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Selecting Irish Government Ministers: An Alternative Pathway?

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Introduction

When the critical illness of the ‘Celtic tiger’ became plainly visible in 2008, a long-running debate on institutional reform in Ireland was given added vigour.¹ One of the oldest targets of reformers has been the single transferable vote system of proportional representation, which allegedly promotes clientelistic politics. Thus, for example, Garret FitzGerald has argued that an electoral system based mainly on single-member districts would relieve deputies of a great deal of their constituency work and leave them freer to concentrate on their legislative roles (FitzGerald, 2008). The electoral system has also been criticised severely by an experienced government minister (Dempsey, 2010) and, in a more indiscriminating way, by a former university president (Walsh, 2010). As one ex-minister put it, the present system ‘almost ensures that a broad range of the best brains and achievers in the country will never see the inside of Leinster House, much less the Cabinet room’ (Hussey, 2009).

To the extent that proposals of this kind are motivated by a desire to broaden the channel of recruitment to ministerial office, they are unlikely to deliver dramatic results. First, comparative evidence has shown that constituency workloads under other electoral systems continue to be formidable, and raises questions about the alleged positive impact of electoral reform (Gallagher, 1987, 2005; Gallagher and Komito, 2010; Farrell, 2010). Second, the focus on elections to the Dáil as the only route to ministerial office is misplaced: the closed systems in the United Kingdom and especially in Ireland are striking deviations from

¹ The debate was stimulated initially by the work of an active think-tank, TASC (Think-tank for Action on Social Change); see Hughes et al, 2007, and www.tascnet.ie; for the report of its Democracy Commission, see Harris, 2005, also available at www.tascnet.ie/upload/Democratic_Renewal_final.pdf [accessed 29 July 2010]. The debate was also carried forward by a new ‘Political Reform’ group; see politicalreformireland.wordpress.com.

the more open ministerial recruitment system typical of continental Europe.

The eccentric assumption that the only route to government office is through the lower house of parliament places a heavy burden on perceptions of the role of Dáil deputy: TDs are expected to be not just representatives and legislators, but also potential ministers, a load placed on them not by the electoral system but by the ministerial recruitment formula. The object of the present article is to explore this peculiar feature of the Irish experience. Its first and second sections look at the comparative position, initially from a constitutional perspective and then from a behavioural one, setting in context the unique system of ministerial recruitment in Ireland. The third and fourth sections examine Irish provisions for ministerial appointment in this area, first at a constitutional level and then as applied in practice. The final section assesses the prospects for change.

The comparative constitutional position

The constitution of Ireland firmly endorses the principle of governmental answerability to parliament, a core feature in other European states: governments can remain in office only for so long as they enjoy the confidence of the lower house (see Gallagher, Laver and Mair, 2006: 40-54). Elsewhere, there may be additional conditions. In some bicameral systems, such as that of Italy, there is a requirement also of answerability to the upper house; and in semi-presidential systems, such as that of France, the President, too, can independently appoint and dismiss governments and ministers. But in all of these cases the lower house of parliament plays a critical role in the appointment of a government: a new government can survive only if it has the endorsement of the lower house, or at least its passive support (in that a majority will not vote against it).

There are obvious alternatives to this principle. The outstanding one is the presidential system of the United States and of Latin American countries: the cabinet is appointed by the President,

but is not answerable to parliament. Thus, 'divided government' or 'cohabitation' of a kind inconceivable in Europe is possible. A cabinet appointed by a Republican President can survive even if congress is controlled by the Democrats (as under the latter years of the Bush presidency, 2007-09), and one appointed by a Democratic President can work with a congress controlled by the Republicans (as under the Clinton presidency, 1995-2001). Congress can make the life of such administrations difficult, but cannot bring them to an end. Switzerland is an unusual mixture: the federal government is elected by the lower house (as elsewhere in Europe), but it cannot be dismissed during its fixed four-year term (in practice, Swiss governments since 1959 have always been four-party coalitions enjoying the support of an overwhelming majority of parliamentarians).

The distinction between the presidential and parliamentary systems of government is defined by the separation of powers and functions that lies at its heart, not by the separation of personnel between government and parliament. The presidential system classically precludes dual membership of parliament and government; when Hilary Clinton joined the Obama cabinet, for instance, she had to resign her Senate seat. But the parliamentary system does not imply the opposite: there is no need for government ministers to be parliamentarians. This system does entail attendance by government ministers in the lower house, and their collective answerability to it; but it is not a requirement that they be voting members. On the contrary, separation of personnel is more common than the dual minister-deputy mandate that is taken for granted in Ireland.

The unusual Irish position will become clearer if we look at arrangements in other parliamentary democracies. There are three patterns of relationship between membership of parliament and membership of government in Europe. In the first, and most common traditionally, dual membership is permitted but not required. Most European countries still fall into this category, with cabinets made up of a mixture of parliamentarians and non-parliamentarians. In the second group, one of growing

importance, dual membership is prohibited: cabinet members may not be members of parliament. France, Luxembourg, the Netherlands and Norway are long-standing members of this group, which was joined in 1976 by newly democratic Portugal; two other countries which originally belonged to the first group eventually also prohibited ministers from holding parliamentary seats – Sweden in 1974 and Belgium in 1995.² This leaves two countries isolated in the third, residual category: Ireland and the United Kingdom, each of which requires all cabinet members to be serving parliamentarians, though not necessarily members of the lower house (Bergman et al, 2006: 148-52).

Routes to ministerial office

When we turn to examine the routes to ministerial office that exist in practice, it becomes clear that the most open pattern is represented by the presidential system, where there are few constraints on the president's power of selection. As one study of US practice concluded

... there is no existing corps of notables or functionaries who stand in the wings, ready to assume the cloaks of office when the new government takes power. Instead, the newly elected president puts together his administrative leadership from the vast reservoir of talent that is found in prominent positions in diverse institutions: business, the academy, the professions, and government itself. Prior political service may be important, particularly if it is service to the successful president himself, but it is certainly not a requirement (Mann and Smith, 1981: 213).

Congress, it is true, has a role, in that executive appointments at all levels require approval by the Senate; but this is largely a foregone conclusion, since the Senate has approved 97 per cent of all such appointments (Mann and Smith, 1981: 226) –

² In Belgium, this has been described as a 'sleeping mandate': as in Bulgaria, Estonia and Slovakia, ministers must relinquish their parliamentary roles on assuming office, but may resume them on leaving government (Dowding and Dumont, 2009b: 6).

though we should not ignore the possibility that presidents tailor their nominations, second-guessing the Senate's position.

In parliamentary systems, party politicians play a major role in government even where the constitution does not require ministers to be members of parliament, or where it altogether bans parliamentarians. In pre-war Japan, for instance, where there was no requirement of parliamentary membership, almost half of all ministers were drawn from parliament; under the post-war constitution, which requires only that a majority of ministers be parliamentarians, appointments tend to be made overwhelmingly from the House of Representatives, with some from the second chamber, and a handful from outside parliament (Tomita, Baerwald and Nakamura, 1981: 241). In Spain over the period 1976-95, only 19 per cent of ministers had no prior political experience (Bar, 1997: 133-4). In other European countries though the trend seems to be rather in the opposite direction, with the importance of parliamentary experience diminishing. Thus, in an early study of Italy, Dogan (1981: 192-3) concluded that 'members of government are recruited from among parliamentarians', with few exceptions; but Verzichelli (2009: 89) points out that, over the period 1996-2006, 39 per cent of ministers were 'outsiders', with no parliamentary experience. In Belgium, similarly, Frogner (1997: 91) showed that 82 per cent of cabinet members were also members of parliament in the post-war decades; but Dumont, Fiers and Dandoy (2009: 132) report a big increase in the number of non-parliamentarians appointed ministers since the beginning of the 1990s.

Overall, there has been a considerable level of variation in the background of ministers in Europe. A survey covering the period 1945-84 showed that three quarters of all ministers had been members of parliament before joining the government, but with big differences from country to country. At one extreme were the 'truly parliamentary' types in respect of composition, Ireland and the United Kingdom; at the opposite were the 'semi-parliamentary' types, represented by the Netherlands, Norway,

Sweden, Finland, Austria and France, where the parliamentary route accounted for about two thirds of ministers (in the Netherlands the figure was only 53 per cent). In between were countries such as Germany, Belgium, Luxembourg, Denmark and Iceland, with a smaller but still significant presence of ministers without parliamentary experience (De Winter, 1991: 44-47; for updates, see the various chapters in Dowding and Dumont, 2009a).

The British case is particularly important given its role as a model for so many other states, not least Ireland. At one time, the House of Lords was of great importance as a route to cabinet membership (Pitt's cabinet of 1783 consisted entirely of peers, apart from the prime minister himself, the only MP), and a sizeable representation of peers in the cabinet continued into the twentieth century (Daalder, 1963: 5-10). Only about 15 per cent of the ministers were from non-political backgrounds over the period 1916-58 (computed from Willson, 1959). Unelected ministers are expected to acquire seats in parliament without delay. Thus, for example, in October 1964 Harold Wilson appointed two non-parliamentarians to his cabinet, but one resigned when he failed to win a seat at a by-election three months later.³ The most recent case, in October 2008, was the appointment of Peter Mandelson as Secretary of State for Business, Innovation and Skills; he was appointed to the House of Lords at the same time.

In other Commonwealth countries variants of the Westminster practice are the norm. The second chamber is also a channel to ministerial office in Canada, where the government leader in the Senate is always included in the cabinet; any non-parliamentarians appointed to government are expected to find seats 'within a reasonable time' (Dawson and Dawson, 1989: 44-45). In Australia, where, unlike Canada and the UK, the second

³ The ministers were Frank Cousins, a trade union leader who was elected to the safe Labour seat of Nuneaton on 21 January 1965, and Patrick Gordon Walker, a defeated outgoing MP, who narrowly lost the by-election in Leyton on the same day in a surprise result (*Irish Times*, 22 Jan. 1965).

chamber is elected, appointment through the Senate is not possible in the same way; when outsiders become ministers they must secure election to one or other house of parliament within three months (Hamer, 1996: 74-75). In India, where in practice a non-parliamentary route to cabinet membership is common, ministers must nevertheless secure parliamentary seats within six months (Sisson, 1981: 152). New Zealand is an exception: there is no second chamber, and in effect only parliamentarians may become ministers (Mulgan, 2004: 75-80).

The Irish constitutional position

When we switch to the Irish case, the extent to which practice is even more restrictive than in Britain and other Commonwealth countries becomes immediately obvious; it has been argued that from a comparative perspective Irish heads of government have 'the most limited pool from which to choose their cabinet' (O'Malley, 2006: 319). The notion of ministers as a committee of the Dáil has been embedded since that body's first meeting on 21 January 1919, when the new Dáil constitution provided for a prime minister (*príomh aire*, later to become known as President) and four ministers, all of whom were to be members of the Dáil.⁴ Later changes in the Dáil constitution (on 1 April 1919, when the maximum size of the cabinet was expanded from five to ten, and 23 August 1921, when it was reduced to seven) left this position unaltered. All members of the Provisional Government which held office from 16 January to 6 December 1922 were also members of the Dáil.⁵

⁴ For the official Irish text of the constitution, see *Dáil debates*, F, 21 Jan. 1919, 13; for an English translation, Farrell, 1969: 135-6 and 1971: 86-7.

⁵ The Provisional Government was established under article 17 of the Anglo-Irish Treaty, which did not define the manner in which it was to be constituted. The official listing of Irish governments identifies the following: (1) First Cabinet, 21 Jan. 1919; (2) Second Cabinet; 1 Apr. 1919; (3) Dáil Cabinet (Pre-Treaty), 21 Aug. 1921; (4) Dáil Cabinet (Post-Treaty), 10 Jan. 1922; (5) First Provisional Government, 16 Jan. 1922; (6) Second Provisional Government, 16 June 1922; (7) First Executive Council, 6 Dec. 1922, and so on, up to the Eighth Executive Council, 21 July

continued

This strictly parliamentary mode of ministerial recruitment was not entirely a matter of choice. Political realities (in particular, the fact that the Dáil had to operate against the authority of the *de jure* state) meant that the parliamentary route was one of the few channels through which an effective and democratically legitimated counter-elite could emerge. But this episode also appears to confirm the strength of commitment of the Irish revolutionary elite to parliamentary government (Farrell, 1969: 135; 1971: 83).

Options were widened while the new constitution was being drafted following the Anglo-Irish treaty of December 1921. True, the provisions of the constitution would have to be compatible with the terms of the treaty, and would have to be endorsed by the British Parliament as well as being approved by the Dáil. But the central preoccupation of the British was to protect the position of the crown, and as long as this was secure they were content to tolerate a wide measure of independence as regards the mechanics of political institutions. The constitutional provisions in respect of the composition of government evolved in three stages.

First, a constitutional drafting committee nominally chaired by Michael Collins but otherwise composed of non-parliamentarians was given the task of urgently preparing a new constitutional blueprint in early 1922. Collins, who attended only the first meeting, instructed the committee to produce 'a free democratic constitution' that would break with the past (Kennedy, 1928: 443). The committee cast its net wide in looking for models, and finally presented the government with three drafts. The draft ultimately adopted provided for a mixture

⁵ *contd.* 1937; (15) First Government, 29 Dec. 1937, and so on, up to the present (the 28th Government was formed on 1 May 2008); see National Archives, Taoiseach's Department, Ministerial appointments: summary, 1919-, S 14175 A 1. The post-treaty Dáil cabinet, headed by Arthur Griffith (10 Jan. – 12 Aug. 1922) and then by William Cosgrave (12 Aug. – 6 Dec. 1922) overlapped with the two provisional governments, headed first by Michael Collins (16 Jan. – 22 Aug. 1922) and then by William Cosgrave (25 Aug. – 6 Dec. 1922).

of the British and Swiss models of government formation.⁶ Four members of the government or 'Executive Council', all Dáil deputies, would be responsible for the most 'political' areas and would be collectively answerable to the Dáil: the Uachtarán (President), Tánaiste, Minister for External Affairs and Minister for Finance. Other domestic policy areas would be quarantined from this: they would be the responsibility of other ministers, to a maximum of eight, elected by the Dáil but not themselves members of it (though the Dáil could allow up to two of these to be TDs). These would be nominated by a committee representative of the Dáil, but could also be nominated by 'functional or vocational councils', should such be established; and they would hold office for a fixed, four-year term, regardless of any dissolution of the Dáil. The Executive Council would function as a single collective authority, except in matters relating to external affairs, which would be managed by the core group of four.

Second, following the government's effective endorsement of this draft, the blueprint was further revised by the committee, which made some small but significant changes (dropping External Affairs and Finance as named core ministries, increasing the number of 'extern ministers' who could be Dáil deputies to three, and providing that all terms of office would end with a dissolution of the Dáil). These provisions survived the intense round of negotiations with the British, where the focus was on the issue of the crown, and the draft constitution was finally published on the morning of the general election, 16 June 1922.⁷ Although this innovative document reflected in part the

⁶ This draft (labelled B) was produced by James Douglas and others; for background, see Douglas, 1998: 82-5. Another draft (A) was produced by the acting chair of the committee, Darrell Figgis and others, and a third (C) by two independent minded professors, Alfred O'Rahilly and James Murnaghan. All three drafts made provision for ministers who would not be parliamentarians. For the texts of drafts A and B, see Akenson and Fallin, 1970: II: 57-74 and 74-93; for draft C, Farrell, 1970-71: III: 124-35; and for the text finally forwarded to London, Akenson and Fallin, 1970: III: 41-53.

⁷ Rialtas Sealadach na hÉireann, 1922; United Kingdom, 1922; *Irish Times*, 16 June 1922.

enthusiasm and open-mindedness of those who drew it up, the distinction between two types of minister responded to a particular reality: the need, if at all possible, to find space for anti-Treaty representatives in the government. The implication was that it would be possible to let pro-Treaty ministers get on with managing the constitutional question, while allowing anti-Treaty deputies to hold ministerial office in clearly delimited policy areas on which the Dáil would make separate decisions. This was the kind of coalition for which provision was made in the Collins – de Valera ‘pact’ of May 1922, which provided for an uncontested Dáil election and a government comprising five pro-Treaty and four anti-Treaty ministers, with the President and the Minister for Defence as separate posts (Hopkinson, 1988: 98).⁸

The third stage was the enactment of the new constitution. By the time the draft made its way to the new Dáil for approval in September 1922, political realities had changed. The pact had been abrogated by Collins (who had himself been killed on 22 August) and civil war had broken out. Nevertheless, the thinking behind the original proposal remained strong: Home Affairs Minister Kevin O’Higgins described the provisions for government composition as representing ‘a very real desire to get away from the British Party system’ by distinguishing between the political core, who would be vulnerable to defeat in the Dáil, and the more non-political extern ministers.⁹ The articles on government composition were, however, referred to a Dáil committee, whose recommendations were incorporated in the revised text.¹⁰ These changes, though at first sight innocuous,

⁸ For the text of the pact, see *Dáil debates* S2, 20 May 1922, 479; on the ‘pact’ election, see Gallagher, 1981.

⁹ *Dáil debates* 1, 20 Sep. 1922, cols 487-8.

¹⁰ Chaired by Gerald FitzGibbon, QC, the committee included four members of the pro-treaty Sinn Féin party, three of Labour, one Farmers’ Party deputy and two independents from Dublin University, including FitzGibbon himself. The committee produced a unanimous report, and though, strangely, the report was formally rejected by the Dáil, its provisions were incorporated through a series of amendments; see Committee on Executive Articles (1922) and *Dáil debates* 1, 12 Oct. 1922, cols 1535-75.

had far-reaching effects. The most important was the dropping of the requirement that a certain number of ministers be non-parliamentarians; under the new wording, they might, but need not be, TDs. In addition, the Executive Council was now restricted to an inner grouping of not more than seven nor less than five ministers (including the President and Vice President of the Council and the Minister for Finance), who would be collectively answerable to the Dáil, and others (the extern ministers), who would be appointed on the recommendation of a committee 'impartially representative' of the Dáil, and would serve for the life of the Dáil. The total number of ministers, including those in the Executive Council, continued to be capped at twelve.

The new constitution was hailed for its novelty, for putting unwritten British constitutional provisions into written form, and for experimenting boldly with these. It was described as 'a most exciting political experiment in a most exciting milieu' (Saunders, 1924: 345), and as novel in 'the tendency of its framers to break away from English models' (Kohn, 1932: 271). But in the final version of the constitution the breach with the British model was in reality less dramatic. As Nicholas Mansergh (1934: 166-7) suggested, the original proposals were indeed 'a striking innovation', but by the time they had found their way into the final draft of the constitution 'the vitality of the scheme disappeared'. In the words of Basil Chubb (1970: 181), the original proposal was 'enacted in only an emasculated form'.

Four later constitutional changes had implications for the position of ministers from outside the Dáil. First, an amendment in 1927 (the fifth amendment) increased the maximum size of the Executive Council from seven to twelve. This left the extern minister category theoretically in existence, but made it easier to accommodate all ministers within the Executive Council. As the responsible minister, Kevin O'Higgins, put it 'our experience of the working of the extern Minister idea has led us to think that it is not as valuable a constitutional idea as we once thought it

would be'.¹¹ The measure was adopted following some resistance in the Seanad and criticism in the Dáil, where Labour leader Thomas Johnson argued, not implausibly, that 'this experiment, confessedly an experiment, has not been tried, and whatever value was in it has not had a chance of finding expression', since ministers seemed to see themselves as answerable to the government rather than to the Dáil.¹²

Second, on 13 June 1928 the Dáil considered a further constitutional amendment to loosen up eligibility for ministerial office (this had emerged from the deliberations of a joint committee of the two houses). The proposal would require three members of the Executive Council (the President, Vice President and Minister for Finance) to be members of the Dáil, while the remaining members could be members of either house. The change was opposed by Fianna Fáil on the grounds that, as de Valera argued, 'the Executive Council should be completely composed of members of this House, who have to face their constituents afterwards and would be able to face criticism here'.¹³ A government amendment to the effect that no more than one member of the Executive Council could be a senator was accepted, greatly watering down the original proposal (this became the fifteenth amendment, 1929).

Third, the abolition of the Seanad in 1936 altogether removed the possibility of ministerial appointments from this house (the twenty-fourth amendment, 1936). This left one 'external' route to ministerial office still in existence, at least theoretically: non-parliamentarians could still be appointed ministers (though not members of the Executive Council) if the Dáil so wished.

The fourth change was the new constitution of 1937. This altogether dropped the notion of extern ministers, but increased the maximum size of the government from twelve to fifteen. It

¹¹ *Dáil debates* 17, 1 Dec. 1926, cols 418-20.

¹² *Dáil debates* 17, 1 Dec. 1926, cols 420-22.

¹³ *Dáil debates* 28, 13 Mar. 1929, col. 1293.

reintroduced, in article 28.7.2°, a provision that up to two members of the government might be senators. The Taoiseach, Tánaiste and Minister for Finance were exempted from this: they are required to be Dáil deputies.

Routes to ministerial office in Ireland

When the constitution came into effect on 6 December 1922, the appointment of extern ministers immediately arose as a concrete issue, and the great significance of Dáil membership became clear. This feature of earlier ministerial appointments also characterised even junior appointments.¹⁴ William Cosgrave, who became first President of the Executive Council, nominated the six leading members of his outgoing administration to be members of the Executive Council (bringing its size to the maximum number of seven). This left the Dáil entitled to appoint a committee to nominate a further five. Its freedom of action was curtailed by a suggestion from Cosgrave that the terms of reference of the committee require it to recommend nominees for three ministries: agriculture, fisheries and the post office. The 15-member committee, elected on 8 December, was dominated by the pro-treaty Sinn Féin party with nine members, but it also included two Labour, two Farmers' Party and two independent deputies. It reported unanimously on 14 December, and its recommendations were accepted by the Dáil. Perhaps not surprisingly, the three new ministers were Dáil deputies, and all had been members of the

¹⁴ Earlier junior appointments included three 'directors' of new departments on 2-4 April 1919, and a fourth a little over a year later. Nine non-cabinet ministers were appointed in 1921 and 1922, and 'assistant ministers' also in 1922; all of these were Dáil deputies. The status of junior office holders was regularised in 1924 with the creation of the post of parliamentary secretary, who could be drawn from either the Dáil or the Seanad, and whose numbers were limited to seven. The post was retitled 'minister of state' in 1977, and the maximum number was increased to ten; it was further increased to fifteen (1980), seventeen (1995) and twenty (2007). The actual number dropped below this maximum in 2009, when the Taoiseach asked for the resignation of all ministers of state and reappointed only fifteen. Of the many holders of these posts, though, every one has been a Dáil deputy.

outgoing government: Patrick Hogan continued as Minister for Agriculture and JJ Walsh as Postmaster General; and Fionán Lynch, a minister without portfolio in the outgoing government, was appointed to the new post of Minister for Fisheries.¹⁵ Of the eleven ministers in the outgoing government, only one, Eamonn Duggan, was not appointed to the Executive Council (he was made a parliamentary secretary in 1924).

On 20 September 1923 this process repeated itself: Cosgrave again appointed the same seven ministers to be members of the Executive Council, and he recommended that the local government portfolio be added to the three existing 'extern' ministries, on which a Dáil committee would make a decision. The 15-person committee, elected on 25 September, had an identical political composition to that of 1922. It met and reported on 3 October. When its report reached the Dáil, there was, for the first time, a vigorous debate about the extent to which the spirit of the provisions for extern ministers was violated. Opposition speakers alleged that the decision had been taken in advance by the governing party, with Labour leader Thomas Johnson claiming that 'there was no pretence or no attempt even to consider qualifications'.¹⁶ But as one government deputy bluntly put it, 'What is sauce for the goose is sauce for the gander. To the victors the spoils of war. The Government Party has only done in this case what the high priests who are condemning them ... would do if the same opportunity turned up for them'.¹⁷ Not surprisingly, the three outgoing extern ministers were duly reappointed by the Dáil; a fourth TD, Seamus Bourke, was appointed Minister for Local Government.

¹⁵ In making the formal appointments, constitutional niceties of a kind that were less obvious at the political level were strictly observed. Five official notices appeared: of the appointment of the President, the Executive Council, and, individually, of each of the three ministers; National Archives, Taoiseach's Department, Appointment of First Executive Council, S 8901; and *Iris Oifigiúil* 6 and 14 Dec. 1922.

¹⁶ *Dáil debates* 5, 10 Oct 1923, col. 194.

¹⁷ Cork East Cumann na nGaedheal Deputy Thomas O'Mahony, *Dáil debates* 5, 10 Oct 1923, col. 197.

When the next round of ministerial appointments fell due on 23 June 1927, the constitutional position had changed; the President had the option of proposing extern ministers, but there was no pressure on him to do so. Accordingly, three of the four outgoing extern ministers were promoted to Executive Council status (the fourth, Bourke, was made a parliamentary secretary), and no extern minister was appointed subsequently.

Remarkably enough, despite Fianna Fáil's strong objections to the appointment of senators as ministers, in forming his first Executive Council on 9 March 1932 de Valera included Senator Joseph Connolly, Fianna Fáil leader in the Seanad, as Minister for Posts and Telegraphs, alongside eight Dáil deputies.¹⁸ He repeated this in forming his second government on 8 February 1933, now appointing Senator Connolly to the Department of Lands and Fisheries. But the days of senators in the Irish Free State were almost numbered. On 29 May 1936 the Seanad disappeared from Ireland's constitutional structure, and with it this particular route to ministerial office. De Valera briefly considered reactivating the appointment of extern ministers to allow Senator Connolly to continue in office, but decided against this course of action.¹⁹ With this went Senator Connolly's ministerial post; he left political life to become chairman of the Commissioners of Public Works.

Since then, and under the 1937 constitution, the power to make appointments from the Seanad has been used only twice. The first occasion was in 1957. In forming his new government on

¹⁸ Ironically, this appointment, and de Valera's decision himself to hold the position of Minister for External Affairs (1932-48), brought the Irish Free State back into alignment with practice in other Commonwealth countries (where the prime minister usually held the external affairs portfolio, and the second chamber was usually represented in the cabinet).

¹⁹ De Valera expressed the implausible view that a representative selection committee of the kind required by the constitution could no longer be put together, a view not shared by his officials; but the matter was not pursued; see *Extern ministers: procedure file* (1935), National Archives, Taoiseach's Department, S 8242. Connolly (1996: 388) states that he turned down an offer from a colleague to resign from the Dáil to create a 'safe' seat for him.

20 March, de Valera announced that he would be appointing a defeated Dáil candidate, Sean Moylan, as Minister for Agriculture by first nominating him to the Seanad; the Minister for External Affairs, Frank Aiken, would hold the portfolio in the meantime. This appointment came in for some criticism in the Dáil on 16 May on grounds that it was undemocratic, as Mr Moylan had just lost his seat in the general election, but the appointment easily went through. Following Senator Moylan's death on 16 November 1957 after exactly six months in office, this experiment came to an end.

The second occasion was on 30 June 1981, when Garret FitzGerald, following an identical procedure, announced his intention of appointing Professor James Dooge, an academic who had retired from a long Senate career four years earlier, as Minister for Foreign Affairs. This time, Professor John Kelly, Minister for Industry and Energy, would hold the portfolio until Professor Dooge's nomination to the Seanad took effect. This initiative was opposed by Fianna Fáil on the grounds that it was 'a departure from well settled constitutional practice', as party leader Charles Haughey put it.²⁰ The appointment took place only following a division at the end of a debate that extended over two days. Dr FitzGerald attributed this cultural resistance to the fact that this provision had only been used once before and 'most people had probably forgotten that it existed' (FitzGerald, 1992: 363).

The prospects for reform

The new Irish state began its life with a bold experiment in constitutional innovation by creating the office of extern minister. Like many of the other constitutional innovations of the time, this reflected an original blueprint that showed the influence of both British and continental European (or specifically Swiss) constitutional traditions, as well as responding to political realities of the time (the need to bridge the gulf

²⁰ *Dáil debates* 330, 20 Oct 1981, col. 113.

between the two wings of Sinn Féin). Rather than pursuing the middle ground between the two models, though, the constitution created a hybrid system that was never likely to work. Instead of simply allowing for non-parliamentary membership of the government (the norm in continental Europe), it created a distinction between an inner cabinet of politically sensitive ministries (to be headed by Dáil deputies who would be collectively answerable to the Dáil) and an outer tier of less sensitive ministries (whose incumbents would be selected by but not otherwise dependent on the Dáil).

In this respect, the analysis of the founding fathers was naïve: they believed that stable government would be impossible in the context of proportional representation, and pursued an inclusive formula for ministerial appointments. The resulting compromise between a potentially unstable inner cabinet and a stable outer tier, designed 'to enlist the abilities and services of men who had no party political attachments or who would not cooperate with the political party in power in the Executive Council' (Kennedy, 1928: 444), was never likely to prove workable.

The defects of the new system were clear at an early stage. Kohn (1932: 271-83) highlighted three. First, the distinction between 'political' and 'non-political', or between 'executive' and 'extern' ministers, was 'devoid of any reality in the conditions of the modern state', as all decisions would ultimately be political, especially since they would typically entail expenditure, on which political agreement would be needed.²¹ Second, the fact that extern ministers would enjoy greater security of tenure than their more powerful colleagues in the Executive Council 'must inevitably produce a tense psychological problem'. Third, the mere fact that such ministers would be appointed by parliament rather than by the head of the government would destroy cabinet cohesion. Mansergh (1934: 156-171) agreed with these criticisms: the main problem was the dual nature of the ministry,

²¹ This difficulty had been identified by Justice Minister Kevin O'Higgins in December 1926; *Dáil debates*, 17, 1 Dec. 1926, cols 418-9.

making conflict between two types of ministers likely, and resting on an unsustainable distinction between the political and administrative domains. Experience confirms this view: one of the extern ministers, JJ Walsh, used his constitutional independence to criticise the government on major policy matters (O'Sullivan, 1940: 89).

There has been little discussion since the 1930s of the merits of Ireland's unusual system of ministerial recruitment. The Committee on the Constitution (1967) did not address the issue at all. The Constitution Review Group (1996: 92) considered the possible appointment of non-elected 'executive experts' as ministers, but noted the argument that 'democracy is best served by a situation where the people control the Oireachtas and through the Oireachtas the government', and did not propose any change. The position of the All-Party Oireachtas Committee on the Constitution (2003: 12) was similar; it also considered the creation of a further tier of executive appointments from the Dáil (parliamentary private secretaries on the British model), concluding that 'this proposal merits further consideration'.

There are two obvious obstacles to any kind of reform in this area. The first is the self-interest of Dáil deputies. Given the attractions of ministerial office, especially in the context of the increased professionalisation of political roles, it is only to be expected that those who form the tiny pool from which ministers are drawn (the members of the ruling parties in the Dáil) would resent any attempt to broaden this pool to include even senators, not to mention non-members of the Oireachtas (O'Malley, 2009: 182). It is striking that the constitution drafting committee that initially proposed the introduction of non-parliamentary ministers in 1922 did not include any TDs, and that the committee which effectively neutralised this provision later in the same year consisted entirely of TDs. Second, a deeply embedded ideology has emerged to justify the status quo. This rests on the view, articulated by de Valera in 1929 but often repeated by others on all sides of the Dáil, that all ministers should be Dáil deputies answerable to the electorate. This view

conflicts with the experience of other democracies, as described above. It also conflicts with first principles of democratic theory: it is far from clear why the minister responsible for the formation and implementation of Irish foreign policy should be especially answerable to 9,845 voters in Cork city, or why 7,468 voters around Clondalkin should have a particular influence over the minister responsible for the state's entire health service.²² But political cultural values need not have a rational basis, and absence of logic is unlikely to undermine TDs' commitment to the belief that they alone should be entitled to be ministers.

It is not clear that merely *permitting* non-parliamentarians to be appointed to government would have much impact, given the nature of Irish elite political culture. If, however, the constitution were to be changed to *require* ministers to be non-parliamentarians, two important consequences would follow. First, the door would be open to the appointment of political and non-political figures who occupy particular representative positions in civil society or who possess special skills that would be valuable in a cabinet, a particularly important consideration at a time of economic crisis. This would not, of course, prohibit Dáil deputies from assuming ministerial office, and presumably talented former parliamentarians would continue to dominate the cabinet in Ireland, as they do elsewhere. Second, by forcing TDs appointed to ministerial office to resign their Dáil seats, it would greatly strengthen the position of the Dáil. On the government side, in particular, there would be a much larger set of Dáil deputies free to focus on the legislative process and to develop leadership skills in this area (Van der Hulst, 2000: 48).

Abolition of the dual mandate would have certain side effects that would have to be addressed. For example, if a large number of newly elected Dáil deputies were forced to resign their seats to

²² These figures refer to the quota in Cork South Central, the constituency of Foreign Minister Micheál Martin (who actually won 11,226 first preference votes in the 2007 general election), and in Dublin Mid-West, the constituency of Health Minister Mary Harney (with 4,663 votes in the general election).

become ministers this would immediately create a set of casual vacancies, which under the current system would have to be filled by a series of by-elections. But there are several alternatives that would eliminate the need for by-elections – which in any event are not compatible with proportional representation.²³ Even without going as far as moving to other electoral formulas such as the list system, provisions could be made for replacement of resigning TDs by substitute candidates nominated at the time of each general election (as in Irish elections to the European Parliament), or by a recount of the further preferences of the candidate vacating the seat (as in Malta).

Conclusion

Appointments to the government from outside the Dáil have, then, been of little significance in Ireland, and ministers emerging from the Seanad have not been assisted by the perceived modest prestige of that chamber (Chubb, 1974: 3). There is nevertheless a case for constitutional reform that would extend the pool of potential ministerial talent by aligning the Irish political system more closely with the European model of ministerial selection. This is not to undervalue the contribution of the many distinguished Irish ministers whose management and political skills enable them to perform effectively in a range of different departments, and who would continue to do so under changed ministerial selection rules. But overall ministerial effectiveness would be likely to be enhanced by some reduction in the burden of Dáil and constituency representation, and by opening the door to ministerial office to a much wider number of potential appointees.

It would be unfair to dismiss the idea of non-parliamentary ministers on the basis of the experience of the 1920s: that early provision was never properly tested, but it was in any case inherently flawed. Aside from its obvious technical defects, it has been rightly criticised as conflicting with democratic theory,

²³ For a discussion, see Gallagher, 1996.

since under the original scheme extern ministers would not be answerable to anyone (Mansergh, 1934: 165-6). But that argument should not be confused with the contemporary dismissal of non-parliamentary ministers on the same grounds: they would and should, as elsewhere, be answerable to the Dáil.

It would be a mistake to assume that institutional reforms of the kind discussed in this article would act as a panacea for Ireland's political ills, much less its economic problems. A more open recruitment system would not necessarily restore faith in underperforming government. Furthermore, 'outside' ministers would be likely to encounter particular problems arising from their parliamentary and political inexperience, given that much of their work would have to be conducted in the Dáil chamber, resulting in further management issues for the head of government (Dowding and Dumont, 2009b: 7). But, in the long term, there is a case for going back to the broad-minded perspective of the founders of the state and for lifting the restrictive and damaging barriers that lie in the way of recruitment to ministerial careers in government.

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