

Exercise on Constitutional Design

Objectives

The remit of the Citizens Assembly is to consider the 8th Amendment to the Constitution and to make such recommendations as it sees fit. In order to assess whether it is appropriate to make recommendations, it is not enough that citizens understand the meaning and effect of the 8th Amendment. You must also be able to assess the reasons for and against including provisions in a constitution as well as the reasons for and against using law to regulate issues. The objective of this session is to assist you in developing this competence.

Structure

On Sunday morning, you will receive a presentation from Dr David Kenny on *How Laws are Made and Changed*. Rather than directly discuss the presentation in your groups, you will be asked as a group to consider the questions set out below. As you read this document in preparation for weekend 2, it would be helpful to start giving some consideration to the questions.

When you consider the questions below, don't try to give an answer straightaway. Instead, ask yourselves what are the *reasons* that would support one answer and what are the *reasons* that would support the other answer.

The questions below are quite abstract but we have suggested some examples that may help you to think of reasons that point towards particular answers. The hope is that some of the general reasons you discuss at your tables will be helpful to you when you start to consider the specific issues on the Assembly's agenda. Immediately after the group discussions, you will be provided with an individual reflective exercise to help you start this process.

Why regulate?

Ordinarily, we make decisions about what we ought to do by considering reasons for and against a particular course of action and then deciding what is best at the moment of decision. When an issue is regulated by law, this decision-making

calculus is transformed. Now the decision must be made not with reference to what seems best at the time of the decision, but rather with reference to what the law has already determined. Let us look at this from the opposite end: the perspective of the law-maker rather than the perspective of those bound by law. When deciding whether to make a law, we need to consider what reasons we have *now* for determining how people *in the future* must or may behave.

The questions below are general, but you may find it helpful to think about the examples of *consumer protection* and *road safety* as you consider how to respond to them:

- 1) What reasons might we have to decide that a particular issue should be regulated by a law?
- 2) What reasons might we have to decide that a particular issue should not be regulated by a law?

Rules v Standards

If we decide to regulate an area by law, we could employ a rule or a standard. A rule is a fairly strict provision that leaves relatively little leeway to those who have to interpret it and apply it. A standard is a vaguer provision that leaves considerably more leeway. Contrast 'Do not emit chemical X at greater than 100ppm' with 'Do not cause a smell nuisance.' The examples of consumer protection and road safety may again help you as you respond to the following questions:

- 3) What reasons might we have to decide that a rule is the more appropriate way to regulate a particular issue?
- 4) What reasons might we have to decide that a standard is the more appropriate way to regulate a particular issue?

Constitutions

Deciding what should be in a constitution is a more complicated question. Again, the dimension of time is important. We are deciding *now* what should happen in the *future*. We are also making an important statement of our values and priorities on the relevant issue by dealing with it in a constitution. This is both because constitutions

have a special status and because they are more difficult to change than ordinary laws.

If a constitution is silent on an issue, this usually means that the Legislature (in Ireland, the Oireachtas) is free to legislate as it sees fit. However, this is complicated by the fact that courts often interpret constitutions broadly so it may turn out that the constitution wasn't really 'silent' at all. Sometimes, we might include constitutional provisions to prevent courts from interpreting constitutions in particular ways.

If the constitution-drafter decides to include a provision in the constitution dealing with a particular issue, this may prevent the legislature in the future from passing certain types of law. Such a provision empowers the courts in the future because the courts will decide what that constitutional provision means. The same constitutional provision, however, in a different sense limits the courts' freedom because they are also constrained by the Constitution. Standards (as distinct from rules) empower courts more because standards leave more leeway for interpretation. The reasons for choosing a rule or standard really turn on how sure we are now that we know how we will want things decided in the future. Rules leave less interpretative leeway and so we (as drafters) are more in control. However, even rules require some interpretation and empower judges to that extent.

Once again, the questions below are general but the examples of *the death penalty* and *a right to housing* may help you as you respond to them:

- 6) What reasons might we have to decide that an issue should be dealt with in a constitution?
- 7) What reasons might we have to decide that the Oireachtas should be prevented from passing a particular type of law, or conversely, that the Oireachtas should not be prevented from passing a particular type of law?
- 8) What reasons might we have to use a rule to constrain the Oireachtas?
- 9) What reasons might we have to use a standard to constrain the Oireachtas?

As noted above, once courts have a power to interpret the constitution, they get to decide whether it is silent or not. Sometimes, they can find values or make interpretations that could not have been anticipated when drafting the Constitution. Sometimes, constitutions specifically make clear that a Legislature has the power to pass particular types of laws. This immunises those laws from a constitutional challenge based on another constitutional provision. The final questions:

- 10) What reasons might we have specifically to give the Oireachtas the power to pass a certain type of law?
- 11) What reasons might we have to control that power through a constitutional provision?