause as meaning that a parity of ratio of members to population in the constituencies throughout the country is to be attained by the Oireachtas as far as that is capable of being carried into action in a practical way having regard to such practical difficulties as exist and may legitimately, having regard to the context and the provisions of the Constitution generally, be taken into consideration. It does not I may add seem to me that that involves taking mere matters of convenience into consideration." (Pages 23-24.)

"On due deliberation as to the proper inferences to be drawn from all these considerations as to the proper construction of Article 16 2 3° I have arrived at the following conclusions. First that the *dominant principle of that sub-clause is the achievement of as near an equality of the parliamentary representation of the population as can be attained paying due regard to practical difficulties*. Secondly that *there are difficulties of an administrative and statistical nature* so plain to be seen that it may be safely assumed they at any rate must have been in the minds of these enacting the Constitution. Thirdly that these difficulties are of themselves alone sufficient to explain and justify the qualification of the principle of equality. Fourthly that *there is no indication to be found in the Constitution that it was intended that any of the difficulties as to the working of the parliamentary system should be taken into consideration on the question of practicability*. Fifthly, that if matters of the kind mentioned as to the working of the parliamentary system were to be taken into consideration the result would be that the dominant principle of equality would be departed from so far as to be destroyed and the intention of the people in enacting the relevant sub-clause would be entirely frustrated. Finally that this fifth conclusion involves rejecting, with one qualification, the contention that the difficulties of the operation of the parliamentary system should be considered in determining what is practicable. In the result it would seem to me that *the difficulties which the legislature should have regard are those of an administrative and statistical nature and the principal question to decide will be as to whether equality of ratio of members to population has been achieved in so far as practicable having regard to such difficulties*. There is it

seems to me only one possible qualification of this : that if it be shown that the result would involve the collapse of the parliamentary system that factor would have to be most seriously considered." (Pages 32-33.)

"What is practicable with regard to them '(constituencies other than the Western constituencies with which the judge had been dealing)', again however in the administrative sense? Here let me observe straight away that although a system in the main based on Counties has in fact been adopted, *there is nothing in the Constitution about Constituencies being based on Counties.* The Constitution does not say, that in forming the Constituencies according to the required ratio, that shall be done so far as is practicable having regard to county boundaries. Even if it did, the Oireachtas or appropriate Minister could alter county boundaries. No doubt it is convenient in many ways to use the existing administrative machinery : nor is there anything objectionable in a certain degree of adherence to the county basis of division provided that the dictates of the Constitution are observed. *But it should be understood that it is quite open to the Legislature to disregard county boundaries altogether and to formulate a scheme of constituencies on an entirely different basis if that be necessary to achieve the required ratio. No doubt the Oireachtas would have to proceed on the basis of having regard to the areas for which census figures are available but that is about the only limiting factor.* The census of population compiled by the Central Statistics Office goes into considerable detail and supplies of itself all the necessary information in admirably produced publications.

"The smallest Administrative unit used in the enumeration in the country districts is the townland: there are about 51,000 of them in the State. The townland figures are not actually published, but I was informed that the figures for each townland can be produced, if required. Townlands are combined into District Electoral divisions in rural areas. In the case of towns the enumeration is done by streets and streets in towns are similarly aggregated, the District Electoral Divisions in the case of County Boroughs being, however, termed wards. It is thus possible to obtain the figures of population for streets in the case of County Boroughs and *in such areas constituencies can be demarcated by streets as has in fact been done in the electoral acts.* There are some 3,064 District Electoral Divisions or Wards in the Country. Figures have been worked out in respect of these and disregarding the cities and Counties of Dublin and Cork, where city figures come into play, the result shows that the average population of District Electoral Divisions falls below 1,000 in all cases save that of Louth. *While average figures may be misleading and should be used with care, it is apparent that an adjustment of constituency boundaries by the process of adding and shedding of District Electoral Divisions would enable a reasonably close approximation of ratio of deputies to population throughout the country to be obtained.* It must also be remembered that there is nothing to

prevent the Oireachtas or appropriate Minister altering even District Electoral Divisions. *Even if difficulties arise in some particular areas, there are still the smaller divisions of townlands to fall back on in the last resort.*" (Pages 44,45.)

"The average townland figure therefore including cities and towns, is in the neighbourhood, taking round figures, of well under 60 persons per townland. Excluding towns and cites it must obviously be less. Again of course I appreciate fully that in making adjustments one would have to take the actual townlands bordering adjoining constituencies and that in some cases one might well find that the average did not apply. *Even however assuming that in any given case of adjoining entities, be they counties or constituencies, the average population of townlands adjacent to the relevant boundaries varied from the average by being 10 times greater which must be an exceedingly rare occurrence, one would still be dealing in entities of about 600 persons.* It is therefore obvious that Constituencies can be delineated in Country areas so that the ratio of members to population in each can be adjusted to give a fairly close approximation to parity. When one comes to deal with towns and cities figures can be adjusted even to the numbers in a street and likewise a close approximation to parity can be achieved, as has been shown in the case of Dublin City." (A difference of only 745 between the lowest and the highest ratios was achieved in the Dublin city constituencies in the 1959 Act.) (Pages 44-46.)

In these extracts the references to pages are to references in the stencilled copies of the judgment. Significant passages are in italics but they are not in italics in the original judgment.

ANNEX 7

CONSTITUENCY DELIMITATION IN SOME OTHER COUNTRIES

1. The Constitution of Denmark provides that:

"When electoral areas are being arranged, account shall be taken not only of the number of inhabitants but also of the number of electors and of the density of the population."

Under the Constitution of Norway specific numbers of parliamentary representatives are allotted to named provinces and cities. In Sweden since 1953 it has been provided that each province must have a minimum parliamentary representation regardless of population.

2. The electoral law of Great Britain specifically allows higher representation for rural areas. Thus the number of persons required to elect a member of Parliament in a remote single-member consti-

tuency in Scotland may be one third of that required in the case of an industrial single-member constituency in England. On average, a Scottish vote may be worth about 18% more than an English vote, while the bonus in the case of the Welsh vote is about 12%. Over the whole of Great Britain, the average rural vote has been estimated to be worth about 8% more than the average urban vote.

3. It may be mentioned that the revision of constituencies in Britain is carried out by Boundary Commissions, subject to ultimate Parliamentary approval, there being separate commissions for England, Scotland and Wales. These Commissions operate in accordance with the following rules:—

- (a) the total number of constituencies in Britain must not vary greatly from a specific number, with prescribed minima for Scotland and for Wales;
- (b) Each constituency must return a single member;
- (c) The electorate of any constituency must be as near the electoral quota as is practicable having regard to the foregoing rules and an excessive disparity between the electorate of any constituency and the electoral quota must be avoided;
- (d) No constituency must over-step the boundaries of any administrative county, county borough or metropolitan borough, and no county district can be divided into two or more constituencies.

The electoral quota referred to above is obtained by dividing the total electorate for each part of the Kingdom by the total number of seats allocated to that part.

4. In Australia the Boundary Commissioners in each State are required by law to take into account the community of territorial interests (economic, social and regional), means of communication, population trends, density of population, physical features, and existing boundaries. The electorate of each constituency must not be greater or less than the quota (national average) by more than one fifth. (See extract from official Australian publication—Annex 8). In Canada and New Zealand also, care has been taken in framing the electoral laws to ensure that factors other than population are taken into account and to prevent representation for specified territorial areas from falling below certain levels. The recent legislation in Canada allows even greater scope than the Australian system, the population tolerance being $\pm 25\%$ of the quota for each province.

5. W. J. M. MacKenzie in his book *Free Elections* sums up the situation in the following words:—

.....“It is obvious that in a diversified country, if all districts have approximately the same number of voters, some members

(of the legislature) will find "contact" more difficult than do others, because of relatively bad communications and scattered population. It is, therefore, usual to allow large sparsely-populated districts a rather more generous allocation of seats than that to which they are numerically entitled. . . . In Western countries the argument generally favours country against town".

ANNEX 8

EXTRACT FROM "EXPLANATION OF THE COMMON-WEALTH ELECTORAL LAW" CHIEF ELECTORAL OFFICE, CANBERRA

REPRESENTATION

The Senate

At Federation the Senate comprised thirty-six members—six Senators for each State—but by the Representation Act of 1948, Parliament increased the number of Senators for each State to ten—making a total of sixty Senators for the Commonwealth.

After a dissolution, newly elected Senators are divided into two groups—one group retiring at the expiration of three years and the other group retiring at the expiration of six years. The Senators elected to fill the places of the group which retires after three years, then serve a normal six-year term. Similarly, the Senators elected to fill the places of the group which retires three years later, also serve a normal six-year term. Thus every third year, one-half of the Senators retire and the newly elected Senators serve a six-year term.

In Senate elections the electors of a State vote as one electorate.

The House of Representatives

The Constitution provides that the number of members of the House of Representatives shall be as nearly as practicable twice the number of Senators and that the State representation shall be in proportion to the population of the States.

It is the function of the Chief Electoral Officer to determine the number of members of the House of Representatives for the several States after the taking of each population Census. He does this by dividing the population of the Commonwealth, as determined by the Census, by twice the number of Senators (i.e. by 120) and by then dividing the population of each State by the quotient so obtained. The quotients resulting from these further divisions represent the number of members to be chosen for each

State, provided that where there is a remainder, one more member shall be chosen for the State (there will be a remainder in almost every instance). Under the Constitution, no State may have less than five members of the House of Representatives.

Having determined the number of members to be chosen, it is then necessary to divide each State into as many Electoral Divisions as there are members to be chosen for the State.

Distribution of State into Electoral Divisions

For the purpose of distributing (or redistributing) the States into Electoral Divisions, the Governor-General appoints three Distribution Commissioners for each of the States. One of the Commissioners shall be the Chief Electoral Officer or an officer having similar qualifications, and one shall be the Surveyor-General for the State or an officer having similar qualifications. The third Commissioner is selected by the Government, usually from a panel of names submitted by the Chief Electoral Officer.

Before a distribution is commenced, the Chief Electoral Officer determines a "quota" for each State by dividing the number of electors enrolled for a State by the number of members of the House of Representatives to be chosen for that State. In effecting a distribution, the Distribution Commissioners must arrange the boundaries of the Divisions in such a way that no Division contains a number of electors more than one-fifth greater than the "quota" or more than one-fifth less than the "quota". In determining the boundaries of the proposed Divisions the Commissioners must give due consideration to the following factors :

- (a) community of interest within the Division, including economic, social and regional interests;
- (b) means of communication and travel within the Division, with special reference to disabilities arising out of remoteness or distance;
- (c) the trend of population changes within the State;
- (d) the density or sparsity of population of the Division;
- (e) the area of the Division;
- (f) the physical features of the Division; and
- (g) existing boundaries of Divisions and Subdivisions.

Prior to a distribution any person may lodge suggestions with the Distribution Commissioners, who normally take about six months to determine their initial proposals. Maps showing the initial proposals must be exhibited at Post Offices and a further period of thirty days is allowed in which suggestions or objections in writing may be lodged with the Commissioners.

After the Commissioners have considered all suggestions and objections they formulate their final proposals and report to the Minister. In due course the proposals are tabled in both Houses of Parliament.

When passed by Parliament, the proposals are duly proclaimed and fresh Electoral Rolls are then prepared on the new electoral boundaries. In the event that either House of Parliament rejects the proposals, the Minister may direct the Commissioners to prepare fresh proposals.

Representation of Territories

The Constitution provides that Parliament may allow the representation of a Territory in either House of the Parliament to the extent and on the terms which it thinks fit. The Northern Territory has been represented by one member of the House of Representatives since the general elections of 1922 and the Australian Capital Territory by one member of the House of Representatives since the general elections of 1949. The Member for the Northern Territory may join in debates but is not entitled to vote, except on any proposed law which relates solely to the Territory. The voting rights of the Member for the Australian Capital Territory were similarly restricted until 1966, when Parliament granted that Member the same voting rights as other Members of the House of Representatives.

ANNEX 9

HISTORY OF PROPORTIONAL REPRESENTATION IN IRELAND

1. The Single Transferable Vote (or S.T.V.) system of PR was first evolved around the middle of the last century by two individuals working separately in England and Denmark. The declared object of these people was to devise an electoral system which would enable even very small minorities to secure parliamentary representation for their particular interests. It was designed to suit a parliamentary system in which there would be no large political parties but a multiplicity of small groups representing the diverse religious, social and economic elements in the electorate. One of the greatest advocates of this kind of parliament was John Stuart Mill who recommended the adoption of Proportional Representation in Britain in an extreme form; under his proposals the whole country would have been treated as one constituency having 600 seats. Any group securing one-sixth of 1% of the votes in the country would, therefore, have been able to secure its own special parliamentary representation. The task of this parliament would then be to endeavour to reconcile all these different and conflicting interests with a view to forming a Government having a personnel and programme acceptable to all.

2. A proportional Representation Society was founded in Britain in 1884 and undertook a substantial publicity programme to promote this new parliamentary system. In 1909 a Royal Commission on Electoral Systems was set up and the Proportional Representation Society pressed its views strongly to this Commission. With one dissentient, the Commission were unable to recommend the adoption of the Single Transferable Vote for elections to the House of Commons, although they did agree that, of all the schemes for producing Proportional Representation, S.T.V. would have the best chance of acceptance. Undeterred by this setback, the promoters of Proportional Representation maintained their activities but did not achieve any success in Britain except in relation to elections of minor importance. They did, however, succeed in securing some acceptance of their ideas in the Dominions and other countries abroad.

3. In 1911 a proportional Representation Society was set up in this country and Arthur Griffith was a founder member. The publicity activities of this body succeeded in winning substantial support for the idea of Proportional Representation in Ireland and it appears to have been generally accepted that it would be the most suitable electoral system for a country suffering from the religious and other divisions existing at that time. Provision for election by P.R. to a number of the seats in the Irish House of Commons was made in the Home Rule Bill of 1914; this Bill did not, however, become law. Proportional Representation was first put into effect in Ireland for the election of Sligo Corporation in 1918. For some time prior to this there had been considerable uneasiness on the part of ratepayers and other interests about the way in which the affairs of this body were conducted, and ultimately it was agreed that minority elements should be given some chance of securing representation on the Corporation. A Private Bill to provide for the introduction of P.R. was passed and considerable publicity attended the subsequent election. The result was generally regarded as being satisfactory all round and the most was made of this success by the P.R. societies. Shortly afterwards, legislation providing for the use of P.R. in all local elections in Ireland was passed and there was general acceptance of this change. P.R. was also provided for under the Government of Ireland Act, 1920, which set up separate parliaments for the Six Counties and the remainder of the country.

4. The 1922 Constitution provided, in Article 26, that the members of the Dáil should be elected "upon principles of Proportional Representation", without specifying the form of P.R. which was to be used. The assumption was, however, that this would be the S.T.V. system which had been known in the country for some years. This system was, in fact, later prescribed under the Electoral Act, 1923. The specific provision in relation to P.R. in the Constitution was intended to meet the wishes of the religious minority, who felt that their interests would be protected in this way. The history of elections since that time indicates, however, that this special feature

of the electoral system has never been availed of by the minority for the purpose of securing specific Parliamentary representation for their interests.

5. In 1929 P.R. was abolished in the Six Counties and was replaced by the single-seat first-past-the-post system which has been in operation in the United Kingdom for several centuries in connection with Parliamentary elections. In 1959, a referendum was held in this country on the question of introducing a similar electoral system here but the proposal was rejected by a narrow margin. In this referendum approximately 50% of the electorate voted and 486,989 votes were cast in favour of retaining the existing system of P.R., with 453,322 in favour of the first-past-the-post system. The arguments put forward for and against the proposal have been adequately summarised in a number of publications, including "P.R.—The Great Debate", by Garret FitzGerald (*Studies*, Spring, 1959); "P.R.—For and Against"; a Tuairim pamphlet, April, 1959; and more recently, in the *Irish Republic and its Experiment with Proportional Representation*, by Cornelius O'Leary: University of Notre Dame Press, 1961.

ANNEX 10
Number and Size of Constituencies, number of Dáil Members, and Total Population

Electoral Act	Number of Constituencies	Number of members per Constituency						Total number of members	Based on total population of	Average number of persons per member
		9 Seat	8 Seat	7 Seat	5 Seat	4 Seat	3 Seat			
1923	30	1	3	5	9	4	8	153	3,139,688 (1911)	21,358
1935	34	—	—	3	8	8	15	138	2,971,992 (1926)	21,536
1947	40	—	—	—	9	9	22	147	2,955,107 (1946)	20,103
1961	38	—	—	—	9	12	17	144	2,898,264 (1956)	20,127

NOTE 1: The number of Constituencies in 1923 (30) included two University Constituencies each electing three deputies. These were abolished under the Constitution (Amendment No. 23) Act which finally became law in April, 1936. The Electoral Act, 1935, did not include any provision for University representation.

NOTE 2: Under Article 26 of the 1922 Constitution, the total number of members was not to be more than one for each 20,000 of the population and not less than one for each 30,000. University members were to be excluded from the computation. There is a similar provision in Article 16 of the present Constitution without, of course, any reference to University members. Article 18 of the present Constitution allocates three seats in the Seanad to the N.U.I. and three to the University of Dublin.

ANNEX 11

Results of Irish General Elections (1923-1965)

Election	Party	Percentage of Total Votes	Seats Won	Percentage of Seats Won	Dáil in existence for	
					Years	Months
1923	C. na G.	39.2	63	41%	3	8
	F.F.	27.6	44			
	Lab.	11.6	14			
	Far.	11.5	15			
	Others	10.1	17			
	Total	100.0	153			
1927 (June)	C. na G.	27.4	46	30%	—	2
	F.F.	26.1	44			
	Lab.	12.6	22			
	Far.	9.5	11			
	Nat. League	7.3	8			
	Sinn Féin	3.6	5			
	Ind. Reps.	0.8	2			
	Clann Eir.	0.5	—			
	Ind.	12.2	14			
	Total	100.0	152			
1927 (Sept.)	C. na G.	38.4	61	40%	4	3
	F.F.	34.9	57			
	Lab.	8.9	13			
	Far.	6.3	6			
	Nat. League	1.6	2			
	Comm.	1.1	1			
	Ind.	8.8	12			
	Total	100.0	152			
1932	F.F.	44.6	72	48%	—	10
	C. na G.	35.3	56			
	Lab.	7.7	7			
	Far.	3.3	5			
	Ind.	9.1	9			
	Total	100.0	149			
1933	F.F.	49.7	76	50%	4	4
	C. na G.	30.5	48			
	Centre	9.1	11			
	Lab.	5.7	8			
	Ind.	5.0	9			
	Total	100.0	152			
1937	F.F.	45.3	68	49%	—	10
	F.G.	34.8	48			
	Lab.	10.0	13			
	Ind.	9.9	8			
	Total	100.0	137			
1938	F.F.	52.0	76	55%	5	0
	F.G.	33.3	45			
	Lab.	10.0	9			
	Ind.	4.7	7			
	Total	100.0	137			
1943	F.F.	41.9	66	48%	—	11
	F.G.	23.1	32			
	Lab.	15.7	17			
	C. na T.	10.9	14			
	Ind.	8.4	8			
	Total	100.0	137			

Election	Party	Percentage of Total Votes	Seats Won	Percentage of Seats Won	Dáil in existence for	
					Years	Months
1944	F.F.	48.9	73	54%	3	7
	F.G.	20.6	29			
	C. na T.	9.8	9			
	Lab.	8.9	8			
	Nat. Lab.	2.2	4			
	Ind.	9.6	11			
	Total	100.0	134			
1948	F.F.	41.9	67	46%	3	3
	F.G.	19.8	31			
	Lab.	8.7	14			
	C. na P.	13.2	10			
	C. na T.	5.3	7			
	Nat. Lab.	2.6	5			
	Ind.	8.5	12			
	Total	100.0	146			
1951	F.F.	46.3	68	47%	2	10
	F.G.	25.7	40			
	Lab.	11.5	16			
	C. na T.	2.9	6			
	C. na P.	4.1	2			
	Ind.	9.6	14			
	Total	100.0	146			
1954	F.F.	43.4	65	45%	2	8
	F.G.	32.0	50			
	Lab.	12.1	18			
	C. na T.	3.1	5			
	C. na P.	3.7	3			
	Ind.	5.7	5			
	Total	100.0	146			
1957	F.F.	48.3	78	53%	4	6
	F.G.	26.6	40			
	Lab.	9.1	11			
	Sinn Fein	5.3	4			
	C. na T.	2.4	3			
	C. na P.	1.7	1			
	Ind.	6.6	9			
	Total	100.0	146			
1961	F.F.	43.8	70	49%	3	5
	F.G.	32.0	47			
	Lab.	11.7	16			
	C. na T.	1.5	2			
	C. na P.	1.2	1			
	Sinn Fein	3.0	—			
	Ind. etc.	6.8	8			
	Total	100.0	144			
1965	F.F.	47.7	72	50%		
	F.G.	34.1	47			
	Lab.	15.4	22			
	C. na P.	.8	1			
	Ind. etc.	2.1	2			
	Total	100.0	144			

ANNEX 12

Number of Candidates nominated at General Elections

Dáil	Total Number of Candidates Nominated	Number of Seats
1922	173	128
1923	377	153
1927 (1)	383	153
1927 (2)	262	153
1932	279	153
1933	246	153
1937	254	138
1938	207	138
1943	354	138
1944	351	138
1948	406	147
1951	296	147
1954	303	147
1957	289	147
1961	300	144
1965	280	144

ANNEX 13

Extent of Poll at General Elections and Invalid Votes

General Election	Percentage of electorate which voted	Percentage of votes invalid
1922	62	3.08
1923	61	3.66
1927 (1)	68	2.6
1927 (2)	69	1.86
1932	77	1.6
1933	81	1.05
1937	76	2.1
1938	79	1.2
1943	74	1.2
1944	68	1.04
1948	74	0.98
1951	75.3	0.89
1954	76.4	0.94
1957	71.3	0.93
1961	70.6	0.96
1965	75.1	0.91

ANNEX 14

General Elections—New Members elected

General Election	Total Number of New Members	Percentage of Membership
1922	32	25
1923	78	51
1927 (1)	63	41
1927 (2)	30	20
1932	38	25
1933	23	15
1937	23	17
1938	12	9
1943	32	23
1944	12	9
1948	33	22
1951	30	20
1954	29	20
1957	33	22
1961	37	26
1965	33	23

ANNEX 15

Population of Each Constituency for Elections to Dáil Éireann

Constituency	Population				Members assigned by Electoral (Amendment) Act, 1961	Population per member
	1961	1966				
	Persons	Persons	Males	Females		
Borough Constituencies:						
Cork	97,319	104,846	50,199	54,647	5	20,969
Dublin North Central	73,427	66,842	31,116	35,726	4	16,711
Dublin North (East)	114,723	139,163	66,237	72,926	5	27,833
Dublin North (West)	70,744	81,841	39,883	41,958	3	27,280
Dublin South (Central)	93,603	90,687	41,775	48,912	5	18,137
Dublin South (East)	63,358	65,808	28,713	37,095	3	21,936
Dublin South (West)	99,037	100,221	47,116	53,105	5	20,044
County Constituencies:						
Carlow-Kilkenny	99,491	98,454	50,971	47,483	5	19,691
Cavan	56,594	54,022	28,803	25,219	3	18,007
Clare	73,702	73,597	38,667	34,930	4	18,399
Mid-Cork	81,084	84,258	42,572	41,686	4	21,065
North-East Cork	96,965	97,270	49,491	47,779	5	19,454
South-West Cork	55,075	53,329	27,748	25,581	3	17,776
North-East Donegal	57,847	55,649	28,512	27,137	3	18,550
South-West Donegal	55,995	52,900	27,094	25,806	3	17,633
Dublin	116,931	145,903	72,290	73,613	5	29,181
Dún Laoghaire and Rathdown	86,509	104,582	48,562	56,020	4	26,146
East Galway	92,483	89,836	47,750	42,086	5	17,967
West Galway	57,404	58,504	29,946	28,558	3	19,501
North Kerry	57,744	56,157	28,817	27,340	3	18,719
South Kerry	58,714	56,628	29,857	26,771	3	18,876
Kildare	77,932	79,998	41,980	38,018	4	20,000
Laoighis-Offaly	96,602	96,312	50,629	45,683	5	19,262
East Limerick	77,995	83,022	40,891	42,131	4	20,756
West Limerick	55,344	54,335	28,244	26,091	3	18,112
Longford-Westmeath	76,399	74,788	38,654	36,134	4	18,697
Louth	59,935	61,926	30,727	31,199	3	20,642
North Mayo	53,984	50,315	25,918	24,397	3	16,772
South Mayo	72,095	67,798	35,228	32,570	4	16,950
Meath	58,715	60,830	31,418	29,412	3	20,277
Monaghan	54,531	53,325	27,847	25,478	3	17,775
Roscommon	71,504	67,605	35,929	31,676	4	16,901
Sligo-Leitrim	71,995	67,892	35,326	32,566	4	16,973
North Tipperary	56,425	56,440	29,455	26,985	3	18,813
South Tipperary	78,611	77,121	39,679	37,442	4	19,280
Waterford	60,225	62,331	30,748	31,583	3	20,777
Wexford	78,827	79,039	40,009	39,030	4	19,760
Wicklow	58,473	60,428	30,231	30,197	3	20,143

ANNEX 16

PROPORTIONAL REPRESENTATION SYSTEMS

Notes based on "Free Elections" by W. J. M. McKenzie and "Parliaments and Electoral Systems" published by the Institute of Electoral Research.

Proportional representation systems fall into two categories, the single transferable vote system and the list system.

SINGLE TRANSFERABLE VOTE SYSTEM

Under this system the elector expresses preferences for individual candidates (who may or may not have party affiliations). He marks one, some or all of the candidates on the ballot paper in the order of his own choice by consecutive numbers.

When counting the votes a quota is fixed. This is the number of votes that can be obtained by as many candidates as there are seats to be filled, but not by more (i.e. one vote more than one-quarter of the total valid votes in a 3-member constituency, one vote more than one-sixth in a 5-member constituency and so on). This is called the "Droop" quota after H. R. Droop who first evolved it in 1872. The formula can be stated:—

$$\frac{\text{Total valid votes}}{\text{Total Seats} + 1} + 1$$

Any candidate who, on the first count of the votes, is found to have received a quota of first preference votes, gets a seat.

If he has obtained more first preference votes than the quota, the surplus votes are redistributed among the other candidates in proportion to the respective second preferences shown on all of his ballot papers. The votes so re-distributed then count as first preferences for the candidates benefitting from the transfer of the surplus. This may bring the total of votes cast for one or more of the other candidates above the quota. If so, then each such candidate gets a seat on this second count.

Then the next highest number of surplus papers (if any) obtained by any successful candidate is re-distributed according to the next preferences shown on the papers last transferred to him. Should no candidate's total have exceeded the quota, then the candidate with the lowest number of votes is eliminated and each of the papers then credited to that candidate is transferred to the candidate marked by the voter as his next preference among the candidates still remaining in the running.

After each such re-distribution, the votes for each candidate are totalled and any candidate who attains the quota gets a seat. The process is continued until all seats are filled.

This is the system used here for all public elections. It is also

used, for example, in parliamentary elections in Australia (Senate), Malta, Gibraltar, Tasmania (Lower House) and New South Wales (Upper House). It was used in elections to the British House of Commons for four university constituencies between 1918 and 1945.

The Droop formula has the defect of producing, inevitably, an unused remainder of votes in each constituency. For example, in a 5-member constituency, the quota is 16.7% of the total valid votes; hence, filling 5 seats consumes approximately 83.5% of the votes leaving 16.5% unused.

THE LIST SYSTEM

A list system is one in which the voter is invited to choose not between individual candidates but between lists of candidates sponsored by parties or other organisations. The seats are distributed in proportion to the number of votes cast for each party. The seats given to each party are, as a general rule, filled by taking names from each party's list of candidates in the order in which they have been placed on it by the party. There are two principal methods of allocating the seats to the parties viz.: "P.R. by the Highest Average" and "P.R. by the Greatest Remainder".

P.R. by the Highest Average (also known as the d'Hondt rule) is based on the principle that the seats are allocated one by one, and each goes to the list which would have the highest average number of votes per seat if it received the seat in question. In practice the procedure is to divide the total number of votes cast for each party list successively by the numbers, 1, 2, 3 and so on as far as may be necessary. The quotients so obtained are then arranged in order of magnitude and the seats are allocated accordingly.

Assuming that there are 5 seats to be filled, 24,000 electors vote and the voting is as follows:

List A	8,700 votes
„ B	6,800 „
„ C	5,200 „
„ D	3,300 „

The number of votes cast for each of these lists is divided successively by 1, 2 and 3 and the result is set out thus:

Divider	List A	List B	List C	List D
1	8,700 (1)	6,800 (2)	5,200 (3)	3,300
2	4,350 (4)	3,400 (5)	2,600	1,650
3	2,900	2,266	1,733	1,100

The seats are awarded by reference to the highest five numbers in order of magnitude—indicated above by the figures in brackets. The result of the election, therefore, is as follows:

List A	2 seats
„ B	2 seats
„ C	1 seat
„ D	No seat

(Under the system used in some countries a seat is awarded to each party for each multiple of the Droop quota and any remaining seats are allocated by the highest average method).

In the allocation of seats the highest average method favours the more popular parties at the expense of the smaller ones. To deal with criticisms of this kind the method of *P.R. by the Greatest Remainder* has been devised. Under this method an electoral quotient is calculated by dividing the total number of votes cast by the number of seats to be filled. Then each list is given as many seats as its total vote contains the quotient. If any seats remain they are allocated successively according to the sizes of the remainders obtained by deducting from the original total vote for each list the number of votes it has already “used” to gain a seat or seats by means of the quotient.

In the example already used the quotient would be 4,800 (24,000 divided by 5) and lists A, B and C would obtain one seat each by means of the quotient. The remaining two seats are then allocated amongst the lists having the highest remainders, which would be as shown below :

List	Votes	Quotients deducted	Remainders
A	8,700	4,800	3,900
B	6,800	4,800	2,000
C	5,200	4,800	400
D	3,300	—	3,300

Lists A and D having the greatest remainders would therefore each be awarded one seat. The final allocation would be—

List A	2 seats
List B	1 seat
List C	1 seat
List D	1 seat

Under this method the smallest party, D, would gain a seat at the expense of the second largest, B, which would have obtained two seats under the highest average method.

Variations of the system

Changes can be made in the system to meet certain criticism, without sacrifice of principle.

It is a common criticism that list systems give great power to party machines because the voters are given no voice in the choice of individual members. While the parties, of course, pay some attention to popular appeal in putting forward candidates, in effect the voters choose between parties and the parties choose the members. There is, however, no technical difficulty in permitting the voter to choose on the same ballot paper between individuals as well as between parties, though the calculations which follow may be complicated. One way of doing this is to maintain the rule that the allocation of seats between parties is determined solely by votes cast for lists, but to allow the voter to choose the order of names within the list which he favours. There are then in a sense two separate elections on the same piece of paper—the first to allocate seats to parties and the second (in effect limited to the voters of each successful party) to determine which of the party candidates are to get the seats allocated to the party. This second selection can be conducted on a majority or single transferable vote system of voting, but the latter is probably the best and is the usual system used for the purpose. The freedom of choice thus given to the voters may however be ineffective in practice, because preferential voting cannot very well be made compulsory, and those who put no marks of preference opposite the names of individual candidates must be assumed to accept the order given by the party and this is much the simplest thing for the average elector to do. This variation can be taken further, so that in theory it changes the character of the system, by allowing the voter to mix party lists together. In a seven-member constituency, for example, an elector would have seven votes (or one vote divisible into sevenths), and could divide his vote between parties in any ratio he pleases, such as 5:1:1. Voters are not likely to do this except to support an individual on some list other than that of their own party and this mixing of lists (for which the French term *panachage* is often used) is not of any value unless combined with preferential voting, i.e., the right to favour an individual. But even so the first stage in voting is still the allocation of votes between lists. In the example above, the imaginary voter has given five votes to List A, one each to List B and List C, and it is the sum of the votes for each list which determines the number of seats to be shared among its candidates. It is in the second stage that the voter's choice may help the individual candidate whom he favours. In theory, by devices of this kind a list system can be given some of the flexibility of the single transferable vote system, but practice lags behind theory, because the vote for the party comes first, and there are relatively few voters who wish to break away from it, especially if the effect may be to benefit not the man of their choice, but another party.

Like the single transferable vote, the highest average and greatest remainder methods have the weakness in proportional theory that there is always an unrepresented remainder of votes in each constituency which may be as high as $\left(\frac{\text{votes cast}}{\text{Seats to be filled plus 1}} \right)$. The

ratio of this remainder to the number of electors can be reduced by increasing the size of the constituency, but there is a limit to what is thought tolerable in this respect. Even under list systems constituencies rarely have more than 8-10 seats. The unrepresented remainder may therefore be substantial. If added together for the country as a whole it might perhaps equal 10% of the electorate. Minorities below this size may go without spokesmen and without votes with which to bargain, a matter which may be quite serious where each party is organised specifically to cater for its own clientele, and does not cast its net wide to catch the floating voter and marginal interest. There is no technical difficulty in dealing with the problem by arranging that all parties, large and small, may carry forward unused remainders to a number of regional pools, to each of which seats are allocated in proportion to the votes entering it, and from the regional pools remainders can be carried forward to a national pool. There generally is some provision for a minimum, for instance that a party is not further considered unless it gains at least a certain minimum percentage of the votes cast in constituencies for which it has entered lists.

USE OF LIST SYSTEMS

List systems are used in the following European countries :— Austria, Belgium, Denmark, Finland, Greece, Iceland, Italy, Luxemburg, The Netherlands, Norway, Sweden, Switzerland and Western Germany.

ASSESSMENT OF P.R. SYSTEMS

W. J. M. Mackenzie in his book *Free Elections* adopts the following criteria as a basis for assessing the P.R. systems :— There are eight main criteria :—

(a) *Quality of members.* Does the system secure the election of members of good quality? The idea of "good quality" is of course not unambiguous but it is clear in a general way what it means.

(b) *The member and his constituency.* Does the system secure the election of members qualified to speak for those who supported them and in close touch with the electorate? In other words, are the members good "constituency men"?

(c) *A collectively effective assembly.* Does the system make it possible for the assembly elected to do the business required of it? This business is different in different political systems. Where the system produces Houses from which emerge cabinets continuously dependent on them for support the assembly must be capable of maintaining a stable majority or it will produce unstable cabinets. Whether there is a stable majority depends on the working of the party system. This criterion may resolve itself into another—does the voting system tend to strengthen or weaken the party system?

Does it promote party discipline among the electorate and in the assembly? How does it affect the number of parties and the possibility of lasting coalitions between them?

(d) *Reflection of opinion.* Does the system fairly reflect opinion? Is the opinion to be reflected the organised opinion of disciplined parties or the opinion of the individual voter on complicated issues presented to him without prior simplification?

(e) *Attitude of electors in voting.* Does the system encourage voters to take the right attitude to their own choice? Does it "educate" them in the practice of democracy? Should the voter be given a chance to express all the ramifications of his attitude to a complex situation or should he be forced to take a narrow but effective decision by limiting his freedom of choice to a small number of pre-determined options?

(f) *Public confidence.* Does the system inspire public confidence in its fairness and effectiveness? This involves public belief in the competence and impartiality of electoral administration, and some public understanding of the relation between votes and results.

(g) *By-elections.* Vacancies are bound to occur during the tenure of office of a large assembly, and they cannot be left unfilled without effects on the balance of power in the assembly. How are they to be filled? In many list systems of P.R. the general election produces lists of "reserves", placed in order, who can step into the assembly without a further election if a member of their party falls out. Under the single transferable vote system it is necessary to have by-elections and a series of individual elections therefore takes place at unpredictable intervals between general elections. This has the advantage of giving some indication of the current state of opinion, but to secure this the system must be such that it admits by-elections without great administrative inconvenience and without distorting the process of choice.

(h) *Political possibility.* Finally, there is a criterion of a rather different kind. Methods of voting nowadays are rarely imposed from outside upon a political system. This has happened in the development of elections in colonies and of plebiscites in occupied territories, but these occasions grow rarer and must be treated as exceptions. A voting system is usually created by an act within the political system to which it belongs. An existing ruler must be convinced. A majority must be found within an existing assembly. It is useless to propose a voting system for the defence of interests which are not powerful enough to secure the introduction of the system unless of course they can find allies of greater strength.

Using these criteria Mackenzie goes on to make his assessments as follows:—

ASSESSMENT OF SINGLE TRANSFERABLE VOTE SYSTEM

It should be said at the outset that evidence about the use of the system in large political units is still very limited. It has been used for elections to the main popular assembly only in the Republic of Ireland, which has a population of about 3 million, and in Tasmania, which has a population of 300,000. It is used for elections to second chambers in the Commonwealth of Australia and in New South Wales, and on a limited scale in some parliamentary and local elections elsewhere. Discussion therefore proceeds on the basis of general probabilities, and of experience of the system in smaller units, which is considerable. It is agreed that the system is much the most elegant device available for enabling individuals to express themselves through the electoral process in such a way that the outcome of voting bears a logical relationship to the votes cast. At some points, however, the logic is drawn rather fine. When it comes to second and third preferences it may often happen that what is reckoned is not the individual vote of any specific elector, but a vote derived by sums in proportion from the votes of a large number of electors.

(a) *Quality of members.* The tendency of the system is to give more opportunity to the voter to express an opinion about the merits of individual candidates. In a constituency in which a number of party candidates stand for election it can be made plain whom the voters think to be best of the party candidates, and an "independent" party candidate rejected by the party machine might stand without splitting the party vote. The electorate gains freedom in the choice of members, at the expense of the parties. Whether this means better members depends on the quality of the electorate and on their sources of information about the candidates.

(b) *The member and his constituency.* It is agreed that multi-member constituencies are necessary. The three-member constituency is too small to be altogether satisfactory. In consequence, a member is not closely attached to a fairly small locality, as he is under a single-member constituency system. It may be that instead of having a strong local attachment he builds up a personal and political following, with which he is associated just as closely, but in rather a different way.

(c) *A collectively effective assembly.* The system is often criticised on the ground that it may wreck the stability of the executive in countries where the executive depends for its existence on continuous support in the elected assembly. There is no doubt that the theoretical tendency (indeed part of the purpose) of the system is to weaken the grip of parties on the mechanism of elections. It should do so for two reasons. Firstly because it makes it relatively easy for small parties to establish and maintain themselves, and secondly because it enables the elector to express his choice between the candidates offered to him by his own party. The single transferable

vote system therefore tends to break up a system of two Parties, and to weaken discipline within each party in the assembly and in the country. It may thus make responsible cabinet government more difficult, but this is no more than a tendency, which may be counter-balanced in various ways. The system of voting is not the only reason for the emergence of two great parties in some countries but not in others, and the tendency to party domination may prove stronger than the effects of the single transferable vote system. The climate of opinion in the country may be strongly opposed to cabinet instability, and it may therefore be possible for an assembly with several parties and much freedom of speech to produce a majority coherent enough to support a cabinet for long periods.

The evidence is limited. Cabinets in Ireland have not been conspicuously unstable, and there are countries (the Scandinavian countries in particular) which have stable cabinets in spite of the existence of several equally balanced parties whose position is protected by some form of P.R. under the list system.

(d) *Reflection of opinion.* The system undoubtedly reflects individual opinions as well as any system can, within the administrative limits set by the huge size of modern electorates. A counter-argument can only be constructed on this point by insisting that in politics what counts is organised opinion, not the sort of opinion which expresses itself in answer to the questionnaires of the "gallup poll", but opinion shaped by party organisation into an effective political instrument associating known leaders, an alert body of party followers, coherent principles and an agreed programme of action. This is a crucial point in debate about mass democracy. The case for political parties is strong, but it is also possible to reverse the argument and to suggest that since party organisation is hostile to free speech within the party, it is as likely to block public opinion as to canalise it.

(e) *The attitude of electors.* J. S. Mill, the greatest of all advocates of the system, laid most stress on the educational function of democracy. For him the main merit of representative government was that it produced an active self-helping type of man more effectively than any other sort of government. Most people would agree about this, but unfortunately the "educational" effect may be secured in two different ways, not always completely compatible. Firstly, men become better politically by practice in exercising their wits in the subtleties of politics and by adjusting their judgments to the facts as they know them. Secondly, they become better in rather a different sense if they are made to share in responsibility to take decisions which are effective in the sense that the decider must suffer in his own person if he has chosen wrong. It is scarcely in dispute that the single transferable vote system is more "educational" than "first past the post" voting in the first of these senses. It sets the elector a more interesting and varied problem. But the single member constituency system probably has the advantage

in the second sense—experience is lacking, but it is less likely that under the single transferable vote system an election can become in effect the direct choice of a government to which the chooser must submit for the next few years.

(f) *Public confidence.* The weakness of the system in this respect is secondary rather than direct. It is not hard for experienced people to administer, and the logic of the arithmetical processes involved can be explained in fairly simple terms, at least to people who are interested in that sort of logic and take pleasure in the construction of an argument. But such people are relatively few in number, and the average voter is not likely to understand the system fully. It is impossible to judge without experience how important this difficulty would be in practice. Many would be prepared to put down an order of preference on the ballot paper and to take it on trust from those who know better that their vote in some way finally becomes effective. But the relative complexity of the system means that it is vulnerable to attack by unfriendly persons who wish to make fun of it. In this as in so many things, the decisive factor is the growth of habit and tradition.

(g) *By-elections* are essential, as the system (unlike list systems of P.R.) cannot fairly be used to designate “reserve” members to fill casual vacancies. This means in practice that a large constituency normally electing perhaps five members must vote in a by-election to choose one member, either by the simple majority system, or by a second ballot, or by the alternative vote. There is some minor inconvenience in this, but no real difficulty.

(h) *Political Possibility.* Judged by these arguments alone the system is certainly a valuable “tool in the bag”, more suitable in some circumstances than in others, but not to be rejected out of hand. Its weakness in terms of practical politics is that it is difficult to induce established political parties to support it, because there is good reason to believe that it will be hostile to their interests. A strong two-party system is most easily maintained under the single-member majority system, and where that system exists the two largest parties (even though otherwise irreconcilable) generally unite to support it. In a multi-party system parties find it easier to preserve internal discipline under some variant of the list system than under the single transferable vote system. The system, where it exists, gains most of its support from the smaller parties and from the sentiment of individual voters. Its existence in Ireland is for this reason a little precarious and its introduction elsewhere is unlikely, except in elections not deemed important by organised political parties.

ASSESSMENT OF LIST SYSTEMS

(a) *Quality of members.* The choice of members, even where preferential voting is allowed, depends largely on the parties. These

are not wholly unresponsive to public opinion, but it is primarily their character which determines the character of members.

(b) *The member and his constituency.* The effects are like those of any multi-member constituency system. The member represents primarily not a locality as a whole, but a group of like-minded people. This can be modified slightly by allocating individual members to single-member districts. It is intensified if the system is run on the basis that there shall (for instance) be one member for every 50,000 voters, regardless of locality, so that regional and national pools play a relatively important part.

(c) *A collectively effective assembly.* These systems tend to strengthen discipline within parties, and also to fix the number of parties at more than two. They do not, however, in general appear to increase the number of parties indefinitely. One could devise a system likely to encourage this, but most systems represent a compromise which gives existing parties some power to resist splits and the creation of new parties. This situation makes for stable coalition or minority cabinets if the parties are capable of working together and for chaos if they are not. The roots of such attitudes lie much deeper in the structure of the political community.

(d) *Reflection of opinion.* List systems in their most elaborate forms are sensitive devices for registering in the composition of the assembly the amount of support given to each party by the voters. They do not register opinion in any other sense. Indeed, they scarcely recognise its political existence. This is part of a consistent view of the place of parties in the state.

(e) *Attitude of electors to voting.* The effects of the system perhaps lie between those of single-member constituencies and those of the single transferable vote system. The subtleties of expression open to the voter are (usually) more limited than under the single transferable vote system; his choice is not so directly related to the choice of a government as under the "first past the post" system, since governments are generally fixed by compromise between parties joining a coalition majority.

(f) *Public confidence.* These systems though rigid are relatively plain, except when attempts are made to give real effect to preferential voting and panachage. Probably most electors find them simpler to follow than the single transferable vote system and other mixed systems. The most obvious line of attack is based on sarcasms not about complexity but about party bureaucracy and about indecisive coalitions of wirepullers.

(g) *By-elections.* Under list systems it is possible to dispense with by-elections altogether, by allowing the next candidate on the relevant list to take the place of the member who has dropped out. This is

generally done, but, if by-elections are wanted, it is easy to hold them, subject to the same difficulty as that of by-elections under the single transferable vote system. That there is some inconvenience in electing one member in a large multi-member constituency, and that the result cannot be proportional, like the rest of the system, must favour the strongest party, even though the seat had been fairly awarded to a weaker party at the general election.

(h) *Political Possibility.* It might be said that list systems are all too possible. Like the "first past the post" system, they create vested interests which tend to maintain them. Their virtues and their defects perpetuate themselves equally, and they are likely to remain the basis of one of the main forms of Western democracy.

ANNEX 17

ELECTION METHODS FOR SINGLE-MEMBER CONSTITUENCIES

1. Annex 16 deals with systems of proportional representation in use in Europe and compares the party list system with the single transferable vote system in operation in this country. All these systems of proportional representation require for their operation multi-member constituencies. There are also a number of different election systems which might be adopted for single-member constituencies. The following material is taken mainly from *Elections and Electors* by J. F. S. Ross; *Voting in Democracies* by Lakeman and Lambert; *Proportional Representation* by Hoag and Hallett, and the Report of the British Royal Commission on Electoral Systems (1910).

2. When two candidates compete for a single seat the process of election is quite simple. Each elector prefers A to B or else prefers B to A: there is no third alternative way for him to vote. In such a case the candidate receiving the most votes is without any question the choice of the electorate. When more than two candidates compete, however, complications and ambiguities can arise. When A, B and C are candidates for a single seat each voter selects one of the three whose success would please him best and he may, in addition, have a second choice. In other words he may prefer A to B and if A cannot win, he may prefer B to C. His total response consists, therefore, according to Ross, of a first preference together with a second preference; this may be one of the six responses AB, AC, BA, BC, CA and CB.

3. In order to ascertain to which candidate the seat should be allotted, Ross suggests that the following five conditions should be observed :

1. Each of the three candidates must be treated on terms of strict parity with each of the others;
2. Each elector must be allowed and encouraged to indicate on his ballot paper his second choice as well as his first;
3. All first choices must be counted as of equal weight amongst themselves;
4. All second choices must be counted as of equal weight amongst themselves but of less weight than first choices;
5. In determining the results of the election, account must be taken of all the choices expressed by all the electors.

4. Bearing these requirements in mind, he examines the various methods employed in Britain and elsewhere for elections to single-member constituencies. He deals first of all with the *Spot Vote* which is used in British elections. Under this system of voting, the elector can indicate only his first choice amongst the candidates put forward and he cannot, therefore, express his full response to the challenge of the election. For instance, if there are four candidates for one seat, the total possible number of alternative responses on the part of the elector is twenty-four, whereas only four are permitted by the election system in operation. In so far as the counting of the votes and the allocation of the seat are concerned, even the leader of the field may have only a minority of the votes, and the more candidates there are, the smaller may be this minority expressed as a fraction of the whole. There is, therefore, no certainty, in cases other than a straight fight between two candidates, that the candidate with the largest number of votes under the spot vote system is the one who is most acceptable to the electorate as a whole, and he may in fact be the least acceptable. This situation arises from the fact that the elector is not able to express his views with proper fullness.

5. One of the methods adopted to rectify the defects of the spot vote system is the *second ballot*. Under this arrangement, if the first poll fails to give any candidate a clear majority, a second ballot is held at a later date in which only the two candidates who received the most votes are allowed to stand. The arbitrary exclusion of one or more of the candidates who, though having a lower position in the first ballot, may really be more popular with the electors than either of the candidates who are allowed into the second contest, can lead to inaccuracy in determining the wishes of the electorate. Ross gives an example of this, and condemns the second ballot method as unsound even though it may be somewhat better than the spot vote system. He states that it is now generally dis-credited, particularly since anything it sets out to attain can be achieved

more quickly and reliably by means of a system known as the alternative vote which cuts out altogether the second ballot.

6. With the *alternative vote* the elector uses the preferential method of voting, marking a figure "1" against the candidate of his first choice, a figure "2" against his second choice and so on. Any candidate with a clear majority of first choices is declared elected. If no candidate has an absolute majority the last in the list is eliminated and his papers are distributed according to the second preferences; this may give an absolute majority to one or other of the remaining candidates. Ross states that while the alternative vote eliminates the disadvantage of the second election, it is no more sound in principle than the second ballot. According to him each system takes it for granted that the first preference is all that really matters and that later preferences are to be called on only when a decisive result cannot be reached by means of first preferences alone. In Ross's view, the elector's later preferences, though less weighty than his first, are just as truly a part of his response to the election. In order to take account of all preferences it is necessary, he states, to adopt the Borda system.

7. Briefly, the *Borda system* may be described as a method by which the electors can indicate their order of preference for all the candidates in the election, in the knowledge that, in the counting of the votes, specified values will be attached to the various preferences and a grand total for each candidate thereby calculated. Ross traces the history of the Borda system since its invention in France in 1770 and sets out the views expressed thereon by other persons who have taken an interest in electoral systems, such as Condorcet, Laplace, Todhunter and Nanson. Nanson's views are perhaps of the greatest importance since they strongly influenced the British Royal Commission on Electoral Systems, 1910. Ross states that Nanson failed to grasp the essential principles involved and points out that the Royal Commission did not include amongst its members any statistician or mathematician who could have spotted the fallacies underlying Nanson's conclusions. Nanson gave the following example in which the application of the Borda system would in his view, have given the wrong result:—

"Suppose that there are twelve electors, of whom five prefer A to B and B to C, whilst two prefer A to C and C to B, and five prefer B to C and C to A. Then the votes polled will be, for A, fourteen; for B, fifteen; for C, seven*. Thus B is elected. It is clear, however, that this result is wrong because seven out of the whole twelve electors preferred A to B and C, so that, in fact, A has an absolute majority of the electors in his favour. Hence, then, Borda's method does not satisfy the fundamental condition,

*Under the Borda system each elector would be entitled to two votes for first choice and one vote for second choice.

for it may lead to the rejection of a candidate who has an absolute majority of the electors in his favour”.

Ross severely criticises this statement and points out that, while Nanson gives the Borda score correctly, he goes wrong in his reasoning because he fails to understand the basic principles governing an election of this type. He quarrels with the assertion that “A has an absolute majority of the electors in his favour” and points out that the majority which A has received is of first preferences rather than electors. It is clear, however, that this difference of opinion springs from a basic difference of approach in that Nanson’s system is based essentially on the ascertainment of majorities, whereas Ross claims that the result should be such as to take account of all preferences indicated in the ballots.

8. Concluding his evidence to the Royal Commission, Nanson rejected every known method of election to single seat constituencies, except one devised by himself, and this was admitted to be too complicated for big political elections. The Commission, failing to find a better solution, recommended the adoption of the “alternative vote” Ross expresses the view that had the Commission exercised more critical judgement it would surely have recognised that in the Borda method lay the answer to the problem and that, “theoretically sound and practically convenient, that method was superior in every respect to the ‘alternative vote’.”

9. In applying the Borda system one of the most important matters to be decided is the relative values to be attached to the first and later preferences. Borda and Laplace argued that the same difference should be considered to exist between all preferences, i.e. that the intervals of value should be taken as equal all the way down the scale. Ross concludes, however, that, whatever may be said about the mathematical justification for this approach, the relative value of successive preferences is a matter of subjective estimation in the minds of the electors. It is not, he says, a constant relationship, and there is no possible way of determining what will be true for all electors. He gives an example to support this. He also points out that if the Borda/Laplace view is accepted the relative values of successive preferences will vary with the number of candidates. Thus with three candidates the first preference is twice as valuable as the second, with four candidates it drops to $1\frac{1}{2}$ times and with six to $1\frac{1}{3}$ times. This means that with every increase in the number of candidates the value of a second preference becomes more nearly equal to that of a first preference, and this can give rise to distortion.

10. Ross suggests that the best arrangement is to fix the value of a first preference at a suitable figure say, two, irrespective of the number of candidates and then to take the value of each succeeding preference at one-half that of its predecessor, making the sequence of

values 2, 1, $\frac{1}{2}$, $\frac{1}{4}$ etc. This would, in effect, substitute a geometrical progression for the arithmetical one recommended by Borda/Laplace. He admits that this geometrical progression might seem to imply that in the mind of the elector there is likely to be, more often than not, a diminishing difference between the values of his preference as he passes from first to second, second to third, and so on. He suggests that there is ample justification for this assumption, at least in modern political elections. There is not, he says, and cannot be any fixed rule in such matters but it is reasonable to think that the elector is usually more concerned that his first choice should defeat all the other candidates, than with any other consideration.

11. In summing up, Ross points out that the Borda method for dealing with elections in which more than two candidates contest a single seat complies with all the five basic conditions referred to in paragraph 3, and he states that there is no other system known that fulfills these requirements.

12. In their book *Voting in Democracies*, Lakeman and Lambert offer some comments on the Borda system. They state that, although the alternative vote is the commonest method of securing election by a clear majority, it is not the method likely to give the most general satisfaction. While admitting that the Borda method has decided merits and can give better results than the "alternative vote", they state that it is open to the objection that the outcome may depend on the relative values assigned to the various preferences. They give an example in which one of three candidates will win where arithmetical progressions of 2, 1, 0 or 3, 2, 1 are used, and another candidate if the votes are valued in geometrical progression 4, 2, 1. They admit that the geometrical progression may be the more logical since it makes the ratio between one preference and the next independent of the number of candidates.

13. They go on to state that the assigning of values to preferences can be avoided entirely, and for details of appropriate schemes they refer the reader to *Proportional Representation* by Hoag and Hallet (New York—The Macmillan Company—1926). Although that publication deals primarily with P.R. (which requires multi-member constituencies), it also gives information about voting methods for deciding single seat contests which allow the voter to express his preference as between different alternatives. The Second Ballot System, the Alternative Vote System, the Bucklin or Grand Junction System, the Nanson System and the Hallet System are discussed under the general heading of "Majority Preferential Voting".

14. Initially, the authors state that the purpose of the preferential ballot is to make it possible for the voter to say how his vote is to be counted, under any one of the several situations in respect of the relative strength of the different candidates, which may be revealed through the count. They go on to state that :

"The criterion by which the correctness of a majority preferential method should be judged will be conceded by most readers to be as follows: the method must select from more than two competitors the one supported, as against any of the other competitors taken singly, by more than half of the voters who have expressed a preference between the two, if such a measure or candidate there be. If there are none such, the method of voting must in any case never (except in the case of an absolute tie) defeat a competitor unless one of the others is preferred to that competitor by more than half of the voters who have expressed a preference between the two".

It is significant that they make no reference whatever to the Borda System although it is clear from the sources which they quote that they must have been well aware of it. It must be assumed that the reason for this is that the Borda System is not a majority preferential voting system in accordance with the criterion enunciated by Hoag and Hallet. The Borda System is substantially the same as a points system; all preferences are taken into account immediately and the person with the highest total is declared the winner without further ado on the basis of one scrutiny only of the ballot papers. The idea of preferences by a majority being ascertained for one candidate as against any other candidate does not enter into it.

15. It is not considered necessary to deal here with the Bucklin or Grand Junction System as it was found in the United States to be defective and unsatisfactory. Its principal defect, according to Hoag and Hallet, was that the voter could hurt the chances of his first choice by marking a second, the chances of his first or second choice by marking a third, and so on. (This criticism may also be levelled against the Borda System.)

16. The Nanson System is designed to indicate the person preferred by a majority in accordance with the criterion set out above in paragraph 14. As Nanson himself said in his evidence to the British Royal Commission on Electoral Systems (1910):

"The object of such an election is to select, if possible, some candidate who shall, in the opinion of a majority of the electors, be most fit for the post. Accordingly, the fundamental condition which must be attended to in choosing a method of election is that the method adopted must not be capable of bringing about a result which is contrary to the wishes of the majority."

As already mentioned in Paragraph 7, Nanson gave an example to indicate that the Borda System does not meet this fundamental condition. Apart from this defect, Nanson also stated that there is another objection which is of great importance:—

"Borda's method holds out great inducements to the electors to vote otherwise than according to their real views. For if an

elector strongly desires the return of a particular candidate, he not only gives his two votes to that candidate but he also takes care to give his remaining vote to the least formidable of the other candidates. The effect of this is to give a great advantage to second-rate candidates."

A similar fear had been expressed many years before by the French mathematician Laplace, but Ross dismisses this point on the ground that it is rash to jump to conclusions as to what goes on in other peoples' minds. He states that, as Nanson offers no evidence in support of his assertions, they can be disregarded.

17. The Nanson method was first explained in a paper read in October, 1882, by the author before the Royal Society of Victoria (Australia), and extracts from this paper are appended to the report of the British Royal Commission on Electoral Systems, 1910. In his paper, Professor Nanson states that his system consists merely in combining the principle of successive scrutinies with the Borda System, and at the same time making use of the preferential voting paper. For a contest involving three candidates, the procedure would be as follows :—

" At the first scrutiny two votes are counted for each first place and one vote for each second place, as in the method of Borda. Then if the two candidates who have the smallest number of votes have each not more than one-third of the whole number of votes, the candidate who has most votes is elected, as in the Borda method. But if one only of the candidates has not more than one-third of the votes polled (and some candidate must have less), then that candidate is rejected, and a second scrutiny is held to decide between the two remaining candidates. At the second scrutiny each elector has one vote, which is given to that one of the remaining candidates who stands highest in the elector's order of preference. The candidate who obtains most votes at the second scrutiny is elected."

Complete rules were later drawn up for this system for use by certain bodies in the U.S. who had adopted the Nanson system and these are quoted in Hoag and Hallet :—

1. At the voting precincts transcribe on co-ordinate paper (ruled to correspond with the spacing of the names of the candidates on the ballot) the figures marked on the ballots by the voters, using a separate column for each ballot and numbering both ballot and column with a distinctive number in order to be able at any time to compare the original ballot with its record. Send the record to the central electoral board, as ordered by that board.

2. On the record, but not on the ballots, let the central electoral board fill in all blank spaces with the figure found by divid-

ing by two the sum of the number of candidates and a number one higher than that indicating the last preference marked on the ballot by the voter.

3. Add the figures of each candidate.
4. Exclude as defeated every candidate whose total is equal to or more than the average.
5. If more than two candidates remain, set down on record sheets figures representing the preferences on all the ballots as among the candidates remaining. Add again, and again eliminate all candidates whose total is equal to or more than the average.
6. Proceed again, if necessary, as prescribed in rule 5, until only two candidates remain. When only two remain, examine the record to see which of those two was preferred to the other by the voters and declare him elected.
7. If only one candidate remains after an elimination of candidates, declare him elected.

18. Hoag and Hallet state that the Nanson system is infallibly correct in interpreting the ballots as marked, according to the criterion with which they start off, and they prove this mathematically (as did, of course, Professor Nanson himself). While admitting the possibility that a voter may be inclined to feel that he can help his favourite candidate by giving the lowest mark to the second-best candidate, they point out that only in the most exceptional cases would this stratagem work in the manner desired by the voter. They admit, however, that the Nanson method is difficult to explain and to carry out. The counting system which they recommend is essentially the same as that suggested by Nanson in his original paper, and requires the elaborate recording in a register of each ballot paper and the various preferences entered thereon. If there is no election on the first count a further detailed analysis of all the ballot papers is required for the second and subsequent counts.

19. Hoag and Hallet then go on to describe another system of voting known as the Hallet system, designed by one of themselves. It is not considered necessary to describe this system in any detail since it seems to be founded upon the same principles as the Nanson system, though it may be superior to that system in certain respects.

20. The most significant feature of the Hoag and Hallet dissertation on the subject of majority preferential voting is their conclusion that, despite its defects, the Alternative Vote system is the best available. The Nanson and Hallet systems are, they admit, too complicated to explain and to conduct. For ordinary majority elections they recommend the Alternative Vote; they state that the likelihood of error under it is very small, and that its reactions upon the voter

are excellent. They also point out that under the Alternative Vote the voter can be quite sure that marking a second choice cannot, under any circumstances, injure the chances of his first, and that the marking of a third choice cannot injure the chances of his first or second, etc. For this reason, voters will, they state, express their real will on the ballot. The successive dropping out of the lowest candidate on the assumption that he cannot merit election over all the others is, they concede, a theoretical defect but they are satisfied that such an assumption is nearly always justified. The Alternative Vote is, they conclude, sufficiently accurate for most practical purposes.

21. The spot vote (or first-past-the-post) system is used for single-member constituencies in—

The U.K. (Commons, Provincial County Councils and other local Councils with wards which elect one member annually).

The U.S.A. (most members of House of Representatives, Senate, some local authorities).

South Africa (House of Assembly).

New Zealand (House of Representatives).

The Second Ballot (or exhaustive ballot) is used for single-member constituencies in—

France (Chamber of Deputies).

Some Trade Unions.

The Alternative Vote is used for single-member constituencies in—

Australia (House of Representatives).

Legislative Assemblies of Victoria,

New South Wales, South Australia and Western Australia.

Some Trade Unions.

ANNEX 18

THE SEANAD

History to 1937

1. The Government of Ireland Act, 1920, (following the pattern of earlier Home Rule Bills) provided for a bicameral legislature. The Senate of Southern Ireland was to consist of a total of 64 members of whom three would be *ex officio*, 17 nominated and 44 elected to represent the Roman Catholic Church (4), the Church of Ireland (2), the peerage (16), the Privy Council (8), and the County

Councils (14). The *ex officio* members were to be the Lord Chancellor, The Lord Mayor of Dublin and the Lord Mayor of Cork. The nominated senators were to represent Commerce (including Banking), Labour and the Scientific and Learned Professions, and the power of nomination lay with the Lord Lieutenant. The representatives of the Churches were to be elected by the Archbishops and Bishops of the two Churches respectively, while the representatives of the peerage and the Privy Council were to be elected by resident peers and privy councillors respectively. The County Council representatives were to be allocated as follows :

Leinster	...	...	...	...	4
Munster	...	...	...	...	4
Connaught	...	...	...	...	4
Counties Donegal, Monaghan and Cavan	...	...	...	...	2
Total					14

and these were to be elected by the County Councils voting together as provinces. The 1920 Act was, of course, never effective in this country.

2. Before and after the signature of the Treaty in December, 1921, discussions were held with representatives of the Southern Unionists in regard to the powers and constitution of a Senate for the new Free State and heads of an agreement on this subject were drawn up. The Unionists were particularly interested in a form of Senate which would give them adequate representation in the legislature and would have substantial powers in relation to the first house. They proposed that the electorate for the Senate should be based on a restrictive valuation qualification but it was felt that this would not be acceptable to the people. The best concession that could be given to the Southern Unionists in this respect was that the new Senate should be elected by persons not less than thirty years old. A total of 40 Senators had apparently been contemplated, but this was increased to 60 to meet the wishes of the Unionists.

3. Originally it had been intended that the Universities should be represented in the Seanad but during the passage of the Constitution Act it was decided to give them representation in the Dáil instead (three from N.U.I. and three from T.C.D.). The other provisions relating to the Seanad in the Constitution as passed may be summarised as follows :—

- (1) The Seanad was to consist of citizens to be proposed on the grounds that they had done honour to the nation by reason of useful public service or that, because of special qualifications or attainments, they represented important aspects of the nation's life.

- (2) The number of members was to be sixty and a person could not be elected unless he was eligible to be a member of Dáil Éireann and had reached the age of thirty-five.
- (3) The term of office was to be twelve years, but one-fourth of the members were to be elected every three years from a panel.
- (4) This panel was to consist of three times as many qualified persons as there were members to be elected, of whom two-thirds would be nominated by the Dáil and one-third by the Seanad. Retiring members of the Seanad were also entitled to have their names placed on the panel.
- (5) All citizens over thirty years of age would have the right to vote on a P.R. basis for members of the Seanad, the entire State being one electoral area.

Special provision was made by Article 82 of the Constitution for the first Seanad. Thirty of the members of that Seanad were to be elected by the Dáil and thirty nominated by the President of the Executive Council. Fifteen of the nominated members were to hold office for the full period of twelve years and the remainder for six years; of the elected members fifteen were to hold office for nine years and the remainder for three years.

4. It was found necessary to make frequent and substantial changes in these provisions in the following years. In particular, difficulties were encountered in arranging satisfactory elections by direct vote of the people and in 1928 this was altered to provide for election by an electoral college consisting of the Dáil and Seanad voting on a P.R. basis. Changes were also made in regard to the terms of office, the eligible age for candidature and the formation of the panel of candidates.

5. It was necessary also to make substantial changes in regard to the powers of the Seanad. Under Article 38 of the Constitution, the Seanad held a power of suspension for ordinary Bills for a period of 270 days, and it was also empowered to convene a joint sitting of the two Houses for the purposes of discussing, but not voting upon, a Bill other than a Money Bill. In 1928, in conjunction with a number of other important amendments to the Constitution (including abolition of the Referendum), the provision for joint sittings was abolished while the suspensory period was extended to twenty months.

6. Arising out of difficulties with the Seanad, the Government introduced in 1933 a Bill to reduce this suspensory power to a period of three months, but this Bill did not, in fact, ever become law. It

was ultimately over-taken by the Constitution (Amendment No. 24) Bill which abolished the Seanad entirely in May, 1936. That Bill made a number of other changes in the Constitution in order to make up in some way for the loss of safeguards involved in the abolition of the Seanad, but it would appear that further fundamental safeguards would have been devised if time had permitted. It had always been understood, of course, that the question of having a Seanad of some kind would continue to receive consideration and the new Constitution of 1937 did, in fact, provide for a reversion to a bicameral legislature. Our experience of a single-house legislature was, therefore, extremely short.

Existing Constitutional and Statutory Provisions

7. The principal provisions relating to the present Seanad are set out in Articles 18 and 19 of the 1937 Constitution but there are, of course, many other clauses in that Constitution which relate to the powers and functions of the Seanad. In referring to these provisions in 1937, the President of the Executive Council mentioned that before they were drawn up a Committee representative of different parties had been established to consider the question of a second house. He went on to say that the result of their deliberations was, in the main, to prove the thesis that it is not possible to get a satisfactory Seanad. He explained that his own attitude was that if a large section of the people of the country wished to have a second chamber then provision should be made for it. He also referred to the fact that one of the principal recommendations of the Committee was that an attempt should be made to get a second chamber that, at least, would be of a character in which there would be represented men who would have special knowledge and experience of certain activities in our national life. He welcomed an arrangement on these lines as it could result in a Seanad that was not a mere reproduction of the interests prevailing in the Dáil.

8. The general scheme set out in Articles 18 and 19 in relation to the composition of the Seanad is that there are 60 members, of whom 11 are nominated by the Taoiseach and the remainder elected. Of the elected members three are elected by the National University of Ireland, three by the University of Dublin and 43 from five panels of persons having knowledge and practical experience of the following interests and services:—

- (i) National Language and Culture, Literature, Art, Education and such professional interests as may be defined by law;
- (ii) Agriculture and allied interests, and Fisheries;
- (iii) Labour, whether organised or unorganised;
- (iv) Industry and Commerce including banking, finance, accountancy, engineering and architecture;

- (v) Public Administration and social services, including voluntary social activities.

It is prescribed under Article 18.7.2° that not more than 11 or less than 5 members of the Seanad shall be elected from any one panel.

9. The Seanad Electoral (Panel Members) Act, 1947, divides each panel referred to in Article 18 into two sub-panels. One of these, the Oireachtas sub-panel, contains the names of candidates each of whom has been nominated by not less than four members of the Oireachtas. The second sub-panel (the Nominating Bodies sub-panel) consists of persons nominated by bodies which have secured registration on the register of nominating bodies in respect of that panel. The same Act prescribes the manner in which the 43 elected members are to be divided amongst the different panels and sub-panels as follows :—

- (a) 5 members from the Cultural and Educational panel, of whom 2 at least must be elected from each sub-panel;
- (b) 11 members from the Agricultural panel, of whom 4 at least must be elected from each sub-panel;
- (c) 11 members from the Labour panel, of whom 4 at least must be elected from each sub-panel;
- (d) 9 members from the Industrial and Commercial panel, of whom 3 at least must be elected from each sub-panel ;
- (e) 7 members from the Administrative panel, of whom 3 at least must be elected from each sub-panel.

The candidates proposed for each panel must satisfy the Seanad Returning Officer that they have knowledge and practical experience of the interests and services covered by that panel. In reaching decisions on these matters the Returning Officers can have the assistance of a judicial referee. The register of nominating bodies is maintained in accordance with the provisions of the Seanad Electoral (Panel Members) Acts, 1947 and 1954. The present register of nominating bodies is reproduced in Annex 19.

10. The electorate for the 43 elected members of the Seanad is specified by the Seanad Electoral (Panel Members) Act, 1947, as follows :—

- (a) The members of the Dáil elected at the previous Dáil elections.
- (b) The members of the Seanad.
- (c) The members of every Council of a County or County Borough.

It is of interest to note that the Constitution is quite elastic on this point and it would be open to the Oireachtas to decide on other forms of electorate.

11. While the Seanad has equal and/or complementary powers with the Dáil in regard to certain matters such as the removal from office of the President, the Controller and Auditor General and Judges, the declaration and termination of a state of emergency, and other matters, the pre-eminence of the Dáil is clearly established by a number of provisions of the Constitution. Under Article 28 the Government is responsible to the Dáil alone and under Article 13 the Taoiseach is nominated by it while it must also give its approval for the persons whom he selects as members of his Government. Under Articles 17 and 28 the Dáil alone is given power to consider the Estimates of Receipts and Expenditure of the State. Under Article 29 it must approve international agreements involving charges on public funds and under Article 28 its assent to a declaration of war must be procured. Article 21 provides that Money Bills may be initiated in the Dáil only and the Seanad is given only 21 days to consider them; furthermore, the Dáil has the right to accept or reject any recommendations of the Seanad on such Bills. Finally, under Article 23 any Bill to which the Seanad does not agree may be deemed to be passed by both Houses if the Dáil so resolves within 180 days after the period of 90 days which the Seanad is allowed for considering the Bill.

12. It will be seen therefore that from the very beginning of the present form of Seanad the three essential features in relation to its composition and powers were as follows:—

- (i) it was not to have the power of unduly interfering with the business of the Dáil;
- (ii) it was, in so far as it was possible to do so, to consist of persons representing various activities and interests in the national life;
- (iii) it was not to be elected on the same basis as the Dáil.

Experience since 1937 and criticisms

13. Throughout the years since 1937 various difficulties have been experienced in devising a satisfactory system in relation to the election of the 43 elected members of the Seanad and a number of committees have dealt with this subject. The most recent inquiry was that carried out by the Seanad Electoral Law Commission which submitted its report in 1959. The principal recommendation of this Commission was that a fixed number of seats should be allocated to be filled from the Oireachtas and nominating sub-panels respectively, and that the electorate for each of the five nominating bodies sub-panels of candidates should be limited to lists to be forwarded by the registered

nominating bodies. The Commission considered that the electorate for the Oireachtas sub-panels should be the same as at present, i.e., the members of the Dáil and Seanad and the members of each council of a county or county borough. They also submitted proposals for the direct election by appropriate bodies of members of the Seanad in accordance with the general enabling powers in that behalf set out in Article 19 of the Constitution. The principal effect of these recommendations would have been to give nominating bodies the exclusive right to elect a certain proportion of the 43 members provided for in the aggregate under the five different panels. In other words, the members of the Houses of the Oireachtas and of the County Councils and County Boroughs would have no say in the election of those particular elements of the Seanad. There was a long debate on these proposals on 17th February and 13th July, 1960, in the Seanad, and it emerged that the members of the Seanad as then constituted were not greatly in favour of a change.

14. It will be noted that members of the Dáil and Seanad have the right to nominate a particular portion of each panel provided for under Article 18 of the Constitution from which the 43 elected members are drawn. In addition they, together with the Council members, have the right to vote in respect of all candidates put forward whether by themselves or by the nominating bodies. It has been alleged that the effect of this arrangement is that the Seanad is largely a reproduction of the political interests represented in the Dáil and that, for that reason, it has failed to provide the independent and impartial comment on legislation which would normally be expected from a House endowed mainly with a "revising" role. It has also been strongly represented that the existing arrangements have failed to produce a Seanad which is composed of representatives of vocational interests.

15. Of interest in this connection is the following extract from the Report of the Commission on Vocational Organisation, 1943 :—

" With regard to the latter (nominations by nominating bodies), we have received much evidence to indicate that they are not fully representative of the organised vocations and that owing to the method of selection followed they tend to nominate not those who are most eminent in their professions or callings, but those who are most likely to be acceptable to the political parties. Though candidates nominated by Dáil members must belong to one or other of the five functional panels, the Constitution only requires that they ' have knowledge or practical experience ' *sic*, with the result that persons on the periphery of vocational activity rather than at the centre find themselves placed on the cultural or other panels ".

The 1959 Commission quoted this particular paragraph in their own report and then went on to say:—

"Our investigations showed that the tendency, so far as it exists, of nominating bodies to nominate candidates likely to be acceptable to the political parties, has not resulted in the election of much more than the statutory minimum of nominating bodies' candidates. In only three instances out of a possible twenty in the four Seanad general elections held since the Act of 1947 became law have the number of nominating bodies candidates elected exceeded this minimum. In each case the excess was one person. On the other hand the number of Senators elected from Oireachtas candidates in every case but one exceeded the minimum were it not for the minimum prescribed by statute even less of the nominating bodies' candidates would have been elected. The Commission are satisfied that, as might be expected in these circumstances the great majority of the persons elected from the nominating bodies' candidates vote on party lines".

16. It will be seen from Annex 20 that the situation has not improved since the 1959 Seanad Electoral Law Commission reported. That Annex sets out the relevant statistics for the last five Seanad elections. It shows that it is now 16 years since the statutory minimum of nominating bodies' candidates was exceeded. In effect this means that the total of 43 seats in question is permanently allocated in the proportion of 27 Oireachtas nominees and 16 nominating bodies nominees. It is clear too that, but for the minima imposed by law, the nominating bodies' candidates would be even fewer in number.

17. A further point which may be dealt with at this stage is the question of former T.D.'s becoming members of the Seanad. This is a frequent cause of complaint and it was dealt with briefly by the 1959 Commission. They said that they were unable to find any valid grounds for the contention that candidates defeated in Dáil elections should not sit in the Seanad. In view of the attitude adopted by certain commentators it is of interest to note (see Annex 21) that the number of former deputies in the Seanad has been falling steadily. In 1938 (second election) they represented 39% of total Seanad membership, whereas the 1965 figure was 25%.

ANNEX 19

Seanad Register of Nominating Bodies

SEANAD ELECTORAL (PANEL MEMBERS) ACTS, 1947 AND 1954

Register of Nominating Bodies entitled to nominate persons to the panels of candidates for the purpose of every Seanad general election revised at the annual revision and signed by the Seanad Returning Officer in pursuance of section 19 of the Seanad Electoral (Panel Members) Act, 1947, as amended by the Seanad Electoral (Panel Members) Act, 1954.

CULTURAL AND EDUCATIONAL PANEL

Name of Body	Address
Royal Irish Academy	19 Dawson Street, Dublin 2.
Cumann Leabharlann na hÉireann . . (The Library Association of Ireland)	46 Grafton Street, Dublin 2.
Irish National Teachers' Organisation	9 Gardiner's Place, Dublin 1.
Association of Secondary Teachers, Ireland.	11 Hume Street, Dublin 2.
An Cumann Gairm-Oideachais i n-Éirinn (The Irish Vocational Education Association).	Central Technical Institute, Waterford.
The Incorporated Law Society of Ireland.	Solicitors' Buildings, Four Courts, Dublin 7.
Cumann Dochtúirí na hÉireann . . (The Irish Medical Association)	10 Fitzwilliam Place, Dublin 2.
Royal College of Surgeons in Ireland . .	123 St. Stephen's Green, Dublin 2.
Dental Board	57 Merrion Square, Dublin 2.
Veterinary Council	53 Lansdowne Road, Ballsbridge, Dublin 4.
The Pharmaceutical Society of Ireland	18 Shrewsbury Road, Ballsbridge, Dublin 4.
The General Council of the Bar of Ireland.	Law Library, Four Courts, Dublin 7.
Bantracht na Tuaithe (Irish Countrywomen's Association)	58 Merrion Road, Ballsbridge, Dublin 4.
Royal Society of Antiquaries of Ireland	63 Merrion Square, Dublin 2.
Muintir na Gaeltachta	"Uí Máine", Ceanannus Mór, Co. na Míche.
The Royal Irish Academy of Music . .	36-38 Westland Row, Dublin 2.
Irish Dental Association	29 Kenilworth Square, Dublin 6.

AGRICULTURAL PANEL

Name of Body	Address
Royal Dublin Society	Ball's Bridge, Dublin 4.
The Irish Agricultural Organisation Society, Limited.	84 Merrion Square, Dublin 2.
National Executive of the Irish Live Stock Trade.	Prosperity Chambers, 5, 6 & 7 Upper O'Connell Street, Dublin 1.
The Bloodstock Breeders' and Horse Owners' Association of Ireland.	9 Merrion Square, Dublin 2.
The Irish Sugar Beet Growers' Associa- tion, Limited.	Athy Road, Carlow.
The Irish Creamery Managers' Associa- tion.	32 Kildare Street, Dublin 2.
Munster Agricultural Society	21 Cook Street, Cork.

LABOUR PANEL

Name of Body	Address
Irish Congress of Trade Unions ..	Congress House, 19 Raglan Road, Dublin 4.
The Irish Conference of Professional and Service Associations.	31 Fitzwilliam Place, Dublin 2.

INDUSTRIAL AND COMMERCIAL PANEL

Name of Body	Address
Association of Chambers of Commerce of Ireland.	7 Clare Street, Dublin 2.
Cumann Náisiúnta Cuireadórachta agus Tionsgal. (National Agricultural and Industrial Development Association).	3 St. Stephen's Green, Dublin 2.
The Federation of Irish Industries Limited.	9 Ely Place, Dublin 2.
The Federation of Builders, Contractors and Allied Employers of Ireland.	28 Earlsfort Terrace, Dublin 2.
The Society of Irish Motor Traders, Limited.	5 Upper Pembroke Street, Dublin 2.
Licensed Grocers' and Vintners' Association.	L.G. and V.A. Centre, Anglesea Road, Ballsbridge, Dublin 4.
The Retail Grocery, Dairy and Allied Traders' Association.	24 Earlsfort Terrace, Dublin 2.
The Irish Auctioneers' and Estate Agents' Association.	38 Merrion Square, East, Dublin 2.
Irish Banks' Standing Committee ..	Bank of Ireland, Dublin 2.
The Insurance Institute of Ireland ..	32 Nassau Street, Dublin 2.
The Institute of Chartered Accountants in Ireland.	7 Fitzwilliam Place, Dublin 2.
The Institution of Civil Engineers of Ireland.	Intercontinental, Ballsbridge, Dublin 4.
Cumann na nInnealtóirí (The Engineers' Association).	22 Clyde Road, Ballsbridge, Dublin 4.
The Royal Institute of the Architects of Ireland.	8 Merrion Square, Dublin 2.
The Federated Union of Employers ..	8 Fitzwilliam Place, Dublin 2.
The Irish Hotels Federation	30 Lower Ormond Quay, Dublin 1.
The Association of Advertisers in Ireland Limited.	43 Kildare Street, Dublin 2.
The Irish National Vintners' Federation Limited.	16 Westland Row, Dublin 2.
The Institute of Advertising Practitioners in Ireland.	35 Upper Fitzwilliam Street, Dublin 2.
The Licensed Road Transport Association.	58 Burrin Street, Carlow.

ADMINISTRATIVE PANEL

Name of Body	Address
Irish County Councils General Council	1-2 Cavendish Row, Dublin 1.
The Association of Municipal Authorities of Ireland.	Town Hall, Mallow, Co. Cork.
Central Remedial Clinic	Prospect Hall, Goatstown, Dublin 14.
National Association for Cerebral Palsy (Ireland) Limited.	St. Brendan's, Sandymount Avenue, Ballsbridge, Dublin 4.

ANNEX 20

Seanad General Elections, 1951-1965—Number of Candidates nominated and elected from each sub-panel

Panel	Number of Seats	1951				1954				1957				1961				1965			
		Nominating Bodies Sub-Panel		Oireachtas Sub-Panel		Nominating Bodies Sub-Panel		Oireachtas Sub-Panel		Nominating Bodies Sub-Panel		Oireachtas Sub-Panel		Nominating Bodies Sub-Panel		Oireachtas Sub-Panel		Nominating Bodies Sub-Panel		Oireachtas Sub-Panel	
		Nomi-nated	Elec-ted	Nomi-nated	Elec-ted	Nomi-nated	Elec-ted	Nomi-nated	Elec-ted	Nomi-nated	Elec-ted	Nomi-nated	Elec-ted	Nomi-nated	Elec-ted	Nomi-nated	Elec-ted	Nomi-nated	Elec-ted	Nomi-nated	Elec-ted
Cultural and Educational	5 (2 at least from each sub-panel)	6	2	6	3	13	2	7	3	14	2	6	3	13	2	6	3	13	2	5	3
Agriculture	11 (4 at least from each sub-panel)	14	5	12	6	13	4	13	7	13	4	12	7	10	4	11	7	12	4	13	7
Labour	11 (4 at least from each sub-panel)	14	4	13	7	14	4	13	7	15	4	12	7	10	4	11	7	11	4	9	7
Industrial and Commercial	9 (3 at least from each sub-panel)	12	3	9	6	16	3	9	6	13	3	9	6	16	3	9	6	12	3	10	6
Administrative	7 (3 at least from each sub-panel)	8	3	9	4	8	3	7	4	7	3	10	4	7	3	8	4	7	3	9	4

ANNEX 21

Number of former Deputies Elected to the Seanad

Year	Number elected	Percentage
1938 (1)	17	35
1938 (2)	19	39
1943	16	33
1944	14	29
1948	14	29
1951	15	31
1954	13	26
1957	17	35
1961	13	26
1965	12	25

ANNEX 22

Bills amended and rejected by the Seanad

Year	Bills passed without amendment	With amendments	Amendments agreed to by Dáil	Certain amendments agreed to and others not agreed to by Dáil	Certain amendments agreed to, others agreed to as amended and/or consequential amendments made by Dáil
1938	15	2	2	—	—
1939	20	8	8	—	—
1940	23	6	5	—	1
1941	16	7	6	—	1
1942	12	9	8	—	1
1943	13	5	4	—	1
1944	10	6	6	—	—
1945	21	11	10	—	1
1946	14	13	11	—	2
1947	30	7	7	—	—
1948	18	—	—	—	—
1949	19	3	3	—	—
1950	21	3	2	1	—
1951	14	3	3	—	—
1952	16	5	5	—	—
1953	19	4	4	—	—
1954	20	4	4	—	—
1955	20	3	3	—	—
1956	25	8	8	—	—
1957	16	6	5	1	—
1958	25	3	3	—	—
1959	25	5	5	—	—
1960	24	7	6	—	1
1961	30	7	7	—	—
1962	20	6	6	—	—
1963	18	5	5	—	—
1964	17	4	4	—	—
1965	14	4	3	—	1
1966	20	5	5	—	—

Bills rejected by Seanad during period 1938–1966

1959—1

1964—1

ANNEX 22—continued

Amendments made by the Seanad to Bills received from the Dáil during the period 1965 to 7 December, 1967

1965	Number of Amendments made
Land Bill, 1963	27
Mines and Quarries Bill, 1964	9
Extradition Bill, 1965	11
Succession Bill, 1965	41
1966	
Diseases of Animals Bill, 1965	10
Housing Bill, 1965	27
Social Welfare (Occupational Injuries) Bill, 1965	1
Credit Union Bill, 1966	6
1967	
Landlord and Tenant (Ground Rents) Bill, 1965	33
Industrial Training Bill, 1965	9
Rent Restrictions (Amendment) Bill, 1966	14
Criminal Procedure Bill, 1965	10
Redundancy Payments Bill, 1967	25

ANNEX 23

Money Bills on which Seanad made Recommendations

Year	Money Bills accepted without recommendations	With recommendations	Recommendations accepted by Dáil	Recommendations rejected by Dáil	Bill amended by Dáil in consequence of acceptance of recommendations
1938	11	—	—	—	—
1939	8	—	—	—	—
1940	6	—	—	—	—
1941	5	1	—	—	1
1942	6	—	—	—	—
1943	6	—	—	—	—
1944	6	—	—	—	—
1945	6	—	—	—	—
1946	9	1	1	—	—
1947	12	1	—	1	—
1948	6	—	—	—	—
1949	9	—	—	—	—
1950	7	—	—	—	—
1951	11	1	1	—	1
1952	8	—	—	—	—
1953	13	—	—	—	—
1954	13	—	—	—	—
1955	6	—	—	—	—
1956	13	—	—	—	—
1957	10	—	—	—	—
1958	6	—	—	—	—
1959	12	—	—	—	—
1960	15	—	—	—	—
1961	10	—	—	—	—
1962	12	—	—	—	—
1963	11	—	—	—	—
1964	17	—	—	—	—
1965	7	—	—	—	—
1966	3	—	—	—	—

ANNEX 24

DISTINCTIONS BETWEEN DIFFERENT KINDS OF BILLS

1. The Constitution specifies the powers of the Dáil and Seanad in relation to different kinds of Bills. The principal clauses may be summarised as follows.

2. Article 21 provides that Money Bills can be initiated in the Dáil only. The only power which the Seanad has got in respect of such Bills is to retain them for 21 days and to make recommendations upon them which may or may not be accepted by the Dáil. The Seanad is not allowed to make amendments in Bills of this kind.

3. Article 23 specifies the time to which the Seanad may be limited for the consideration of a Bill sent to it by the Dáil. This Article does not apply to a Money Bill or to a Bill in respect of which a shorter period of time for consideration by the Seanad has been prescribed under Article 24. The exclusion of Money Bills from this Article is, of course, inevitable since the Seanad powers in relation to such Bills, and the period of time during which they can be delayed in the Seanad, are already set out in Article 21. Similarly, a Bill in respect of which the powers given by Article 24 have been exercised must be excluded, since Article 24 is, in effect, an exception to Article 23.

4. Article 24 enables the Dáil, with the concurrence of the President, to specify a period shorter than that set out in Article 23 for consideration of a Bill by the Seanad. This Article does not, however, apply to a Bill to amend the Constitution. The explanation for this no doubt is that, since a Bill to amend the Constitution must necessarily be regarded as having considerable importance, no short cuts for getting it through the Oireachtas should be permissible.

5. Article 26 gives the President power in certain circumstances to refer a Bill to the Supreme Court for a decision on its constitutionality. This Article does not apply to a Money Bill, or to a Bill to amend the Constitution, or to a Bill in respect of which a shorter period for consideration by the Seanad has been prescribed under Article 24. As regards a Bill to amend the Constitution, this cannot, of course, be repugnant to the Constitution, unless the Constitution itself declares some particular provision to be unalterable. As there are no unalterable provisions in our Constitution, such a Bill must, therefore, be excluded from the scope of Article 26. As regards the exclusion of Money Bills and Article 24 Bills please see paragraph 7 *et seq.*

6. Article 27 provides for the reference of Bills to the people by the President on receipt of a petition from members of the Oireachtas (majority of Seanad and one-third of Dáil). This Article does not

apply to a Bill to amend the Constitution, since such a Bill will, in any event, be referred to the people under Article 46. In addition, it does not apply to any Bill other than a Bill in respect of which the Dáil has passed an enactment resolution under Article 23. This is also logical since there is not much point in providing for reference to the people in a case where approval by both Houses of the Oireachtas has been actually obtained.

7. It will be noted that the effect of the foregoing provisions is that in the case of a Money Bill neither Articles 23, 26 nor 27 applies. In other words, the normal period for consideration by the Seanad is not allowed (a shorter period is, in fact, prescribed by Article 21 and this may be abridged by the Dáil under Article 24), recommendations only but not amendments can be made by the Seanad, reference to the Supreme Court by the President for constitutionality cannot be sought, nor can he be asked to ascertain the will of the people by referendum.

8. It will be noted also that, in the case of Bills the time for consideration of which by the Seanad has been abridged under Article 24, neither Articles 26 nor 27 applies. Article 26 specifically excludes such Bills whereas Article 27 does so only indirectly by virtue of the reference contained therein to Article 23. By virtue of Article 24.3 a time-abridged Bill can remain in force for a period of 90 days only unless extended by resolution of the Seanad as well as of the Dáil. Furthermore, the abridgement of time for consideration by the Seanad can be brought about only with the concurrence of the President, after consultation with the Council of State.

ANNEX 25

METHODS OF AMENDING CONSTITUTIONS

1. Most modern Constitutions provide for consultation with the people, directly or indirectly, in deciding whether or not an amendment of the Constitution should be made. This is a logical part of the doctrine of the sovereignty of the people and of their power to give themselves a Constitution; please see in this connection the last paragraph of the preamble to our Constitution. If it is the people who adopt a Constitution, then it is appropriate that any changes should be made with the approval of the people.

2. There are, however, different methods by which the wishes of the people may be ascertained. Under our Constitution and also that of Australia, Denmark, The Swiss Confederation and the individual American States, the amendment is referred to the people

by specific referendum after it has been passed by the legislature. Alternatively, the legislature may be given power to make the amendment subject to a general election being held at which the people will have the right to express their views, by election of the candidates of their choice, as to the merits of the constitutional change proposed. In Belgium when a proposal to amend the Constitution is submitted, both Houses of the legislature must be dissolved and after the ensuing election the amendment must be passed by a two-thirds majority in each House at a sitting at which at least two-thirds of the members are present. As already indicated, the Danish system provides, like ours, for approval by Parliament and subsequent reference to the people. The Danish provisions are, however, a good deal more restrictive and complicated than ours since the referendum cannot take place unless the proposal has been approved in Parliament before and after an election; furthermore, in the referendum the proposal must obtain the support not only of a majority of the electors voting but also of at least 40% of those entitled to vote. In the Netherlands a general election of both Houses is also required to be held and after the election the amendment of the Constitution can be carried only by a two-thirds majority in both Houses. The Swedish amendment procedure requires a majority vote of the two Houses of the Riksdag before and after a general election. In Norway a two-thirds majority of the Storting (two Houses) must be obtained for the proposal after the general election.

3. The next category is that where reference to the people is required only in certain circumstances. Under the present French Constitution an amendment need not be submitted to the people if it has been carried by a three-fifths majority of a joint sitting of the two Houses of Parliament. The Italian Constitution provides that laws for the revision of the Constitution must be adopted by each of the chambers in two successive deliberations with an interval of not less than three months, an absolute majority of the members of each chamber being required on the second vote. An amendment approved by the legislature must be submitted to a referendum if within three months after publication one-fifth of the members of one of the Chambers, or 500,000 voters, or five regional councils, so request; where, however, the proposal is carried by a two-thirds majority in each chamber on the second vote, this provision does not apply and reference to the people is not required.

4. The German Constitution, which is federal in character, may also be mentioned. It is difficult to say whether the amending process provided for therein should be classified as flexible or otherwise. Article 79 on the one hand provides that the Constitution may be amended expressly by a law receiving the affirmative vote of two-thirds of the members of the Bundestag and two-thirds of the votes of the Bundesrat. It goes on to state, however, that no change may be made which would affect the organisation of the Federation into

Lander, the participation of the Lander in legislation, or the basic principles laid down in the Constitution concerning human rights and the democratic, social and federal character of the Republic. There is no machinery for the alteration of these particular aspects of the Constitution. Under the French and Italian Constitutions the republican nature of the State is unalterable. The Norwegian Constitution, (already mentioned in para. 2) contains a general clause which states that no amendment can "contradict the principles embodied in" the Constitution.

5. There is also a procedure known as the initiative under which the people themselves may submit proposals for the amendment of the Constitution. There are complicated provisions of this kind in the Swiss Constitution and some of the American States also provide for it. There is some logic in the initiative, if it is accepted that the people should not be dependent in the matter of constitutional change on proposals submitted to them by the legislature, but it is not now regarded as an important provision for the protection of the rights of the people. It is of interest to note that in so far as the Swiss Constitution is concerned, only a small percentage of constitutional proposals put forward by means of the initiative have ultimately been accepted by the people. There were provisions in our 1922 Constitution (Article 48) permitting the introduction of initiative arrangements in this country but they were never brought into operation and were removed by amendment in 1928 (Amendment No. 10, Act No. 8 of 1928).

6. In his book, *Modern Constitutions*, K. C. Wheare points out that in many Constitutions there is an unnecessary uniformity in the amending process. Bearing in mind the very substantial difference in importance between different provisions of a Constitution this uniformity is, he states, unnecessary. "It would be perfectly proper to say that some parts of a Constitution may be altered by a simple majority of the legislature, that other parts may be altered only with the approval of the people". He holds out as a better model in this respect the Indian Constitution which provides that the clauses relating to the division of powers between the States and the Union may be altered only with the concurrence of the legislatures of at least half of the States, but permits all other clauses to be altered by the Union legislature provided approval is given by an absolute majority of the membership of each House and a two-thirds majority of those present and voting. (It must be remembered, of course, that the Indian Constitution is federal in structure). Wheare expresses the view that this variety in the amending process is wise, but states that it is rarely found.

ANNEX 26

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ANNEX 27

MATTERS REFERRED TO ATTORNEY GENERAL

Advice was sought about the propriety of using the word "Éire" rather than "Ireland" in the Preamble. Reference was made in this connection to the fact that "Ireland" is used in Article 5 of the present Constitution. Preambl

(At a later meeting further reference was made to this query. The view was expressed that the intention may have been to distinguish between the people of the State and the people of the whole island in the matter of adopting the Constitution. It was felt, however, that the word "Éire" should now be replaced by "Ireland", subject to any legal considerations involved and this view was communicated to the Attorney General. The question was also asked whether the Preamble can be amended at all).

Article 9 Reference was made to the fact that legislation in relation to nationality and citizenship had been enacted since the coming into operation of the Constitution. Changes in the wording of this article might be required.

Section 1.3° : It was felt that the prohibition of discrimination on the basis of sex only might be seen to admit the possibility of discrimination of other kinds being introduced by law.

Article 10 *Section 1 :* Is natural gas covered by the present wording? The expression "potential energy" has a particular meaning in science and may not include all forms of energy.

Section 2 : A query was raised as to the meaning of the word "waters". It is not clear whether it includes territorial seas or inland waters or both.

Article 11 It was noted that while the word "exception" is used in the singular the expression "charges and liabilities" is in the plural. Could the use of the word "exception" be interpreted as confining the legislature to making one exception only?

Article 12 *Section 2.3° :* The reference here to "proportional representation" seems to be inaccurate since proportionality arises only in the case of multi-member constituencies.

Section 3.1° : There is no indication in this provision as to who is to take the initiative in making an approach to the Supreme Court. Since the Government is most directly concerned with the discharge of the President's duties in an effective manner, the initiative in making the approach to the Supreme Court should devolve on them as a collective body.

Section 3.3° : Reference was made to the fact that, because of drafting peculiarities, the determination of the time limits prescribed here was a matter of some difficulty in the English version.

Section 6.3° : The view was expressed that it is not clear if the President is prohibited from holding an office whether or not it has emoluments attached to it. Consideration might have to be given to the question whether the President should be prohibited from holding any other office or position whether or not emoluments are attached to it, without the permission of the Government.

Article 13 *Section 1.1° :* Reference was made to a suggestion that the words "that is, the head of the Government or Prime Minister" are superfluous, since the meaning of the term "Taoiseach" is so defined in Article 28.5.

Section 2.2°: It was pointed out that there was no indication as to the manner in which it would be ascertained that the Taoiseach ceased to retain the support of a majority in Dáil Éireann. The provisions of Article 28.10 were also referred to in this connection. It was considered that both Articles should be clarified by prescribing that the loss of support by the Taoiseach must be indicated by a vote of the Dáil.

Section 6: Consideration was given to a suggestion that this Section should provide power to remit or cancel a *conviction* in addition to the existing power to commute or remit *punishment*.

Section 1: Reference was made to the fact that there appeared to be no provisions relating to the determination of temporary incapacity. Article

Section 2: As regards sub-sections 2°, 3° and 4°, should the circumstances in which the Chief Justice, Chairman of the Dáil and Chairman of the Seanad would be deemed to be unable to act, be specified in the Constitution?

Section 5: Should Article 15.5 be extended by words such as "and shall not provide for the infliction of punishment, in respect of a particular offence, greater than that applicable to such offence at the date of its commission"? Article

Section 7: In the English version, there is a suggestion that the *Oireachtas* must hold a "session" once every year. The *Oireachtas* consists of the President and two Houses (Article 15.1.2°). The President may, after consultation with the Council of State, communicate with the Houses of the *Oireachtas* by message or address (Article 13.7) but otherwise would take no part in a sitting or session of either House. Article 15.1.3° provides that the *Oireachtas* shall "sit" in or near the City of Dublin" and Article 15.8.1° provides that "Sittings of each House of the *Oireachtas* shall be public". These "sittings" are different to the British "sessions" and, in practice, it seems that we do not have "sessions of Parliament" in the same sense that the British have them. The Irish language version of Article 15.7 might be varied by substituting "do gach Tigh den *Oireachtas*" for "don *Oireachtas*" and the English version rendered as "Each House of the *Oireachtas* shall sit at least once every year".

Section 12: The view was expressed that this section might not provide privilege in respect of utterances by the Public Accounts Committee and its members in the course of their duties. Privilege should be extended to the utterances and publications of all official Committees of the *Oireachtas*.

Section 1: As regards sub-section 1°, should the expression Article
"without distinction of sex" be omitted when used in relation to the

word "citizen" in this and other provisions of the Constitution, in view of Article 9.1.3°?

Article 20 *Section 3:* The suitability of the word "accepted", which is, apparently, used here with the same meaning as the word "passed", was questioned.

Article 28 Reference was made to the fact that there seems to be nothing in the Constitution specifying the manner in which decisions reached by the Government are to be conveyed.

Article 35 Doubt was expressed as to the extent to which the provisions of this Article apply to Judges (e.g. District Justices) other than judges of the Supreme and High Courts, and it was felt that a similar query could be raised in relation to certain provisions of Article 34.

Article 37 Is there necessity for any action arising out of the Supreme Court decision in relation to the Solicitors Act, 1954?

Article 39 The relationship between this and Article 15.13 was mentioned. Reference was made to the possibility that a person could inadvertently find himself involved against his will in some activity against the State which might constitute treason under the terms of this definition. The view was expressed that the definition of treason ought clearly to take cognisance of the intentions of the person concerned.

Article 42 *Section 4:* In view of the popularly accepted meaning of "primary", it was felt that this word should be deleted and replaced by some clause which would have the affect of imposing on the State the obligation to provide, up to a minimum standard laid down by law, the education needed by the individual to enable him to play a normal role in society. Is it desirable to alter the existing wording?

Article 43 *Section 2.2°:* Attention was drawn to the omission in the Irish version of words equivalent to "by law" in the English version.

Article 44 *Section 2.6°:* Is the word "diverted" suitable?

Articles 48, 49, 50 The wording of these Articles may have to be changed if any amendments are being made to other provisions of the Constitution.

HOUSES OF THE OIREACHTAS

Houses of the Oireachtas

22/12

PAIPEIR ATÁ LE TIOLACADH DON DÁIL AGUS DON XISEANAD
PAPERS TO BE PRESENTED TO THE DAIL AND SEANAD.

9817

1. An Roinn atá ag déanamh an tiolactha

Department making presentation ...

Industry and Commerce

2. Teideal an Pháipéir atá le tiolacadh ...

Title of Paper to be presented ...

Report of the Committee on the

Constitution - December, 1967.

3. Más do réir Reachta atá an tiolacadh á dhéanamh, luaitear Teideal agus Alt an Achta a údaraíonn an tiolacadh ...

If presented pursuant to Statute, state authority for presentation, giving Title and Section of Act ...

Not presented pursuant to Statute.

4. Más gá é a bheith ar taispeáint ar an mBord ar feadh tréimhse áirithe, luaitear :

If required to be on the Table for a specified period, state :

(1) An tréimhse ...

Period ...

No period specified.

(2) Cé acu tréimhse de laethe siosóin de laethe suí í ...

Whether days of session or sitting days ...

5. An gá tairiscint ag lorg aontuithe gach Tí? ...

If motion of approval by each House necessary? ...

No

Cleireach na Dála,
Teach Laighean.Sinithe
SignedCeann na Roinne.
Head of Department.

22 Nollaig, 1967.

22/12

PAIPEIR ATÁ LE TÍOLACADH DON ~~DAIL AGUS DON~~ SEANAD
 PAPERS TO BE PRESENTED TO THE ~~DAIL AND~~ SEANAD.

9817

1. An Roinn atá ag déanamh an tíolactha

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(2) Cé acu tréimhse de laethe siosóin de laethe suí í ...

Whether days of session or sitting days ...

5. An gá tairiscint ag lorg aontuithe gach Tí? ...

If motion of approval by each House necessary? ...

No.

Cléireach an t-Seanaid,
 Teach Laighean.

Sínithe
 Signed...

Ceann na Roinne.
 Head of Department.

22 Nollaig, 1967.

