

Explanatory Memorandum



Constitution for A New Republic

JANUARY 1988

COMMENTARY ON PROPOSED TEXT CONSTITUTION OF IRELAND

PREAMBLE

EXISTING VERSION

"In the name of the most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, we, the people of Eire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation and seeking to promote the common good with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, do hereby adopt, enact, and give to ourselves this Constitution."

PROPOSED NEW VERSION

"We, the people of Ireland, hereby affirm the inalienable, indefeasible and sovereign right of the Irish Nation to choose its own form of Government, to determine its relations with other nations and declare that all powers of government, legislative, executive and judicial, derive from the people, whose right it is to designate the rulers of the State, and, in final appeal to decide all questions of national policy, according to the requirements of the common good, and further declare that such powers of government are exercisable only by or on the authority of the organs of State hereby established. And, seeking to unite in the pursuit of a just social order, the freedom and dignity of the individual and concord with other nations, hereby adopt, enact and give to ourselves this Constitution."

The text of the existing preamble is principally a religious and historical tract. It has little legal significance, but has been invoked by the Courts on a number of occasions (See Kelly, The Irish Constitution 2nd Edition pp4 to 7). The reference to the promotion of the common good was mirrored by Article 6.1 of the existing Constitution which states that all powers of government derive under God from the people whose right it is to decide all questions according to the requirements of the common good.

It is proposed in its place to insert a preamble which is based on the existing wording of Articles 1 and 6 of the Constitution and on a portion of the last sentence of the existing preamble.

Judge McCarthy, in his lecture at the Magill Summer School (August 1987), pointed out that the religious content of the preamble was such as to exclude from adherence those who did not believe in a trinitarian concept of God, be they Unitarians or other Christian denominations, Jews and other minority religions.

The references to the struggle for independence and "centuries of trial" are of little legal significance.

Although Articles 1 and 6 of the Constitution are very general in their terms, they are of significance in the development of our constitutional law and theory and it is proposed to recite their provisions in the preamble so as to preserve the case law and jurisprudence in a revised constitution (See Kelly op. cit. pp 8 and 9 and pp 28-32).

In short the suggested new wording of the preamble is a combination of Article 1, Article 6 and portions of the last paragraph of the existing preamble, all of which are of significance in interpretation and exegesis of the other provisions of the Constitution.

ARTICLE 1 SECTION 1

"The name of the State is Ireland. Ireland is a sovereign independent democratic republic."

This section is intended as amendment of existing Article 4. The text of Article 4 of the 1937 text reads: "The name of the state is Eire, or in the English language, Ireland."

The simplification was discussed in the Report of the Committee of the Constitution (December 1967) and the proposed amendment was recommended (See p 6 of the Report).

This section also embodies the text of Article 5 of the 1937 Constitution which reads as follows: "Ireland is a sovereign independent democratic state".

The word "Republic" is substituted for "State"; again this was recommended by the 1967 Committee (See p 7 of the Report). In short, Section 1 of Article 1 replaces Articles 4 and 5 of the 1937 text and incorporates the amendment suggested in the 1967 Report.

ARTICLE 1 SECTION 2

"The people of Ireland hereby proclaim their firm will that the national territory, which consists of the whole island of Ireland, its islands and territorial seas, be reunited in harmony and by consent. The laws enacted by the Parliament established by this Constitution, until the achievement of the Nation's unity may otherwise require, shall 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."

This section incorporates the reference in the 1937 preamble to unity, the provisions of Article 2 of the 1937 text and a slightly amended version of the substitute text for Article 3 suggested by the 1967 Committee.

Article 2 and 3 of the 1937 text read as follows: "Article 2: The national territory consists of the whole island of Ireland, its islands and territorial seas. Article 3. Pending the reintegration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstát Éireann and the like extra territorial effect."

The 1967 Committee proposed leaving Article 2 as it was but replacing Article 3 with the following text:

- "1. The Irish nation hereby proclaims its firm will that its territory be reunited 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."

The proposed new text is different in that it deletes the phrase "brotherly affection between all Irishmen" and substitutes therefor the words "by consent". The effect of such a change would be to replace a claim of jurisdiction by the people of the South over the people and territory of the North with a declaration of intention to seek unity based on consent. This wording would also be in accordance with the terms of Article 1 of the Anglo-Irish Agreement. It is suggested that it is a constitutional nonsense for a minority of the people of Ireland in 1937 to purport to establish a Parliament with jurisdiction to rule the people of Northern Ireland in accordance with laws, principles and constitutional values and institutions on which they were not even consulted, let alone permitted to vote.

The argument is made that the effect of Articles 2 and 3 is to contest the legitimacy of partition. The proposed wording still disputes the legitimacy of partition by implication, since the right of Ireland to govern itself is asserted in the revised preamble to the constitution and the national territory is expressed to be the whole island. Instead of a claim on behalf of the people of the South to rule the North, we propose a wording which expresses a determination to reunite the country by consent, not conquest. The proposed wording also makes it clear that the achievement of Irish unity could take different forms and stages; thus the suggestion that the Oireachtas must be the legislature for an all Ireland state is withdrawn. In a confederal or federal Ireland the question of an all Ireland government would arise but its nature and powers would be very different from those of the Oireachtas which, in the 1937 text is assumed to be the post-reunification parliament. For this reason, the word "shall" is removed from the text of the 1967 proposed amendment and the word "may" is substituted. Reference to extra-territorial legislation is to give formal recognition to a series of judicial decisions that recognise the right of successive parliaments since 1922 to legislate with extra-territorial effect in criminal matters and as permitted by international law. See, e.g., Re Act. 26 and the Criminal Law (Jurisdiction) Act.

1976 (1977) I.R. 159. The provision also copperfastens the validity of certain provisions of the Law of Extradition which established the State's right to choose between trial on the basis of extra-territorial jurisdiction as an alternative to extradition.

In view of the provisions of Article 1 of the Anglo-Irish Agreement, it is desirable that the principle of unity by consent being the only unity sought by the people of Ireland be written into the fundamental law of the State.

ARTICLE 1 SECTION 3

"The Irish language as the national language and the English language are the official languages of the State which guarantees to cherish both languages as part of the Nation's cultural heritage and life. Provision may be made, by law however, for the exclusive use of either of the said languages for any purpose in any part of the State."

The purpose of this section is to give the English and Irish languages equality of status as official languages of the State. The 1937 text is set out in Article 8 as follows:

- "1. The Irish language as the national language is the first official language.
2. The English language is recognised as the second official language.
3. Provision may, however, be made by law for the exclusive use of either of the said languages where any one or more official purposes, either throughout the state or in any part thereof."

The statement that the Irish language is the "national language" calls into question the concept of the nation referred to in the Constitution. It is hardly a sustainable argument that the Irish language is the "national language" of a nation which includes at least one million people who don't know it, never knew it, and never knew any ancestor who knew it. The statement that the Gaelic language is "the national language" implies that the nation is a Gaelic nation.

We believe that the Irish nation is not simply Gaelic and that the nation which includes Protestants, Dissenters and descendants of planters and dwellers of the Pale is more correctly described as a nation with two languages, Irish and English. Both languages are "national" and both should be official languages of the State.

Moreover, the accordence of first official language status to Irish does not, in our view, assist in its preservation. On the contrary, it gives it an artificial pre-eminence which does not reflect reality and which evokes cynicism and resentment.

In our view the great importance of keeping Irish as a living part of our culture should be formally acknowledged in the Constitution. The proposed text does so for the first time. The key to the survival and development of the Irish language is based, in our opinion, on its being voluntarily accepted and respected and loved for its own worth as part of our cultural life. An unreal constitutional pre-eminence works in the other direction.

In our view, a realistic and positive approach to the Irish language as an invaluable part of the cultural life of a multi-cultural nation is preferable to its mummification as the first official national language.

ARTICLE 1 SECTIONS 4 AND 5

"4. All natural resources, including the air and all forms of potential energy, within the jurisdiction of the Parliament and Government established by this Constitution and all royalties and franchises within that jurisdiction belong to the State subject to all estates and interests therein for the time being lawfully vested in any person or body. All lands and mines, minerals and waters which belonged to Saorstát Eireann immediately before the coming into operation of this Constitution belong to the State to the same extent as they then belonged to Saorstát Eireann. Provision may be made by law for the management of the property which belongs to the State by virtue of this Article or which is acquired by the State after the coming into effect of this Constitution and for the control of the alienation, whether temporary or permanent, of that property.

5. The acquisition and loss of Irish nationality and citizenship shall be determined in accordance with

law and no person shall be excluded from Irish nationality or citizenship by reason of the sex of such person."

The remaining sections of Article 1 are concerned with citizenship and the state's rights in relation to energy and natural resources. The sections embody Articles 9 and 10 of the 1937 text in a slightly revised form.

ARTICLE 2 FUNDAMENTAL RIGHTS

GENERAL NOTE;

This Article substantially reproduces the fundamental rights provisions of the 1937 Constitution. Subject to a number of important changes (which are considered presently), we have remained faithful to the wording used by the present Constitution for two reasons. Firstly, because we want to maintain a certain sense of continuity between the two documents; and, secondly, because it is essential that the very large body of case-law which has grown up around Articles 40-44 be maintained. What we have sought to do is to reinforce the liberal and democratic values expressed in Articles 40-44 by making the following changes:

Abolition of the death penalty. (At present, the habeas corpus provisions of Art. 40.4 make reference to persons sentenced to death and this is thought to prevent the courts holding that the death penalty is unconstitutional and might possibly even preclude its total abolition by the Oireachtas. The same applies to the express power of commutation of the death penalty conferred on the President).

Expressly protect the right to privacy.

Substitute a simpler property rights clause which seeks to give extra latitude to the Oireachtas to regulate such rights in the interest of proper planning and environmental protection.

Abolition of the prohibition on divorce. We have always opposed the retention of this clause, as we think that the Oireachtas should be free to legislate on this issue.

Give greater recognition to the rights of children; and, in particular, to abolish discrimination based on status or parentage.

SECTION 1

"1. All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function. Titles of nobility shall not be conferred by the State."

This reproduces the equality clause contained in Article 40.1 of the present Constitution. We considered adding a clause that would forbid discrimination based on "sex, religion, language or race", but on balance decided against it. We feel that the present clause is sufficiently general (see eg. *de Burca v. Attorney General* (1976) I.R. 38 (exclusion of women and ratepayers from juries unconstitutional); *O'G v. Attorney General* (1985) I.L.R.M. 61 (law restricting widowers, but not widows, from adopting children unconstitutional) and that to introduce such a new provision might serve only to dilute the guarantee in other respects.

ARTICLE 2 SECTION 2

"2. The State shall respect and, as far as practicable, by its laws defend and vindicate the right to life of all persons and of the unborn. The State shall not make lawful the taking of life as punishment for an offence, nor shall any person be subjected to torture or to inhuman or degrading treatment or punishment."

This is essentially a new clause, but the first sentence (protecting the right to life of all persons and the unborn) is loosely based on the existing Article 40.3. We considered the following alternative draft, drawn from a combination of Article 3 of the German Constitution and Article 2 of the European Convention of Human Rights:

"The right to life is inviolable. No person shall be intentionally deprived of his right to life, save

where it results from the use of force which is no more than is absolutely necessary.

- a. in defence of any person from unlawful violence;
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c. in action lawfully taken for the purpose of quelling a riot or insurrection."

However, we felt that an express reference to such exceptions (such as is contained in Article 2 of the European Convention) was necessary as the general guarantees and unusual circumstances (if any) in which a person may be intentionally deprived of his life should be left to the courts.

The question of the express reference to protecting the life of the "unborn" is controversial. The present Constitution was recently amended by a very substantial majority to give explicit protection to the unborn. Whether that was necessary at all is open to doubt; some judicial comment suggested that the existing right to life already extended to the unborn. The wording of the "pro-life" amendment is itself unhappy; the statement that the right to life of the unborn is "equal" to that of the mother's right to life is fraught with problems of a legal ethical and practical nature. The proposed new section would at least avoid that highly controversial area.

The Eight Amendment of the Constitution added the following subsection to Article 40.3 of the 1937 text.

- "3. The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

If express protection for the "unborn" is necessary (as opposed to reliance on the "general" right to life of human persons) it is suggested that the short reference in the proposed text is sufficient.

The second sentence outlaws capital punishment and forbids torture or inhuman or degrading treatment. The abolition of capital punishment is in accordance with practical realities in this country. No one has been executed since 1954, and all the political parties are opposed to the notion of capital punishment. We believe that in a civilized society it is right and proper that the Constitution should reflect that sense of revulsion and general distaste by prohibiting capital punishment. The final sentence (prohibition of torture or inhuman or degrading treatment) is drawn from Article 3 of the European Convention. While the right not to be tortured or subjected to inhuman treatment is already impliedly protected by Article 40.3 of the present Constitution (see the comments of Finlay P. in the *State (C.) v. Frawley* (1976) I. R. 365 and Costello J. in *Murray v. Ireland* (1985) I.R. 532), we thought it right that such conduct should be expressly prohibited.

ARTICLE 2 SECTION 3

- "3. No person shall be deprived of his personal liberty save in accordance with law. Upon complaint being made by or on behalf of any person to the High Court or any Judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith inquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such before the High Court on a named day and to certify in writing the ground of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law. Nothing in this section, however, shall be invoked to prohibit, control or interfere with any act of the Defence Forces during the existence of a state of war or armed rebellion."

This reproduces most of Article 40.4. We saw no reason to change the first sentence ("No person shall be deprived of his liberty save in accordance with law"), based, as it is, on equivalent provisions of the American Constitution. "Law" in this context does not simply mean statute law, but a law which does not stoop to methods which ignore the fundamental norms of the legal order posited by the constitution": see Henchy J. in *King v. Attorney General* (1981) I.R. 233.

The habeas corpus provisions of Article 40.4 are in substance reproduced. In view of the abolition of capital punishment, we do take out the references to a person "under sentence of death". In addition we make some technical changes. The case-stated procedure (which gives a limited form of appeal to the State in cases where a law has been declared unconstitutional in a habeas corpus application) was inserted by the Second Amendment of the Constitution Act, 1941 to deal with the consequences of the State (Burke) v. Lennon (1940) I.R. 136 (where the Supreme Court had denied the State a right of appeal in such cases) is now unnecessary in view of the overruling of Burke's case in the State (Browne) v. Fegan (1967) I.R. 147 (which gives the State a general right of appeal in habeas corpus matters). Accordingly, the case-stated procedure (Article 40.4.3) has been omitted.

ARTICLE 2 SECTION 4

"4. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the other personal rights of the citizen and shall, in particular by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the person, good name, privacy and property rights of every citizen."

This reproduces much of Article 40.3, and, of course, is drafted in such a manner as to continue to enable the courts to hold that there are certain unspecified but implied personal rights which are protected by the Constitution. Although the right to privacy enjoys the status of an implied personal right (see Norris V. Attorney General (1984) I.R. 36 (Homosexuality) and Kennedy V. Ireland, High Court, 12 January 1987 (phone-tapping), we thought it right that this right should be expressly protected. We preferred to speak of a general right to privacy rather than adopt Article 8 of the European Convention ("Everyone has the right to respect for his private and family life, his home and his correspondence"), which rather confines this right to privacy to the context of one's home and family.

ARTICLE 2 SECTION 5

"5. The State shall not enact any law which attempts to abolish the right of private ownership or the general right to transfer, bequeath and inherit property. It shall be lawful for the State to enact laws to delimit and control with or without compensation the exercise of property rights in accordance with the exigencies of the common good, in general, and, in particular, to regulate and delimit in accordance with the principles of social justice, the development and protection of industry, agriculture, commerce, land and the environment."

Section 5 is a re-drafted property rights clause. The property rights clauses of Article 40 and 43 (and the litigation they have produced) have been widely misunderstood. The property rights guarantees are far from absolute, and the Supreme Court has made it perfectly clear that it is only legislation which is unfair or arbitrary which will be struck down. Thus in the farmers' rates case (Brennan v. Attorney General (1984) I.L.R.M. 355) the Court struck down the poor law valuation scheme because it contained indefensible anomalies and bore no reasonable relation to the current value of agricultural land. (The scheme was based on the price of certain agricultural produce in the immediate post-Famine period!). The Oireachtas already does have wide powers to curtail property rights provided this is done on a non-arbitrary or selective basis. Thus in O'Callaghan v. Commissioners of Public Works (1985) I.L.R.M. 364 the Supreme Court upheld a monument preservation order made under the National Monuments Acts, 1930-54, even though this had the effect of sterilising much of the farmer's land and no compensation had been paid. Much has been made in the media about the Derrynaflan chalice case (Webb v. Ireland, High Court, 29 July 1986), but this case had nothing to do with property rights, as it was entirely concerned with whether certain common law prerogative rights which attached to the King had survived the enactment of the Constitution. But there would be nothing to stop the Oireachtas (as it should have done long ago) enacting a statutory form of treasure trove, instead of relying on ancient regal prerogatives. (The recent Supreme Court decision confirms this view).

The greatest confusion has arisen in the planning area. The 1963 Planning Act, enacted in the days when the property developer reigned supreme, proceeds on the basis that one has a constitutional right to do virtually what one wants with one's property right. Local authorities have lived with this Act by resorting to various sham schemes (such as the granting of spurious undertakings) which the courts have disregarded as an attempt to by-pass the 1963 Act: see, e.g., Grange Developments Ltd. v. Dublin Corporation (1987) I.L.R.M. 245). This has meant that local authorities are increasingly saddled with huge compensation claims. And although

the courts have consistently called for reform of the 1963 Act, they are obliged to apply it, as it is still law. But the courts have never said that the 1963 Act - with its generous compensation regime - is constitutionally required. On the contrary, the Supreme Court has said that planning permission is a bonus ("an enhancement of one's property rights"), not a right, and that denial of planning permission is not an infringement of one's constitutional rights: see Pine Valley Developments Ltd. v. Minister for the Environment, Supreme Court, 29 July 1986. Indeed in the latest case (Re XIS Investments Ltd) (the "Roches Hill" case), the Supreme Court invited the local authority to challenge the 1963 Act on the ground that its generous compensation provisions were in fact an arbitrary waste of taxpayers' money.

Be that as it may, the widespread misunderstanding of these decisions has resulted in a perception that the property rights provisions of the present Constitution should be altered. And it is undeniable that the present wording of Article 43 is cumbersome and prolix. That is why we have re-drafted these provisions in order to make it clear that property rights can be curtailed - without the need for compensation - where this is required by the common good. But curious as it may seem to the general public this is largely a cosmetic change and will not greatly affect the present law for the very good reason that the power of the Oireachtas to restrict property rights is already much greater than most non-lawyers imagine.

The proposed text disposes with the Thomistic justification of the private property input in the existing Article 43.1.1 Article 4.1.2 is reproduced, as are phrases from Article 43.2.1 and Article 4.3.2.

ARTICLE 2 SECTION 6

"6. The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."

This reproduces Article 40.5 of the present Constitution and is a sufficient protection against any arbitrary violation of the dwelling by the State or its agents.

ARTICLE 2 SECTION 7

"7. The State guarantees liberty for the exercise of the following rights, subject only to delimitations made necessary in a democratic society by the State's obligation to preserve public order and morality and the authority of the State:"

- (1) *the right of the citizens to express and publish freely their convictions and opinions,*
- (2) *the right of the citizens to assemble peaceably and without arms,*
- (3) *the right of the citizens to travel within the State and abroad,*
- (4) *the right of the citizens to form associations and unions.*

Laws regulating the manner in which the foregoing rights may be exercised shall contain no political, religious, class, race or cultural distinction."

This text reproduces in substance Article 40.6.
The existing text reads as follows:

6.1 The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-

- (i) The right of the citizens to express freely their convictions and opinions.
The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.
The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.
- (ii) The right of the citizens to assemble peaceably and without arms.

Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.

(iii) The right of the citizens to form associations and unions.

Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.

2. Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination."

The new text proposes that the rights should be stated with a uniform qualification based on the democratic nature of the State. In this respect, the qualifications of the general rights are reduced to the minimum required in the interest of maintaining public order and morality and upholding the authority of the State; that minimalist qualification is to be justified only by reference to the exigencies of a democratic state.

It is suggested that the new text is simpler, clearer and more in line with a genuinely liberal republican philosophy.

Although the right to travel abroad and within the State has already been held to be an implied personal right (see e.g., *The State (M) v. Minister for Foreign Affairs* (1979) IR 73), we thought it was better to give this right express protection (as it is in Article 2 of the Fourth Protocol of the European Convention). We also decided to re-word the qualifying language to ensure that these rights can only be taken away or restricted where the State can show that such "restrictions are necessary in a democratic society". This latter phrase has been borrowed from the European Convention of Human Rights; and the European Court of Human Rights has held that this puts the onus on the State to establish that any such restrictions are, in fact, strictly necessary.

These rights are to be read in conjunction with the guarantee in Article 2, Section 3 of other unspecified rights.

ARTICLE 2 SECTIONS 8 AND 9

"8. *The State recognises the Family as the natural primary and fundamental unit group of society and guarantees to protect it in its constitution and authority and to guard and to protect from attack the institution of marriage.*"

"9. *The State acknowledges, that the primary and natural educator of the child is the Family and guarantees to respect the right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State. The State shall, however, as guardian of the common good, require that children receive a certain minimum education, moral, intellectual and social. The State shall provide for free primary education for all children resident in the state.*"

FAMILY AND PARENTAL RIGHTS

These sections reproduce some of the present Articles 41 and 42. However, there are some important changes. At present, parental and family rights are described as being "inalienable and imprescriptible". While this does not mean that these rights are absolute (thus, the Constitution does not require that married prisoners be allowed to procreate (*Murray v. Ireland* (1985) I.R. 532) and a family may be broken up by reason of a barring order or the deportation of a foreign spouse (*Pok Sun Shum v. Ireland* (1986) I.L.R.M. 593), this description has posed difficulties in the area of child custody and adoption. See, for example, *Re J.H.* (1985) I.R. 375, where the Supreme Court held a two and half year old child should be returned to its natural parents who had subsequently married, thereby acquiring "inalienable and imprescriptible" rights in respect of that child. The constitutional presumption was that the welfare of the child would be best served by being in the custody of its (now married) parents; and that it would require exceptional circumstances (which were not found to be present in this case) before that presumption could be displaced. In short the Supreme Court refused to apply the test of "what is in the child's best interest", as Lynch J. had done in the High Court. While naturally parents should normally enjoy the custody of their children, it should not be at the expense of the best interests of the

child. We believe that parental rights are adequately safeguarded by our draft Constitution; and by dropping the designation "inalienable and imprescriptible" we hope to avoid the difficulties caused by cases such as J.H. and to avoid any constitutional difficulties in the area of child welfare and adoption law which these words may cause.

DIVORCE

The other major changes relate to the deletion of the present constitutional ban on divorce (Article 41.3.2) and the reference to the place of the woman in the home (Article 41.2.1). There is no need to rehearse lengthily our views on this. It is clear that this prohibition denies a minority of our population basic civil rights. And how can we expect or attempt to insist on fair play for the minority in Northern Ireland when we refuse to take account of the rights of minorities in our society?

The new Article 2, Section 8 allows for the recognition of family rights independent of valid marriage. The effect of the proposed change would be that parents and children could assert their family rights (which are recognised as "natural" rights as apposed to mere civil rights) irrespective of the formal validity of the parents marriage in such as foreign law.

Consideration was given to replacing the absolute ban on divorce with a popular veto on legislation. This formula was proposed by Michael O'Leary in his private members bill to permit divorce.

However, on balance, it is our view that the popular veto is not required and only was proposed (and endorsed by the Progressive Democrats) as a limited step forward in the area short of the ideal.

For similar reasons we would regard it as inappropriate to write into the Constitution what are essentially statutory preconditions for divorce. This idea was attempted unsuccessfully by the Coalition Government in 1986.

We consider that the phraseology of Article 1 Section 8 is sufficient to allow divorce in limited circumstances while protecting marriage from "divorce-on-demand" legislation.

THE ROLE OF WOMEN

The reference to the place of women in the home seems a dated piece of rhetoric which really ought to have no place in the Constitution. In any event, this clause has doubtful legal significance and has not precluded the courts from holding gender based discrimination is unconstitutional (see, e.g. de Burca v. Attorney General (1976) I.R. 38 (exclusion of women from juries cannot be justified by reference to "place of women in the home")). Nonetheless, we saw no reason to maintain this clause in our new draft.

ARTICLE 2 SECTION 10

"11. Children shall enjoy special protection by law. Equality of rights under the law shall not be denied to any child on the basis of status at birth or parentage. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of parents, but always with due regard for the rights of the child."

This reproduces much of Article 42. However, the first two sentences in section 11 are innovative, and are based on the recommendations contained in the L.C.C.L. Report on Children's Rights (1976). These sentences are designed to give constitutional effect to the sentiments contained in s. 3 of the Guardianship of Infants Act, 1964, viz., that in all legal disputes, the child's welfare should be the dominant consideration. The second sentence would preclude discrimination based on status at birth or parentage: this would, in effect, ban any discrimination on the grounds of illegitimacy.

ARTICLE 2 SECTION 11

"12. Freedom of conscience and the free profession and practice of religion are, subject to public order

and morality, guaranteed to every citizen. The State shall not endow any religion nor impose any disabilities nor make any discrimination on the ground of religious profession, belief or status. Legislation providing State Aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school. Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes."

These clauses essentially reproduce what remains of Article 44, which precludes the endowment of religion and guarantees the free exercise of religion. We saw no reason to change these provisions, which are broadly similar to those contained in the First Amendment of the U.S. Constitution and Article 9 of the European Convention.

The section corresponds closely with the text of Article 8 of the Irish Free State Constitution. The present special guarantee against expropriation of religiously owned property is not necessary in view of the general property rights which are acknowledged to apply to religious denominations.

ARTICLE 3 THE PARLIAMENT

- "1. The Parliament of the State shall be called and known, and is in this Constitution generally referred to, as the Oireachtas. The Oireachtas shall consist of the President and a House of Representatives to be called Dail Eireann."
- "2. The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State, but provision may be made by law to delegate local and limited legislative functions to local authorities and other subordinate legislatures."
- "3. Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall but to the extent only of such repugnancy, be invalid."
- "4. The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission nor increase with retrospective effect the penalty for any infringement of the law."
- "5. The right to raise and maintain military or armed forces is vested exclusively in the Oireachtas. No military or armed force, other than a military or armed force raised and maintained by the Oireachtas, shall be raised or maintained for any purpose whatsoever."

The Parliament is referred to in this Constitution as the Oireachtas. It is not referred to as it was in the Article 15 of 1937 text, as the National Parliament. The claim to be the National Parliament is part and parcel of a claim of its right to exercise jurisdiction over the entirety of the national territory. It is now referred as "The Parliament of the State".

In Section 1, the title and description of the Parliament and its composition are set out. The section reads as follows: "the Parliament of the State shall be called and known, and in this Constitution generally referred to as the Oireachtas. The Oireachtas shall consist of the President and a House of Representatives to be called Dail Eireann."

The effect of this Article is to constitute the Parliament as consisting of the President and the Dail. At the moment, the Parliament consists of the President, Dail Eireann and the Seanad. Since one of the purposes of this revision of the Constitution is to exclude the Seanad, the references to it in Article 3 have been removed.

Specific provisions of Article 15 of the 1937 text which deal with the conduct and power of each House of the present Oireachtas have been replaced with equivalent provisions in Article 7, (the Article of the revised constitution dealing with the Dail). The reference in existing Article 15 to the establishment or recognition of functional and vocational councils is deleted from the text of the Constitution.

Likewise, the prohibition on retrospective criminal legislation set out in Article 15.4 is amplified to prevent retrospective increases in penalties. This is a widely accepted international principle of civil rights and is embodied in Article 5 of the European Convention on Human Rights.

The provisions of Article 3.5 (which conformed to Article 13.6 of the 1937 text and Article 46 of the Irish Free State Constitution) are important in that they form part of our Constitutional system of neutrality. No armed forces of a foreign power may be maintained in Ireland (in bases or otherwise) during peace time. Only forces raised and maintained by the Oireachtas can be stationed in Ireland.

Of course it would be open to the Oireachtas to request assistance in the case of an emergency, but in this proposed text the power of the Oireachtas to declare an emergency is limited to a duration of one year.

ARTICLE 4 THE PRESIDENT GENERAL

Article 4 is designed to embody the provisions of the present Articles 12 to 14 of the 1937 text of the Constitution.

In general terms, the provisions relating to the election of the President have been retained and his role as "Guardian of the Constitution" has been left unaltered. Because of the proposed abolition of the Seanad, the functions of the President have been changed to some extent. For instance, the provision of the 1937 Constitution in relation to reference of Bills to the people at the request of the Seanad (which incidentally have never been used) are removed. Likewise, the procedure for impeachment of the President which involve both Houses of the present Oireachtas, has been considerably altered. Because of the provisions of Article 2 of the proposed Constitution, the reference to the President in the context of capital punishment is also removed.

The reference in Article 12. 2.3 to proportional representation in the 1937 text in the context of the Presidential election is an error. Its amendment was proposed by the 1967 Committee (See p 42 of their report).

The 1967 committee recommended a change of the Constitution to provide that the executive power of the State could be exercised through the President. (See p 7 of their Report). We regard such an amendment as unnecessary and as unduly influenced by the concept of the Crown as the sovereign power in Britain. There is no need, in our opinion, to provide by an amendment to the Constitution that the executive power of the state has to be or may be exercised through the President.

Consideration was given to the arguments set out in p.p. 8 - 10 of the 1967 Commission's Report in relation to the position of President and its possible abolition. In our view, the role of the President is an important one in acting as a guardian of the Constitution and as a check against unconstitutional legislation. He is given powers under the existing Article 26 whose provisions are, with some modifications, incorporated in this Article to refer doubtfully constitutional legislation to the Supreme Court for a decision prior to signing any Bills to make it law.

We have also paid attention to the comments of the 1967 committee in relation to the President's role on the selection of Taoiseach. The 1967 committee in a prescient comment pointed out that there was a possibility that no Party leader would be able to secure a nomination by Dail Eireann after some future general election. It suggested that the President should have a role in this regard. Section 12 of the revised Article 4 provides that where a Taoiseach has resigned from office without advising the President to dissolve Dail Eireann or where the President has exercised his discretion to refuse a resigning Taoiseach a dissolution, he should have power to dissolve Dail Eireann on his own account unless within fourteen days of the President convening a meeting of Dail Eireann in accordance with his powers to dissolve Dail Eireann on his own account, Dail Eireann has nominated one of its members for appointment as Taoiseach. The proposed text also gives the President explicit power to consult with such member or members of the Dail as he deems fit.

ARTICLE 4 SECTION 1

- "1. There shall be a President of Ireland (hereinafter called the President) who shall take precedence over all other persons in the State and who shall exercise and perform the powers and functions conferred on the President by this Constitution and by law. The powers and functions conferred*

on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body. Subject to this Constitution, additional powers and functions may be conferred on the President by law but no such power or function shall be exercisable or performable save only on the advice of the Government."

Comment: This section is an amalgamation of Article 12.1, Article 12.2, and Article 12.10 of the 1937 text. The President, as Head of State, is obliged in most matters to act on the advice of the Government. (For a discussion on the role of the President as Head of State, see David Gwynn Morgan's Constitutional Law of Ireland pp 46 and 47). In certain other matters the President is given a discretion e.g. whether or not to dissolve the Dail at the request of a Taoiseach, the selection of members of the Council of State. In other matters he is required to consult with the Council of State before exercising his discretion.

ARTICLE 4 SECTION 2

"2. The President shall be elected by direct vote of the people by secret ballot and by means of the single transferable vote. Every citizen who has the right to vote at an election for members of Dail Eireann shall have the right to vote at an election for President. Every citizen who has reached his thirty fifth year of age is eligible for election to the office of President. A person who holds, or who has held office as President, shall be eligible for re-election to that office once, but only once."

This section corrects an error in the 1937 Constitution which referred to the election of the President by Proportional Representation. The 1967 Committee on the Constitution noted the error and proposed its correction by a reference to the "single transferable vote". The section replaces Article 12.2, Article 12.4.1 and Article 12.3.2 of the 1937 text.

ARTICLE 4 SECTION 3

"3. Every candidate for election, not a former or retiring President, must be nominated by at least ten members of Dail Eireann or on the nomination of thirty thousand persons eligible to vote in such an election made in a manner to be provided by law. Former or retiring Presidents may only become candidates on their own nomination. Where only one candidate is nominated for the office of President it shall not be necessary to proceed to a ballot for his election. No person may nominate more than one candidate in respect of the same election."

This section changes the basis of nomination for the Presidency. The 1937 text provided for a different system of nomination in Article 12.4.2 as follows:

- "2. Every candidate for election, not a former or retiring President, must be nominated either by:*
- (i.) Not less than twenty persons, each of whom is at the time a member of one of the Houses of the Oireachtas, or*
 - (ii.) By the Councils of not less than four administrative Counties (including County Boroughs) as defined by law.*
- 3. No person shall nominate more than one candidate in respect of the same election.*
- 4. Former or retiring President may only become candidates on their own nomination.*
- 5. Where only one candidate is nominated for the office of President it shall not be necessary to proceed to a ballot for his election."*

The recent system confined the nomination process to the political establishment and within the political establishment to the larger parties. The political dominance of local authorities has ensured that there is no real alternative mode of nomination available.

Consideration was given to changing the mode of nomination and election so as to confine the election to members of the Dail. That would inevitably mean that the election would be decided on party political lines. It is not, in our view, desirable that the Head of State should be chosen on the basis of party politics. For this reason, we propose widening the nominating base to include a nomination by 30,000 voters. We believe that such a procedure would enable the citizens to have a wide choice and to elect a Head of State independently of the party political process.

We believe there is little or no justification for retaining a collective nomination by local authorities; persons elected on local issues for particular areas are not particularly qualified to join with others from different areas to make a nomination.

We have also made it clear that outgoing Presidents can only become candidates on their own nomination. In 1966, there was a controversial nomination by members of the Oireachtas of an outgoing President.

The President is envisaged by the 1937 Constitution to be a person elected by universal suffrage to be Head of State; election by the Dail would detract from the impartiality expected of the Office in political matters.

An alternative would be to stipulate election by a qualified majority (say, two thirds of the Dail membership). But such a procedure might simply give rise to a stalemate. On balance, we are of the opinion that direct election is preferable and not unduly irksome.

ARTICLE 4 SECTIONS 4.5.6.7 AND 8

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

5. An election for the office of President shall be held not later than, and not earlier than the sixtieth day before, the date of the expiration of the term of office of every President, but in the event of the removal from office of the President or of his death, resignation, or permanent incapacity established as aforesaid (whether occurring before or after he enters upon his office), an election for the office of President shall be held within sixty days after such event. Subject to the foregoing provisions of this Article, elections for the office of President shall be regulated by law.

6. The President shall not be a member of Dail Eireann and if a member of Dail Eireann be elected President, he shall be deemed to have vacated his seat. The President shall not hold any other office or position of emolument.

7. The President shall enter upon his office by taking and subscribing publicly, in the presence of members of Dail Eireann, of Judges of the Supreme Court and of the High Court, and other public personages, the following declaration:-

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

8. The President shall have an official residence in or near the City of Dublin and shall receive emoluments and allowances as may be determined by law but which shall not be diminished during his term of office. The President shall not leave the State during his term of office save with the consent of the Government."

These sections replace similar provisions in Articles 12.3.1 and 12.3.3, Article 12.5, 12.6 and 12.11 of the 1937 text.

ARTICLE 4 SECTIONS 9 AND 10

- "9. The supreme command of the Defence Forces, which shall be exercised in a manner regulated by law, is hereby invested in the President and all commissioned officers of the Defence Forces shall hold their commissions from the President.
10. The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction is hereby invested in the President but such power of commutation or remission may also be conferred by law on other authorities."

These sections replace Articles 13.4, 13.5 and 13.6 of the 1937 text. In view of the ban on the death penalty, the special provisions in relation to commutation of the death penalty have been removed from Article 13.7.

ARTICLE 4. SECTIONS 11 AND 12

- "11 The President shall on the nomination of Dail Eireann, appoint the Taoiseach. The President shall, on the nomination of the Taoiseach with the previous approval of Dail Eireann, appoint the other members of the Government and shall, on the advice of the Taoiseach, accept the resignation or terminate the appointment of any member of the Government.
12. Dail Eireann shall be summoned and dissolved by the President on the advice of the Taoiseach; the President may, however, in his absolute discretion refuse to dissolve Dail Eireann on the advice of a Taoiseach who has ceased to retain the support of a majority in Dail Eireann. The President may at any time, after consultation with the Council of State, convene a meeting of Dail Eireann. Where a Taoiseach has resigned from office without advising the President to dissolve Dail Eireann, or where the President has refused under this Section to dissolve Dail Eireann, the President may in his absolute discretion, having consulted with such member or members of Dail Eireann as he deems fit, dissolve Dail Eireann unless within fourteen days of his convening a meeting of Dail Eireann in accordance with this section, Dail Eireann has nominated one of its members for appointment as Taoiseach."

These Sections replace Article 13.1 and Article 13.2 of the 1937 text. The 1967 Committee in the Constitution foresaw a possible impasse in which a Dail reconvened after a General Election was deadlocked on the nomination of a new Taoiseach.

Section 12, accordingly, contains a new provision which permits a President, in his absolute discretion, to deal with such a situation by convening the Dail, consulting with some or all of its members and delaying a dissolution for 14 days to enable a nomination to emerge.

This proposal gives power to the President which were surely essential in the aftermath of the 1987 election. Had one independent T.D. not abstained, the Dail would not have agreed, on the casting vote of the Ceann Comhairle, to the nomination of a Taoiseach proposed by the largest grouping in the Dail.

ARTICLE 4 SECTION 13

- "13. The President may, after consultation with the Council of State, communicate with Dail Eireann by message or address on any matter of national or public importance, or address a message to the Nation at any time on any such matter."

This Article restates the rights of the President to communicate with the Dail. The Government veto on the substance of an address to the Nation is removed. The consultation role of the Council of State is a sufficient safeguard against abuse of such powers. In any event, the 1937 text only requires Government approval for messages to the Nation; no such approval is required for a message to the Dail. It is hard to see how the Government could prevent a Presidential message to the Dail from becoming public knowledge. Hence the veto on messages to the Nation is of little effect.

ARTICLE 4 SECTION 14

"14. Upon receiving a message in that behalf from Dail Eireann, the President, having consulted the Council of State and with the consent of a majority of its members present and voting shall:

- (i) appoint three persons, not being members for the time being of Dail Eireann to be members of a Commission, of which a Judge of the High Court shall act as chairman and which shall be charged with the function of reporting on the revision of Constituencies; and*

(ii) ... the terms of reference

The member of such Commission shall be independent and impartial in the discharge of their functions and shall have due regard to the terms of reference under which they were appointed by the President and any changes in the distribution of population. The report of such Commission shall, as soon as may be, be laid before Dail Eireann."

This section is new. Its purpose is to give Constitutional status to the recent practice of delegating the demarcation of constituencies to an independent commission. Many people regard the existing right of 51% of Dail members to gerrymander the constituencies as completely unacceptable. However, even the present arrangements allow 51% of the Dail to lay down terms of reference to a non-statutory commission which can be used to party political advantage.

The President and the Council of State are together a wide cross section of senior political and judicial figures with a number of non-political appointees of the President.

The section allows the President with the consent of the Council of State to decide on the composition and terms of reference of the Commission. A High Court Judge will chair the commission. In this way, the fairness and impartiality of constituency boundaries will be ensured.

ARTICLE 4 SECTION 15

"15. The President may, after consultation with the Council of State, refer any Bill to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof. Every such reference shall be made not later than the seventh day after the date on which such Bill shall have been presented by the Taoiseach to the President for his signature. The President shall not sign any Bill the subject of a reference to the Supreme Court under this article pending the pronouncement of the decision of the Court. The Supreme Court, consisting of not less than five judges, shall consider every question referred to it by the President under this section for a decision, and having heard argument by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference. In every case in which the Supreme Court decides that any provision of a Bill the subject of a reference to the Supreme Court under this article is repugnant to this Constitution or to any provision thereof, the President shall decline to sign such Bill. In every other case the President shall sign the Bill as soon as may be after the date on which the decision of the Supreme Court shall have been pronounced."

This section restates the provisions of Article 26 of the existing Constitution which permit a President, having consulted with the Council of State, to refer a Bill of doubtful Constitutionality to the Supreme Court before signing it into law.

However there are two important changes:

- (i) the "stare decisis" rule in relation to such a Bill is not included, and,*
- (ii) the "one judgement" rule, which prohibits the revelation of a minority view in such cases, is also dispensed with,*

There has been a suggestion that the Article 26 procedure should be dropped altogether (see John Kelly's Article, Irish Independent, 29-12-87). While his objection appears to be based on the "stare decisis" aspect of the procedure, we feel that it is not sufficient simply to rely on lay litigants at their own expense and often with considerable delay as a constitutional check. If Article 26, was removed a Government could deliberately put through a Bill with a view to securing a short term effect in the knowledge that it infringed the Constitution but would not be found to do so for a number of weeks or months.

We consider that the Presidential reference is a valuable safeguard which should be retained.

ARTICLE 4 SECTIONS 16 AND 17

- "16. The President shall not be answerable to Dail Eireann or to any court for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions, but the behaviour of the President may however, be brought under review in Dail Eireann for the purposes of the next section of the Article or by any court, tribunal or body appointed or designated by Dail Eireann for the investigation of a charge under the said section.*
- 17. Where a proposal is made to Dail Eireann by thirty members of that House by notice of motion in writing that a charge of stated misbehaviour by the President be investigated by Dail Eireann, it shall be lawful for Dail Eireann to resolve to proceed to investigate such charge or to cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation. If, as a result of the investigation, a resolution be passed supported by not less than two-thirds of the total membership of Dail Eireann declaring that the charge preferred against the President has been sustained and that the misbehaviour, the subject of the charge, was such as to render him unfit to continue in office, such resolution shall operate to remove the President from his office."*

These Articles reproduce the provisions of the 1937 text in relation to Presidential immunity and impeachment. The impeachment procedure is slightly modified to take account of the Oireachtas becoming a one chamber house.

ARTICLE 5 THE COUNCIL OF STATE

- "1. There shall be a Council of State to aid and counsel the President on all matters on which the President may consult the said Council in relation to the exercise and performance by of such of his powers and functions as are by this Constitution expressed to be exercisable and performable after consultation with the Council of State, and to exercise such other functions as are conferred on the said Council by this Constitution.*
- 2. The Council of State shall consist of the following members:*
 - (i) As ex-officio members: The Taoiseach, The Tanaiste, The Chief Justice, The President of the High Court, The Chairman of Dail Eireann and the Attorney General.*
 - (ii) Every person able and willing to act as a member of the Council of State who shall have held the office of President or the office of Taoiseach, or the office of Chief Justice.*
 - (iii) Such other persons, if any, as may be appointed by the President under this Article to be member of the Council of State.*
- 3. The President may at any time, and from time to time by warrant under his hand and seal appoint such other persons as, in his absolute discretion, he may think fit, to be members of the Council of State, but no more than seven persons so appointed shall be members of the Council of State at the same time.*
- 4. Every member of the Council of State shall at the first meeting thereof which he attends as a member take and subscribe a declaration in the following form:*

"In the presence of Almighty God, I do solemnly promise and declare that I will faithfully and conscientiously fulfil my duties as a member of the Council of State."

5. *Every member of the Council of State appointed by the President, unless he previously dies, resigns, becomes permanently incapacitated, or is removed from office, shall hold office until the successor of the President by whom he was appointed shall have entered upon his office.*
6. *Any member of the Council of State appointed by the President, resigning, or proposing his resignation in the hands of the President. The President may for reasons which to him seem sufficient, by an order under his hand and seal, terminate the appointment of any member of the Council of State appointed by him.*
7. *The President shall not exercise or perform any of the powers or functions which are by this Constitution expressed to be exercisable or performable by him after consultation with the Council of State unless, and on every occasion before so doing, he shall have convened a meeting of the Council of State and the members present at such meeting shall have been heard by him. Meetings of the Council of State may be convened by the President at such times and places as he shall determine."*

Apart from removing the reference to the President of the Executive Council of Saorstát Éireann, and the Chairman of Seanad Éireann the existing provisions are, with minor amendments, reenacted in their entirety.

ARTICLE 6 THE PRESIDENTIAL COMMISSION

1. *In the event of the absence of the President or his temporary incapacity, or his permanent incapacity established as provided by section 4 of Article 4 hereof, or in the event of his death, resignation, removal from office, or failure to exercise and perform the powers and functions of his office or any of them, or at any time at which the office of President may be vacant, the powers and functions conferred on the President by or under this constitution shall be exercised and performed by a Commission constituted as provided in Section 2 of this Article.*
2. *The Commission shall consist of the following persons, namely, the Chief Justice, the President of the High Court and the Chairman of Dail Éireann (An Ceann Comhairle). Where the Chief Justice is unable to act as a member of the Commission or when his position is vacant, the next senior ordinary judge of the Supreme Court shall act in his stead. Where the President of the High Court is unable to act as a member of the Commission or his position is vacant, the next senior ordinary judge of the High Court shall act in his place. Where the Chairman of Dail Éireann is unable to act as a member of the Commission, the Deputy Chairman of Dail Éireann shall act in his place. The Commission may act by any two of their number and may act notwithstanding a vacancy in their membership.*
3. *The Council of State may by a majority of its members make such provision as to them may seem for the exercise and performance of the powers and functions conferred on the President by or under this Constitution in any contingency which is not provided for by the foregoing provisions of this Article.*
4. *The provision of this Constitution which relate to the exercise and performance by the President of the powers and functions conferred on him by or under this Constitution shall subject to the subsequent provisions of the next section apply to the exercise and performance of the said powers and functions under this Article.*
5. *In the event of the failure of the President to exercise or perform any power or function which the President is by or under this Constitution required to exercise or perform within a specified time, the said power or function shall be exercised or performed under this Article, as soon as may be after the expiration of the time so specified."*

This Article reenacts the provisions of the 1937 Constitution with some minor modifications. Because of the abolition of the Seanad, its Chairman would no longer be available to serve as a member of a Presidential

Commission to act in the event of the President's death or incapacity or absence. Accordingly, it is proposed that the President of the High Court should take the place of the Chairman of Seanad Eireann and that the Chief Justice and the President of the High Court should have, as their substitutes, the next senior Judges of their respective courts.

ARTICLE 7 DAIL EIREANN

GENERAL NOTE:

The proposed Constitution is based on a single chamber parliament. Dail Eireann is the House of Representatives of that Parliament.

In drafting Article 7, we have attempted, as far as possible, to maintain constitutional continuity. We have, as well, reorganised the text to make it more coherent.

Sections 1 to 4 deal with the constitution of the Dail, its membership and the constituencies.

Sections 5 to 9 deal with elections to the Dail.

Sections 10 to 15 deal with procedure and privileges.

Section 16 deals with the Dail as a budgetary body.

Section 17 deals with war and Section 18 deals with emergency legislation.

We have largely reproduced Article 16 of the present Constitution. However, we have effected two fundamental changes. First, the Seanad has been abolished. This automatically results in the omission of Articles 18, to 24 of the present Constitution, with many further consequential changes.

The Dail is remarkably large by international standards. The increase in the numbers of members in recent years has not improved parliamentary standards, and a lower ratio would be more likely to encourage a legislative rather than a clientist attitude. It would be easier to provide improved services to a smaller number of deputies.

The number of members of the Dail will be greatly reduced by the fact that the ratios of members per constituency have been altered from 1/20,000 to 1/30,000 to 1/25,000 to 1/30,000. The use of these new ratios would significantly reduce the number of Deputies. While the precise number would depend on census figures, if the higher ratio was used, we anticipate the Dail would consist of about 110 members.

ARTICLE 7 SECTIONS 1 TO 3

- "1. Dail Eireann shall be composed of members who represent constituencies determined by law made in accordance with the provisions of this Constitution.*
- 2. The number of members shall from time to time be fixed by law, but the total number of members of Dail Eireann shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty five thousand of the population. 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.*
- 3. The members shall be elected on the system of proportional representation by means of the single transferable vote. No law shall be enacted whereby the number of members to be returned for any constituency shall be less than three."*

Comment:

These sections restate the substance of Article 16.2 except that the ratio of population to deputies is reduced from 1/20-30000 to 1/25000-30000.

There would be a corresponding drop in deputies in the Dail of the order of 25% to 50%. The system of multi seat P.R. is retained.

ARTICLE 7 SECTION 4

"4. The Oireachtas shall enact law at least once in every twelve years to revise the constituencies and in accordance with the terms of a report prepared in that behalf on the authority of the President and the Council of State in accordance with terms of Article 4.18 of this Constitution."

Comment:

This section obliges the Oireachtas to revise its Constituencies at least every 12 years, as it obliged to do at present. However, for the first time the Oireachtas is obliged to do so by reference to an independent report of a commission chaired by a High Court Judge and where membership and terms of reference are decided by the President with the consent of the Council of State. (See Article 4.14).

ARTICLE 7 SECTION 5 TO 9

"5. Every citizen who has reached the age of eighteen years, and who is not placed under disability or incapacity by this Constitution or by law, shall be eligible for membership of Dail Eireann."

6. All citizens and such other persons in the State as may be determined by law, who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dail Eireann, shall have the right to vote at an election for member of Dail Eireann. No law shall be enacted placing any citizen under disability or incapacity for membership of Dail Eireann on the ground of sex or disqualifying any citizen or any other person from voting at an election for member of Dail Eireann on that ground. No voter may exercise more than one vote at an election for Dail Eireann, and the voting shall be by secret ballot.

7. A general election for members of Dail Eireann shall take place not later than thirty days after a dissolution of Dail Eireann and the polling at every general election shall as far as practicable take place on the same day throughout the country. Dail Eireann shall meet within thirty days from that polling day. The same Dail Eireann shall not continue for a longer period than seven years from the date of its first meeting; a shorter period may be fixed by law.

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

9. Subject to the foregoing provisions of this Article, elections for membership of Dail Eireann, including the filling of casual vacancies, shall be regulated in accordance with law."

These sections replace Article 16 of the 1937 text. Provision is made for giving the votes to resident non-citizens as at present. The only substantial change is that persons over the age of 18 are entitled both to stand and to vote in Dail Elections. At present, those between 18 and 21 can vote but may not stand for the Dail.

ARTICLE 7 SECTIONS 10 TO 15

"10. Sitzings of Dail Eireann shall be public but in cases of special emergency however, Dail Eireann may hold a private sitting with the assent of two-thirds of the member present."

11. Dail Eireann shall elect from its members its own Chairman and Deputy Chairman; and shall prescribe their powers and duties and their remuneration shall be determined by law. Dail Eireann shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debates, 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

number of members necessary to constitute a meeting of Dail Eireann for the exercise of its power shall be determined by its standing orders.

12. *All questions in Dail Eireann shall, save as otherwise provided by this Constitution, be determined by a majority of the votes of the members present and voting other than the Chairman or presiding member. The Chairman or presiding member shall have and exercise a casting vote in the case of an equality of votes.*
13. *All official reports and publications of the Oireachtas or of Dail Eireann and utterances made in Dail Eireann wherever published shall be privileged.*
14. *The members of Dail Eireann and the Government shall, except in the case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of Dail Eireann, and shall not, in respect of any utterance in Dail Eireann be amenable to any court or any authority other than Dail Eireann.*
15. *The Oireachtas may make provision by law for the payment of allowances to member of Dail Eireann in respect of their duties as public representatives and for the grant to them of free travelling and such other facilities (if any) in connection with those duties as the Oireachtas may determine."*

These sections replace Articles 15.8 to 15.15 of the 1937 text. The procedures of the Dail and its system of Committees is left to the Dail itself to regulate. Consideration was given to giving Constitutional status to the Committees of the Dail, but, in order to provide flexibility, it is felt that the nature, composition and powers of Dail Committees should be left to the Dail's standing orders and to legislation.

ARTICLE 7 SECTION 16

- "16. *As soon as possible after the presentation to Dail Eireann under Article 10 of this Constitution of the Estimates of receipts and the Estimates of expenditure of the State for any financial year, Dail Eireann shall consider such Estimates. Save in so far as may be provided by specific enactment in each case the legislation required to give effect to the Financial Resolutions of each year shall be enacted within that year. Dail Eireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue of other public monies unless the purpose of the appropriation shall have been recommended to Dail Eireann by a message from the Government signed by the Taoiseach."*

This section restates the Dail's supremacy in the Budgetary process. Its provisions correspond to those in Article 17.1 and 17.2 of the 1937 text.

ARTICLE 7 SECTION 17

- "17. *War shall not be declared and the State shall not participate in any war save with the assent of Dail Eireann. In the case of actual invasion, however, the Government may take whatever steps it may consider necessary for the protection of the State, and Dail Eireann if not sitting shall be summoned to meet at the earliest practicable date."*

This section gives to Dail Eirann a veto over the involvement of the State in any war. It is submitted, in light of the Crotty decision, that the Dail cannot have its Constitutional right of veto in the matter abrogated by any treaty made with a foreign power which could oblige the State to go to war whether offensive or defensive in predetermined circumstances. This section is a valuable part of the Constitutional defence against any involvement in a military alliance which committed us to participate in a war or to station foreign forces here. (See Article 3.5 as well.)

ARTICLE 7 SECTION 18

- "18. *Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war*

or armed rebellion in pursuance of any such law. In this sub-section "time of war" includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which Dail Eireann shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State and "time of war or armed rebellion" includes such time after the termination of any war, or of any such armed conflict as aforesaid or of any war, or of any such armed conflict as aforesaid or of any armed rebellion, as may elapse until Dail Eireann shall have resolved that the national emergency occasioned by such war, armed conflict or armed rebellion has ceased to exist, provided that any resolution by Dail Eireann that a national emergency exists shall cease to have effect after 12 months.

This section reenacts the emergency powers provision of the 1937 text as amended and set out in Article 28.3.3.

However, for the first time, it is provided that a declaration of a state of Emergency has a life span of not more than one year.

With the exception of a matter of hours in 1976, the State has been in a State of Emergency since 1939, thus allowing the Oireachtas to bypass Constitutional safeguards at any time for the purpose of securing public safety.

ARTICLE 8

SIGNING OF BILLS AND PROMULGATION OF LAWS.

- "1. As soon as any Bill, other than a Bill expressed to be a Bill containing a proposal for the amendment of this Constitution, shall have been passed by Dail Eireann the Taoiseach shall present it to the President for his signature and for promulgation by him as law in accordance with the provisions of this Article. Save as otherwise provided by this Constitution, every Bill so presented to the President for his signature and for promulgation by him as a law shall be signed by the President not later than the seventh day after the date on which the Bill shall have been presented to him.*
- 2. Every Bill shall become and be law as on from the day on which it is signed by the President under this Constitution, and shall, unless the contrary intention appears, come into operation on that day. Every Bill signed by the President under this Constitution shall be promulgated by him as law by the publication by his direction of a notice in the Iris Oifigiúil stating that the Bill has become law.*
- 3. Every Bill shall be signed by the President in the text in which it was passed by Dail Eireann and if a Bill is so passed or deemed to have been passed in both the official languages, the President shall sign the text of the Bill in each of those languages. Where the President signs the text of a Bill in one only of the official languages, an official translation shall be issued in the other official language.*
- 4. As soon as may be after the signature and promulgation of a Bill as a law, the text of such law which was signed by the President or, where the President has signed the text of such law in each of the official languages, both the signed text shall be enrolled for record in the office of the Registrar of the Supreme Court, and the text, or both the texts, so enrolled shall be conclusive evidence of the provision of such law.*
- 5. Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Eireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."*

These sections reproduce, without significant change, the existing provision of Article 25. These are minor consequential changes which flow from the abolition of the Seanad.

ARTICLE 9

THE COMPTROLLER AND AUDITOR GENERAL

- "1. There shall be a Comptroller and Auditor General to control on behalf of the State all disbursements*

and to audit all accounts of monies administered by or under the authority of the Oireachtas and to perform such other functions as may be determined by law who shall be appointed by the President on the nomination of Dail Eireann.

2. All revenues of the State from whatever source arising shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes and in the manner and subject to the charges and liabilities determined and imposed by law.
3. The Comptroller and Auditor General shall not be a member of Dail Eireann or of any other office or position of emolument.
4. The Comptroller and Auditor General shall report to Dail Eireann at stated periods as determined by law and the Comptroller and Auditor General in making such report may draw the attention of Dail Eireann to any instances where, in his opinion, the expenditure of public monies has been wasteful or ineffective.
5. The Comptroller and Auditor General shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolution passed by Dail Eireann calling for his removal. The Taoiseach shall duly notify the President of any such resolution as aforesaid passed by Dail Eireann and shall send him a copy of each such resolution certified by the Chairman of Dail Eireann. Upon receipt of such notification and of copies of such resolution, the President shall forthwith, by an order under his hand and seal, remove the Comptroller and Auditor General from office.
6. Subject to the foregoing the terms and conditions of the office of Comptroller and Auditor General shall be determined by law."

The provisions in relation to the Comptroller and Auditor General are substantially re-enacted in this Article. They were comprised in Article 33 of the 1937 text of the Constitution.

The existing provisions of Article 11 of the 1937 text are re-enacted in Article 9 so as to highlight the constitutional role of the Comptroller and Auditor General in relation the revenues of the State and their appropriation in accordance with law.

The text of Article 9 is placed immediately after the text relating to Dail Eireann and the legislative function thereof in order to emphasise the important role of the Comptroller and Auditor General's office in relation to control by Dail Eireann of public finances.

Article 9. 1 of the revised text permits, for the first time, other functions to be conferred by law on the Comptroller and Auditor General. It is suggested that the present power of the Comptroller and Auditor General are restrictively interpreted to simple control and auditing functions and in the context of these functions there are good grounds on which the ambit of the Comptroller and Auditor General's function as an independent constitutional officer of state should be expanded. Such functions include, in particular areas, a duty to report in relation to the effectiveness of public spending, the elimination of waste and recommendations in respect thereof (See Article 9.4).

ARTICLE 10

THE GOVERNMENT

SECTIONS 1 TO 6

1. The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government which shall be responsible to Dail Eireann.
2. The Government shall consist of not less than seven and not more than fifteen members who shall be appointed by the President in accordance with the provisions of this Constitution.
3. The Government shall meet and act as a collective authority, and shall be collectively responsible for the Departments of State administered by the members of the Government.

4. *The Government shall prepare Estimates of the Receipts and Estimates of the Expenditure of the State for each financial year, and shall present them to Dail Eireann for consideration.*
5. *The head of the Government, or Prime Minister, shall be called, and is in this Constitution referred to as the Taoiseach. The Taoiseach shall keep the President generally informed on matter of domestic and international policy.*
6. *The Taoiseach shall nominate a member of the Government to be the Tanaiste who shall act for all purposes in the place of the Taoiseach if the Taoiseach should die, or become permanently incapacitated. The President shall have the power to appoint and shall act for or in the place of the Taoiseach during the temporary absence of the Taoiseach."*

Comment:

These sections restate the responsibility and powers and functions of Cabinet Government. The sections with some minor textual improvement reproduce the corresponding provisions of Article 28.

ARTICLE 10 SECTION 7

- "7. *The Taoiseach, the Tanaiste and the member of the Government who is in charge of the Department of Finance must be member of Dail Eireann. Not more than two members of the Government may be persons who are not members of Dail Eireann. Every member of the Government shall have the right to attend and be heard in Dail Eireann."*

Comment:

This Section deals with eligibility for membership of the Government. The section envisages persons who are not members of the Oireachtas being member of the Government. At present, all the Government must be member of Dail Eireann except two who may be member of Seanad Eireann.

Consideration was given to the number of members of Government who might be outsiders. On the one hand it was argued that it would be most flexible to allow all except the Taoiseach, Tanaiste and Minister for Finance to be non - members of the Oireachtas.

The argument against this proposal was that the Government ought to be predominantly representative; a Government which was in the main unelected might be seen as lacking political authority.

On balance, the Parliamentary Party of the Progressive Democrats felt that the great majority of the members of the Government should be T.D.'s and accordingly that not more than two members of the Government should be appointed from outside the Dail.

ARTICLE 10 SECTIONS 8 TO 11

- "8. *The Taoiseach may resign from office at any time by placing his resignation in the hands of the President. Any other member of the Government may resign from office by placing his resignation in the hands of the Taoiseach for submission to the President. The President shall accept the resignation of a member of the Government, other than the Taoiseach, if so advised by the Taoiseach and the Taoiseach may at any time, for reasons which to him seem sufficient, request a member of the Government to resign; should the member concerned fail to comply with the request, his appointment shall be terminated by the President if the Taoiseach so advises.*
9. *The Taoiseach shall resign from office upon his ceasing to retain the support of a majority in Dail Eireann unless on his advice the President dissolves Dail Eireann and on the assembly of Dail Eireann after the dissolution the Taoiseach secures the support of a majority in Dail Eireann. If the Taoiseach at any time resigns from office the other members of the Government shall be deemed also to have resigned from office, but the Taoiseach and the other members of the Government shall continue to carry on their duties until their successors shall have been appointed.*

10. *The members of the Government in office at the date of a dissolution of Dail Eireann shall continue to hold office until their successors shall have been appointed.*
11. *The following matters shall be regulated in accordance with law, namely, the organisation of and distribution of business amongst Departments of State, the designation of members of the Government to be the Ministers in charge of the said Departments, the discharge of the functions of the office of a member of the Government during his temporary absence or incapacity, and the remuneration of the member of the Government."*

Comment:

These Sections reproduce in a slightly amended form the provisions of Articles 28.9, 28.10, 28.11 and 28.12 of the 1937 text.

ARTICLE 11 THE ATTORNEY GENERAL

1. *There shall be an Attorney General who shall be the advisor of the Government in matters of law and legal opinion, and shall exercise and perform all such powers, functions and duties as are conferred or imposed on him by this Constitution or by law. The Attorney General shall be appointed by the President on the nomination of the Taoiseach and shall not be a member of the Government.*
2. *The Attorney General may at any time resign from office by placing his resignation in the hands of the Taoiseach for submission to the President. The Taoiseach may, for reasons which to him seem sufficient, request the resignation of the Attorney General and in the event of failure to comply with the request, such appointment shall be terminated by the President if the Taoiseach so advises. The Attorney General shall retire from office upon the resignation of the Taoiseach but may continue to carry on his duties until the successor to the Taoiseach shall have been appointed.*
3. *Subject to the foregoing provisions of this Article, the office of Attorney General, including the remuneration to be paid to the holder of the office, shall be regulated by law."*

Article 11 of the proposed revised text embodies the substance of Article 30 of the 1937 text. While consideration was given to the removal of the references to the Attorney General from the Constitution and their replacement by a statute, it was considered that the office is of central importance in relation to the conduct of proceedings on behalf of the Government relating to constitutional challenges to legislation and, generally, in relation to its function as legal advisor to the Government.

Consideration was also given to the criteria for appointment of an Attorney General and as to whether such criteria should be embodied in the Constitution. It was felt that that was unnecessary.

ARTICLE 12 THE COURTS GENERAL

The provisions relating to the courts substantially reproduce the provisions of Articles 34 to 37 of the present Constitution. A few changes have been made.

Firstly, the requirement (contained in Article 34.4.5) that only one judgement can be delivered by the Supreme Court when pronouncing on the validity of post 1937 law or statutory instrument. This rule (which was inserted by the Second Amendment of the Constitution Act, 1941) is unsatisfactory for several reasons. It tends to lead to compromise judgements and inhibits the proper development of constitutional law. It is also selective in its application, as it does not apply to pre-1937 legislation or to international treaties (thus in *Crotty v. An Taoiseach* (1987) I.L.R.M. p400. five judgements were given on the constitutionality of the Single European Act). The deletion of the "one judgement" rule has also been recommended by the 1967 Committee on the Constitution and by the Committee on Court Practice and Procedure in their 11th report.

Secondly, the present Article 34.3.2. is amended to allow Courts of Appeal other than the Supreme Court to adjudicate on the constitutionality of any law. While the Court of Criminal Appeal has been validly established (see *The People (Attorney General) v. Conmay* (1975) I.R. 341; *The State (Boyle) v. Neylon* (1937) I.L.R.M. It does not have the power to determine whether a post 1937 law is constitutionally valid. This is at best a minor nuisance, but it could pose a problem if a general Court of Appeal were established (as may very well happen) in the future in order to relieve the Supreme Courts burden. Under our proposals (see sections 5 and 6), the Oireachtas could confer such powers on Court of Appeal if it saw fit to do so.

We also considered inserting a completely new clause which would regulate the manner of judicial appointments by say, creating a form of Judicial Commission whose task it would be to select suitable candidates and present a shortlist to the Government. While we are of opinion that possible new methods of judicial appointments merit consideration, we felt that it would be wrong to tie the hands of the Government and Oireachtas by inserting such a clause.

ARTICLE 12. THE COURTS

SECTION 1 AND 2

- "1. Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and save in such special and limited cases as may be prescribed by law, shall be administered in public.*
- 2. Nothing in this Constitution shall operate to invalidate the making of an adoption order, or the exercise of limited functions and powers of a judicial nature in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, by reason only that such person or body or persons is not a judge or a court appointed or established as such under this Constitution."*

These sections replace Article 34.1 and Article 37 of the 1937 text. The phraseology of the existing Article 37 is modified so as to encompass the purpose of Article 37.2 which was added to the Constitution in the Sixth Amendment to safeguard adoption orders from Constitutional challenge.

ARTICLE 12 SECTIONS "3, 4 AND 5." THE COURTS

- "3. The Courts shall comprise Courts of First Instance and Courts of Appeal including a Court of Final Appeal.*
- 4. The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal, and shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law. The jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any other Court of First Instance.*
- 5. The Court of Final Appeal shall be called the Supreme Court. The President of the Supreme Court shall be called the Chief Justice. The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law provided that no law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution. The decision of the Supreme Court shall in all cases be final and conclusive."*

Section 3 sets out, for the first time, a Constitutional basis for the existence of Courts which are not Courts of First Instance other than the Supreme Court. The Court of Criminal Appeal has been held to be constitutionally established but apart from the Supreme Court and the High Court, the 1937 text only authorised the establishment of other Courts of First Instance of local and limited jurisdiction with a right of appeal as determined by law.

It is considered desirable that the Court of Criminal Appeal and a possible Civil Appeal Court between the High Court and the Supreme Court should have a specific constitutional basis.

Section 4 is amended from the 1937 text to authorise the Court of Criminal Appeal and other possible Courts of Appeal to decide on the constitutionality of a Statute. At present only the High Court and Supreme Court may do so.

ARTICLE 12
SECTIONS 6 to 9

"6. Every person appointed a judge under this Constitution shall make and subscribe the following declaration:

"In the presence of Almighty God, I do solemnly and sincerely promise and declare that I will duly and faithfully and to the best of my knowledge and power execute the office of Chief Justice (or as the case may be) without fear or favour, affection or ill-will towards any man, and that I will uphold the Constitution and the laws. May God direct and sustain me."

This declaration shall be made and subscribed by the Chief Justice in the presence of the President, and by each of the other judges of the Supreme Court, the judges of the High Court and the judges of every other Court in the presence of the Chief Justice or the senior available judge of the Supreme Court in open court, and the declaration shall be made and subscribed by every judge before entering upon his duties as such judge, and in any case not later than ten days after the date of his appointment or such later date as may be determined by the President. Any judge who declines or neglects to make such declaration as aforesaid shall be deemed to have vacated his office.

7. The judges of the Supreme Court, the High Court and all other Courts established in pursuance of this Article shall be appointed by the President. All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law. No judge shall be eligible to be a member of the Oireachtas or to hold any other office or position of emolument. The remuneration of a judge shall not be reduced during his continuance in office.

8. A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolution passed by Dail Eireann calling for his removal. The Taoiseach shall duly notify the President of any such resolution passed by Dail Eireann and shall send him a copy of every such resolution certified by the Chairman of Dail Eireann. Upon receipt of such notification and of copies of such resolutions, the President shall forthwith, by an order under his hand and Seal, remove from office the judge to whom they relate.

9. Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters:

(i) the number of judges of the Supreme Court, and of the High Court, the remuneration, age of retirement and pensions of such judges;

(ii) the number of the judges of all other Courts, and their terms of appointment;

(iii) the Constitution and organisation of the said Courts, the distribution of jurisdiction and business among the said Courts and judges and all matters of procedure;

shall be regulated in accordance with law."

Comment:

The sections restate the remaining provisions of Article 34, 35 and 36.

ARTICLE 13.

TRIAL OF OFFENCES

1. *No person shall be tried on any criminal charge save in due course of law. All crimes and offences prosecuted in any court constituted under Article 12 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose.*
2. *Minor offences may be tried by courts of summary jurisdiction.*
3. *Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order. The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.*
4. *Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion. A member of the Defence Forces not on active service shall not be tried by any courtmartial or other military tribunal for any offence cognisable by the civil courts unless such offence is within the jurisdiction of any courtmartial or other military tribunal under any law for the enforcement of military discipline.*
5. *Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury. The provisions of Article 12 of this Constitution shall not apply to any tribunal set up under section 4 of this Article.*
6. *Treason shall consist only in levying war against the State, or assisting any State or person or inciting or conspiring with any person to levy war against the State, or attempting by force of arms or other violent means to overthrow the organs of government established by this Constitution, or taking part or being concerned in or inciting or conspiring with any person to make or to take part in any such attempt."*

These Sections reproduce in large part the provisions of Articles 38 and 39 of the present Constitution. We saw no reason to alter the provisions dealing with trial in due course of law; jury trial; or treason.

We also make provision for the creation of Special Criminal Courts and military courts. The latter, as before will only have jurisdiction over persons actually subject to military law.

However, we do make one important change as far as the Special Criminal Court is concerned. At present the effect of Article 38.6 is that the traditional constitutional guarantees in respect of judicial independence, removal of judges etc. do not apply to members of the Special Criminal Court (although the Supreme Court has ingeniously circumvented this by saying that the right to trial in due course of law implies certain minimum standards of fairness and impartiality as far as the administration of criminal justice is concerned: see Eccles v. Ireland (1985) I.R. p545. This means that by virtue of s. 39 of the Offences against the State Act, 1939, military officers could be appointed to the Special Criminal Court, and the Constitutionality of this has been upheld: In McCurtain (1941) I.R. p83. Indeed, it is only since 1972 that ordinary judges have been appointed to the Special Criminal Court; prior to this it was composed entirely of military personnel. Our amendment will exclude that possibility, with the result that the only departure from standard judicial practice is that the courts will operate without a jury. The second sentence of Section 4 precludes the appointment of laymen, lawyers, army officers or other non-judicial persons to be judges in the Special Criminal Courts.

ARTICLE 14

INTERNATIONAL RELATIONS.

1. *Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality and affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination. Ireland*

accepts the generally recognised principles of international law as its rules of conduct in its relations with other States.

2. *The executive power of the State in or in connection with its external relations shall be exercised by or on the authority of the Government, and the exercise of such power may be regulated by the provisions of any international agreements to which the State is a party and which has been approved by Dail Eireann.*

Every international agreement to which the State becomes a party shall be laid before Dail Eireann. The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dail Eireann. This section shall not apply to agreements or conventions of a technical and administrative character.

4. *No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.*
5. *The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th. day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th. day of March, 1957), and may ratify the Single European Act (signed on behalf of the members of the Communities at Luxembourg on the 17th. day of February, 1986 and the Hague on the 27th. day of February 1986). No provision of this Constitution invalidates any international agreements or laws enacted, acts done or measures adopted by the State which are deemed by Dail Eireann to be consequent upon laws enacted, acts done or measures adopted by the Communities, or institutions thereof, or prevents them from having the force of law in the State."*

These sections reproduce the substance of the present Article 29. We do, however, make several important changes to take account of the Supreme Court's decision in Crotty v. An Taoiseach (1987) I.L.R.M. p400.

The first change is contained in Article 14.2 where a new sentence provides that the executive power of the State "may be regulated by the provisions of any international agreement to which the State becomes a party and which has been approved by Dail Eireann". This clause blocks off any potential challenges to other international agreements in the light of Crotty's case by expressly providing that the Government's power to conduct external relations may be regulated by international treaty. This, of course, was why Title 111 of the Single European Act was vulnerable to challenge, because (said the Supreme Court majority) it had the effect of restricting the Government's power to conduct external affairs.

Crotty is not quite perhaps as far-reaching as it was feared by some, as surprisingly few international agreements actually impinge on the State's power to conduct foreign affairs. For instance, it is difficult to see how Ireland's adherence to the General Agreement on Tariffs and Trade (GATT) is affected, as that agreement, although an international agreement, does not relate to the conduct of foreign affairs in the sense envisaged by Crotty's case. However, Crotty clearly has implications for the Anglo-Irish Agreement. That Agreement does relate to the conduct of foreign affairs; and the Government's freedom to act is arguably restricted in the same manner as under Title 111. It is only right that we avail of the opportunity, which, of course, should have been taken by the present Government with the referendum on the Single Act, to close off this possibility.

The second set of amendments deal with the wording of the present Article 29.4.3 (which allows us to join the European Community and to ratify the Single Act). It is perhaps not sufficiently realised that it was the change of wording at the Committee Stage of the Third Amendment of the Constitution Bill, 1972, which ultimately produced the Crotty decision. As originally drafted, it gave constitutional immunity to acts, measures etc. which were "consequent upon" (i.e. in some way resulted from) our Community membership. However, at the insistence of Dr. Fitzgerald, then Fine Gael Foreign Affairs spokesman (see Dail Debates, cols 258 - 394. (25 January 1972), the Fianna Fail Government gave way, and we now have the word "necessitated" instead of "consequent upon". And as pointed out by the Supreme Court in Crotty, this means that the immunity from constitutional attack will only apply to domestic legislation which has been enacted on foot of an obligation under Community law. Since by definition an amendment of the Treaty of Rome

cannot (by virtue of Article 236 of that Treaty) be a matter of legal obligation (as all member States must consent to this change), amendments such as the Single Act do not enjoy an immunity from constitutional attack. Similar reasons - which are too complex and technical in this context - preclude us from ratifying other Community treaties such as the Community Patent Convention. Our amendment in essence goes back to the original wording of the 1972 Bill ("consequent on membership of the Community") and thus avoids the

ARTICLE 15

AMENDMENT OF THE CONSTITUTION

1. Any provision of this Constitution may be amended, whether by way of amendment or repeal, in the manner provided by this Article. Every proposal for an amendment of this Constitution shall be initiated in Dail Eireann as a Bill and shall upon having been passed be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum and every such Bill shall be expressed to be "An Act to amend the Constitution". A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal.
2. A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of this Article and shall be duly promulgated by the President as a law.
3. Every proposal for an amendment of this Constitution which is submitted by Referendum to the decision of the people shall, for the purpose of this Article be held to have been approved by the people, if upon having been so submitted, a majority of the votes cast at such Referendum shall have been cast in favour of its enactment into law. Every citizen who has the right to vote at an election for members of Dail Eireann shall have the right to vote at a Referendum. Subject as aforesaid, the Referendum shall be regulated by law.
4. It shall be lawful for the Taoiseach, from time to time as occasion appears to him to require, to cause to be prepared under his supervision a text (in both the official languages) of this Constitution as then in force embodying all amendments theretofore made therein. A copy of every text so prepared, when authenticated by the signatures of the Taoiseach and the Chief Justice, shall be signed by the President and shall be enrolled for record in the office of the Registrar of the Supreme Court and the copy so signed and enrolled which is for the time being the latest text so prepared shall, upon such enrolment, be conclusive evidence of this Constitution as at the date of such enrolment and shall for that purpose supersede all texts of this Constitution of which copies were previously so enrolled."

These Sections restate the present provisions of the Constitution dealing with its amendment and publication and other related matters.

TABLE OF CONCORDANCE BETWEEN PROPOSED REVISION
OF CONSTITUTION AND THE 1937 TEXT

PROVISION OF 1937 TEXT	CORRESPONDING PROVISION OF REVISED TEXT
Preamble	Not reproduced except for some phrases of second last paragraph
<u>The Nation</u>	
Article 1.....	Incorporated in new preamble Article 1.2
Article 2.....	Included in Article 1.2
Article 3.....	Restated in Article 1.2
<u>The State</u>	
Article 4.....	Amended and included in Article 1.1
Article 5.....	Amended and included in Article 1.1
Article 6 Sect. 1 and 2	Amended and recited in the Preamble
Article 7.....	Deleted
Article 8 Sect. 1,2 and 3	Revised and included in Article 1.3
Article 9 Sect. 1	Amended and included in Article 1.6
Article 9 Sect. 2	Deleted
Article 10 Sect 1,2,3 and 4	Amended and repeated as Article 1.5
Article 11.....	Repeated as Article 9.2
<u>The President</u>	
Article 12.1.....	Repeated as Article 4.1
Article 12.2.....	Amended and included in Article 4.2
Article 12.3.3	Repeated as Article 4.5
Article 12.4.....	Amended and included in Article 4.3
Article 12.5.....	Included in Article. 4.2
Article 12.6.....	Repeated as Article 4.7
Article 12.7.....	Deleted
Article 12.8.....	Repeated as Article 4.6
Article 12.9.....	Included in Article 4.8
Article 12.10.....	Amended and included in Article 4.17
Article 12.11.....	Included in Article 4.8
Article 13.1.....	Repeated as Article 4.11
Article 13.2.....	Amended and repated as Article 4.12
Article 13.3.....	Deleted (Article 8.2 suffices)
Article 13.4 and 13.5.....	Repeated as Article 4.9
Article 13.6.....	Amended and included in Article 4.10
Article 13.7.1 and 13.7.2..	Included as Article 4.13
Article 13.7.3.....	Deleted
Article 13.8.....	Repeated as Article 4.16
Article 13.9 and 13.10	Repeated as Article 4.1
Article 14.1.....	Repeated as Article 6.1
Article 14.2.....	Amended and included in Art. 6.2
Article 14.3.....	Included in Article 6.2
Article 14.4.....	Repeated as Article 6.3
Article 14.5.1..	Repeated as Article 6.4
Article 14.5.2..	Repeated as Article 6.5
<u>The Parliament</u>	
Article 15.1.1. and 2..	Amended and included in Article 3.1
Article 15.1.3...	Deleted

Article 15.2.....	Amended and included in Article 3.2
Article 15.3.....	Deleted
Article 15.4.....	Amended as Article 3.3
Article 15.5.....	Extended and included in Article 3.4
Article 15.6.....	Repeated as Article 3.5
Article 15.7.....	Deleted (but provided for in Article 7.16)
Article 15.8.....	Provided for in Article 7.10
Articles 15.9 and 15.10	Repeated and amended as Article 7.11
Article 15.11...	Repeated and amended as Article 7.12
Article 15.12...	Repeated and amended as Article 7.13
Article 15.13....	Repeated and amended as Article 7.14
Article 15.15...	Repeated and amended as Article 7.15

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Article 16.1.1...	Repeated as Article 7.5
Article 16.1.2...	Repeated as Article 7.6
Article 16.1.3...	Deleted as unnecessary
Article 16.1.4...	Repeated as Article 7.6
Article 16.2.....	Repeated as Article 7.1
Article 16.3.1...	Deleted (Repetitive)
Article 16.4.1...	Included in Article 7.7
Article 16.4.2...	Included in Article 7.7
Article 16.5.....	Included in Article 7.7
Article 16.6.....	Repeated as Article 7.8
Article 16.7.....	Repeated as Article 7.9
Article 17.1 and 17.2..	Repeated as Article 7.16

The Seanad

Article 18.....	Deleted
Article 19.....	Deleted
Article 20.....	Deleted

Money Bills

Article 21.....	Deleted
Article 22.....	Deleted
Article 23.....	Deleted
Article 24.....	Deleted

Signing and Promulgation of Laws

Article 25.1 and 25.2.1....	Amended and included in Article 8.1
Article 25.2.2....	Deleted
Article 25.3.....	Deleted
Article 25.4.1 and 25.4.2..	Included in Article 8.2
Article 25.4.3 and 25.4.4..	Amended and included in Article 8.3
Article 25.4.5....	Repeated as Article 8.4
Article 25.4.6....	Deleted
Article 25.5.1 and 25.5.2..	Repeated as Article 15.4
Article 25.5.3..... Deleted	

Reference of Bills to the Supreme Court

Article 26 Preface....	Deleted
Article 26.1....	Repeated as Article 4.15
Article 26.2.1	Repeated and included in Article 4.16

Article 26.2.2.
Article 26.3....

Deleted
Included in Article 4.16

Reference of Bills to the People

Article 27.....

Deleted

The Government

Article 28.1..
Article 28.2..
Article 28.3.1 and 28.3.2
Article 28.3.3.....
Article 28.4.1.....
Article 28.4.2.....
Article 28.4.3.....
Article 28.5.....
Article 28.6....
Article 28.7.1..
Article 28.7.2..
Article 28.8.....
Article 28.9....
Article 28.10..
Article 28.11.1..
Article 28.11.2..
Article 28.12.....

Repeated as Article 10.2
Included in Article 10.1
Repeated as Article 7.17
Amended and Repeated as Article 7.18
Included in Article 10.1
Repeated as Article 10.3
Repeated as Article 10.4
Repeated as Article 10.5
Repeated as Article 10.6
Included in Article 10.7
Amended and included in Article 10.7
Included in Article 10.7
Repeated as Article 10.8
Included in Article 10.9
Included in Article 10.9
Repeated as Article 10.10
Repeated as Article 10.11

International Relations

Article 29.1, 29.2 and 29.3..
Article 29.4.1....
Article 29.4.2....
Article 29.4.3....
Article 29.4.4...
Article 29.5.....
Article 29.6.....

Repeated as Article 14.1.
Amended and included in Article 14.2
Deleted
Included and amended in Article 14.5
Included and amended in Article 14.5
Included in Article 14.3
Included in Article 14.4.

The Attorney General

Article 30.....

Repeated as Article 11

The Council of State

Article 31.....
Article 32.....

Repeated as Article 5
Repeated as Article 5.7

The Comptroller and Auditor General

Article 33.1 and 33.2
Article 33.3.....
Article 33.4.....
Article 33.6.....

Amended and included in Article 9.1
Repeated as Article 9.3
Repeated as Article 9.4
Repeated as Article 9.5

The Courts

Article 34.1.....
Article 34.2.....
Article 34.4.1.....
Article 34.3.2.....

Repeated as Article 12.1
Amended and included in Article 12.4
Included in Article 12.5
Amended and included in Article 12.5

Article 34.3.3.....	Deleted
Article 34.3.4.....	Included in Article 12.4
Article 34.4.1.....	Included in Article 12.5
Article 34.4.2.....	Included in Article 12.5
Article 34.4.3.....	Included in Article 12.5
Article 34.4.4.....	Included in Article 12.5
Article 34.4.5.....	Deleted
Article 34.4.6.....	Included in Article 12.5
Article 34.5.....	Repeated as Article 12.6
Article 35.2, 35.2 and 35.3...	Included in Article 12.7
Article 35.4.....	Included in Article 12.8
Article 35.5.....	Included in Article 12.7
Article 36.....	Repeated in Article 12.9
Article 37.....	Included in Article 12.2 and 12.3

Trial of Offences

Article 38.1.....	Included in Article 13.1
Article 38.2.....	Repeated in Article 13.2
Article 38.3.....	Repeated in Article 13.3
Article 38.4.....	Repeated in Article 13.4
Article 38.5.....	Included in Article 13.5
Article 38.6.....	Amended and included in Article 13.5
Article 39.....	Repeated as Article 13.6

Fundamental Rights

Article 40.1.....	Included in Article 2.1
Article 40.2.1.....	Included in Article 2.1
Article 40.2.2.....	Deleted
Article 40.3.1...	Included in Article 2.2
Article 40.3.2	Included and extended in Article 2.2 and 2.4
Article 40.3.3	Included in Article 2.2
Article 40.4.1	Included in Article 2.3
Article 40.4.2	Included in Article 2.3
Article 40.4.3	Deleted
Article 40.4.4	Deleted
Article 40.4.5	Deleted
Article 40.4.6	Included in Article 2.3
Article 40.5	Repeated as Article 2.6
Article 40.6	Amended and included in Article 2.7

The Family

Article 41.1.1 and 41.1.2	Amended and included in Article 2.8
Article 41.2	Deleted
Article 41.3.1	Amended and included in Article 2.8
Article 41.3.2	Deleted
Article 41.3.3	Deleted
Article 42.1, 42.2 and 42.3.1	Amended and repeated as Article 2.9
Article 42.3.2	Included in Article 2.9
Article 42.4	Deleted but partially repeated in Article 2.9
Article 42.5	Included in Article 2.10

Property

Article 43.1.1	Deleted
Article 43.1.2	Included in Article 2.5

Article 43.2.1

Amended and included in Article 2.5

Religion

Article 44.1

Deleted

Article 44.2.1

Included in Article 2.11

Article 44.2.2

Included in Article 2.11

Article 44.2.3

Included in Article 2.11

Article 44.2.4

Repeated as Article 2.11

Article 44.2.5

Repeated as Article 2.11

Article 44.2.6

Deleted

Directive Principles of Social Policy

Article 45

Deleted

Amendment of the Constitution

Article 46.1 to 46.4

Amended and included in Article 15.1

Article 46.5

Repeated as Article 15.2

Article 47.1

Included in Article 15.3

Article 47.2

Deleted

Article 47.3

Included in Article 15.3

Article 47.4

Included in Article 15.3

Article 48

Deleted

Article 49

Deleted

Article 50.1

Repeated as Article 8.5

Article 50.2

Deleted