

The Constitution and Legislation: the making and changing of laws

Dr David Kenny

The process of making and changing laws is fundamental to our system of government. In this paper, my aim is to explain the process by which laws are made and changed, as empowered and restrained by the Constitution.

The Power to Make Laws, Granted and Constrained by the Constitution

The Constitution both grants the power to make law and limits and constrains that power. Article 15.2.1 of the Constitution gives a broad grant of power to the Oireachtas – and only the Oireachtas – to make law. The Oireachtas is presumptively entitled to make whatever laws it wishes, whenever it wishes, on whatever topics, and in whatever form. In short, the Oireachtas can make new law or change any existing law at any time. However, the Constitution does not grant the Oireachtas unlimited power in respect of lawmaking. The Oireachtas must act make law *in accordance with the Constitution* and must not *violate the Constitution*. Article 15.4.1 says that the Oireachtas should not enact any law which is in any respect unconstitutional. Anything that would violate the Constitution cannot be done by law, unless the Constitution is first changed in order to enable it.

The Constitution restrains the making of laws in several ways. The Oireachtas must:

1. Make laws in accordance with the procedures set out in the Constitution;
2. Obey specific limitations. For example, the Constitution states expressly that the Oireachtas cannot make criminal something lawfully done in the past, or provide for the death penalty for crimes;
3. Obey limits that are inferred from broader constitutional language. For example, the Oireachtas cannot infringe constitutional rights, or interfere with the powers and function of the other organs of the state, such as the judiciary.

We will return to how these restraints operate in practice below.

How to make and change the law

The Oireachtas is defined in Article 15.1 of the Constitution, and it has three parts: Dáil Éireann, the people's house of parliament, elected by all citizens of eligible age; Seanad Éireann, the consultative chamber, primarily elected indirectly by other political representatives, with several University representatives and Taoiseach's nominees; and the President, the non-executive head of State, who is formally part of the legislative branch. The President has a small but essential role in the lawmaking process.

The Constitution sets out the broad requirements for how a law is to be made: it must be passed by both Houses by a majority vote, and then signed by the President. This is essential, and these steps must be taken in order for any bill – a draft law – to become an act – an enforceable piece of legislation. But as to how this should happen – how the Houses of the Oireachtas should create, debate and change a bill – the Constitution says little. It says, in Article 15.10, that the Oireachtas can make its own rules to decide how it discusses and votes on laws. It is these Oireachtas-made rules – called the Standing Orders – that direct the legislative process. In theory, they could be altered significantly at any time by the Oireachtas, but the rules we use are based on conventional and traditional practices

that date from the era of the British parliament in Westminster, and do not frequently undergo radical change.

Generally, a bill can be first introduced in either House of the Oireachtas, the Dáil or the Seanad. It is usual for bills to begin in the Dáil, but introduction of a bill in the Seanad has been preferred by some legislators for its often more detail-oriented and sedate discussion. For our purposes, we will assume that a certain bill begins in the Dáil. Here, the Bill will go through a five-stage process.

The first stage is the First Reading of the Bill. It is merely a formality, where the title of the Bill is read out, and copies are circulated. There is no debate at this stage, and it is usually done immediately before the next stage.

The second stage is known as the Second Reading, which is a debate on the broad merits of the Bill. Typically, the minister in charge of the relevant area presents the Bill to the House. Other government and opposition parliamentarians will then respond and comment, debating the principles underlying the Bill, suggesting changes or expressing objections. It is less about the detail of the legislation as about its general principles. When the debate is concluded, there is a vote of the House to determine if it should progress to the next stage.

If the Bill passes the second stage, it moves onto the Committee Stage. It is sent to a Committee of the House, which will go over the Bill section by section, and lots of suggestions and amendments are proposed. This is usually done by a Select Committee of the Dáil, a small group of parliamentarians who consider bills and policies in a particular area, eg the Committee on Justice and Defence. It can also be a Committee of the whole House, where every member of the House can contribute. This is more common in the Seanad. This stage is designed to probe the details of the Bill and find ways to improve it, clearing up inconsistency or imprecisions, etc. The Bill could change significantly in this stage of the process, and Committees have a broad power of amendment, limited only by the fact that proposed change must relate to the subject matter of the Bill approved at the Second Stage.

Some time later, once the Bill has passed through the Committee, it is then returned to the whole House in the fourth stage, known as the Report Stage. Here, there is a detailed debate on the terms of the Bill as amended by Committee before the whole House. More amendments can be made and all members can offer amendments as long as these have not already been rejected at the Committee Stage.

When this stage is concluded, there is – usually immediately – a Final Stage debate. This is usually short and a formality, but is very important in principle because it ends with the members of the House voting to accept or reject the Bill, using electronic buttons in their seats. The Bill is then passed or rejected.

If the Bill is passed, it moves on to the Seanad, where it undergoes the same five stages again in that House. However, the Seanad's role is essentially advisory; while the Constitution allows the Seanad to delay a bill for a short time, it has no power to veto. The Seanad has 90 days (or longer if the Dáil agrees) to consider the Bill and either: pass the Bill;

reject the Bill; or return it to the Dáil with amendments. If the Seanad offers amendments, the Dáil can either accept them or reject them. Similarly, if the Seanad rejects the Bill, the Dáil can overrule the Seanad and deem the Bill passed. In any event, it is very rare that the Seanad rejects a bill.

When the Bill has passed through both Houses, it is sent to the President, who must decide within 7 days to either sign it, thus making it an Act and giving it the force of law, or to refer it to the Supreme Court to test its constitutionality (which will be discussed below). The President has no power to veto the Bill.

This process is used for almost all laws. (There are some special rules for, for example, taxation and finance bills, where there is a lesser role for Seanad, and for bills passed in a national emergency.) This process is used for changing laws as well as making new laws; in order to change an Act, one has to pass another Act, which will go through all stages in both Houses and be signed. To make a change to an existing law, one can either: simply repeal the older Act, denying its force and effect; repeal the older Act and replace it with a new Act; or amend the text of the older Act to change its meaning and effect.

The legislative process can be slow, but can be very fast when necessary. Even after a draft Bill has been written (which can take years from the first time a measure is proposed) some bills will spend a year or more passing through the Oireachtas. In a crisis, however, laws can be passed very quickly, even in a single night.

Who controls the process?

It is important to note that though in theory the Oireachtas is in charge of the lawmaking process, the reality is that substantial control rests in the Executive, colloquially known as the Government. This is because, most of the time, the parties which form a Government occupy a majority of seats in the Dáil and the Seanad. Our political parties are very strict in their use of the Party Whip – members must vote as instructed by the party or else lose their membership of the party. This means that a government usually has a secure majority to ensure that bills are passed, and it can also use its majority to reject any changes or amendments of which it disapproves. It can also use its majority to invoke “the Guillotine” – a procedure that cuts off debate on a bill, thus limiting the amount of discussion allowed on a topic and speeding the passage of a bill.

Moreover, the Government usually controls what bills are introduced to the Houses and the content of those bills. A bill will usually begin with a minister proposing an idea for a bill to the Cabinet, and the Cabinet will approve the content of any bill before it is introduced by the Minister to the Houses of the Oireachtas. In recent years, a new parliamentary procedure, known as Pre-Legislative Scrutiny, has been introduced, whereby Oireachtas committees can review and hear from experts on proposed Bills before the finally drafted and sent to the Oireachtas, potentially giving more involvement to the Oireachtas in the policymaking process. Though in principle legislation can be introduced by non-government members of the Oireachtas and backbenchers (Private Members’ Bills), the reality is that such measures are rarely passed, and the can Executive use its majority to vote them down. Even if the Executive is in favour of the proposal, it will usually prefer to introduce its own version, made with the help of the Civil Service and Office of the Parliamentary Counsel,

which helps write laws in a consistent style. The result of all this is that government tends to have functional control over most of the legislative process, and so decides what issues are legislated for, and how they are legislated for.

It is important to note that there are times – such as with our current minority government – where the Executive does not command a majority of votes in Dáil Éireann. It can also be the case, for complex reasons related to the Seanad's electoral process, that the government can have a minority of seats in the Seanad. In these instances, the Executive's control over the lawmaking process is weaker, and many of the features that have been common when there have been government majorities – such as use of the guillotine and the voting down of Private Members' Bills – are not prominent. Though it has not happened as of yet, with our current minority government, the opposition parties in the Dáil could pass legislation even if the government was opposed to it.

The Constitutionality of Laws

The Oireachtas is bound to respect the Constitution when making laws, and there are three key ways in which the constitutionality of legislation is tested. Two of these aim to ensure that unconstitutional laws do not enter into force. The third provides a remedy in the event that an unconstitutional law is enacted.

First, the Attorney General gives constitutional advice through the process of governmental policy making and lawmaking. The Attorney General is, under the Constitution, the government's primary legal adviser, and may advise the government – with the help of her staff and sometimes outside counsel – that it would be unconstitutional to make or change a law in a certain way. The Attorney General's opinion is not final and determinative – it is only advice, and the Attorney General is not a judge – but Government rarely proceeds with legislation that the Attorney General has advised is unconstitutional. Given the government control of the legislative process, this means in effect that the Attorney General's advice can have the effect of blocking a legislative proposal. The Attorney General's advice is usually not published, though it has been on several occasions.

Secondly, there is provision in Article 26 of the Constitution for a bill to be referred by the President to the Supreme Court to test its constitutionality. If requested to do so by the President, the Supreme Court will consider the constitutionality of the entire Bill, and if any section is repugnant to the Constitution, the bill cannot be signed and will not become a law. If the Bill survives this test, and its constitutionality is affirmed by the Supreme Court, it is signed by the President and cannot again be challenged in court on the basis that it is inconsistent with the Constitution. This process has only been used on 15 occasions in the Constitution's history, most recently in 2004.

Thirdly, if legislation is not referred by the President to the Supreme Court under Article 26, challenges to the constitutionality of legislation can be brought by citizens, usually where their personal interests are affected, before the High Court, and, on appeal, before the Court of Appeal and the Supreme Court. These courts are empowered to review any legislation and to invalidate any part of a law that is found to be repugnant to the Constitution. Broadly speaking, if a portion of a law is constitutionally invalidated, it is null and void and can have no further force or effect.

Changing the Constitution

The Constitution can, of course, be changed. Amendments to the Constitution begin just like other bills in the Houses of the Oireachtas. It must be introduced into each House and voted for by a majority of members of that House. Unlike other bills, however, it must then be approved by a majority of people voting in a referendum before it can be signed by the President and effect a change to the Constitution.

While the Oireachtas must approve proposals for constitutional change, members of the Oireachtas may be willing to vote in favour of such a proposal in the Oireachtas even if they are not personally in favour of the measure, on the basis that the people should be allowed to decide the matter. Again, like other legislation, the Government will often be able to control whether an amendment proposal is approved by the Oireachtas or not. However, unlike ordinary legislation, the courts cannot review constitutional amendments for consistency with the Constitution. The courts are completely bound by what the people decide in a referendum.