

## Public policy in parliamentary democracies David Farrell<sup>1</sup>

*This note primarily focuses on the role of parliament in scrutinizing government (the cabinet, the ministers and senior civil servants) and how the Oireachtas falls down in that regard. It does not touch on the scrutiny role of the Oireachtas vis-à-vis the wider agencies of government, which I believe will be covered by my UCD colleague, Professor Niamh Hardiman.*

Representative democracies operate on the basis that citizens elect the members of parliament (MPs), who in turn elect and delegate authority to government. The role of parliament is to hold the government and its agencies to account, monitoring their activities, with the ultimate sanction of sacking them and forcing an election.

It is this line of delegation that lies behind article 28.4.1 of Bunreacht na hÉireann, which states that ‘The Government shall be responsible to Dáil Éireann’. However, this constitutional theory is not matched by political reality: the Dáil (and by extension the Seanad too) is subservient to the government. The government controls the parliamentary agenda, (effectively) picks its chair, and determines the fate of legislative bills.<sup>2</sup>

Executive dominance is not unique to Ireland: the general phenomenon in ‘fused’ parliamentary systems such as ours (i.e. where the members of government are elected by and from the parliament) is that over time the executive has become the more dominant actor. But the general consensus among political science observers is that Ireland has an even weaker parliament than in most other countries. This note addresses this issue directly, assessing whether and how this might have contributed to the circumstances that gave rise to the banking crisis.

I have been asked to address a number of matters. Accordingly, this note will start by considering the three key factors that characterize an ‘effective parliamentary democracy’ with particular attention to a parliament’s public policy and governmental oversight role. I will then review how in the period leading up to the banking crisis Ireland’s parliament measured up poorly in each of these regards – as it still does to this day. The general tenor of my remarks is to note that in terms of allocating any responsibility to the parliament in contributing to the circumstances that gave rise to the banking crisis its sins were more of omission than commission.

### ***An ‘effective parliamentary democracy’***

We might reasonably expect an ‘effective parliamentary democracy’ to consist of three key factors. First, the parliament should be organizationally and structurally suited to fulfilling its scrutiny role over government. This relates both to the

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<sup>1</sup> Chair of Politics, UCD. Evidence to the Joint Committee of Inquiry into the Banking Crisis, March 11, 2015.

<sup>2</sup> Only in the case of minority of governments is there any potential for the Oireachtas to assert itself.

organization of its plenary sessions and also to its committee structures. In the first instance, a parliament should be able to determine its own agenda, perhaps in collaboration with the government. This is the practice in many of Europe's parliamentary democracies (particularly in Nordic countries); and in all but a handful of cases the government must seek parliamentary permission to curtail debate (by way of a guillotine). At the heart of this is the chair of the parliament, who is elected by MPs, in virtually all cases across Europe by a secret ballot of MPs.<sup>3</sup>

A well developed parliamentary committee structure should be characterized by such features as: committees that are given a major role in the legislative process (including sufficient time in the parliamentary calendar, such as via the use of 'committee weeks'), the proportional allocation of chair positions among the parties, the election of committee chairs by secret ballot, committee memberships seen as a privilege rather than a right and therefore not available to all members, committees that are well resourced with a permanent dedicated secretariat for each committee staffed by key professionals.<sup>4</sup> All these features – parliamentary plenary and committee structure – share in common a careful balancing of the power relations between parliament and government.

A parliament may have good control over its own agenda, greater say over electing its key officers and be given adequate time and resources to monitor government and its agencies, but whether it makes good use of this opportunity is quite another thing: in other words, the 'culture' of the parliament needs to be attuned to its role as a more equal player vis-à-vis the government. A culture of effective parliamentary scrutiny is, therefore, the second main factor of an 'effective parliamentary democracy' and it plays out particularly in the parliament's committees – the workhorses of late twentieth-early twenty-first century democracies. In those parliaments with effective committees we find a tendency for many of those members elected to committees (because not every MP gets to be a member of a committee) to take their committee role seriously, with consistently high attendance at meetings, many of them becoming policy specialists and some even seeing the committees as an alternative career route to ministerial office; we see committees that follow a tight schedule of policy scrutiny, with meticulous attention to tracking the detail of the policy process, careful background research, well-structured interviewing of witnesses, and a philosophy of operation that specifically eschews 'ambulance chasing'.<sup>5</sup>

Parliament may be well-structured and organized with members actively seeking to make full use of their powers of legislative scrutiny, but for this to operate effectively requires the third link in the chain – a culture of open and transparent government. A robust freedom of information regime and whistleblower legislation is core to this, but

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<sup>3</sup> Herbert Döring, Ed. *Parliaments and Majority Rule in Western Europe* (Frankfurt: Campus Verlag, 1995).

<sup>4</sup> I. Mattson and K. Strom, 'Parliamentary committees', in Herbert Döring, Ed. *Parliaments and Majority Rule (ibid.)*; Shane Martin and Sam Depauw, 'Parliamentary Committees and Coalition Government, paper presented at the European Consortium for Political Research, Lisbon, 2009.

<sup>5</sup> Keith Krehbiel, *Information and Legislative Organization* (Ann Arbor: University of Michigan Press, 1991); Shaun Bowler and David Farrell, 'The Organizing of the European Parliament: Committees, Specialization, and Coordination', *British Journal of Political Science*, 25 (1995): 219-43.

so is how the government relates to parliament. The government and its agencies must be prepared to work with the parliament, providing access to information and to key officials. Of particular relevance to the subject matter of this note are an open budgetary process (such as shown by the German case) and the right for parliamentarians to quiz heads of agencies and senior civil servants on policy and operational matters.

It does not require much knowledge of Irish government and parliamentary practice to know how poorly Ireland maps onto these three factors.

***The weakness of the Irish parliament***

The first factor – relating to parliamentary powers and structures – has been the focus of most attention to date. The consensus among academics writing about the Irish parliamentary process is that it is weak and ineffectual by comparative standards.<sup>6</sup> In the 2011 general election all the political parties featured parliamentary reform (for the most part focused on the Dáil) in their election manifestos; the issue was given prominence in the 2011 Programme for Government; and the Convention on the Constitution chose this topic over a large number of competing issues as the area to focus one of its two final reports on.<sup>7</sup>

It is the weakness of the Oireachtas that explains why so little attention has been paid to it in the three reports of the banking crisis that have been produced to date.<sup>8</sup> In their explanations of the circumstances that gave rise to the crisis all three reports place emphasis on failings in the domestic regulatory process. Attention inevitably is focused on the office of the Financial Regulator, the Central Bank and the Department of Finance; in the case of the most recent Commission of Investigation report (2011) some attention is also paid to the role of government. The Oireachtas is notably absent from this coverage, receiving only passing reference in the Commission of Investigation report where it is noted that one of the causes of a ‘systematic financial crisis’ is likely to be ‘a parliament that remains unaware of the mounting problems’.<sup>9</sup>

Given the recent flurry of interest in Dáil reform, it would be nice to think that this issue has been resolved. Certainly, the current government has made much of its steps to reform the Dáil since 2011. Unfortunately, however, most of these measures have been little more than cosmetic (e.g. meeting more regularly, a rejigging of committees). One useful innovation has been the introduction of pre-legislative scrutiny. It would be worth considering how this might be matched by post-legislative

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<sup>6</sup> In particular, see Muiris MacCarthaigh, *Accountability in Irish Parliamentary Politics*. (Dublin: IPA, 2005), Muiris MacCarthaigh and Maurice Manning, eds., *The Houses of the Oireachtas*. (Dublin: IPA, 2010).

<sup>7</sup> For more general coverage of the need for parliamentary reform, see the seventh report of the Convention on the Constitution, *Dáil Reform*, lodged with the Oireachtas in March 2014 – and still awaiting a response from government.

<sup>8</sup> Klaus Regling and Max Watson, *A preliminary report on the Irish banking crisis* (2010); Patrick Honohan, *The Irish banking crisis and regulatory and financial stability policy 2003-2008* (2010); The Commission of Investigation into the Banking Sector in Ireland, *Misjudging risk* (2011). This latter report shall be referred to in this note as the Commission of Investigation report.

<sup>9</sup> In the Commission’s view, however, parliament is not seen as an ‘essential’ factor. *Commission of Investigation into the Banking Sector in Ireland*, 2011, para. 1.4.3.

scrutiny: the principle is there, for instance in the legislation establishing NAMA, but, to be best of my knowledge, we have yet to see regular and systematic scrutiny of that agency.

*A lack of scrutiny by the Oireachtas*

Turning to the second factor – on how parliaments perform in using what scrutiny powers they have – the Commission of Investigation’s observation of a parliament that seemed ‘unaware of the mounting problems’ is consistent with academic accounts of its inadequate role (and particularly that of the Joint Committee on Economic Regulatory Affairs) in the lead-up to the banking crisis.<sup>10</sup> Much the same point that is made in the three reports of the banking crisis about the key regulatory agencies applies to the Oireachtas, namely that it took its eye off the ball, in this case, perhaps more implicitly than explicitly, following the ‘group think’ that all would be well in the end.

The institutional weakness of the Oireachtas vis-à-vis the government is not a sufficient excuse for this failure.<sup>11</sup> On paper at least the committees already had pretty substantial powers to monitor and scrutinize government. For instance, under the existing standard orders a committee may:

- send for persons, papers and records;
- take oral and written evidence;
- invite written submissions and oral presentations from interested persons or bodies;
- appoint sub committees, to refer matters to them and to delegate powers to them;
- draft recommendations for legislative change and for new legislation;
- require principal office-holders in State agencies or bodies to attend a meeting to discuss their official responsibilities;
- engage specialist or technical knowledge, subject to budget and sanction;
- print and publish reports and related documents;
- request a debate in plenary.<sup>12</sup>

There is no evidence (at least none that I have seen) to suggest an attempt by any of the Oireachtas committees to deploy powers of this nature in order to properly test the veracity of arguments by the government and its agencies that all was well. In other words, the issue is not just that of the weakness of the Oireachtas; questions must be asked over the lack of attention to this agenda. It indicates a need for cultural change in how seriously Oireachtas members treat their committee role. And if there were to

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<sup>10</sup> Philip Lane, ‘The Irish Crisis’, in M. Beblavy, D. Cobham and L. Odor (eds.), *The Euro Area and The Financial Crisis*, (Cambridge University Press, 2011); Shane Martin, ‘Monitoring Irish Government’, in E. O’Malley and M. MacCarthaigh (eds.), *Governing Ireland*. (Dublin, IPA, 2012).

<sup>11</sup> I am sure (though I haven’t had the time to check) that there were individual parliamentarians who were referring to the few discordant voices among the academic and journalistic commentariat during these years; but if there were they would have been in the minority. The various accounts of these period attest to the strong cross-party consensus that things were basically fine.

<sup>12</sup> Art O’Leary, ‘Briefing note on Oireachtas Committees’, Convention on the Constitution, *Seventh Report: Dáil Reform*, March 2014.

be moves to provide additional resource to committees, it should be on the understanding that committee members make full use of it.

### *Open government*

Certain prominent themes emerge from the three reports on the banking crisis that have a direct bearing on the open government agenda – our third measure of an ‘effective parliamentary democracy’. In the reports there are references to a ‘herd instinct’, to ‘group think’, to a ‘lack of contrarian voices’. The Commission of Investigation report notes how in the lead up to the crisis the ‘government actively supported the market over an extended period against the fairly weak but clear opposition of the Department of Finance’.<sup>13</sup>

A more active engagement by the Oireachtas and its committees might have picked up these signals. But what also didn’t help was the closed culture that (to this day) characterizes Irish government. Two issues that merit particular attention – and that are just as relevant today as they were in the lead up to the crisis – are the Irish budgetary process, and restrictions on what civil servants are allowed to say to Oireachtas committees.

In the first instance, the tightly controlled and highly secretive nature of the Irish budgetary process prevents the Oireachtas from providing effective scrutiny. This fixation on budgetary secrecy is a legacy of British rule: matters are very different in other European democracies. As we discovered several years ago, the German Bundestag is privy to more information about the Irish budget than are members of the Oireachtas.

The current government promised to change this. Its 2011 Programme for Government promised to ‘open up the Budget process to the full glare of public scrutiny’. This promise has yet to be implemented. We will never know for sure, but it is worth speculating how things might have turned out differently had the relevant Oireachtas committee been given sufficient details over budgetary assumptions in the 2003-07 period when – as we now know – the Minister for Finance was ‘under considerable pressure to allow relatively high rates of expenditure to meet social and other priorities’.<sup>14</sup>

A second issue that affects the ability of Oireachtas committees to scrutinize government is the restrictions that apply to how senior civil servants might respond to questions by committee members. The protocol that is followed is that the minister’s word is final: any advice that might have been provided in conflict with the decision of a minister is not divulged.<sup>15</sup> In a context – which we know in retrospect was the case here – in which there are differences of opinion between government departments over the direction of economic policy, it should be possible for a senior

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<sup>13</sup> Commission of Investigation report (2011), Executive Summary, vii; also 4.5.3.

<sup>14</sup> Commission of Investigation (2011), para. 4.5.3.

<sup>15</sup> Often referred to as the Carltona doctrine it originated in British legal practice. It was confirmed as consistent with Irish legal practice under a Supreme Court ruling in the *Devaney v Shields* case (1998). The Chief Justice noted that the minister must answer before parliament for anything his or her officials have done under their authority (Richard Boyle, ‘Governance and accountability in the Irish civil service’, *Committee for Public Management Research, Discussion Paper 6*, Dublin, IPA (n.d.)).

civil service to provide additional information to an Oireachtas committee on the different scenarios that might have been explored in the lead up to a decision; arguably it should even be allowed for the civil servant to inform the committee of areas where he or she may have been in disagreement with their minister.

That this is a significant restriction on the scrutiny role of Oireachtas committee was recognised by the Labour Party in its 2011 election manifesto, which proposed that:

‘Restrictions on the nature and extent of evidence by civil servants to Oireachtas committees will be scrapped, and replaced with new guidelines for civil servants that reflect the reality of authority delegated to them, and their personal accountability for the way it is exercised.’<sup>16</sup>

This proposal (worded exactly the same) was included in the 2011 Programme for Government, though was never implemented. But the fact that it is included in the Programme for Government supports the contention that this was a significant hindrance to the ability of the Oireachtas in its scrutiny role over government in the lead up to the crisis – and, indeed, remains a significant hindrance to this day.

### ***Sins of omission***

The main conclusion to draw from all this is that in the period under investigation the Irish parliament performed poorly: it lacked sufficient organizational and structural fire power to provide effective scrutiny; it lacked too the political will to use what powers it did have indicating ‘cultural’ shortcomings; and it was hindered by a governmental system that places great emphasis of secrecy particularly in its dealings regarding budgetary matters. There is little evidence to suggest that things are any different today.

A final issue that I’ve been asked to address is whether the failings of our parliamentary system contributed to the circumstances that gave rise to the banking crisis. The answer would seem likely that it did. By not providing adequate scrutiny of a government that (we know from the three reports on the banking crisis) was, itself, not providing adequate scrutiny of its regulatory agencies, the Oireachtas took its eye off the ball. If the Oireachtas were guilty of any sins these were more of omission than commission.

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<sup>16</sup> Labour Party manifesto, 2011.