

CO-OPTION AND THE HUMAN RIGHTS ACT 1998

CO-OPTION

A **co-option** is an election where members of a committee (or similar group) vote in order to fill a vacancy on that committee or group. It involves the selection of a new member, usually by the vote of the existing membership. Co-option is a popular mechanism used by local government to avoid a by-election, which inevitably means more money and more time allocated to finding a replacement.

Where a small committee is originally elected using a method of proportional representation a co-option may be thought unsuitable as the newly elected member will not necessarily represent the interests of the group represented by the vacating member.¹

Co-option is used extensively within Northern Ireland and indeed the UK as a mechanism within local administration to elect members to a specific authority. The procedure involving co-option is usually specified within the Articles and Associations of particular corporations or within the constitution of various authorities and is subject to the approval of the members of the group. In Northern Ireland, all of the councils will have procedures in place to implement co-option as a means of appointing a new member.

HUMAN RIGHTS ACT 1998('THE ACT')²

Protocol 1, Article 3 Right to Free Elections³

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

3.125 If you have the right to vote for members of a legislative body, the elections in which you take part must be free and fair.

How must elections be conducted?

3.126⁴ Elections must be held at reasonable intervals, and they must be by secret ballot. They must be held in conditions that ensure that people can freely express who they want to be a member of a legislature. If this provision is not allowed, you can complain about it.

¹ <http://en.wikipedia.org/wiki/Co-option>

² The Human Rights Act 1998: http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_1

³ Ibid

⁴ Ibid

Can the state limit rights to elections?

3.127⁵ The state can put some limits on the way in which elections are held. Also, it can decide what kind of electoral system to have.

3.128 the right to fair elections under Protocol 1, Article 3 applies only to those eligible to vote under domestic laws.⁶

Protocol 1, Article 3 derives from The Human Rights Act 1998 which is an act that was designed to give further rights and freedoms guarantees under the European Convention on Human Rights. The Act makes available in UK courts a remedy for a breach of convention rights without having to go to the European Court of Human Rights in Strasbourg. The main aim is to ensure that Parliament Acts are interpreted as to make compatible with the European Convention. Judges are not allowed to override it; all they can do is make a declaration of incompatibility. This declaration does not affect the validity of an Act of Parliament; it is designed to maintain the principle of parliamentary sovereignty.

Article three is concerned with ensuring that parties are free to hold elections and under conditions that will allow free expression from the will of the people. If the Northern Ireland Executive chooses to abolish dual mandates then the options that will arise from this are co-option or a by-election in order to secure a new member to the seat of council.

IS CO-OPTION COMPATIBLE WITH THE HUMAN RIGHTS ACT 1998?***Protocol 1, Article 3 Right to Free Elections***⁷

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

In looking at the words of Article 3 it would appear that as long as the co-option is used to replace 'like with like' it is not conflicting the principles behind Article 3. Co-option will allow the relevant party holding the current position to pass the position on to another member of the same party thus meaning that the will of the electorate is still carried out. This is an interpretation of Article 3 and is subject to further opinion however as long as co-option is replacing a departing member of a particular party with a new member from the same party, there would appear to be no conflict. Although the electorate may have chosen a particular person from a party, they nevertheless chose that particular party to hold the position. Co-option simply replaces that member with another member from the same party with the consent by way of vote of the existing membership.

For co-option to be implemented in a manner acceptable to everyone there will need to be a strategic plan and a government body put in place to ensure that is handled

⁵ Ibid

⁶ <http://www.dca.gov.uk/people-rights/human-rights/pdf/act-studyguide.pdf>

⁷ The Human Rights Act 1998: http://www.opsi.gov.uk/ACTS/actss1998/ukpga_19980042_en_1

appropriately. In the Republic of Ireland, a Local Government Commission put in place to oversee the dissolution of local authority.

REPUBLIC OF IRELAND⁸

The **Local Government Act, 2001** (No.37 of 2001)⁹ was enacted by the Oireachtas of the Republic of Ireland on 21 July 2001. Most of the provisions of the act came into operation 1 January 2002.

According to the explanatory memorandum¹⁰ issued before the passing of the act, its purposes were to:

- enhance the role of the elected member,
- support community involvement with local authorities in a more participative local democracy,
- modernise local government legislation, and provide the framework for new financial management systems and other procedures to promote efficiency and effectiveness,
- underpin generally the programme of local government renewal.

The Local Government Act 2001 enshrined the mechanism of co-option and specified the process involving the co-option of existing members of local authority. Before this Act was implemented many of the Members had been disqualified from holding the dual mandate and co-option subsequently followed. The Local Government Commission was put in place to oversee the modernization of local government and to ensure that any dissolution of local authority areas was carried out in an appropriate manner.

The relevant articles of The Local Government Act 2001¹¹ are listed below:

14.—(1) A person shall not hold membership simultaneously of—
(a) more than one local authority of the same class, or
(b) a city council and town council.

(2) For the purposes of this section, local authorities shall be deemed to consist of the following 2 classes:
(a) county councils and city councils;
(b) town councils.

16.- (1) A person ceases to be a member of a local authority and a casual vacancy arises in its membership immediately upon he or she becoming disqualified from membership of a local authority under section 13 or 182, or under section 20 of the Local Elections (Disclosure of Donations and Expenditure) Act, 1999.

(2) When a person ceases to be a member of a local authority under this section he or she also ceases to be a member of any body to which he or she-

⁸ <http://www.oireachtas.ie/documents/bills28/acts/2001/a3701.pdf>

⁹ The Local Government Act 2001: <http://www.irishstatutebook.ie/2001/en/act/pub/0037/index.html>

¹⁰ Ibid

¹¹ Ibid

- (a) was elected, nominated or appointed by a local authority, or
- (b) is a member by virtue of being a member of a local authority.

Section 19 governs co-option and when co-option may occur:

19.- (1) A causal vacancy in the membership of a local authority occurs-

- (a) Where section 16(1) applies,
 - (b) upon the death or resignation (including deemed resignation by virtue of section 18 (4) of a member of local authority.
 - (c) In such circumstances as are set out in Articles 25, 28 and 124 of the Local Elections Regulations 1995 (S.I. No. 297 of 1995),
 - (d) In such circumstances as may be prescribed by regulations made by the Minister under section 27, or
 - (e) In such circumstances as are referred to in section 15(1) of the Local Elections (Petitions and Disqualifications) Act, 1974
- (2) It is the duty of the meetings administrator to notify the members of the local authority in writing on becoming aware that a causal vacancy has or may have occurred.
- (3) (a) a casual vacancy shall be filled by the co-option by the local authority of a person to fill the vacancy and except where paragraph (c) or 9d) or (e) of subsection (1) apply, subject to such person being nominated by the same registered political party who nominated for election or co-option the member who caused the causal vacancy.
- (b) Where the person causing the causal vacancy was a non-party candidate at his or her election to the local authority, the vacancy shall be filled by the co-option by the local authority of a person to fill the vacancy (except where paragraph (c) or (d) or (e) of subsection (1) apply) in accordance with such requirements and procedures as may be set out in its standing orders.
- (c) A local authority shall in making standing orders consider the inclusion of provisions for the purposes of paragraph (b).
- (4) (a) A co-option shall be made, after due notice, at the next meeting of the local authority after the expiration of 14 days from the occurrence of the vacancy or as soon after the expiration of the 14 days as circumstances permit.
- (b) In this subsection 'due notice' means not less than 3 clear days' notice given in writing to every member of the local authority.
- (5) A person is not to be proposed at a meeting of the local authority for co-option without his or her prior consent.

- (6) A person co-opted to fill a casual vacancy shall be a member of the local authority until the next ordinary day of retirement of members of that local authority unless he or she sooner ceases to be a member.

EU- HOW DUAL MANDATES WERE ABOLISHED

In the European Parliament there was an EU directive passed that prevents Members from holding an elected position in a national parliament. A directive is a legislative act of the European Union which requires member states to achieve a particular result without dictating the means of achieving that result. It can be distinguished from European Union regulations which are self-executing and do not require any implementing measures.

The legal basis for the enactment of directives is article 249 of the Treaty establishing the European Community and, as such, directives only apply within the European Community pillar of the European Union.

CONCLUSION

It would appear from the text of Protocol 1, Article 3¹², that the mechanism of co-option would not infringe the right to a free election, for the purposes of the Human Rights Act 1998. It would appear from analysing other jurisdictions that have placed a ban of dual mandates, that implementing co-option as an effective measure to elect a new member, from the existing elected party, into government. By electing a member from the existing elected party, the will of the electorate is being implemented along with a consensual vote from the existing membership. However, it must be noted that this interpretation is not definite and can be subject to further analysis.

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¹² http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_1