**The Resilience of Executive Dominance in Westminster Systems: Ireland 2016-2019**

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The imperfect separation of powers in Westminster systems has produced a curious contradiction: legislative supremacy in theory eclipsed by executive control in practice.[[3]](#footnote-3) While parliament’s lawmaking power is in principle greater than the executive’s power to faithfully administer and execute the law, the executive has come to control the legislation process almost entirely. This is a consequence of several factors: an increase in the power of the civil service and the administrative state in policy formation and preparation of legislation; the professionalisation of legislative drafting; the general tendency for the government to have a legislative majority (either by single party or in coalition); the enforcement of discipline and use of the parliamentary whip; and perhaps, decreased willingness to tolerate the uncertainty and risk that attends a less disciplined legislative process. From policy formation to initiation to amendments to final passage, the executive will tend to control the process. Moreover, private members bills becoming law is now almost unheard of. This phenomenon can be termed executive dominance, and in extreme instances can reduce the legislature to something akin to a reactive rubber stamp, approving whatever the executive proposes with little to no autonomous power.

How does this dominance sit with the kind of constitutional principles - often articulated in judicial doctrine – which emphasize legislative predominance?[[4]](#footnote-4) There are at least two broad responses.[[5]](#footnote-5) The first is that executive dominance provides a *realpolitik* gloss over fundamental constitutional principles of the system, but has not disturbed them. On this view, the executive’s power is *de facto* as legislative majorities – in following the whip and not seeking to seize power from the cabinet – leave us in this situation. Because legislatures’ effectively *choose* to self-limit much of their authority vis a vis the executive, it does not fundamentally disturb constitutional principles underpinning its formal predominance, even if it is jarringly dissonant with their self-presentation. On this view, should political circumstances shift enough, the legislature could theoretically be expected to exercise its own institutional muscle, by engaging in independent policymaking, and the executive could resume a more modest administrative role.

The second view is that executive dominance is by now so deeply entrenched, that it is no longer just a *realpolitick* gloss over important constitutional principles, but is viewed by many political actors as an expression of an important constitutional principle in its own right - existing independently of any political contingency. Namely, that the executive not only *is*, but *ought* to be the predominant constitutional actor, and parliament, on this view, appropriately acts in a reactive capacity to give scrutiny, imprimatur, and the force of law to executive proposals. If parliament is engaged in a robustly pro-active law-making capacity, on this view it would be acting in a constitutionally unprincipled fashion.

Signs have emerged recently, in several jurisdictions, that it is plausible to view the second position as the prevailing one amongst elite political actors. In several Westminster systems, the executive has retained remarkable control of the legislative process in spite of *not* having a legislative majority.[[6]](#footnote-6) Even minority governments have proven capable of stifling the legislature in the performance of its functions. This suggests that executive dominance is a more resilient phenomenon than might have been previously thought.

Ireland’s recent Fine Gael minority government, which was formed in May 2016 and dissolved in January 2020, provides an interesting and extreme example of this phenomenon. Despite being well short of a legislative majority, and relying on the other traditional party of government, Fianna Fáil, for confidence and supply, the government successfully resisted almost all private members legislation. This was also in spite of the coincident introduction of several reforms—known collectively as “new politics”—that were designed to re-empower and reinvigorate parliament.[[7]](#footnote-7) Several longstanding elements of parliamentary and government process were used to create a form of legislative veto over private members legislation and leave government with substantial control over the legislative process. Essentially, executive dominance remained, in spite of minority government and other factors which might have been expected to reduce it.

In Part I, we examine the phenomenon of executive predominance in contemporary constitutionalism, and the trend of executive dominance in the Irish parliamentary system specifically. We also outline Ireland’s recent experience of minority government and its attempt to increase the institutional capacity of parliament. In Part II, we look at the “money message” procedure in the Irish parliament from 2016-2020. Article 17.2 of the Constitution provides that no bill for the appropriation of revenue can proceed without a message from the government approving it. This erstwhile obscure constitutional provision essentially became an executive veto, with the government—facilitated by broad interpretation of the constitutional clause and the related standing orders—using it to stop almost all private members bills of which it disapproved. In Part III, we examine the practice of Attorney General’s advice, and the use of legal advice on constitutionality as a way to oppose legislation. The apparent scope and impact of the AG on Irish politics is very significant. Through its perceived independence and secret advice, which apparently receives remarkable deference from politicians and government, it can function as an effective veto play in the legislative process. This practice has long been used a reason for the government not supporting legislative measures, but it use has been increasingly regular, and it has recently been combined with the money message procedure to veto private members’ legislation.

In Part IV, we argue that executive dominance is resilient because it is a function of political and constitutional culture just as much as formal rules. This culture is a set of (largely unspoken, perhaps subconscious) beliefs and assumptions about politics and its operation which undergirds and shapes our understanding of the rules and how constitutional actors ought to function. None of the rules and practices in Ireland that facilitated executive dominance by minority governments are new or newly implemented, and all are capable of other interpretations and applications. Indeed, there are compelling arguments that all could and should be interpreted and applied differently to restrict less radically the legislative power. The fact that they are interpreted as they are—and that there is so much acceptance of this and resistance of change—illustrates that executive dominance is cultural, an assumption that underlies parliamentary democracy and its institutions, and animates the practices and interpretations of rules upholding them. This serves an important lesson to anyone who would seek to reform parliamentary practices or challenge executive dominance. If executive dominance is a resilient part of the culture of Westminster systems, it will be protected—when challenged by circumstance or by deliberate reform—by rules and practices particular to the specific traditions of each system, as interpreted in light of this cultural assumption.

**I: Executive dominance**

In the classic conception of the separation of powers, the executive power was the legal duty to ensure the “implementation of instructions and authority that came from” the legislative authority. The executive branch on this conception is “guided by law,” and “manacled both by man and measures.”[[8]](#footnote-8) The legislature would be the “centre of gravity of the governmental system”, and the executive would be the actor who faithfully carried out its will and instruction.[[9]](#footnote-9) Compared to this modest conceptual understanding of executive power, the contemporary executive is a leviathan. In myriad areas of policy, the executive is the predominant actor: it drafts most primary legislation enacted by the legislative branch, and exercises copious administrative and regulatory authority through delegated statutory power. The political executive often sits at the apex of a potent bureaucracy capable of projecting public power across every conceivable aspect of social and economic life.[[10]](#footnote-10) The executive’s increasingly dominant role has arisen from intertwined assumptions of structural necessity and pragmatism: meeting complex and fast-changing political challenges demanded increased and expansive discretionary power be granted to the executive as the only branch capable of using it.[[11]](#footnote-11) This cohesion became particularly strong in Westminster parliamentary systems, with an imperfect separation of powers leading to a large degree of fusion between the branches, allowing the nominally weak executive to effectively leverage dominance over parliament in practice in terms of policy and law formulation.

Executive dominance in Ireland

Ireland has been in no way immune from the tendency towards executive dominance. Indeed, it has experienced an acute form of it, traditionally having, along with Greece and the UK, one of the most executive dominated parliaments in Europe.[[12]](#footnote-12) The 1937 Constitution cut against several core elements of British constitutionalism:[[13]](#footnote-13) stressing popular rather than parliamentary sovereignty; codifying constitutional rights, to be enforced by judicial review; changing the electoral system to Proportional Representation by Single Transferable Vote; requiring a referendum for every constitutional amendment.[[14]](#footnote-14) But despite departing from the Westminster system in several respects, the Westminster parliamentary model was adopted without much direct alteration.[[15]](#footnote-15) There is good evidence that the architects of the Irish Constitution believed in this aspects of the UK parliamentary tradition like strong party discipline.[[16]](#footnote-16) The central components of the Westminster parliamentary model were retained, and with it an executive that can enjoy a highly concentrated form of power.[[17]](#footnote-17)

The relationship between the executive and the legislature thus heavily mirror its colonial predecessor.[[18]](#footnote-18) The structural core of Irish government remains centred on a Taoiseach (Prime minister) appointed by the Dáil(lower house)appointing and leading a government which governs for five years as long as it can command the confidence of the lower House.[[19]](#footnote-19) The party (or more typically coalition parties) which win a majority of seats in a general election mean that a Taoiseach and cabinet can control the entire machinery of administration and law-making.[[20]](#footnote-20) Ireland has, in general, had strong majority or coalition government. The two major political parties—Fianna Fáil and Fine Gael—which were on opposite sides of Ireland’s civil war on the extent and nature of Irish independence, have dominated government. Since 1989, all governments have coalition governments, with the sole exception of the Fine Gael minority that took office in 2016. The net effect of this is that the Government has tended to have a stable majority in parliament.[[21]](#footnote-21)

As such, Government parties usually had the capacity to control the legislative process *de facto*, and used this ability to its fullest extent.[[22]](#footnote-22) The Government used its majority to control the agenda and business of the Oireachtas. Debates during periods of majority or coalition government were frequently “guillotined” by a cloture motion to reject all other proposed amendments and to end the relevant parliamentary stage.[[23]](#footnote-23) The parliamentary whip is also imposed in Irish political parties “to an extent which is unusual even in Westminster-type democracies”.[[24]](#footnote-24) Almost no opposition or backbench amendments to bills are accepted and are thus not generally offered seriously as legislative/policy suggestions, but for publicity or political point scoring. This has led academic and other commentators to describe the lower house as a “supine” and “a puny parliament peopled by members who have a modest view of their functions and a poor capacity to carry them out”.[[25]](#footnote-25) This leaves the executive largely unconstrained by a parliament that often can and does whip into passing whatever it wishes, to an extent that can render “parliament close to redundant”.[[26]](#footnote-26) In the 2000s, there was some expression of dissatisfaction with the extent to which government backbenchers were marginalised, but the effects of this were modest.[[27]](#footnote-27)

Executive dominance in Ireland is thus pervasive and very strong but should not be crudely caricatured. For example, it is obvious few Governments would attempt to press through proposals that it knows a majority of its own backbenchers in parliament would be sufficiently opposed to,[[28]](#footnote-28) even if separating this from the risk of public/voter backlash is difficult. Such influence should not be discounted as just because such influence may not be “easily observable…does not make it any less real”.[[29]](#footnote-29) That said, *it is* fair to say its impact does not seem to be significant enough to greatly undermine executive dominance. It is also the case that, in principle, logrolling—trading political support for reciprocal action, or informally threatening withdrawal of support to secure certain results—by backbenchers (and minority coalition partners) is possible.[[30]](#footnote-30) But in reality, evidence for the impact of logrolling is relatively scant and again does little to dent executive dominance.

The concentration of power in the 15-member cabinet is therefore very significant.[[31]](#footnote-31) It is collectively responsible for all actions of government. With the help and guidance of the large, permanent and influential civil service, the government controls policymaking; writes and effectively introduces all enacted legislation; manages the legislative process and limits any changes to legislation; and controls the implementation and execution of policy.

The formal authority and power of the Oireachtas over the executive is patent: the Oireachtas can direct the government through use of its exclusive law-making power; the Taoiseach must retain the confidence and support of the Dáil to maintain power; and the executive is expressly constitutionally answerable or responsible to Dáil Éireann.[[32]](#footnote-32) Yet academic commentators can credibly say that Ireland’s form of separation of powers is ‘fundamentally bipartite’: the Dáil/government on the one hand, and courts on the other.[[33]](#footnote-33)

There are few constitutional rules limiting the outer bounds of executive dominance in Ireland. A few judicial rules build on the constitutional injunction that the sole and exclusive legislative power of the state belongs to the Oireachtas.[[34]](#footnote-34) The executive cannot unmake or disapply law, even if a statute authorizes this.[[35]](#footnote-35) There is a non-delegation doctrine that requires that the power to make laws cannot be given to the executive. If a power to make rules and regulations is delegated, all matters of principle and policy must be included in the parent statute and only matters of detail can be left to executive discretion. Any laws that delegate beyond this are unconstitutional and invalid. In practice, however, the rule is not nearly so strict, and it would be more accurate to say that delegations must contain *some* principles and policies to guide their use; only a complete absence will tend to result in invalidation.[[36]](#footnote-36)

Minority government and attempt to bolster parliamentary power

Minority government can act to disempower the executive; where a government enjoys a plurality but not a majority of parliamentary seats, a moderate measure of inter-branch competition can emerge.[[37]](#footnote-37) An executive in a minority government may be less able to pass its full legislative and policy agenda, and parliament may command a greater influence, with government policy proposals more likely to be defeated or modified. Minority governments are also obviously more susceptible votes of no confidence. Where a minority government is maintained by a confidence and supply agreement with an opposition party—as the Irish executive was from since 2016-2020—its legislative efficacy should be undoubtedly lessened.[[38]](#footnote-38) Conversely, we would expect the legislative efficacy of parliamentary actors should increase.

In Ireland, when where the political system’s anticipation of and response to a very severe financial crisis were widely said to have be lacking, new reform measures were promised to improve the powers of the Dáil in the legislative process. Their introduction coincided with Ireland’s minority government arrangement in 2016. These phenomena together were termed “new politics”. The reforms were genuinely significant: First, the Ceann Comhairle (speaker of the Dáil) is now elected by secret ballot of TDs rather than by open vote of the House. The outcome of the 2016 election meant that the first Ceann Comhairle elected in this way was chosen from an opposition party. Secondly, a standing Business Committee was created to allocate parliamentary time on a more proportionate basis between government and opposition parties, and reduce to some degree the government’s control over the agenda of the House. Thirdly, a D’Hondt system was introduced to allocate chairs/membership of Dáil committees. All these measures potentially increased the power of the parliament, and diluted the ability of the government to dominate it.[[39]](#footnote-39)

Allied to this has been introduction of a significant change to the legislative processes: Pre-Legislative Scrutiny. This process involves parliament, through its committees, scrutinising almost all proposed government legislation before policy formation is complete and when change to policy is realistically possible. It is clear that this new stage of the legislative process has empowered parliament.[[40]](#footnote-40) Accompanying these innovations has been greater provision for legal and research support to non-Government members of the Oireachtas, to assist in policy formation and legislative drafting.[[41]](#footnote-41) Cumulatively, these institutional innovations are amongst the most far-ranging in the history of the state.[[42]](#footnote-42) Combined with minority government and confidence and supply, these developments led some commentators to hope it could re-invigorate the Oireachtas, moving towards something approximating the tripartite separation of powers envisioned by the Constitution. As Doyle noted, the executive might be forced to faithfully execute legislation with which it profoundly disagreed.[[43]](#footnote-43)

However, the potential of new politics has not come to fruition; it has been regularly been declared a failure.[[44]](#footnote-44) Pre-legislative scrutiny has had some impact in nudging and tweaking policy formation, and there has been a slowdown of the legislative process with less government legislation being passed. But the balance of power has not fundamentally shifted between the executive and legislature. In fact, the executive has retained remarkable control of the legislative process in spite of not having a legislative majority. It has been able to stop private members legislation, blocking almost all legislative initiatives from outside government. If there has been a reduction in executive dominance, then, it has been negative: the executive can be more easily frustrated in its agenda, but others cannot pursue a legislative agenda in the teeth of government resistance. This highlights that executive dominance is a more resilient and fundamental phenomenon than might have been previously thought. It may not be a contingent political reality, but a constituent feature of the Irish parliamentary system. In the next two parts we outline how the executive managed to maintain its dominance.

**II: Money messages and Private members’ bills**

Article 17.2 and the Money Message

The Westminster tradition reserves a substantial role for the executive in control of State finances. It places what the courts have described as a “double lock” on expenditure, requiring the cooperation of the government and the Dáil.[[45]](#footnote-45) The government is given responsibility, in Article 28.4.4, with preparing for each financial year Estimates of State Receipts and Expenditure. Article 17 gives the Dáil oversight of the government’s estimates. Article 17.2 then provides:

“Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach.”

This provision is far from comprehensive. The term appropriation is not defined, and there is no procedure for adjudication of this question. The Standing Orders of Dáil Éireann expand somewhat on these provisions. [[46]](#footnote-46) Order 179 of the Standing Orders of Dáil Éireann 2016 details the Money Message Procedure:

“Bills involving the appropriation of revenue or other public moneys.

179. (1) A Bill which involves the appropriation of revenue or other public moneys, other than incidental expenses, shall not be initiated by any member, save a member of the Government.

(2) The Committee Stage of a Bill which involves the appropriation of revenue or other public moneys, including incidental expenses, shall not be taken unless the purpose of the appropriation has been recommended to the Dáil by a Message from the Government. The text of any Message shall be printed on the Order Paper.

(3) An amendment to a Bill which could have the effect of imposing or increasing a charge upon the revenue may not be moved by any member, save a member of the Government or Minister of State.”

This Order distinguishes incidental and non-incidental expenditure. For non-incidental expenditures—where the *purpose* of the bill is expenditure—only the government can introduce a bill, and any attempt to introduce such a bill is out of order. This is a function of the Constitution’s grant of power to the executive to prepare annual expenditures.[[47]](#footnote-47) However, where expenditure is incidental—when the bill incurs expenditure from pursuing another end—then it may be introduced and may pass second stage, but cannot proceed to committee stage without authorisation in the form of a Money Message from the government. There is also a related limit on the ability of private members to offer amendments with financial implications to government bills.[[48]](#footnote-48)

The crucial term “incidental expenses” is again not defined.[[49]](#footnote-49) As the interpreter of the Standing Orders, the Ceann Comhairle determines the meaning and application of this provision. If a bill passes Second Stage, it is examined by the Ceann Comhairle and Bills Office for the purposes of Order 179(2). If it is found to entail an incidental expenditure, the decision to grant or deny the Message is for the government. There is no formal time limit for the making of this decision. If the Message is granted, and the bill may proceed to Committee Stage. There is no requirement that a refusal of a Message be communicated or confirmed in any form; the bills can simply exist in limbo, awaiting a Money Message that will never come.

The Money Message in the term of the 2016 minority government

This procedure had, until this period, been the subject of little controversy. The main reason being that a Government with a disciplined and whipped parliamentary majority could vote any private member’s bills (or amendments go bills) down without reliance on this procedure. However, in the aftermath of the formation of the 2016 minority government, it became a major issue. The number of PMBs dramatically increased, from 30 in 2011 to 110 in 2017.[[50]](#footnote-50) As of May 2019, 99 PMBs had been agreed at Second Stage in the term of the minority government. Only ten had passed. 69 bills were stalled awaiting Committee stage, and 55 of these were awaiting money messages.[[51]](#footnote-51) 14 bills were ruled not to require money messages.[[52]](#footnote-52) 7 bills were granted money messages by the government.

It is not exaggeration to say that the Money Message procedure ground PMBs to a halt; the government’s approach was to simply refuse Message, without comment, in almost all cases. As noted by a former Clerk of Dáil Éireann writing in the Irish Times, this use of the money message procedure is “unprecedented in the past 50 years”.[[53]](#footnote-53)

The crucial decision about whether a Money Message is required for a bill is made not by the government, but by the Ceann Comhairle. However, this process is largely a black box; we do not know how the decision is made, and what standards are used to make it. It seems that almost any cost or expense­—including indirect costs,[[54]](#footnote-54) costs already appropriated elsewhere,[[55]](#footnote-55) minor enforcement costs,[[56]](#footnote-56) minor administration costs[[57]](#footnote-57)—will trigger the Money Message procedure. It is also not clear that there is consistency in application of the rules. Some of the bills that have ruled not to require Money Messages appear to have the same levels of expenditure as others that have been said to require one.[[58]](#footnote-58)

Particular controversy arose about the Climate Emergency Measures Bill 2018. Its direct costs were minimal, perhaps nugatory, in requiring the relevant Minister to take account of various environmental factors in considering the grant of petroleum drilling licences, and preventing the Minister from granting licences that would have certain environmental effects. The *economic* effects of this may have been significant in lost revenue from the operation of petroleum companies, but the *appropriation* was scant. That the measure was likely costless was affirmed by the fact that the Ceann Comhairle initially decided that no Money Message was required. However, the government later wrote the Ceann Comhairle expressing concern about the Bill, and in an extraordinary move, the Ceann Comhairle reversed his position and deemed a Money Message to be required.[[59]](#footnote-59) This incident raises questions about the process being independent of government, but also about the methods used to make these determinations.[[60]](#footnote-60)

The high number of PMBs, and dissatisfaction about their progress, led the signing of a Memorandum of Understanding (MoU) between the government and the sub-Committee on Dáil reform, which was formally adopted in December 2018. It provided for wider use of the “Detailed Scrutiny” procedure for a PMB that passes Second Stage; the suspending of the Money Message procedure until after the Detailed Scrutiny report is completed and a recommendation made about the Bill proceeding to Committee Stage; and the government committed to making a decision to issue a Money Message within a six week period or, in the alternative, to provide a “reasoned response” as to why such a Message was refused.[[61]](#footnote-61)

In terms of the government’s decisions to refuse Money Messages for certain bills, it was initially unclear if the government limited itself to financial considerations or if it felt entitled to refuse on other grounds. Several commentators felt it should be so limited.[[62]](#footnote-62) But it became apparent that the government does not feel restrained in this way. First, since the government began to issue “reasoned responses” for its refusal of Money Messages, in some cases it has cited costs as the reason for refusal,[[63]](#footnote-63) but sometimes is has not, clearly refusing for other reasons.[[64]](#footnote-64) In December 2019, commenting on the controversy around the Money Message, Taoiseach Leo Varadkar made it clear that the government felt entitled to refused for several reasons. Only one of them related to money, with two relating to legality and one to simple preference of its own legislation :

“Essentially, there are four grounds. First, if it requires money that has not been voted for by the Oireachtas… The second ground relates to whether a Bill is unconstitutional… The third ground relates to whether the legislation is contrary to European law or international treaties… The fourth ground relates to circumstances where the Government is introducing legislation that supersedes a Private Members’ Bill… It is common for the Government to… put forward legislation which is better and which does much the same thing”.[[65]](#footnote-65)

Constitutionally questionable

There are doubts about the constitutionality of the procedure as currently used. Kenny and Daly note that the Irish procedure is markedly more strict than the equivalent “money resolution” procedure in Westminster; basic enforcement and administration costs; indirect costs; new minor criminal offences; and costs covered by other enactments would not require a money resolution, nor would administrative costs up to a certain conventional threshold.[[66]](#footnote-66) They suggest that the current Irish procedure, as applied under the current Standing Orders, is so strict that it may violate the Constitution in handing the executive a veto on all or almost all legislation, and thus denying the parliament its sole and exclusive power to make laws. The past reality of the “executive’s power over lawmaking is based only on political factors or *realpolitik*, not on constitutional law”, and there is no reason to believe that the Money Message procedure should be read as allowing this functional veto.[[67]](#footnote-67) At the very least, we can say the current interpretation and application of the provision is questionable, not least because the Constitution is hardly specific on the matter; the Constitution’s framework for financial matters is “general and partial rather than precise and comprehensive”.[[68]](#footnote-68)

Whether this matter is justiciable is complicated, but it is possible that this may be decided in the near future. Several TDs who were behind the Climate Emergency Measures Bill attempted to introduce a change to the Standing Orders varying the Money Message rules to reduce its scope. The Ceann Comhairle—in an extraordinary move—rejected the motion to change the Standing Orders as out of order because the proposed change would violate Article 17.2 of the Constitution. This contradicts longstanding practice and Salient Rulings that the Chair does not interpret the Constitution.[[69]](#footnote-69) It also raises constitutional concerns, as the House is empowered to make its own rules, and it is not clear that the Chair has any role in limiting this.[[70]](#footnote-70) The TDs who advanced this change challenged the decision of the Ceann Comhairle and were given leave to judicially review the decision.[[71]](#footnote-71) They applied to widen the scope of the judicial review to seek a ruling more broadly on Article 17.2. This case was delayed due to the calling of a general election in February 2020, but it may be resumed.

**III: Attorney General’s advice on constitutionality**

Attorney General as legal advisor

The Attorney General (AG) is an office in many common law systems with shared roots in English history.[[72]](#footnote-72) It has constitutional status in Ireland by virtue of Article 30 of the Irish Constitution, which provides that the AG is ‘the adviser of the Government in matters of law and legal opinion’.[[73]](#footnote-73) The AG is the legal adviser of the *government*; it does not have a constitutional role in advising the Oireachtas, but constitutionally, the AG operates with a degree of formal independence from government.[[74]](#footnote-74) In a break from Westminster practice, the AG almost never a member of the Oireachtas and is generally a senior barrister. But the AG has a very close relationship with the government, serving at the government’s pleasure and (unlike in the UK) sitting in cabinet meetings.[[75]](#footnote-75) Many have queried if it is accurate to treat the office as truly independent of government, or if the government could influence the Attorney General while asserting the independence of the office and its advice.[[76]](#footnote-76) Advising on the constitutionality of legislation is one of the most important and high-profile functions of the AG. But this advice of the AG is almost never published, nor are summaries of written advice released for parliamentarians or the public to assess. The fact of the advice is disclosed: that the AG has advised that some policy is constitutional or not. Governments have sometimes claimed AG’s advice is not merely highly authoritative and of great weight when considering policies, but binding as a constitutional matter. And this, as we shall see, is often enough to stop legislative proposals in their tracks, despite the fact AG’s advice is only legal advice.[[77]](#footnote-77) Moreover, despite occasional government assertions to the contrary, secrecy is not constitutionally required, and it seems to have developed as a sort of convention. In fact, AG’s advice is published when it suits the government to do this, undermining any case that it is impermissible.[[78]](#footnote-78)

Use of AG advice to curb private members bills

Ireland’s period of minority government saw the executive increasingly rely on AG’s advice to undergird controversial decisions with respect to PMBs. Despite lacking a legislative majority, the Government heavily leaned on secretive, and often contentious, AG’s advice to undercut the legitimacy of PMB’s on the basis they were unconstitutional. A good example of this phenomenon came can be seen through the Government’s treatment of a raft of PMB’s advanced to tackle Ireland’s homelessness crisis. Between 2016-2020, the then Fine Gael minority government faced a deepening homelessness crisis.[[79]](#footnote-79) The Government received considerable critique for its alleged lack of robust action. In justifying its record, the Government repeatedly claimed to face very severe limitations on legislative action due to AG’s advice on constitutional property rights.[[80]](#footnote-80) Unimpressed with the Government’s perceived lack of action, backbenchers proposed several measures they hoped would assist tackling the crisis. However, on each occasion the Government asserted that each measure proposed was unconstitutional based on AG’s advice. As a result, the Government asserted it could not support them, giving itself political cover for opposing measures that may have been very popular during a housing crisis. This may also have been influential in stopping the bills either in persuading other parties to vote against them, or giving other parties political cover for opposing these measures.

The Social and Affordable Housing Bill 2016, introduced by the opposition Labour Party in December 2016, proposed additional powers for local authorities to compulsorily acquire land for housing purposes at reduced rates, and for strengthened rent controls. The Government opposed the Bill, citing constitutional concerns based on legal advice from the AG to the effect that the proposal was a disproportionate interference with property rights.[[81]](#footnote-81) No advice was published, and the Bill was defeated at the Second Stage debate. The Residential Tenancies (Prevention of Family Homelessness) Bill 2018 met a similar fate. Introduced to the Dáil by Sinn Féin in October 2018, the bill proposed to prevent landlords from evicting tenants on the basis that they intended to sell the property, or where the landlord or developer had purchased the property on a buy-to-let scheme. The Housing Minister Eoghan Murphy said that the Bill was an unconstitutional interference with the property rights of a sub-group of society. In response, the Deputy introducing the Bill strongly defended its constitutionality in light of Supreme Court case-law and demanded that the basis for any constitutional advice from the AG be published for scrutiny.[[82]](#footnote-82) Again, however, no advice was published, and the Bill was defeated at the Second Stage debate.

The AG’s stated positions on many of these points was hotly contested by academic and political commentators[[83]](#footnote-83) on the grounds they appeared to flow from a highly conservative interpretation of Supreme Court precedent. Several commentators pointed out that Supreme Court precedent emphatically affords significant latitude and deference to the Oireachtas in balancing property rights and measure aimed at promoting social justice.[[84]](#footnote-84) Since the advice was not published, how the government *presented* the AG’s advice could not be assessed. In other words, parliamentarians had no way of scrutinizing whether the Government was presenting equivocal advice in an overly-cautious manner, to provide favourable legal cover for what was, in reality, ideological unwillingness to undertake aggressive state action.[[85]](#footnote-85)

The true extent of the role AG’s advice played in defeating these PMBs is hard to know, being hard to separate from other political considerations. But it is notable that on both occasions, spokespersons for the largest opposition party cited AG’s constitutional concerns as a reason they could not support their fellow backbenchers. This suggests two possible vectors of influence. First, these opposition parties may have used the AG’s advice as political cover to enable them to oppose popular measures without adverse political consequences. In particular, it is quite possible that Fianna Fáil—the largest opposition party, with a centre-right ideology—had ideological opposition to restrictions on property rights but passed these off as constitutional concerns.[[86]](#footnote-86) Secondly, it is possible that enough non-government parties/TDs were persuaded, or felt brow-beaten, into accepting the Government’s citation of AG’s advice on their unconstitutionality. Political discourse in Ireland is highly legalistic, and perceived commitment to legality is critical for political credibility.[[87]](#footnote-87) Political debate frequently fixates on a policy’s fidelity to constitutional norms.[[88]](#footnote-88) Attacking PMBs by undermining their perceived constitutionality could have an impact. TDs may even come to doubt the constitutionality of policies they might be otherwise politically sympathetic to, in light of advice from this source. If AG’s legal advice were published, it could be ‘scrutinized for accuracy, persuasion, and consistency’ by the press, the academy, and parliamentarians, who could all ‘criticize and possibly correct self-serving or mistaken or excessive interpretations.’ This is clearly harder to do when ‘mere legal principles, as opposed to detailed legal analyses, are disclosed.’[[89]](#footnote-89) This could plausibly function as a useful tool of executive governance and for facilitating dominance over the policymaking process.

*AG’s advice and the money message procedure*

The money message, discussed in the previous section, casts a different light on the role of AG’s advice. In the Taoiseach’s late 2019 statement to the Dáil on the Money Message controversy, he stated that government could and did refuse to issue Money Message based on AG’s advice on constitutionality: “Some legislation put forward is unconstitutional. On the advice of the Attorney General, I cannot grant a money message for legislation I know to be unconstitutional.”[[90]](#footnote-90) If this is an accurate statement of government practice, and given the breadth of the Money Message procedure as currently interpreted, this turns AG’s advice into a veto point on nearly all legislation.

When this tool was used against their bills, some backbenchers strongly resisted arguments about their proposal’s unconstitutionality, proffering their own legal advice to the contrary, or relying on Supreme Court precedent to demonstrate their legal soundness. To take one example,[[91]](#footnote-91) The Mortgage Arrears Resolution (Family Home) Bill 2017 was introduced by Fianna Fáil in the Dáil in July 2017. The Bill proposed to create an independent mortgage arrears tribunal with powers to make binding orders against banks and lending institutions requiring them to restructure a mortgage in a more equitable manner. Opposing the Bill, the Government cited AG’s advice and argued that the Bill was unconstitutional as an infringement of judicial power under Article 34, and a disproportionate interference with the property rights of banks. This prompted a fierce reaction from backbenchers, with one stating bluntly that the advice appeared ‘fundamentally wrong’ in light of the Constitution and that he could not ‘imagine that this advice came from the office of any learned Attorney General.’[[92]](#footnote-92)

Similarly, the No Consent, No Sale Bill, 2019 was introduced to the Dáil by Sinn Féin in January 2019. The bill aimed to prevent the sale of a mortgage onward by a bank or credit institution without the consent of the borrower. The Government not only argued that the bill was bad economic policy, but also raised constitutional objections, on the basis the AG advised was a disproportionate interference with the property rights of banks.[[93]](#footnote-93) In response, backbenchers cited to legal advice from the Office of the Parliamentary Legal Advisor which appeared more sanguine about its constitutionality.[[94]](#footnote-94) In each instance, despite strong Government opposition and the citation of AG’s advice, the Bill passed the second stage, and was halted by the need for a Money Message. We can reasonably infer from the Taoiseach’s later comments that the government refused Money Messages for these bills because of the constitutional concerns raised by the AG.

There are, of course, constitutional checks on the Oireachtas passing unconstitutional legislation in the Irish system: the institution of judicial review. The President has absolute discretion to refer bills to the Supreme Court for pre-enactment constitutional review under Article 26, and the Superior Courts are empowered to declare an Act of the Oireachtas invalid due to its repugnancy to the Constitution.[[95]](#footnote-95) Yet the executive has turned the Constitution’s financial provisions into an additional—and questionable—check on the constitutionality of laws.[[96]](#footnote-96)

**IV: Political culture and the resilience of executive dominance**

Cultural expectation of executive dominance

It is our case that the Money Message procedure, the use of Attorney General’s advice, and their *combined* use to control the legislative process illustrates a remarkable resilience of executive dominance in Ireland. It might suggest that this is a more fundamental and less contingent feature of Westminster systems than we might initially suspect.[[97]](#footnote-97) If so, what accounts for this? Why and how has this become a feature of Ireland’s system? It is not, we think, simply a function of these rules and practices because there is nothing in Ireland’s constitutional order that requires these rules and practices to be used in this way. On the contrary, as we have noted, there are at least plausible arguments that the practices as currently constituted are constitutionally questionable based on a reasonable interpretation of text and structure.

If that is so, what motivates these interpretations and practices that uphold and reinforce executive dominance? One might be tempted to think it a simple power grab: the executive has an obvious incentive to maximise its power at the expense of the legislature. But this does not fully account for the phenomena observed in Ireland. First, in respect of the Money Message, the primary issue with the scope of the procedure derives not from the government but from the independent Ceann Comhairle (who was not formerly of the government’s party) and the Bill’s Office that assisted him in the carrying out of this task. There is no suggestion that the view of the Ceann Comhairle and the Bill’s Office anything other than a sincere interpretation of the constitutional provisions, and these actors have no obvious incentive to empower the executive. Likewise, while the government *might* have an incentive to maximise the impact and power of the AG’s advice, other legislators appear to take this advice very seriously, which they have no obvious incentive to do.

It is our case that a belief in the fundamental dominance of the executive is part of Irish constitutional culture. By constitutional culture, we refer broadly to the norms, habits of thought, social beliefs, and values held by both officials and citizens relevant to interpreting the substance of the Constitution and transforming its words into concrete consequences.[[98]](#footnote-98) It is an intermediate layer between concrete legal rules and their realisation and application, shaping and filtering their reading through a set of fundamental and foundational views that undergird the legal order.[[99]](#footnote-99) The suppositions, assumptions, and beliefs that undergird the practice of Irish constitutional politics includes the idea that the executive should have almost complete control of the legislative process, and any instance where this is not the case—in minority government, say—is something that must be corrected for.

Part of this culture comes from a great change in expectations of what the executive does and what it is for. The contemporary executive would be considered as hopelessly falling short if it contented itself to be a mere instrument for implementing legislative dictates.[[100]](#footnote-100) The executive is now the locus of political hope and expectation. Citizens primarily look to their Taoiseach, Prime Minister, or President—not their legislature— for solutions to tackle complex social and economic problems. To meet expectations placed on it, the executive became, to invert Madison’s famous warning about the legislative branch, the vortex which draws in public power in staggering amounts.[[101]](#footnote-101) This creeping agglomeration of power has created or reinforced a constitutional culture that expects that executive to be chief policymaker and legislator. This constitutional culture is not new, and the idea of a strong executive as the cornerstone of governance was not alien to the drafters of the Constitution.[[102]](#footnote-102) But as the executive moves ever further from the ideal type of a subservient executive, faithful to its parliamentary principal, this has, we believe, bedded down a culture where by political actors, elected and unelected, believe that the normal and proper operation of constitutional politics sees the executive dominant even in the legislative sphere. The executive not only *is*, but *ought* to be the dominant actor, and parliament, on this view, appropriately acts in a reactive capacity to give scrutiny, imprimatur, and the force of law to executive proposals.[[103]](#footnote-103) Executive dominance is no longer just a consequence of *realpolitick*; it is now constitutional expectation.

Viewed through this cultural lens, constitutional rules and practices will be interpreted to defend executive control of the legislature rather than to diminish it. The Money Message is not merely a constitutional rule about major financial control, but a sweeping power for the executive to control even the most minor expenditure, and if this prevents almost all legislative activity without executive approval, that is simply what the Constitution requires. The advice of the Attorney General on constitutionality is appropriately a governmental veto point and not merely contestable legal advice informing policy positions. When your expectations are that government *should* dominate as a matter of constitutional principle, your application and interpretation of rules will tend to facilitate, advance or acquiesce in this reality rather than resist it.

A culture of executive dominance might not manifest itself in the same manner across different Westminster systems. For example, even compared to other Westminster systems with influential legal advisors, Ireland’s AG stands out as seemingly having a uniquely influential role which has been utilised to potent effect by the executive.[[104]](#footnote-104) The end point – a constitutional culture which sees the executive as the proper predominant policy actor – may be similar, but this culture may manifest through different institutional forms or political practices that suit the particular circumstances and happenstantial development of that system.

It should also be noted that the extent of this culture’s embeddedness could be less significant than it currently seems. It might be that Ireland’s recent experience is as much a product of political happenstance—where the major opposition party Fianna Fáil was not greatly or ideologically opposed to the government’s agenda—as deeply embedded culture. Following the General Election in February 2020, it seems likely that Ireland’s political future may be very different, with very significant ideological differences between government and opposition.[[105]](#footnote-105) This might change or weaken this culture, or show it to not be as strong as we have postulated here. As to this, only time will tell.

*Changing culture and formal institutional reform*

Ireland’s experience is also a case-study in the difficulty of approaching constitutional reform through a rationalist lens. That is, belief in our ability to deploy “premeditated principles to make (or re-make) the arrangements of a political community”[[106]](#footnote-106) through institutional adjustments. In this instance, several major reforms were introduced to alter political arrangements to empower the parliament to have a robust role in policy choices and law-making, parallel to the executive’s agenda. But despite these reforms, and a period of minority Government, Ireland’s deeply embedded executive-centred constitutional culture proved robust. It continued to infuse how leading political actors and lawyers interpreted the Constitution’s text and structure concerned with checks and balances and separation of powers. It facilitated arguably strained interpretations of constitutional text and structure in order to allow the executive to maintain predominance, even when it lacked a legislative majority and faced an Oireachtas that has arguably, due to recent reforms, never been better resourced or more institutionally robust.[[107]](#footnote-107)

We do not suggest that the government or any other political actor behaved cynically; it is entirely reasonable to assume good faith in every step of this process. Culture does not have to be consciously understood; it is a set of shared assumptions and community understandings that, once internalised, operate without any conscious regard to them.[[108]](#footnote-108) The interpretations adopted in respect of Article 17.2 and AG’s advice present themselves not only as plausible, but self-evidently right, if one begins from an unexamined assumption of executive dominance. On this view, the empowerment of the Oireachtas to pass laws and set policy in contradiction to the executive’s desires was a breakdown of the policy and law-making status quo, which jeopardised the integrity of the constitutional order.

The stymying of this perceived legislative usurpation would, from this perspective, be a legitimate example of what Pozen dubs “constitutional self-help”: a unilateral attempt by one constitutional actor to resolve a perceived wrong by another, through “efforts to enforce constitutional settlements” and defend institutional prerogatives.[[109]](#footnote-109) In an executive-centred view of constitutional culture, the executive reasserting dominance through the tools available to it is a principled remedy for a usurpation of policymaking by the Oireachtas.

The adoption of these interpretations; their defence as natural and even essential; and the substantial (though by not universal) acquiescence in this by political actors is the most cogent evidence that executive dominance is a facet of constitutional culture, an assumption that underlies Ireland’s parliamentary democracy and its institutions. Culture is resilient because it cannot, directly and intentionally, be changed. Being largely unspoken and often subconscious, it is not clear what steps we can take to augment or shift it. Formal changes to practices, rules and institutions may reshape the culture, and can certainly nudge cultures in the direction of change. But our intent for change might be frustrated as these new processes are interpreted in light of, and subsumed by, cultural norms. If we are unaware of this culture, it may be even harder to change it. Deep reform of how constitutional institutions interact requires careful attention to how different constitutional actors understand the Constitution. If a constitutional culture, and its assumptions and presuppositions, can be mapped out, constitutional actors and commentators might be in a better place to highlight the contingent nature of these assumptions and re-examine them.

However, culture is difficult to capture and document, given that ‘many of the workings of the constitution are not visible to outsiders.’[[110]](#footnote-110) But even insiders will find it difficult to step outside of themselves, from their situated position inside the very political practices and activities under examination, to tell us what those practices are, and how they think constitutional culture shapes them. Their account of the influence of constitutional culture on political decision-making, and how they interpret the Constitution, will be given from within a political identity already formed and shaped, subconsciously, by the culture they are trying to identify.[[111]](#footnote-111) But, even if difficult, our case-study shows that knowing whatever we can about constitutional culture may prove indispensable for any genuine attempt to recalibrate the balance of constitutional power between the executive and legislature.

1. Max Weber Postdoctoral Fellow, European University Institute. [↑](#footnote-ref-1)
2. Assistant Professor, Trinity College, Dublin. [↑](#footnote-ref-2)
3. *See* Margit Cohn, “Tension and Legality: Towards a Theory of the Executive Branch” (2016) 29 Canadian Journal of Law & Jurisprudence321, 344; see Albert, “Presidential Values in Parliamentary Democracies” (2010) 8 International Journal of Constitutional Law207. [↑](#footnote-ref-3)
4. In the UK context *see e.g. R (Miller) v Prime Minister* [2019] UKSC 41; in an Irish context *see MacDonncha v Minister for Education and Skills* [2013] IEHC 226. [↑](#footnote-ref-4)
5. These have a familial resemblance to debates in the UK around the distinction between so-called Westminster and Whitehall conceptions of the constitutional order. *See* David Howarth, “Westminster versus Whitehall: Two Incompatible Views of the Constitution” UK Const Law Blog (18 April 2019). For a defence of executive-legislative relations in the ‘Whitehall’ conception of the UK constitutional order, *see* Stephen Laws and Richard Ekins, *Endangering Constitutional Government: The risks of the House of Commons taking control* (Policy Exchange, 2019). [↑](#footnote-ref-5)
6. See Paul Evans, “Is there, and should there be, an ‘executive veto’ in the British Constitution?”, February 2020, paper on file with the author. [↑](#footnote-ref-6)
7. See Pat Leahy, “The ‘new politics’ one year on: Different? Yes. Better? No” *The Irish Times* (25th February 2017). [↑](#footnote-ref-7)
8. Julian Mortenson, “The Executive Power Clause” (Forthcoming, 2020) 167 University of Pennsylvania Law Review 1, 93. [↑](#footnote-ref-8)
9. Peter Cane, “Executive Primacy, Populism and Public Law” (2019) 28 Washington International Law Journal527, 548; Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (John Hopkins University Press, 1993)7. [↑](#footnote-ref-9)
10. Eric Posner and Adrian Vermeule, *Executive Unbound: After the Madisonian Republic* (Oxford University Press, 2010) 11-12. [↑](#footnote-ref-10)
11. Terry Moe and Scott A. Wilson, “Presidents and the Politics of Structure” (1994) 57 Law and Contemporary Problems 1-44. [↑](#footnote-ref-11)
12. *See* Niamh Hardiman, “Conclusion” in Niamh Hardiman (ed.), Irish Governance in Crisis (Manchester University Press, 2012). [↑](#footnote-ref-12)
13. Oran Doyle, “Constitutional Change in Ireland” (2018) 40 Dublin University Law Journal 1, 3. [↑](#footnote-ref-13)
14. Article 46 of the Irish Constitution. *See McKenna v An Taoiseach (no. 2)* [1995] 2 IR 10, 43. [↑](#footnote-ref-14)
15. Tom Hickey, “Republicanism, the Distribution of Power and the Westminster Model of Government: Lessons from 20th Century Irish Constitutionalism” (2012) 4 Ius Publicum Network Review1-37. [↑](#footnote-ref-15)
16. Basil Chubb, “Government and Dail: Constitutional Myth and Political Practice” in Brian Farrell (ed.), *De Valera’s Constitution and Ours* (Gill and MacMillan, 1988) 94. [↑](#footnote-ref-16)
17. Oran Doyle, *The Irish Constitution: A Contextual Analysis* (Bloomsbury, 2018) 19. [↑](#footnote-ref-17)
18. Harment Bulsara and Bill Kissane, “Arend Lijphart and the Transformation of Irish Democracy” (2009) 32 Western European Politics 172-195, 176. [↑](#footnote-ref-18)
19. Oran Doyle, *The Constitution of Ireland* (n 16) 46-52. [↑](#footnote-ref-19)
20. Ibid 99. [↑](#footnote-ref-20)
21. This is true for the lower house. The government typically—though not always—enjoys legislative majority in the Seanad (upper house) too, but if it does not, the powers of the Seanad are very limited. See David Kenny, “The failed referendum to abolish the Ireland’s Senate: defending bicameralism is a small and relatively homogenous country” in Richard Albert, Antonia Braggia, Cristina Fasone, (eds.) *Constitutional Reform of National Legislatures: Bicameralism under Pressure* (Edward Elgar, 2019) 163. [↑](#footnote-ref-21)
22. Lia O’Hegarty, “The Constitutional Parameters of the Work of the Houses of the Oireachtas” in Manning and MacCarthaigh (eds.), *The Houses of the Oireachtas: Parliament in Ireland*, (Institute of Public Administration, 2010) 103. [↑](#footnote-ref-22)
23. Oran Doyle, *The Constitution of Ireland* (n 16) 84-90. [↑](#footnote-ref-23)
24. John O’Dowd, “Parliamentary Scrutiny of Bills” in Muiris MacCarthaigh and Maurice Manning (eds.), The Houses of the Oireachtas: Parliament in Ireland (Institute of Public Administration, 2009) 322. The Seanad, of course, is also be under the whip, and is, but to a somewhat lesser extent. [↑](#footnote-ref-24)
25. John Coakley and Michael Gallagher, *Politics in the Republic of Ireland* (6th edn, Routledge, 2017) 211. [↑](#footnote-ref-25)
26. Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law*, (Manchester University Press, 2015) 105. [↑](#footnote-ref-26)
27. Mark Brennock, “Backbenchers want to influence policy and have voices heard,” *The Irish Times* (24th June 2006). [↑](#footnote-ref-27)
28. Michael Gallagher, “The Oireachtas: President and Parliament” in (eds.), John Coakley and Michael Gallagher *Politics in the Republic of Ireland*, (Routledge, 2017) 177. [↑](#footnote-ref-28)
29. Eoin O’Malley, “The Apex of Government: Cabinet and Taoiseach in Operation” in O’Malley and MacCarthaigh (eds.), *Governing Ireland: From Cabinet Government to Delegated Governance* (Institute of Public Administration, 2012) 37. [↑](#footnote-ref-29)
30. *See* generallyRichard S. Conley and Marija A.Bekafigo, “No Irish Need Apply? Veto Players and Legislative Productivity in the Republic of Ireland, 1949-2000” (2010) 43 Comparative Political Studies 91, 93; Richard Albert, “Fusion of Presidentialism and Parliamentarianism” (2009) 54 American Journal of Comparative Law 531, 570. [↑](#footnote-ref-30)
31. O’Malley, “The Apex of Government” (n 28). [↑](#footnote-ref-31)
32. Conor Casey, “Under-Explored Corners: Inherent Executive Power in the Irish Constitutional Order” (2017) Dublin University Law Journal1, 28-32. [↑](#footnote-ref-32)
33. Oran Doyle, *The Constitution of Ireland* (n 16) 46. [↑](#footnote-ref-33)
34. Article 15.2.1. *See* Maria Cahill & Sean O’Conaill, “Judicial Restraint Can Also Undermine Constitutional Principles: An Irish Caution” (2017) 36 University of Queensland Law Journal 259 [↑](#footnote-ref-34)
35. Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh, *Kelly: The Irish Constitution* (Bloomsbury Professional, 2019) para. 4.2.27. [↑](#footnote-ref-35)
36. Ibid 306. [↑](#footnote-ref-36)
37. Richard Albert, “Fusion of Presidentialism and Parliamentarianism” (n 29) 565. [↑](#footnote-ref-37)
38. However, see *contra* Conley and Bekafigo, who argue that there is no real difference in legislative productivity in Irish government, regardless of whether the executive commands a majority or acts in a minority or coalition. *See* Richard S. Conley and Marija A.Bekafigo, “No Irish Need Apply? Veto Players and Legislative Productivity in the Republic of Ireland, 1949-2000” (n 29). [↑](#footnote-ref-38)
39. *See* Catherine Lynch, “The effect of parliamentary reforms (2011–16) on the Oireachtas committee system” (2017) 65 Administration 59–87. [↑](#footnote-ref-39)
40. *See* Catherine Lynch and Shane Martin, “Can parliaments be strengthened? A case study of pre-legislative scrutiny” (2019) Irish Political Studies1-20; Catherine Lynch, Eoin O’Malley, Theresa Reidy, David M.Farrell, Jane Suiter, “Dáil reforms since 2011: Pathway to power for the 'puny' parliament?” (2017) 65Administration 37–57. A similar system introduced for private members’ bills—known as Detailed Scrutiny—is discussed below. [↑](#footnote-ref-40)
41. Through the Oireachtas Library & Research Service and Office of Parliamentary Legal Advisors. ibid 53. [↑](#footnote-ref-41)
42. ibid 55. [↑](#footnote-ref-42)
43. Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (n 16) 62, 97. [↑](#footnote-ref-43)
44. Noel Whelan, “New politics means little legislation” *Irish Times* (27th January, 2017)**;** Stephen Collins, “Current Dáil tottering toward demise as 'new politics' fails” *Irish Times* (28th February, 2019). [↑](#footnote-ref-44)
45. *Collins v Minister for Finance* [2016] IESC 73 at [62]. [↑](#footnote-ref-45)
46. There has been no judicial consideration of these questions. See David Kenny and Eoin Daly, ‘Opinion on the Constitutional Limits of the “Money Message” Procedure under Article 17.2 of the Constitution of Ireland” May 2019 available at https://www.academia.edu/40448056/Opinion\_on\_the\_Constitutional\_Limits\_of\_the\_Money\_Message\_Procedure\_under\_Article\_17.2\_of\_the\_Constitution\_of\_Ireland. [↑](#footnote-ref-46)
47. Catherine Lynch and Darren Lawlor, “Private Members’ Bills (PMBs): Admissibility, Government messages and detailed scrutiny” *Oireachtas Library and Research Service Note* (June 14th 2018) at 6-7. [↑](#footnote-ref-47)
48. Salient Ruling 151 in the 2011 edition publication gives limited insight into the understanding of appropriation in the context of amendments from private members, including that contingent or potential expenditures are included, as are Ministerial powers that cannot be exercised without expenditures. Ruling 152 makes it clear that an amendment *becomes* out of order if it emerges in the course of debate that it puts a charge on public funds. [↑](#footnote-ref-48)
49. The Library and Research Service of the Oireachtas offers the following, unofficial definition: “Such incidental expenses may include the research, consultation and development of a new policy, its implementation, monitoring, a subsequent review process and possible enforcement costs.” *See* (n 54) 8. This cannot, of course, be taken to be an official definition. [↑](#footnote-ref-49)
50. Catharine Lynch and Darren Lawlor, “Private Members’ Bills (PMBs): Admissibility, Government messages and detailed scrutiny (updated Note)” *Oireachtas Library and Research Service Note* (30th May 2019) 3-4. [↑](#footnote-ref-50)
51. Ibid 17. [↑](#footnote-ref-51)
52. ibid 18. [↑](#footnote-ref-52)
53. Kieran Coughlan, “Government relying on little-known rule to block Bills” *The Irish Times* (June 26th, 2017). [↑](#footnote-ref-53)
54. The Statute of Limitations (Amendment) Bill 2018sought to augment the limitations rules in respect of the victims of thalidomide. [↑](#footnote-ref-54)
55. The Provision of Objective Sex Education Bill 2018 did no more than augment very slightly the existing statutory duty of the Minister for Education to account for certain goals and values when engaging in a curriculum reform of sex education required under s 30 of the Education Act 1998. Any cost associated with this would result from the original statutory duty, and it is hard to see that the minor variation of the duty incurred any additional costs whatsoever. [↑](#footnote-ref-55)
56. The Sale of Tickets (Sporting and Cultural Events) Bill 2017 involved only the minor costs of police enforcement of a criminal offence for ticket touting, which would be unlikely to have any major resource implications. See Kenny and Daly (n 53) 10. [↑](#footnote-ref-56)
57. One Oireachtas member reported being told by those involved in the process that even €1 of civil servant time would be sufficient to trigger the requirement. [↑](#footnote-ref-57)
58. See Kenny and Daly (n 53) 13-14. Several examples include the Garda Síochána (Amendment) Bill 2017; the Central Bank (Variable Rate Mortgages) Bill 2016; the Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Act 2018; and the Ramming of Garda Vehicles Bill 2015. Two referendum Bills are also included, and the Clerk of the House apparently confirmed to a deputy that referendum bills do not require Money Messages even though referendums cost money. Dáil Éireann debate, 4th December 2019 vol 990 no 5. [↑](#footnote-ref-58)
59. See *Smith v An Ceann Comhairle* [2019] IEHC 746. [↑](#footnote-ref-59)
60. A similar controversy arose during debate on the Control of Economic Activity (Occupied Territories) Bill, 2018. See Dáil Éireann debate, Wednesday 23rd January 2019, Vol. 978 No.3. [↑](#footnote-ref-60)
61. Memorandum of Understanding between the Government and Dáil Éireann on Private Members Bills (5th December, 2018) available at: <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/sub_committee_on_dail_reform/reports/2019/2019-04-29_report-memorandum-of-understanding-between-the-government-and-dail-eireann-on-private-members-bills_en.pdf>. Catharine Lynch and Darren Lawlor, “Private Members’ Bills (PMBs): Admissibility, Government messages and detailed scrutiny” (n 53) 13. [↑](#footnote-ref-61)
62. See Kieran Coughlan, “Government relying on little-known rule to block Bills” (n 60). [↑](#footnote-ref-62)
63. Department of Housing, Planning & Local Government, ‘Reasoned response to the request for a money message in relation to the Local Government (Town Councils Commission) Bill 2017’ available at <https://ptfs-oireachtas.s3.amazonaws.com/DriveH/AWData/Library3/HPLGdoclaid290319\_150417.pdf>. [↑](#footnote-ref-63)
64. See Department of Communications, Climate Action and Environment, ‘Reasoned response to Waste Reduction Bill 2017’ available at <https://ptfs-oireachtas.s3.amazonaws.com/DriveH/AWData/Library3/2019-02-27_Reasoned_Response_to_be_laid_before_both_Houses_164802.pdf>>, where compliance with EU law was cited. [↑](#footnote-ref-64)
65. Dáil deb 4 December 2019 vol 990 no 5. That the government feels it can and should prefer its own legislation is a reflection of its belief that fundamentally, it should control the process. [↑](#footnote-ref-65)
66. See Kenny and Daly (n 53) 11-13; Malcolm Jack, *Erskine May: Parliamentary Practice* (24th ed., Lexis Nexis, 2011) 746-52. [↑](#footnote-ref-66)
67. Ibid 16. [↑](#footnote-ref-67)
68. Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (n 40) para [4.3.75], citing *Collins v Minister for Finance*  [2016] IESC 73 [↑](#footnote-ref-68)
69. Salient Ruling 258 and 259. [↑](#footnote-ref-69)
70. Nothing in the Constitution of the Standing Orders gives the Chair this role. [↑](#footnote-ref-70)
71. *Smith v An Ceann Comhairle* [2019] IEHC 746. [↑](#footnote-ref-71)
72. Seegenerally J Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell London 1984). [↑](#footnote-ref-72)
73. SeeArt 30 Constitution of Ireland; Hogan, Whyte, Kenny and Walsh, *Kelly’s Irish Constitution* [5.4.12]–[5.4.40]; David Kenny and Conor Casey, “A One Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency” 42 *Dublin University Law Journal* (Forthcoming, 2020). [↑](#footnote-ref-73)
74. Art 30.1 of the Constitution expressly states that the AG “shall not be a member of the Government.” [↑](#footnote-ref-74)
75. Eoin O’Malley, “The Apex of Government: Cabinet and Taoiseach in Operation” (n 28) 49. [↑](#footnote-ref-75)
76. David Kenny and Conor Casey, “A One Person Supreme Court?” (n 81); David Kenny and Conor Casey, “Shadow Constitutional Review: The Dark-Side of Political Pre-Enactment Review in Ireland and Japan” (2020) 18 International Journal of Constitutional Law 51-75. [↑](#footnote-ref-76)
77. Ibid. [↑](#footnote-ref-77)
78. The advice can be privileged, but this can be waived. Arguments that it is required by cabinet confidentiality are, in our view, misplaced. Ibid. [↑](#footnote-ref-78)
79. #  See eg Megan Nolan, ‘Homelessness in Ireland is at crisis point, and the vitriol shown towards homeless people is just as shocking’ *New Statesman* (2nd February, 2020).

 [↑](#footnote-ref-79)
80. #  David Kenny and Conor Casey, “Shadow Constitutional Review” (n 84); David Kenny and Conor Casey, “A One Person Supreme Court?” (n 81); Finn Keyes, “Property rights and housing legislation” *Oireachtas Research & Library Service Briefing Paper* (2019).

 [↑](#footnote-ref-80)
81. Dáil Éireann debate, Thursday 8th December 2016, Vol 932. No.2. [↑](#footnote-ref-81)
82. Dáil Éireann debate, Thursday 28th March, 2019, Vol. 981 No.2. [↑](#footnote-ref-82)
83. The authors of the leading treatise on Irish constitutional law suggested in the preface to the most recent edition, “considerable latitude is given the Oireachtas to regulate and organise a modern economy. The popular conception to the contrary is a pure myth.” Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* (n 40) xvii. *Cf* Edmund Honohan, “Open letter to Alan Kelly - 'Don't blame the housing crisis on the Constitution” *Irish Independent* (3rd April 2016). [↑](#footnote-ref-83)
84. *See* Gerard Hogan, “Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country” in A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019) 1360. [↑](#footnote-ref-84)
85. David Kenny and Conor Casey, “Shadow Constitutional Review” (n 84); David Kenny and Conor Casey, “A One Person Supreme Court?” (n 81). [↑](#footnote-ref-85)
86. #  Finna Fáil would later go on to support a rent freeze policy, before distancing itself yet again based on constitutional concerns raised in legal advice provided by a barrister who unsuccessfully stood for the party in the 2014 local elections. Christina Finn, “No rent freeze under FF government as party states it would be unconstitutional” *Journal.ie* (21st January, 2020).

 [↑](#footnote-ref-86)
87. David Kenny and Conor Casey, “Shadow Constitutional Review” (n 84); David Kenny and Conor Casey, “A One Person Supreme Court?” (n 81); Eoin Daly, “Reappraising judicial supremacy in the Irish constitutional tradition” in Hickey, Cahillane and Gallen (eds.), Judges, Politics and the Irish Constitution (Manchester University Press, 2017). [↑](#footnote-ref-87)
88. ibid. [↑](#footnote-ref-88)
89. Jack Goldsmith, “The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation” in Clement Fatovic and Benjamin A. Kleinerman (eds.), *Extra-Legal Power and Legitimacy: Perspectives on Prerogative* (Oxford University Press, 2013) 228. [↑](#footnote-ref-89)
90. Dáil deb 4 December 2019 vol 990 no 5. [↑](#footnote-ref-90)
91. Very similar controversy emerged a year later in respect of the Urban Regeneration and Housing (Amendment) Bill 2018, aimed at tackling land hoarding (Dáil Éireann debate, Tuesday 3rd July, 2018, Vol. 971 No. 1) and the Residential Tenancies (Greater Security of Tenure and Rent Certainty) Bill 2018 relating to rent restrictions. Dáil Éireann debate, Wednesday 30th May, 2018, Vol. 969 No. 8. [↑](#footnote-ref-91)
92. Dáil Éireann debate, Wednesday 12th July, 2017 Vol. 958 No.1. [↑](#footnote-ref-92)
93. #  Cristina Finn, “The banks are dictating what happens': TDs say government relying on 'constitution' card to block vulture funds Bill” *Journal.ie* (3rd April, 2019).

 [↑](#footnote-ref-93)
94. #  Jack Horgan Jones, “Barriers to ‘no consent, no sale’ Bill can be overridden, say legal advisers” *Irish Times* (10th July, 2019).

 [↑](#footnote-ref-94)
95. *See* Article 26 and 34 of the Irish Constitution. [↑](#footnote-ref-95)
96. David Kenny and Conor Casey, “Shadow Constitutional Review” (n 84); David Kenny and Conor Casey, “A One Person Supreme Court?” (n 81). [↑](#footnote-ref-96)
97. In the devolved Scottish parliament in Holyrood, there is a “perceived dominance of executive power” and a prevalence of “party culture” that is said to disempower the legislature, leading again to proposals for institutional reform. Commission on Parliamentary Reform, *Report on the Scottish Parliament*, 20th June 2017, 43, 48, available at <https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/108084.aspx>. Such cultures are difficult to shift, in spite of institutional reform. [↑](#footnote-ref-97)
98. *See* Andrew Siegel, “Constitutional Theory, Constitutional Culture” (2016) 18 University of Pennsylvania Journal of Constitutional Law 1067, 1107; Reva Siegel, “Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA” (2006) 94 California Law Review1323 1325; Pierre Legrand, “Comparative Legal Studies and the Matter of Authenticity” (2006) 1 Journal of Comparative Law 365, 380. [↑](#footnote-ref-98)
99. Culture in this sense is “the values, beliefs, dispositions, justifications and the practical consciousness that allows [actors] to consolidate a cultural code, to crystallize their identities, and to become professionally socialized.” Pierre Legrand, ‘The Impossibility of Legal Transplants’ (1997) 4 Maastricht Journal of European and Comparative Law 111, 114.This is not to say that the culture doesn’t shape the rules. Of course, it does, and you could make a case that formalised rules are an attempt to capture culture. But here we are interested in the way that culture shapes the application and evolution of rules. [↑](#footnote-ref-99)
100. *See* Harvey Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (John Hopkins University Press, 1993). [↑](#footnote-ref-100)
101. Martin Flaherty, “The Most Dangerous Branch” (1996) 105 Yale Law Journal1725, 1817. [↑](#footnote-ref-101)
102. De Valera, the architect of the Constitution, said in the debates on the Constitution that the government will have the greatest power in the State.’ But, he noted “if it were not for the majority of the Dail the government would not be ruling at all”. Dáil Debates 67/35; 11 May 1937. See Brian Farrell, *Chairman or Chief?: the role of Taoiseach in Irish Government*, (Gill and McMillan, 1971) 33. [↑](#footnote-ref-102)
103. Muiris MacCarthaigh, *Government in Modern Ireland* (Institute of Public Administration, 2008) 39. [↑](#footnote-ref-103)
104. We have argued elsewhere that Ireland has a uniquely negative form of political constitutionalism compared to other Westminster systems. David Kenny and Conor Casey, “Shadow Constitutional Review” (n 84). [↑](#footnote-ref-104)
105. In this election, the populist left-wing Irish republican party Sinn Féin won a very large share of the vote, winning almost as many seats as Fianna Fáil and more than Fine Gael. Whatever government might be formed after this (or a second) election, it is very likely to face a more strident opposition than was seen between 2016 and 2020. [↑](#footnote-ref-105)
106. Graham Gee and Grégoire Webber, “Rationalism in Public Law” (2013) 76 *Modern Law Review* 708, 717. [↑](#footnote-ref-106)
107. Conor Casey, “The Constitution Outside the Courts: The Case for Parliamentary Involvement in Constitutional Review” (2019) 61 Irish Jurist36-64. [↑](#footnote-ref-107)
108. See David Kenny, "Merit, Diversity and Interpretive Communities: The (non) party politics of Judicial Appointments" in Hickey, Cahillane and Gallen (eds.), Judges, Politics and the Irish Constitution (Manchester University Press, 2017). [↑](#footnote-ref-108)
109. David Pozen, “Self-Help and the Separation of Powers” (2016) 124 Yale Law Journal 2, 8-12. *See* also N.W. Barber, “Self-Defence for Institutions” (2013) 72 Cambridge Law Journal558, 561. [↑](#footnote-ref-109)
110. Graham Gee and Grégoire Webber, “Rationalism in Public Law” (n 112) 732. [↑](#footnote-ref-110)
111. David Kenny, “Conventions in Judicial Decision-Making: Epistemology and the Limits of Critical Self-Consciousness” (2015) 38 432, 436. [↑](#footnote-ref-111)