

Political Gender Quotas

The present Tánaiste and Labour leader, Eamonn Gilmore, has promised to publish a Bill designed to “encourage” political parties to nominate more women candidates. Under its terms, parties that do not nominate at least 30% women candidates (rising to 40% in 7 years’ time) will immediately lose half of their Oireachtas funding.

A brave and intelligent Labour woman TD, solicitor Joanna Tuffy, has condemned her leader’s proposal. And with good reason, as we will presently see. My experience of Deputy Tuffy in her time in the Seanad was that she was one of the most skilful, reasonable, pleasant (and sometimes dogged) contributors in the legislative process there.

It is noteworthy that neither of the Government parties which together have such a massive majority in the Dáil is content to take the far simpler and more obvious course of amending *its own rules* to give effect to such gender quotas. That would leave the other parties free to decide whether they wanted to follow suit. It must, Mr Gilmore tells us, be done by law for all parties.

I feel that I can speak with some little knowledge and experience on this issue, I was a member of a party –the Progressive Democrats - which far more than any other in the history of the State achieved gender-balance in outcome consistently over two decades. It did so without any form of tokenism. There was no women’s section, no gender quotas, and no rules or procedures which dealt with gender-balance at all. Men and women in that party simply practised instinctively what other parties now appear to want to legislate for or posture about at the taxpayer’s expense. We did not need a law to tell us what to do.

I strongly share Joanna Tuffy’s concern that this piece of promised legislation is merely a piece of tokenism and window dressing. It is likely to set back the cause of would-be women politicians by creating an impression that they are not selected on merit. And in any event it is highly unlikely to have any serious effect, as it is easy to add “paper” candidates to party tickets in multi-seat constituencies creating the false appearance of a gender-balanced ticket, but allowing the local party to allocate and use its resources to promote its most electable candidate regardless of any legal quota.

Justification?

But regardless of the effectiveness of such a law, a more fundamental issue arises.

Have the Government parties the constitutional right or power to impose their view on gender balance on other parties by a law which discriminates radically between compliant and non-compliant parties in the way they are funded by the Exchequer?

Where is the constitutional justification for such a piece of “positive discrimination”? (I use that phrase guardedly as the idea is in reality a proposal to penalise parties which fail to achieve the desired

candidate profile and for them will be “negative discrimination”). I believe that there is no constitutional authority for such discrimination – whether it is described as positive or negative.

Our Constitution, which wisely makes no explicit reference to political parties at all, provides that the political process at every level, including voting and standing for and being elected to office, is open to women and men alike, and accords to all of us the unfettered gender-equal right to stand for election and to choose our public representatives in Dail Eireann. Political parties are free associations which may or may not agree with social quotas in electoral law.

Constitutional Issue

The Government must first answer this preliminary question. Is it open constitutionally for a majority in Dail Eireann, even with the support of a majority at the *last* election, to introduce discriminatory funding into the political process in pursuit of their particular policy as to the type or types of people who they feel that the people should elect or who should be nominated at the *next* election to the Dail.

If you ask yourself whether a future all-woman feminist political party should receive only half the political funding of, say, a future anti-immigrant political party which fielded a gender-balanced slate of candidates, the answer to the constitutional question becomes pretty clear.

And if you extend the mistaken legal thinking behind the present Government’s proposal to cognate “equality policy” areas, the constitutional infirmity of allowing a future temporary Dail majority with one outlook to use taxpayers’ money to bend the electoral process towards outcomes favoured by them becomes all the more clear.

Such social quota electoral legislation, if constitutionally permissible, could, with equal justification, be used to financially favour parties with a minimum number of candidates who come from different classes or groupings or minorities.

I have no doubt that there are already NGO discussion groups meeting to consider the possibility of class quotas, Lesbian Gay Bisexual and Transgender quotas, traveller quotas, immigrant quotas, unemployed quotas – the potential list is endless.

By logical extension, parties which “fail” in these equality areas could and should also be open to being penalised financially in the allocation of Exchequer revenues.

There is already a volume of very clear constitutional jurisprudence from our courts concerning the discriminatory misuse of taxpayers’ money to attempt to influence the outcome of referenda and elections.

I believe very strongly that the proposal to halve by law the funding of any party which fails to gender-balance its candidate slate is clearly unconstitutional. The point that is forgotten by some is that the People are sovereign in our constitutional order. Dail Eireann has no legitimate function in applying State funds to influence the outcome of referenda or elections. There is simply no constitutional basis for a law telling political parties what kind or range of candidates it should offer for election.

In case the Government is content to assume that nobody would have sufficient legal status (*"locus standi"*) to challenge such a law if enacted before the next election, I think that they should think again. I believe that every citizen has the right to expect that political parties are left free to choose their candidates and certainly that any party member citizen is entitled to protect his right within his party to participate in a free choice on candidate selection without the threat of financial retribution by the State.

In passing, we should not forget that the "People Got The Referendum Wrong And Can't Be Trusted" brigade are always with us and never go away. A number of otherwise intelligent people still believe that the Government of the day should be free to plunder the Exchequer to fund Yes campaigns in unpopular EU referenda even though exactly the same people would have been outraged and cried "constitutional foul" if FF had done the same thing to try to get rid of PR in 1959 or 1968. There is precisely the same kind of patronising attitude that finds gender-quota electoral funding laws attractive. Is there no end to their arrogance and moral superiority?

Political parties, while not dealt with in terms under the Constitution, are nonetheless obvious examples of the exercise of "freedom of association" guaranteed by the Constitution. Interference with that freedom by legislation is simply not legitimate in pursuit of ideological goals – however worthy or unworthy they may be.

If some political parties really wish to mend their hands in relation to gender-balance in their choice of candidates, let each of them separately do so in their own rule-book - and accept or suffer the consequences as the people decide. They are absolutely free to change their own rules. They are not, however, free to impose them by law on other parties or to cripple financially those parties which adopt different merit based candidate selection strategies.

This raises the question: *"Why do the Government political parties not act unilaterally and simply change their own rules?"* Do they fear that the electoral outcome will be negative? Do they think that voluntary gender-balance in their rules would disadvantage them? And if so, why?

Why have an unconstitutional "let's all jump together" law? If leaving gender balance to be dealt with internally by the parties is a problem for voters, the people at large can deal with that issue, whether by voting against imbalanced tickets at the ballot box, or by joining imbalanced parties to change them, or by founding new ones.

Dail Eireann simply has no constitutional right to abuse its legislative powers to qualify the constitutional freedom of association in a manner designed to seriously electorally disadvantage those who don't agree with the particular social quotas deemed desirable by a temporary majority in that House.

Such laws, I think, will be struck down. So let's save some legal fees, ask the Government parties to amend their own rule-books if that's what their members want, and uphold our Constitution while we're at it.

Beware, too, the Government's mooted constitutional convention. Not a good idea. Already their vacant-minded proposals for five year presidential terms to coincide with the Dail cycle (which may not be five years in any event!) and votes for 17 year olds seem like ridiculous distractions for a country with serious problems. The Government should wise up generally.

Glib constitutional and reformist "issue surfing" will discredit them.

The late and great constitutional lawyer, FG politician, and, yes, former attorney general, John M Kelly wrote against it in the strongest possible terms – warning against "new" constitutions and ill-judged reform for their own sake. Pointing out that even the tiniest constitutional change required the approval of the people, he said: *"This awkward necessity causes impatience among social reformers; but it is also the guarantee for ordinary people that their rather old fashioned set of fundamental rights will not be rashly reduced, nor rashly enlarged, in response to the pressures of a passing moment"*.