THE CONSTITUTION OUTSIDE THE COURTS—THE CASE FOR PARLIAMENTARY INVOLVEMENT IN CONSTITUTIONAL REVIEW

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Abstract: This article makes the case for greater parliamentary involvement over assessments of the compliance of policy proposals with constitutional commitments. It proceeds in four parts. Part I outlines the strongest normative justifications for parliamentary involvement in pre-enactment constitutional review in theoretical ideal-type accounts offered by scholars. Part II outlines the Irish constitutional review process. It traces the predominant role played by the executive and judiciary, and how Parliament is largely excluded from any substantive participation. Part III provides a comparative account of how several other common-law parliamentary systems implement parliamentary engagement with rights issues. Part IV distils the various factors considered in Part III by way of guiding potential institutional reforms aimed at facilitating a more pronounced role for Parliament over constitutional review. It is tentatively suggested that the recent innovation of pre-legislative scrutiny—if accompanied by several additional initiatives—may serve as a good basis for commencing any conversation concerning reform. These amendments include reforming the extremely secretive and opaque process of executive branch legal review, and promoting greater parliamentary capacity to contest and scrutinise executive determinations through the creation of a non-partisan, specialised and well-resourced constitutional law committee. However, Part V concludes on a note of caution and highlights the obvious barriers which may hamper attempts at cultivating greater parliamentary involvement over constitutional review, notwithstanding any reforms.

Keywords: Political constitutionalism – extrajudicial constitutional interpretation – executive dominance – parliamentary committees – comparative constitutional law

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INTRODUCTION AND OUTLINE

Executive dominance over policy formation and law-making in Ireland has been well documented. The constitution vests the Oireachtas with a great deal of power—the "sole and exclusive power of making laws" for the State. However, it is widely understood that the executive is in fact the most powerful branch of state,[2] exercising considerable authority over the law-making process.[3] A considerable body of academic scholarship has grown exploring and explaining this trend. These accounts present the executive's predominance as a consequence of several factors; including Ireland's Westminster form of government,[4] the centrality of cohesive organised political parties to allocations of public power,[5] and the rise of the modern administrative state.[6] In addition to identifying and exploring factors which compound executive dominance, Irish public law and political science scholarship have also explored institutional reforms that might strengthen the position of the Oireachtas in performing its core functions:[7] including holding the executive to account and discharging its role as the exclusive law-maker of the State by engaging with, deliberating on, and robustly scrutinising policy proposals. There are now debates over the current *extent* of executive predominance[8] and the degree to which it has fluctuated during Ireland's ongoing experience of minority government and recent modest parliamentary reform.[9] However, the fact that the

[2] If we understand power in this context as referring to the ability to "control the outcomes of contested decision making processes and secure their preferred policies" or "the ability to effect substantive policy outcomes by influencing what the government will or will not do". Daryl J. Levinson, "Foreword: Looking for Power in Public Law" (2016) 130 *Harvard Law Review* 1 at 33.

[3] Conor Casey, "Under-explored Corners: Inherent Executive Power in the Irish Constitutional Order" (2017) 40(1) *Dublin University Law Journal* 1; 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), p.103.

[4] Alan J. Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland 1782–1992*, (Irish Academic Press, 1994), p.157.

[5] Muris MacCarthaigh, "The Role of the Houses of the Oirechatas: Theory and Practice", in Manning and MacCarthaigh (eds) (2010) fn.3 above, p.48.

[6] Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press, 2009).

[7] See for example Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press, 2015), p.99.

[8] Eoin O'Malley, "The Apex of Government: Cabinet and Taoiseach in Operation", in O'Malley and MacCarthaigh, *Governing Ireland: From Cabinet Government to Delegated Governance* (Institute of Public Administration, 2012), p.37.

[9] For example, a recent article authored by several Irish political scientists assessing the impact of pre-legislative scrutiny and several other recent political reforms has suggested that: "The reforms made in the thirty-first and thirty-second Dáil Éireann represent the most substantial changes to the operation of the Dáil since it was formed. These changes shift Ireland substantially on the scale of government control of the parliament … In particular, the election of the Ceann Comhairle by secret ballot, the creation of the Business Committee, pre-legislative scrutiny and the allocation of committee chairs on the basis of proportionality can strengthen the parliament." Catherine Lynch, Eoin O'Malley, Theresa Reidy, David M. Farrell, Jane Suiter, "Dáil reforms since 2011: Pathway to power for the 'puny' parliament?" (2017) 65 *Administration* 37 at 55.

executive generally exercises considerable control over Parliament is not contested, even if it is recognised that this control exists on a continuum.

Despite the considerable array of literature discussing executive–parliamentary relations, and the appropriate calibration of power between the two, there is one related and important issue that has received scant consideration: the absence of any substantive or structured role for Parliament to contest and debate *specifically over constitutional issues* during the legislative process.

The judiciary is not the only institution capable of assessing the compatibility of legislation with constitutional or statutory rights-based commitments. In many legal systems, this process encompasses the political branches playing an important role through engaging in pre-enactment constitutional/political review.[10] Accounts offered in public law scholarship argue that pre-enactment review by both political branches promotes several valuable normative benefits, including enhancing government accountability by subjecting its decisions to constitutional or rights-based scrutiny internally through executive assessment, and then externally through parliamentary and public scrutiny. This in turn is said to encourage the political branches to be more rights-conscious in their approach to the law-making process and the public to be more aware of rights issues. Similarly, proponents of political-branch review argue that it represents a more compelling way to cohere democratic self-governance with constitutional or rights commitments, than relying on judicial review alone.

In Ireland, however, the constitutional review process is dominated by the executive and judiciary and disempowers Parliament from any meaningful say over questions concerning constitutional commitments. Although Ireland has a form of pre-enactment review, it is a highly secretive process heavily dominated by the executive. It is a variant far removed from the ideal-type outlined in theoretical accounts. Consequently, it instantiates few of the benefits typically associated with pre-enactment review. Aiming to compensate for a dearth of literature on this issue, this article makes the case for greater parliamentary involvement in questions concerning the compliance of policy proposals with constitutional commitments.

This article proceeds in four parts. Part I outlines the strongest normative justifications for parliamentary involvement in pre-enactment constitutional review in theoretical accounts offered by scholars. Part II outlines the Irish constitutional review process. It traces the predominant role played by the executive and judiciary, and how Parliament is largely excluded

[10] Janet L. Hiebert, "Parliamentary Bills of Rights: An Alternative Model" (2006) 69 *Modern Law Review* 7. These terms are interchangeable, depending on whether the legal system in question has a constitutional or statutory bill of rights.

from any substantive participation. Part III gives a comparative account of how several other common-law parliamentary systems implement pre-enactment review and parliamentary engagement with rights issues, focusing on Canada, New Zealand and the United Kingdom. I suggest that attempts to realise the benefits associated with ideal-type theoretical accounts have had modest success at best. This is because the efficacy of pre-enactment review at promoting them appears contingent on the wider political surround of the system pre-enactment review is embedded.[11] Thus, political party cohesiveness and the institutional closeness between Parliament and the executive[12] have impacted realisation of these benefits. However, the form and structure pre-enactment review itself takes also has an impact on efficacy. Systems where the process is executive-dominated and opaque appear to veer further from the benefits of the ideal-type. In contrast, where the structure of pre-enactment review is more transparent, and carves out institutional space for Parliament to scrutinise and contest executive decisions, it offers a closer approximation to theoretical accounts. Overall, pre-enactment review in these systems generally represents a sub-optimal approximation of the account of political review offered by theorists.[13] That said, though few systems match the ideal-type account, a more transparent form of pre-enactment review with a greater structured role for Parliament can nonetheless retain important benefits that the Irish system could similarly gain. Part IV distils the factors analysed in Part III to consider potential institutional reforms aimed at facilitating a more pronounced role for Parliament over constitutional review. I suggest the recent innovation of pre-legislative scrutiny—if accompanied by several additional initiatives—may serve as a good starting basis for any conversation concerning reform. These amendments include reforming the extremely secretive and opaque process of executive branch legal review, and promoting greater parliamentary capacity to contest and scrutinise executive determinations through creation of a non-partisan, specialised and well-resourced constitutional law committee. However, Part V concludes on a note of caution and highlights the obvious barriers which may hamper attempts at cultivating greater parliamentary involvement over constitutional review, notwithstanding any reforms, the most prominent being the difficulty inherent in creating and sustaining a culture of parliamentary constitutional review in a context

[11] The term "political surround" to refer to the broad array of actors acting within and around the branches formally identified in the Constitution order, including political parties, party whips, party activists, special advisors, civil servants, special-interest groups and lobbyists. *See* Aziz Huq and Jon D. Michaels, "The Cycles of Separation-of-Powers Jurisprudence" (2016) 125 *Yale Law Journal* 346.

[12] Janet L. Hiebert and James B. Kelly, *Parliamentary Bills of Rights: The Experience of New Zealand and the United Kingdom* (Cambridge University Press, 2015), pp.401–402.

[13] Rosalind Dixon, "The Core Case for Weak-Form Judicial Review" (2017) 38 *Cardozo Law Review* 2193 at 2230.

where strong-form judicial review is strongly institutionalised and entrenched. It may be extremely difficult to determine in the abstract whether the kind of reforms I am advocating will be capable of morphing broader constitutional culture.

I. NORMATIVE JUSTIFICATION FOR PARLIAMENTARY INVOLVEMENT IN CONSTITUTIONAL REVIEW

Pre-enactment constitutional review involves the political branches of government—the executive and legislative branch—assessing the compliance of legislative proposals with fundamental constitutional commitments.[14] The account of pre-enactment review promoted by scholars is associated with a diverse range of benefits. These include greater rights consciousness amongst the political branches in the law-making process—facilitated by fuller, freer and more transparent engagement and deliberation over rights and values by the executive, Parliament and the public. This is secured by a combination of internal executive review, and subsequent parliamentary and public engagement and scrutiny of the executive's initial assessment. In turn, this fuller and more open debate on constitutional issues may also counteract the limitations of relying on judicial review to vindicate constitutional or statutory rights-based commitments. This account of pre-enactment review is said to offer the institutional means to mediate a more optimal form of constitutionalism; one that provides a better mediation between democratic self-governance and constitutionalism, the dual concepts underlying constitutional democracy.[15]

(a) Fosters greater rights-consciousness over decisions implicating rights

Scholars such as Gardbaum and Hiebert argue that pre-enactment review helps ensure the political branches think and act in a more rights-conscious way when considering policy proposals.[16] Pre-enactment review achieves this by dispersing responsibility for rights review amongst all the branches of government; meaning that ensuring compatibility of policies with

[14] See Hiebert, "Parliamentary Bills of Rights", fn.10 above.
[15] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013), p.52.
[16] Footnote 15, pp.77–82. See Hiebert, "Parliamentary Bills of Rights", fn.10.

constitutional commitments is a task for the executive and legislature, and not just the courts. Political review places the onus on government to give effect to rights principles when developing legislation, encouraged by scrutiny by Parliament and the public.[17] Dispersal of this responsibility is additionally said to provide more robust protection for rights, given courts can typically check only small segments of legislative activity through litigation.[18]

(b) Avoids limitations of relying on judicial review alone

Pre-enactment review also allows for a greater airing of diverse viewpoints and perspectives on constitutional issues than relying on judicial reasoning alone.[19] Those critical of strong legal constitutionalism[20] contend that courts tend to confront morally and politically infused constitutional issues in narrow legalistic terms, in a manner where engagement with relevant and pressing moral considerations is almost wholly ignored.[21] For those more supportive of political constitutionalism, the kind of issues addressed by constitutional courts are too vital for ultimate decisions about them to be at the mercy of legalistic "theories of interpretation or the labored concoction of analogies" which might wash out relevant moral and political considerations.[22]

Unlike a court, which is constrained to addressing the factual matrix of a case before it, arguments made by counsel and perhaps extensive prior precedent, when the political branches address important rights issues through pre-enactment review, they are better placed to deliberate upon moral and political matters more directly. Given that answers to questions

[17] Janet Hiebert, "*Charter Conflicts: What is Parliament's Role?*' (McGill-Queen's University Press, 2002), p.4.
[18] Janet L. Hiebert, "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?" (2004) 82 *Texas Law Review* 1963 at 1986.
[19] Jeremy Waldron, "The Core of the Case against Judicial Review" (2006) 115 *Yale Law Journal* 1346 at 1381.
[20] Tom Hickey provides a useful summary: "Although a broad school, legal constitutionalist scholars tend to present law as a distinctive enterprise to politics, and, indeed, as a higher, more principled, vocation. They suppose that law serves to contain and control politics, through the enforcement of certain principles of legality and fundamental rights. Very often, those principles and rights are understood as pre-determined and mechanically identifiable. That is, that the job of judges is to set out the meaning and implications of a set of pre-existing, pre-political rights and to apply them against political actors, thereby upholding an essentially legally-defined framework within which ordinary politics can occur." Tom Hickey, "Judges as God's philosophers? Re-thinking 'principle' in constitutional adjudication", in Cahillane, Gallen and Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press, 2016), p.65.
[21] Richard H. Fallon, "The Core Of An Uneasy Case For Judicial Review" (2008) 121 *Harvard Law Review* 1693 at 1698; Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves and Kills Politics* (Cambridge University Press, 2009), p.63.
[22] Jeremy Waldron, "Judges as Moral Reasoners" (2009) 7 *International Journal of Constitutional Law* 2 at 23. See also Keith Whittington, "Extrajudicial Constitutional Interpretation: Three Objections and Responses" (2002) 80 *North Carolina Law Review* 773 at 813.

concerning constitutional rights involve a host of thorny considerations inviting reasonable disagreement,[23] proponents of pre-enactment review suggest it makes little sense to pretend judges have superior or exclusive insights, particularly when judges tend to rely on the typical tool-kit of judicial reasoning.[24]

(c) Facilitates popular engagement with shaping constitutional commitments

Relatedly, political review is said to provide a better means of cohering democratic self-governance with constitutional commitments than relying on judicial review alone.[25] It does so by providing scope for greater popular engagement with shaping the content of constitutional commitments, rather than reserving this function to a relatively homogeneous band of judges and elite lawyers. Greater political branch engagement in the constitutional review process allows elected representatives to bring a greater diversity of views to bear on rights deliberations compared to the "numerically smaller, cloistered and elite world of the higher judiciary".[26] Proponents of political constitutionalism who propose this engagement may disrupt the notion that constitutional argument is a body of technical expert knowledge, or a rarefied activity that only those with formal legal training can participate in and shape.[27]

This view proceeds on the premise that constitutional interpretation is not a process capable of determination by disinterested, neutral or mechanical application of authoritative legal sources such as judicial precedent or text. Rather, it involves complex moral and political questions about the content and scope of rights, the boundaries of governmental powers, and a conception of how our society works and what values are most important to it.[28] Thus, it is inevitable that moral and political viewpoints, shaped by a person's background and life experience, will shape their bona fide view on what the "Constitution is for, and what the

[23] For example, whether the importance of the values the legislation seeks to advance are legitimate and justified in the interests of the common good, or whether the means are proportionate to the ends.
[24] Hiebert, "New Constitutional Ideas", fn.18, at 1987; Mark Tushnet, "How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review?" (2010) 30 *Oxford Journal of Legal Studies* 49 at 51–52.
[25] See Eoin Daly, "Reappraising judicial supremacy in the Irish constitutional tradition", in Hickey, Callihane and Gallen (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press, 2017), p.35; See also Wojciech Sadurski, *Rights before Courts*: *A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2005), p.115.
[26] Gardbaum, *New Commonwealth Model*, fn.15, p.69.
[27] Daly, "Reappraising judicial supremacy", fn.25; Whittington, "Extrajudicial Constitutional Interpretation", fn.22 at 818.
[28] See David Kenny, "Merit, diversity, and interpretive communities: the (non-party) politics of judicial appointments", in Callihane, Gallen and Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press, 2017).

Constitution means".[29] Voters and their representatives may come to conscientious conclusions about the constitution's meaning that differ from those reached by constitutional courts.[30] However, proponents of this view argue that this does not mean these differing views are wrong, but only that they are different given that the meaning of indeterminate constitutional text will often lie within a range of reasonable disagreement.[31] Irish judges already reach different, often strongly opposed, conclusions in the same case. This fact is reflective of the kinds of principled disagreement over vaguely worded constitutional rights and aspirations which will invariably exist across broader society.[32] There appears to be no pressing reason why Parliament should not be able to add its bona fide voice to this kind of principled discourse.[33] This suggestion may be controversial to those who prize finality in constitutionalism and who associate judicial supremacy over constitutional interpretation as the only feasible means to achieve it.[34] It will be less so for those sympathetic to departmentalism[35] and extrajudicial interpretation, who value open deliberation over the "relative interpretive openness of the Constitution as a positive good rather than an unnecessary evil".[36] The Irish Constitution explicitly provides for strong-form judicial review.[37] However, this argument is not necessarily incompatible with maintaining robust judicial review to nullify state action that clearly violates constitutional commitments. Instead, it poses a challenge to the notion that courts enjoy *exclusive* authority to determine constitutional meaning. It also raises the difficult question whether the court's interpretation of the Constitution should *always* predominate when the political branches act on an alternative but bona fide and reasonable constitutional interpretation.[38]

(d) Limitations of relying on executive review alone

[29] Kenny, "Merit, diversity, and interpretive communities", fn.28, p.136.
[30] Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law,* (Edward Elgar Publishing, 2014), p.46.
[31] Tushnet, *Advanced Introduction to Comparative Constitutional Law*, fn.30.
[32] Hickey, "Re-thinking 'principle' in constitutional adjudication", fn.20.
[33] Whittington, "Extrajudicial Constitutional Interpretation", fn.22 at 813.
[34] I take judicial supremacy in this context to mean the view that superior court interpretations of the constitution should be taken by all "officials, judicial and non-judicial, as having an authoritative status equivalent to the Constitution itself". Larry Alexander & Frederick Schaeur, "Defending Judicial Supremacy: A Reply", (2000) 17 *Constitutional Commentary* 455.
[35] Broadly speaking, departmentalism can be taken to mean that each branch has co-equal authority to interpret the constitution in the context of conducting its respective duties and that no branch should dominate as a matter of course. Whittington, "Extrajudicial Constitutional Interpretation", fn.22 at 783.
[36] Whittington, "Extrajudicial Constitutional Interpretation", fn.22 at 813.
[37] See Art.26 and Art.34 of the Irish Constitution.
[38] Whittington, "Extrajudicial Constitutional Interpretation", fn.22 at 831.

So much for the limitations associated with relying solely on judicial reasoning. However, a further question arises. Why it is important *Parliament* takes an increased role during constitutional review? In other words, why is it not sufficient to allow the executive to have sole say at the pre-enactment stage, and then leave it to the judiciary to scrutinise their conclusions post-enactment? After all, the executive is also a representative branch of government. It enjoys a democratic mandate; appointed by a popularly elected Parliament to which it remains answerable. Why should they not be trusted to reach good-faith conclusions on the Constitution free from parliamentary scrutiny?

The objection to leaving pre-enactment review with the executive alone stems from the fact that disputes concerning constitutional rights and values are tied up with moral and political considerations; issues which invariably invite reasonable differences of opinion. If the possibility of reasonable differences justifies doubt that judges have the only relevant opinions on how to reconcile conflicting rights and values, then similarly strong doubts should arise from relying exclusively on the judgment of a few executive lawyers. This is particularly the case if the review is carried out in a closed secretive process. No matter how conscientious the internal review process, relying on executive assessment alone at the pre-enactment stage involves crucially important constitutional judgments—decisions about the State's fundamental law—being made by a handful of lawyers within an opaque process effectively immune from any real external scrutiny.[39] Closing out Parliament has the dramatic effect of narrowing meaningful public engagement and scrutiny over the assumptions and reasons underlying assertions of compatibility.[40] For example, whether conclusions are based on assumptions stemming from an overly conservative or lax interpretation of the Constitution. Or whether an executive determination on constitutionality stems from a lax or conservative *reaction* to legal advice provided by the Attorney-General. Simply put, in a secretive executive-dominated process, Parliament and the public cannot scrutinise what they cannot see. Left solely in the hands of executive lawyers in a process closed off and aloof from politics, the "potentially distinctive democratic voice" offered by parliamentary input is muted. As is the possibility of free and full debate between the political branches and the public, which dilutes the vitality and legitimacy attributed to extrajudicial constitutionalism.[41]

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[39] Hiebert, "*Charter Conflicts: What is Parliament's Role?*", fn.17, p.15.
[40] Hiebert, "*Charter Conflicts: What is Parliament's Role?*", fn.17, p.15.
[41] Cornellia T. Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands" (2005) 103 *Michigan Law Review* 676 at 743.

In contrast, when the legislature has an institutional role over scrutinising executive determinations of constitutionality, this can provide clarity concerning the actual legal position of the executive. This in turn facilitates more nuanced engagement with these determinations by parliamentarians and civil society.[42] Interpretations which, when exposed to the light of day, are politically, legally or morally objectionable can come under greater scrutiny. Without parliamentary engagement with executive determinations of constitutionality, benefits provided by pre-enactment review vis-à-vis enhancing scrutiny and transparency over decisions implicating constitutional commitments are severely diminished. Similarly, attempts to facilitate fuller and freer debate on important political and moral issues infusing constitutional review will also be weakened.

The next part of this article outlines the Irish constitutional review process and how parliament is largely excluded from any substantive participation, making its form of pre-enactment review a poor variant of the ideal type account sketched above.

II. PRE-ENACTMENT CONSTITUTIONAL REVIEW IN IRELAND

(a) Role of executive legal review

The Constitution provides that the Attorney General (AG) is "the adviser of the Government in matters of law and legal opinion".[43] The AG has a close relationship with the Government, sitting in Cabinet meetings and appointed by and serving at the pleasure of the Taoiseach.[44] The AG is usually an eminent lawyer who was a member of, or has some political affiliation with, one of the parties in government. The AG acts a centralised provider of legal advice for the Cabinet, government departments, and core state agencies, on all areas of law.[45] Any policy proposal generated by Government begins with consultation by the relevant Minister or department and the Taoiseach's office and Department of Finance.[46] Additionally, should the policy contain "any substantive constitutional or legal dimension", the Attorney General's

[42] Daphna Renan, "The Law Presidents Make" (2017) 103 *Virginia Law Review* 805 at 901.
[43] See Constitution of Ireland, Art.30.1 and 30.4 (1937). This is essentially the only constitutional basis for the AG's role in pre-enactment review.
[44] He or she is formally appointed by the President, but the nomination is made by the Government, and the President has no discretion to refuse to make the appointment.
[45] For more detailed discussion of the AG's role, see James Casey, *The Irish Law Officers* (Round Hall, 1996), p.53; David Kenny and Conor Casey, "Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan", *International Journal of Constitutional Law* (forthcoming, 2019).
[46] Department of the Taoiseach, *Cabinet Handbook* (2006) 32.

Office must be consulted as well.[47] Any proposal that would lead to legislation must undergo prior consultation with the AG.[48]

If full legal advice is required, this should be acquired and taken into account before a memo is circulated to Government. If this advice is not obtained, any policy proposal to Government may be withdrawn by the Taoiseach.[49] The AG is thus intimately involved in the formulation of policy and legislation. The Office remains involved in an advisory capacity throughout the formulation of policy and the drafting and passage of legislation by Government. Based on the AG's advice, the Government will make decisions about what policies and enactments to pursue. It is only when the AG is satisfied as to the constitutionality of a policy and draft heads of bill that the relevant Minister will present the draft to Cabinet for agreement in order to introduce it to the Oireachtas. On controversial issues as diverse as abortion,[50] gay-marriage[51] and aggressive measures to tackle homelessness,[52] the Government has explicitly relied on the AG's advice as its justification for *not* taking legislative action.[53]

When advice is requested, a permanent advisory counsel (overseen generally by a senior member of the advisory counsel staff) researches the constitutional issues raised and helps the AG in preparation of advice.[54] Any matter that is "legally significant or novel, politically important, sensitive or financially valuable"[55] must be brought directly to the attention of the AG. Each government department may also have its own in-house legal adviser who may have an input. It is also common for additional legal advice to be sought from independent private practitioner barristers selected from specialist panels approved by the

[47] *Cabinet Handbook*, fn.46, p.32.
[48] *Cabinet Handbook*, fn.46, p.36.
[49] *Cabinet Handbook*, fn.46, p.32.
[50] A relatively recent and high-profile example of the executive's refusal to publish legal advice on a deeply contested constitutional issue came with the defeat of Independent TD Clare Daly's Bill allowing for abortion in cases of fatal foetal abnormality. Resisting opposition calls to disclose the legal basis for the Government's opposition to the Bill, the *Irish Times* reported that Taoiseach Enda Kenny "ruled out accepting the legislation, having received an opinion from Attorney General Máire Whelan that it was unconstitutional. He said the AG's advice would not be published, in line with precedent". Michael O'Regan, "Government defeats Daly's abortion Bill with big majority"*, Irish Times*, 10 February 2015.
[51] In 2006 the issue of same-sex marriage was gaining traction. In response to calls for legislative reform, the Minister for Justice said that the Government could not legislate for same-sex marriage as the advice of the AG was that any such legislation would be unconstitutional and a constitutional referendum would be required. Katherine Zappone, "In Pursuit of Marriage Equality in Ireland: A Narrative and Theoretical Reflection" (2013) 10 *The Equal Rights Review* 115.
[52] Kitty Holland, "Kelly says Constitution blocked attempts to tackle housing crisis", *Irish Times*, 3 March 2016.
[53] Oran Doyle, *The Constitution of Ireland: A Contextual Analysis* (Hart Publishing, 2018), pp.93–94. For a more detailed account of this phenomenon, see Kenny and Casey, "Shadow Constitutional Review", fn.45.
[54] Office of the Attorney General, (2006) Annual Report, p.8.
[55] Office of the Attorney General, (2006) Annual Report, p.21.

AG.[56] There does not appear to be any set form for how AG's advice is presented. Sometimes, advice will be incorporated into a policy memo or proposal that comes before Cabinet. With major and specific constitutional issues, the AG may prepare a formal memorandum of advice for Cabinet.[57]

The executive exercises extremely high levels of informational control over the AG's advice. The advice of the AG is very rarely published, and detailed reasoning or even a summary of the written advice is generally not released for parliamentarians to scrutinise.[58] Moreover, it is unclear what substantive norms the AG applies when assessing constitutionality.

Publication of the legal basis for assertions of compliance or non-compliance would open avenues for review of controversial government policies; particularly those explicitly tied to contestable constitutional assessments of the AG. When an opinion is made public it can certainly help to defend an executive policy. It may be that no real constitutional issue arises on any reasonable interpretation, or the analysis given by the AG and endorsed by the executive is compelling. However, disclosure can also create controversy, and put the preferred policies at risk if the constitutional assessment is more contestable, as many constitutional issues are.[59] Near blanket insistence on non-disclosure of legal advice on constitutional compliance or non-compliance narrows the scope for parliamentary or public scrutiny. It is currently extremely difficult for parliamentary deputies to scrutinise or contest the executive's determination of constitutionality. They simply cannot assess or consider the *basis* on which the executive reaches its conclusions. Under Ireland's current form of pre-enactment review, conclusions on the constitutional compliance of a bill are effectively presented to parliament as a fait accompli.[60] As Hickey starkly puts it, once "one unelected lawyer has given an opinion on the

[56] In 2014 the *Irish Times* reported that: "The State is by far the biggest buyer of barristers' services. Every day of the week, it turns to the law library for legal advice and dispatches counsel to represent it in civil and criminal cases in courthouses across the country, on everything from constitutional challenges to complaints against Government agencies." Ruadhán Mac Cormaic, "Not unusual for some barristers to make €500,000 from AG's office", 7 January 2014.
[57] Casey (1996), fn.45, pp.110–112.
[58] Kenny and Casey, "Shadow Constitutional Review", fn.45. In a very rare occurrence, in January 2018, a summary of the AG's advice on the constitutional effects of removing or replacing Ireland's constitutional prohibition on abortion was released by the Government. "Full text of Attorney General's advice on repeal of Eighth Amendment", *Irish Times*, 30 January 2018.
[59] Renan, "The Law Presidents Make", fn.42 at 852.
[60] Conor O'Mahony, "Societal Change and Constitutional Interpretation" (2010) 1 *Irish Journal of Legal Studies* 71 at 93.

matter, a majority of the elected legislators" are expected to fold and accept the executive's determination.[61]

(b) Role of judiciary

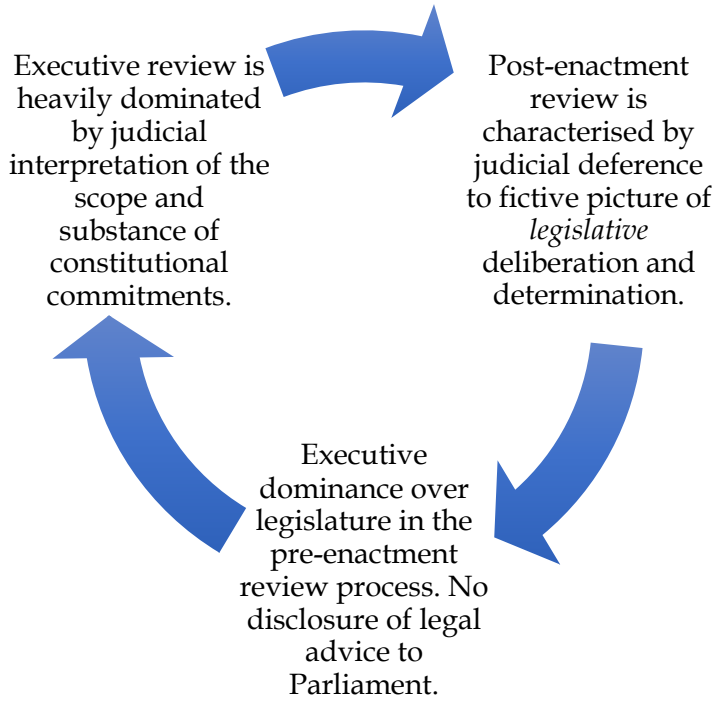
The relationship between the executive and the judiciary in respect of constitutional issues is one of uncritical anticipatory obedience.[62] It is extremely unlikely that the executive will consciously propose a piece of legislation anchored on a good faith, but possibly contrary understanding of a constitutional norm to that articulated by the courts.[63] Disputes over the scope and substance of constitutional norms are not typically regarded as contestable in the context of public and parliamentary discourse. Instead, constitutional norms as enunciated by the judiciary are generally perceived as trump cards and a "technical-legal and essentially non-political matter".[64] To be sure, there is certainly disagreement among politicians, academics and the media, often vociferous, over decisions made by the courts concerning constitutional issues. But judicial supremacy over authoritative constitutional interpretation per se has never faced any real challenge. Uncritical acceptance of judicial supremacy over constitutional interpretation has also ensured that government officials regard judicial decisions as binding not only in specific cases. They are also considered indicative of correct constitutional principles that may apply in a wide variety of future, not-yet-contemplated cases.[65] When the courts speak to constitutional meaning in a case, questions may remain about the broader implications of the judgment—for example, whether a precedent may have lateral application in an analogous or different doctrinal arena.[66] Decisions on its implications ultimately involve *some* executive interpretation.[67] However, in the Irish legal order this will be heavily circumscribed by attempts to map how the judiciary are likely to rule in a future case. Executive interpretation will rarely involve the executive's own bona fide and reasonable, but contrary, articulation of constitutional meaning. The concept of judicial supremacy over interpretation

[61] Tom Hickey, "Revisiting *Ryan v Lennon* to Make the Case Against Judicial Supremacy (And For a New Model of Constitutionalism in Ireland)" (2015) 53 *Irish Jurist* 125 at 147.
[62] Daly, "Reappraising judicial supremacy", fn.25, p.12.
[63] However, given the intense secrecy surrounding the AG's advice, this is impossible to conclusively confirm.
[64] Daly, "Reappraising judicial supremacy", fn.25, p.12.
[65] Whittington, "Extrajudicial Constitutional Interpretation", fn.22 at 845.
[66] Silverstein, *Law's Allure*, fn.21, p.68.
[67] See Fiona de Londras, "In defence of Judicial Innovation", in Hickey, Callihane and Gallen (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press, 2017); Cornellia T. Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands", fn.41 at 688–689.

in the Irish legal order is not an issue regularly debated in Irish political discourse[68] or even (until quite recently) in the pages of Irish law review.[69] Indeed, Ireland might be unusual amongst Anglophone jurisdictions in the *degree* of this consensus.[70]

Constitutional review of legislation in the Irish legal order can therefore be characterised as a fusion and repeated iteration of the following processes: (i) executive dominance in the pre-enactment review process; (ii) an executive dominance heavily influenced by obedience to judicial precedent; and (iii) post-enactment judicial deference to an idealized, but fictive picture of *legislative* deliberation and determination over the balancing of constitutional rights and interests.[71] The cumulative dispersal of pre- and post-constitutional review involvement can be illustrated by the following figure:

Figure 1: Illustration of Constitutional Review Process in Irish Legal Order



[68] See John O'Dowd, "The Impact of the Constitution in the Deliberations of the Houses of the Oireachtas", in Oran Doyle and Eoin Carolan (eds), *The Irish Constitution: Governance and Values* (Round Hall, 2008).
[69] See in this vein: Daly, "Reappraising judicial supremacy", fn.25; Hickey, "Revisiting *Ryan v Lennon*", fn.61; Daly and Hickey, *The Political Theory of the Irish Constitution*, fn.7.
[70] Daly, "Reappraising judicial supremacy", fn.25, p.2.
[71] Brian Foley, "Presuming the Legislature Acts Constitutionally: Legislative Process and Constitutional Decision Making" (2007) 29 *Dublin University Law Journal* 141 at 160, 164.

The cumulative impact of this is that consideration of constitutional issues is characterised by pre-enactment executive dominance, but a dominance heavily influenced by uncritical adherence to judicial precedents on the substance of constitutional commitments. Given the Office of President is a component of the Houses of the Oireachtas, the President's absolute discretion to refer a bill to the Supreme Court pursuant to Art.26 gives the legislature *some* institutional role in monitoring the constitutionality of legislation during the pre-enactment review process.[72] However, this does little to offset the absence of any real role for the explicitly political components of the Oireachtas. The President's power notwithstanding—conspicuously absent from pre-enactment review is a substantive or structured role for the Dáil and Seanad in contesting and deliberating constitutional issues. It is very clear that they play by far the least consequential role over the pre-enactment review process.[73]

III. COMPARATIVE ANALYSIS OF PRE-ENACTMENT REVIEW

Even if one accepts in principle that Parliament ought to have a greater role in debates over constitutional issues in Ireland, one must consider how involvement might be operationalised. One must also consider any difficulties or obstacles such involvement might encounter. To this end, the next part of this article undertakes a comparative analysis of how several other parliamentary systems conduct pre-enactment review. I consider Canada, New Zealand and the United Kingdom. Based on this comparative account, Part IV attempts to distil the kinds of factors and trends which might inhibit or empower parliamentary involvement in pre-enactment review in Ireland.

(a) Canada

[72] Oran Doyle, *The Constitution of Ireland*, fn.53, p.76. I thank one of the anonymous reviewers for raising this point.

[73] Moreover, it is also worth noting Art.26 has suffered a precipitous decline in its use, a factor which has been linked to the increasing prominence and visibility of the AG's advice during issues of constitutional controversy. I have argued alongside David Kenny that it is "possible that the Presidency may be institutionally ill-equipped to effectively second guess the constitutional assessment of the Office of Attorney General and its sizeable bureaucratic apparatus". Kenny and Casey, "Shadow Constitutional Review", fn.45.

The Canadian Minister for Justice has a statutory obligation to examine every Bill introduced to the House of Commons by the Government, and "to ascertain whether any of the provisions … are inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms*".[74] The Minister has an additional duty to report any inconsistency to the House of Commons.[75] This process is intended to encourage rigorous internal evaluation of proposed legislation by the executive, under subsequent scrutiny by a parliament prepared to rigorously evaluate bills from a rights and values perspective.[76] As noted above, under the ideal-type account of political review offered, this dispersal of responsibility for evaluating proposals for rights compliance is said to help create the stage for fuller and freer parliamentary and public engagement and deliberation with rights and values during the law-making process. In practice, however, the Canadian experience of pre-enactment review has been characterised by features only weakly matching the values associated with pre-enactment political review. It has resulted in relatively minimal parliamentary engagement with constitutional issues and the emergence of a highly juridical and secretive form of executive review. [77]

This has been linked to several factors. For a start, the secretive nature of the internal review process makes it difficult for parliament to second guess or challenge the executive's determination on compatibility. Parliament is given very little insight into why there has been a conclusion of consistency, because the executive has never made a report of inconsistency,[78] and does not have a legal duty to report when and why it considers a proposal is consistent. Parliamentarians have therefore found it quite difficult to determine whether the executive's assessment is objectionable or not, for example if it seems too lax or conservative.[79] The present reporting duty undermines effective parliamentary scrutiny as the executive is not required to disclose the constitutional basis of its legislative agenda. These authors suggest that a requirement to introduce statements of compatibility and incompatibility would require the cabinet to engage with Parliament in a more robust manner.[80] A second prominent factor linked to Parliament's marginal role in the pre-enactment review process is the absence of a

[74] Section 4(1) of the Department of Justice Act 1985.
[75] Section 4(1) of the Department of Justice Act 1985.
[76] Hiebert, "*Charter Conflicts: What is Parliament's Role?*", fn.17.
[77] Hiebert, "New Constitutional Ideas" fn.18, (1971).
[78] Gardbaum, *New Commonwealth Model*, fn.15,
[79] Janet L. Hiebert, "Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes" (2005) 1 *New Zealand Journal of Public and International Law* 63 at 75.
[80] James B. Kelly and Matthew A. Hennigar, "The Canadian Charter of Rights and the minister of justice: Weak-form review within a constitutional Charter of Rights" (2012) 10 *International Journal of Constitutional Law* 35 at 68.

sufficiently well-resourced committee dedicated to constitutional issues. Hiebert offers a concise summary of these cumulative deficiencies:

> "Although the Canadian parliament has two committees that regularly evaluate the constitutional and legal dimensions of bills, the lack of a ministerial statement about the Charter implications of a bill combined with the lack of independent legal advice, and insufficient resources, make it difficult for these committees to fully appreciate whether legislation is vulnerable from a Charter perspective or, alternatively, whether the government has produced legislation that is constitutionally more cautious or risk adverse than required."[81]

The currently peripheral position of Parliament in the pre-enactment review process may change on foot of the introduction of a Bill aimed at amending the reporting duties of the Minister for Justice. Bill C-51, which was introduced in June 2017 and is now winding its way through Parliament, imposes an additional statutory duty on the executive not only to report on inconsistencies to Parliament, but to issue a publicly available statement outlining the key considerations that inform the review of a proposed Bill for consistency with the Canadian Charter of Rights and Freedoms.[82] These "Charter Statements" are designed to highlight rights and freedoms that are potentially engaged by a Bill and to provide a brief explanation of the nature of any engagement, in light of the measures being proposed.[83] A Statement may also identify potential justifications for any limits on the rights and freedoms a Bill may impose.[84] The self-described purpose of Charter Statements is to help inform public and parliamentary debate on a proposed Bill[85] and to provide some kind of substantive reason justifying an assertion of compatibility. While the Minister for Justice does occasionally publish a Charter Statement as a matter of practice, if the Bill is enacted, publication of statements will become a statutory requirement.[86]

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[81] Hiebert, "New Constitutional Ideas", fn.18 (1971).
[82] *http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html/* [last accessed 18 January 2019]. Prior to 2017, this appeared to be done as a matter of political practice.
[83] Footnote 82.
[84] Footnote 82.
[85] Footnote 82.
[86] Section 72 of Bill C-51 inserts s.4.2 into the Department of Justice Act, and provides that: (1) The Minister shall, for every Bill introduced in or presented to either House of Parliament by a minister or other representative of the Crown, cause to be tabled, in the House in which the Bill originates, a statement that sets out potential effects of the Bill on the rights and freedoms that are guaranteed by the Canadian Charter of Rights and Freedoms. (2) The purpose of the statement is to inform members of the Senate and the House of Commons as well as the

As already discussed, another prominent benefit associated with pre-enactment is that it offers a way of vindicating constitutional commitments unconstrained by the limitations associated with judicial reasoning. The Canadian experience appears to again fall short in respect of how the ideal-type account ought to function. While the executive has a specified role over constitutional review at the pre-enactment stage, it largely accepts judicial interpretation of Charter commitments. Consequently, the introduction of the Charter has been linked to the development of a highly juridical form of constitutionalism,[87] reflective of a very deep scepticism about whether the political branches have a legitimate role to contribute to constitutional judgment, other than to anticipate judicial decisions and correct invalidated legislation within the guidance provided by dicta.[88] Canada's embrace of pre-enactment political review and its acceptance of judicial supremacy over Charter interpretation has thus helped facilitate bureaucratic and political cultures that try to "Charterproof" proposed legislation. That is, attempting to anticipate how a court may rule in respect of policy, as opposed to engaging in constitutional interpretation from a more openly political or morally infused manner.[89]

Overall, pre-enactment review in Canada is largely characterised by a secret and confidential executive rights-vetting process, heavily shaped by legalistic interpretation of judicial doctrine. During this process, Parliament largely remains on the margins and lacks the institutional means, such as a well-resourced specialised committee, to counteract the dominance of government and a strong party-whip system.[90] Proposed reforms might increase transparency and parliamentary involvement and help instantiate some of the benefits and objectives associated with pre-enactment review. But for now, Canadian practice offers only a very rough approximation of the ideal-type account.

(b) New Zealand

Under the New Zealand Bill of Rights Act ("NZBORA"), rights are protected by a mixture of political pre-enactment review and limited post-enactment judicial review. Political pre-enactment review in New Zealand is embodied in s.7 of the NZBORA, which requires that the

public of those potential effects.From the website of the Canadian Parliament: *http://www.parl.ca/DocumentViewer/en/42-1/bill/C-51/third-reading* [last accessed 18 January 2019].
[87] Hiebert, "Parliamentary Bills of Rights", fn.10.
[88] Hiebert, "Parliamentary Bills of Rights", fn.10.
[89] Hiebert, "Parliamentary Bills of Rights", fn.10.
[90] Hiebert, *Charter Conflicts: What is Parliament's Role?*, fn.17, p.12.

Attorney-General advise Parliament when bills are not consistent with its provisions. Pre-enactment review in New Zealand involves three stages. First, there is an initial executive-based review of the compatibility of a bill with the NZBORA. Second, based on this assessment, the Attorney General will either certify the bill's compatibility or outline reasons for its incompatibility under the reporting requirement of s.7.[91] The third avenue for rights review comes through parliamentary scrutiny after a bill's formal introduction to Parliament.

The first stage opens with an internal review amongst executive branch lawyers. A specialist human rights unit of the Ministry of Justice evaluates all bills for their compliance with the Bill of Rights. Bills originating from the Ministry of Justice itself are vetted by the separate Crown Law Office[92] to ensure that assessment remains external in all cases.[93] Following this, the Attorney General is advised if reviewing counsel consider that a rights inconsistency can be discerned. The number of bills eliminated before introduction because of this internal process is unknown due to its confidentiality, but it has been suggested that there has been "presumably some, with others being amended or reworded".[94] The process for evaluating bills on behalf of the executive is highly legalistic and involves government lawyers basing their assessments on interpretation of relevant jurisprudence and on expectations of what courts might say.[95] If the Attorney General considers there is an inconsistency between the proposed bill and the Bill of Rights, then he is obliged, under s,7 of the NZBORA, to issue a report outlining the legal basis for this conclusion. While these reports have no formal implications for the bill's status, the reports—which are made publicly available—are designed to put Parliament on notice about rights issues for discussion and scrutiny in the remainder of the legislative process.[96] However, even if the Attorney General concludes that a bill *is consistent* with the NZBORA, the legal basis for this determination is also made publicly available. Since 2003 the Government has chosen to make available the advice provided to the Attorney-General on all draft bills.[97]

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[91] Section 7 provides: Where any Bill is introduced into the House of Representatives, the Attorney-General shall-
(a) in the case of a Government Bill, on the introduction of that Bill; or
(b) in any other case, as soon as practicable after the introduction of the Bill, bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.

[92] Headed by the Attorney General.

[93] Gardbaum, *New Commonwealth Model*, fn.15, p.132.

[94] Footnote 93, p.133.

[95] Hiebert, "Parliamentary Bills of Rights", fn.10.

[96] Gardbaum, *New Commonwealth Model*, fn.15, p.133.

[97] Gardbaum, *New Commonwealth Model*, fn.15, pp.133–134. For copies of the relevant advice *see https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/advice/* [last accessed 18 January 2019].

The combination of tiers of executive review and reporting requirements help ensure that rights implications are taken into serious account by the executive during the drafting process. Moreover, the s.7 reporting requirement and Government willingness to publicly disclose the legal basis for its assessments also help facilitate greater transparency and deliberation on rights issues. This is because Parliament and the public have access to the substantive reasons both for the executive's assertions of compliance and non-compliance and can, at least in theory, subject them to much greater contestation and debate than if the internal vetting process were highly confidential and secretive.

Despite these statutory requirements and high levels of transparency, the efficacy of New Zealand's system of pre-enactment review has been subject to critique. Parliament has legislated in the face of a s.7 reports 90 per cent of the time, a stark figure which has led some to conclude that the impact of the Bill of Rights on parliamentary behaviour is relatively minimal. The New Zealand experience of pre-enactment review highlights that the institutional and political context in which a system of review operates is just as important as the formal structure of review.[98] In this context, the relevant figures are partly explained by the fact that the executive usually enjoys a reliable majority such that it can invariably whip to vote in line with a bill, regardless of a negative s.7 report. Factors typically associated with Westminster-style government, such as party cohesion and executive dominance, have therefore constrained and complicated ambitious attempts to influence how Government decides its legislative agenda, and how Parliament scrutinises and votes on bills.[99]

While an element of executive dominance may be an inevitable facet of Westminster-style government, there are also institutional design features of the pre-enactment review process compounding the legislature's passive role. Most conspicuously for some commentators is the fact that the New Zealand Parliament lacks institutional means to carve out and cultivate a relatively autonomous and non-partisan space to scrutinise and contest the rights determinations made by the executive. For example, unlike the United Kingdom, New Zealand lacks a specialised, non-partisan and well-resourced human rights committee. The absence of an independent committee with sufficient resources, access to independent legal advice, and a widely recognised mandate to engage in robust and non-partisan assessment of a bill's rights implications has been described as a considerable weakness reducing the extent to

[98] Hiebert and Kelly, *Parliamentary Bills of Rights*, fn.12, p.10.
[99] Hiebert and Kelly, *Parliamentary Bills of Rights*, fn.12, p.10.

which Parliament is likely express substantive disagreement with an executive which may be comprised of members of the same party.[100]

In some ways, the New Zealand experience appears to generate some of the benefits associated with political review. The determinations of the executive following the process of internal legal review in respect of both compatibility and incompatibility are made publicly available. This structure of review is therefore quite transparent and in theory facilitative of greater deliberation and engagement with important rights issues amongst the political branches and public, as all parties can access and scrutinise the basis for the executive's assessments. However, in other respects New Zealand can be considered only a rough approximation of the ideal-type account of political review. As in Canada, the internal executive review process is highly legalistic and involves government lawyers interpreting judicial doctrine and attempting to guess how a court might rule.[101] Moreover, the largely marginal role of Parliament in the review process, and the fact that it rarely attempts to contest the executive's willingness to legislate in the face of a s.7 report also undermines the extent to which it fulfils the promise of this account—premised as it is on encouraging both branches to think and act in a more rights-conscious way during the law-making process.

(c) The United Kingdom

Under s.19 of the Human Rights Act 1998, a Minister is obliged to make a statement accompanying every bill his department sponsors as to its rights compliance.[102] The first stage in the pre-enactment review process involves collaboration between the sponsoring departments' legal and policy advisers with legal officers in the Attorney General's Office, Cabinet's Legislation Committee ("CLC"), and Ministry of Justice.[103] According to CLC guidelines, legal advice on the European Convention on Human Rights (the "Convention") matters will come primarily from departmental legal advisers, but a department may also instruct external counsel, or seek an informal view on particularly tricky issues from legal

[100] Gardbaum, *New Commonwealth Model*, fn.15, p.153.
[101] Hiebert, "Parliamentary Bills of Rights", fn.10.

[102] Section 19 provides that a minister must: "make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights" or if he is "unable to make such a statement of compatibility the government nevertheless wishes to proceed with the Bill". *https://www.legislation.gov.uk/ukpga/1998/42/section/*19 [last accessed 18 January 2019].
[103] The Parliamentary Business and Legislation Committee are the screening body who clear any bill for inclusion in the government's legislative programme. See Parliamentary Business and Legislation Secretariat, *Guide to Making Legislation* (Cabinet Office, 2017).

advisers in the Ministry of Justice who coordinate human rights legal issues across government.[104] The Attorney General's input is reserved to ensuring a memorandum is in the best possible shape for the legislation committee.[105] Before clearing any bill for parliamentary scrutiny, CLC guidelines require that any bill must first be exposed to a frank assessment[106] of human rights considerations. Previous CLC guidelines have instructed that ministers should only declare compatibility where "at a minimum, the balance of [legal] argument supports the view that the provisions are compatible".[107] This legal advice focuses on whether "it is more likely than not that the provisions of the Bill will stand up to challenge on Convention grounds before the domestic courts and the Strasbourg Court".[108] As a result, the criteria used by ministers to identify whether bills are compatible with rights is very heavily focused on legal interpretations of relevant jurisprudence.[109] After this review is complete, bills are then subject to further review by Parliament. By the time they are introduced they usually do not merely include a bare statement of compatibility, but may also be accompanied by a human rights memorandum complete with a fuller statement of reasons why this is so.[110]

Perhaps the most significant institutional feature of the UK's approach to pre-enactment scrutiny has been the establishment of a permanent Joint Committee on Human Rights. This Committee is charged with reporting to Parliament on the human rights implications of any bill.[111] The Committee is widely considered to act in a way that is non-partisan and free from executive domination[112] and is exclusively dedicated to and specialised in human rights issues. The Committee is also well resourced and has access to its own full-time legal advisers.[113] The work of the Committee typically involves critically evaluating s.19 compliance statements and

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[104] *Guide to Making Legislation* (London: Cabinet Office, 2017), fn.103 at para.12.7.
[105] *Guide to Making Legislation* (London: Cabinet Office, 2017), fn.103 at para.12.7.
[106] *Guide to Making Legislation* (London: Cabinet Office, 2017), fn.103 at para.12.11.
[107] Cabinet Office Constitution Secretariat, *Human Rights Act 1998: Guidance for Departments* (London: Home Office, 2000) at para.36.
[108] *Human Rights Act 1998: Guidance for Departments*, fn.107.
[109] Hiebert, "Parliamentary Bills of Rights", fn.10.
[110] Gardbaum, *New Commonwealth Model*, fn.15, p.165.
[111] Comprised of members of the Commons and House of Lords.
[112] For example, although the incumbent government consists of the Conservative party, they do not enjoy a majority on the Committee. The Chair of the Committee is a senior member of the leading opposition party and six out of 12 seats on the Committee are filled from the opposition benches. See *http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/membership/* [last accessed 18 January 2019]. Kavanagh observes that, due to its membership composition and access to independent legal advice, the committee tends to function with a "relatively high degree of cross-party consensus and cooperation" and has a reputation "for being more independent than most Commons committees". See Aileen Kavanagh, "Joint Committee on Human Rights: A Hybrid Breed of Constitutional Watchdog", in Hunt, Hooper and Yowell (eds), *Parliament and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015), p.118.
[113] Kavanagh, "Joint Committee on Human Rights", fn.112.

explanatory memoranda issued by the executive in respecting of Convention compliance, and issuing reports on the rights implications of the bill for broader parliamentary and public review. Aileen Kavanagh notes that the work of the Committee has become a settled part of the UK human rights landscape, earning an excellent reputation for the quality and robustness of its reports.[114]

In terms of its substantive impact, the Committee has worked to robustly probe the evidence for the "government's compatibility statements, inform parliament of its rights concerns, educate members and generally increase parliament's engagement with human rights issues".[115] In recent years, it has also been observed that the Committee—given that it is not bound by precedent—will often express its own views on compatibility rather than merely attempting to rigidly predict what a court might say about the measure.[116] When it does so it explains the difference in its view by giving explicit reasons in its reports.[117] This is not to say that the Committee disregards existing jurisprudence when carrying out its work. The Committee's access to independent expert legal advice has played a considerable role in its work, and the legal dimension of its work has been used as a tool of political influence.[118] For example, Kavanagh notes how the Committee's access to independent legal advice heightens its ability to point out where government lawyers may have "overlooked or underlooked the importance of some legal issues" and to provide strong counter-arguments to the Government's legal advice which might make it more likely to consider amendments.[119]

However, because executive dominance of parliament is invariably one of the general structural features of Westminster-style systems, the direct impact of Committee deliberations on legislative outputs remains underwhelming for some commentators.[120] Nonetheless, given that the Committee operates in a typically executive-dominated and highly partisan environment, commentators argue that its less tangible impact on pre-enactment rights deliberation and scrutiny should not be underestimated. A narrow focus on how many amendments Committee scrutiny has secured will not reveal gains in accountability, deliberation and scrutiny which are all valuable in themselves and instrumentally valuable in promoting greater parliamentary respect for important statutory commitments.[121] In terms of

[114] Kavanagh, "Joint Committee on Human Rights", fn.112, p.117.
[115] Gardbaum, *New Commonwealth Model*, fn.15, p.193.
[116] Kavanagh, "Joint Committee on Human Rights", fn. 112, p.127.
[117] Kavanagh, "Joint Committee on Human Right".' fn. 112.
[118] Kavanagh, "Joint Committee on Human Rights", fn.112, p.130.
[119] Kavanagh, "Joint Committee on Human Rights",. fn.112, p.129.
[120] Kavanagh, "Joint Committee on Human Rights", fn.112, p.134.
[121] Kavanagh, "Joint Committee on Human Rights", fn.112, p.138.

its less tangible impact, Kavanagh suggests that the Committee has helped ensure the executive now provides Parliament with more detailed information on its human rights reasoning than ever before, increasing the transparency of the review process for legislators and the public.[122] Additionally, Committee reports are now frequently cited and deployed as the basis for intervention in parliamentary debates,[123] which might suggest a greater level of rights consciousness and engagement by parliamentarians. Some suggest the robust scrutiny of the Committee and increased engagement by parliamentarians with its work has heightened executive interest in ameliorating the likelihood of a negative Committee report in the first instance.[124] Of course, these gains in transparency and the increased ability of Parliament to scrutinise executive action for consistency with Convention rights have not reconstituted the fundamental nature of their relationship, which remains characterised by high levels of party cohesion and loyalty.

An important observation to take from this comparative account is that the efficacy of pre-enactment review in promoting the benefits outlined in Part I is constrained by broader socio-political frameworks. This includes political party cohesiveness and the degree of institutional closeness between Parliament and the executive.[125] That said, it is also evident that the institutional design of pre-enactment review plays a role, for example, whether the Government has a mandatory reporting duty or a duty to disclose the basis for asserting compliance or noncompliance. The greater the level of transparency, the easier it is for parliamentarians to scrutinise and debate the conclusions of the executive branch. Similarly, the lack of a strong committee system has been associated with the strength or weakness of parliamentary involvement in pre-enactment review. The presence or absence of these factors undoubtedly plays a role in the ability of Parliament to cultivate a robust role during pre-enactment review. Pre-enactment review in many systems represents a rough approximation, or second-best instantiation of the type found in theoretical accounts. However, even if only amounting to a sub-optimal version of these accounts, benefits such as increased contestation, deliberation and transparency over political processes concerning important rights and values are certainly not trivial. They represent valuable benefits from which the Irish system of constitutional review could potentially gain.

[122] Kavanagh, "Joint Committee on Human Rights", fn.112, p.139.
[123] Kavanagh, "Joint Committee on Human Rights", fn.112, p.132.
[124] Kavanagh, "Joint Committee on Human Rights", fn.112, p.137.
[125] See generally Hiebert and Kelly, *Parliamentary Bills of Rights*, fn.12.

Part IV of this article attempts to distil the various factors which might help potential institutional reforms facilitate a more pronounced role for Parliament over constitutional review in Ireland. I tentatively suggest that the recent innovation of pre-legislative scrutiny—along with several additional reforms—may serve as a good starting basis for any conversation concerning reform.

IV. PRE-LEGISLATIVE SCRUTINY AS A ROAD-MAP TO REFORM?

It has been suggested that after a draft bill is approved by cabinet it will tend to become law in the same form and unaltered by the Oireachtas. [126] There is a deal of enduring truth to this assertion insofar as its underscores the executive's political predominance. However, the institutional weakness of the Oireachtas should not be caricatured.[127] For example, as with other parliamentary systems, political parties act as a variable on executive power that can empower or constrain depending on whether a government commands a majority, a coalition, or a minority. Coalition and minority government have become frequent fixtures of Irish political life.[128] Both scenarios can make it more difficult for the executive to leverage predominance over Parliament. An executive leading a coalition government may well be faced with the possibility of finding itself pursuing policies it would reject if it commanded a majority.[129] In these circumstances it lacks the legislative efficacy enjoyed by majority government.[130] Minority governments can similarly act to disempower the executive. Where a government commands a plurality but not a majority of seats, a moderate measure of inter-branch competition can emerge. In this way, minority government in Ireland can resemble divided governments in presidential systems where different parties control the presidency and legislature.[131] An executive in a minority government will generally be less able to pass its full legislative and policy agenda, and Parliament may command a greater institutional role over policy formulation.[132] Irish minority governments are much more likely than majority governments to see their policy proposals defeated or modified by Parliament. Minority

[126] Daly and Hickey, *The Political Theory of the Irish Constitution*, fn.7, p.105.
[127] Eoin O'Malley, "Apex of Government". fn.8, p.37.
[128] Doyle, *The Constitution of Ireland*, fn.53, pp.55–56.
[129] Richard Albert, "Fusion of Presidentialism and Parliamentarianism", (2009) 57 *American Journal of Comparative Law* 531 at 570.
[130] Albert, "Fusion of Presidentialism and Parliamentarianism", fn.129 at 573.
[131] Albert, "Fusion of Presidentialism and Parliamentarianism", fn.129 at 565.
[132] Albert, "Fusion of Presidentialism and Parliamentarianism", fn.129.

governments are also clearly more susceptible to collapse and votes of no confidence.[133] Even if not at immediate threat of a no confidence vote, for example, where a minority government is maintained by a memorandum of understanding with another opposition party—as the current Irish executive has been since 2015—its legislative efficacy is undoubtedly lessened.[134]

Aside from party variables, relatively recent political developments are an additional caveat which must accompany statements emphasising the weakness of Parliament. At least to the extent such statements imply that the Oireachtas as an institution has no policy input during or prior to the legislative process.[135] Since 2011, successive governments have pioneered several initiatives which have bolstered the institutional power of Parliament. These include the introduction of secret ballot to elect the Ceann Comhairle,[136] creation of a standing Business Committee to allocate parliamentary time on a more proportionate basis between government and opposition parties,[137] and the introduction of the D'Hondt system to allocate chairmanship and membership of committees on a more proportional basis. These initiatives are all symbolically and practically significant to Parliament's institutional power. The latter two measures dilute the ability of the government to dominate parliamentary time, underscoring the independence of committees, and counteracting the ability of government to exercise tight control over their policy and scrutiny work.[138] Allied to these has been the introduction of pre-legislative scrutiny ("PLS") to the Oireachtas. This process involves Parliament—through its committees—scrutinising draft legislation of government departments and reporting its concerns, views and recommendations before a more final version of a bill has been drafted and formally introduced to the houses.[139]

Initially, PLS was largely a matter of government discretion, with 2011 amendments to cabinet procedure *permitting* ministers to publish legislation in draft format following its approval by Cabinet. However, in 2013 Dáil Standing Orders were amended to provide for a more formalised process of PLS. The relevant standing order now provides that the initiative

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[133] Albert, "Fusion of Presidentialism and Parliamentarianism", fn.129 at 566.
[134] Doyle, *The Constitution of Ireland*, fn.53, p.62.
[135] Lynch, O'Malley, Reidy, M. Farrell, Suiter, "Dáil reforms since 2011", fn.9 at 55.
[136] Speaker of the Dáil.
[137] An amendment to Dáil Standing Orders in 2016 allowed for the establishment of a business committee responsible for the scheduling and timetabling of Dáil business. The Business Committee is cross-party and it operates on the basis of consensus, although ultimately its decisions may be put to a vote in the chamber in the event of disagreement. This committee settled on a division of the available Dáil time between Government and Opposition on a 60/40 basis. Previously this government would invariably use its majority to allocate itself the lion's share of parliamentary time.
[138] See Catherine Lynch, "The effect of parliamentary reforms (2011–16) on the Oireachtas committee system" (2017) 65 (2) *Administration* at 59–87.
[139] Oireachtas Library & Research Service, "Research Note: 'Pre-legislative scrutiny (PLS) by parliament'" (December 2014).

for requesting PLS is squarely in the hands of Parliament.[140] If initiated, PLS can involve[141] public hearings involving the calling of department officials to explain the heads of bill; the invitation of written and oral submissions from a range of advocates, interest groups and stakeholders relevant to the bill;[142] and a committee report providing judgment and recommendations based on issues arising during the scrutiny of the bill. A recent study of the impact of PLS demonstrates its efficacy as a means of bolstering parliamentary influence over the legislative process. The study undertook a content analysis of 50 instances of PLS, and identified 467 unique recommendations emerging from the Oireachtas. In 31 of these 50 cases, the bill under scrutiny had subsequently been published and/or enacted at the time of the analysis. Analysis of the bills in these 31 cases indicated that ministers accepted 146 of 350 recommendations—an acceptance rate of 41.7 per cent. The study concluded that PLS can have a "very real and substantive impact on Government legislation" and serves to strengthen the "role of the Oireachtas in law-making."[143]

PLS has provided Parliament with the institutional means to exercise greater contestatory power over policy choices, and the form of their implementation. This innovation has undoubted implications for the allocation of power between the executive and Parliament, and is a potentially solid means of strengthening Parliament's capacity to robustly scrutinise government proposals. PLS gives it greater opportunity to influence policy-making through public analysis, critique and feedback on draft legislation.[144] These institutional innovations are amongst the most far-ranging in the history of the state, albeit they are operating from a low baseline.[145] That said, in terms of the division of authority and responsibility for assessing the compatibility of policy measures with constitutional commitments, parliamentary involvement remains minimal. In respect of these issues, the initial drafting and pre-enactment

[140] Standing Order 146A. This order provides: Prior to its presentation or introduction to the Dáil, the general scheme or draft heads of a Bill shall (save in exceptional circumstances and by permission of the Business Committee), be given by a member of the Government or Minister of State to the Committee empowered under Standing Order 84A to consider Bills published by the member of the Government. The general scheme or draft heads of the Bill shall be considered by the Committee, having regard to guidelines agreed by the Working Group of Committee Chairmen: Provided that the Committee may decide in relation to a particular Bill that such consideration is not necessary, and in such cases, need not consider the general scheme or draft heads. See *http://www.oireachtas.ie/parliament/media/about/standingorders/Consolidated-version-of-all-of-the-Standing-Orders-of-D%C3%A1il-%C3%89ireann,-9-May-2017.pdf* [last accessed 18 January 2019].

[141] Oireachtas Library & Research Service, "Pre-legislative scrutiny", fn.139.

[142] For example, during the pre-legislative scrutiny of the Adoption (Information and Tracing) Bill 2015, the Oireachtas Joint Committee on Health and Children heard from adoptive parents, birth mothers, birth parents, foster parents and adoption agencies. See *http://beta.oireachtas.ie/en/visit-and-learn/how-parliament-works/how-laws-are-made/* [last accessed 18 January 2019].

[143] Shane Martin, "The Impact of Pre-Legislative Scrutiny on Legislative and Policy Outcomes", Oireachtas Library & Research Service (December 2017) 4; Doyle, *The Constitution of Ireland*, fn.53.

[144] Lynch, O'Malley, Reidy, M. Farrell, Suiter, "Dáil reforms since 2011", fn.9 at 37–57.

[145] Lynch, O'Malley, Reidy, M. Farrell, Suiter, "Dáil reforms since 2011", fn.9 at 144.

review process remains heavily dominated by the input of cabinet, executive lawyers and independent private practitioners briefed by the AG's Office. While the executive incorporates legal review for constitutional issues into the pre-enactment process, the process excludes Parliament from a substantive role in this area. PLS has not altered that reality.

This failure is traceable to several factors, but I focus on two of the most prominent. First, there is a marked lack of transparency in the pre-enactment review process carried out by the executive. The legal basis for executive assertions regarding a bill's constitutionality is rarely (if ever) disclosed to Parliament for a second look or contestation. Second, Parliament lacks institutional means such as a dedicated, well-resourced and non-partisan constitutional committee to allow it to carve out space to review decisions concerning constitutional commitments. These arrangements necessarily dilute several of the normative values otherwise instantiated by entrusting constitutional review with both representative branches. They hamper capacity to engage in full, free and critical deliberation over the implications of legislative proposals from the perspective of constitutional commitments. Even with the introduction of PLS, secretive and undisclosed executive determinations of constitutionality remain effectively determinative of legislative opinion.[146] Consequently, explicit exercises in constitutional interpretation by legislators still arise infrequently.

Based on the arguments and observations made above, PLS may be a good point at which to kick-start any debate over increasing parliamentary involvement with respect to constitutional review. Through this innovation parliamentary committees now enjoy greater institutional contestatory power in respect of policy formulation and its execution. This stems from their authority and power to scrutinise draft bills and report their recommendations to Government before a final version of the bill is formally introduced to Parliament. This reform has *generally* empowered Parliament to a greater degree than before. However, what is missing from the current framework of PLS in the context of my argument is a conscious attempt to carve out sufficient institutional autonomy for parliament to *specifically* contest and deliberate upon constitutional issues. Several amendments to the current PLS process could bolster Parliament's role over constitutional review.

By comparing the pre-enactment constitutional review processes of Canada, New Zealand, and the UK I have distilled a few institutional features from each system which are better calculated to facilitate deliberation on constitutional issues by the political branches. The

[146] Doyle, *The Constitution of Ireland*, fn.53, p.94; Kenny and Casey, "Shadow Constitutional Review", fn.45.

first involves increasing the transparency of executive branch constitutional review. This might include a requirement that the executive disclose *reasons* why a bill is or is not compliant with constitutional commitments as opposed to supplying a bare assertion of compatibility. This might involve frequent disclosure of the underlying legal and policy basis for the executive's assessment of a bill's compliance, by making legal advice, or perhaps an abridged summary, available to Parliament and the public for scrutiny. As already noted, the near blanket insistence on non-disclosure of legal advice severely narrows the scope for parliamentary or public scrutiny. Ultimately, increased transparency is crucial as lack of disclosure of any detailed information about constitutional advice severely undermines the ability of external actors to assess or second-guess executive conclusions on constitutionality. This severely inhibits any kind of full and free debate between the branches on the interaction between policy proposals and constitutional commitments. If the legal basis for asserting compliance or non-compliance were published it would open avenues for review of controversial government policies, particularly those explicitly tied to contestable constitutional assessments of the AG. The recent Canadian innovation of introducing "*Charter Statements*" might provide a useful template for reform in the Irish context, offering a compromise between full disclosure of advice by the executive and blanket refusal. Such statements could highlight the constitutional rights and values potentially engaged by a bill and provide a brief explanation of the nature of any engagement, in light of the measures being proposed.[147] The statement may also identify potential justifications for any limits on the rights a bill may impose.[148] They could also identify legal reasons why the Government has concluded a particular measure is unconstitutional. As in Canada, the purpose of these statements would be to help inform public and parliamentary

[147] *http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/index.html/* [last accessed 18 January 2019].
[148] Footnote 147.

debate on a proposed bill[149] and to provide substantive reasons for justifying a declaration of compatibility or non-compatibility, rather than relying on bald and contestable assertions.

The second reform involves fostering parliamentary contestatory power against the executive. This attempts to counteract the general structural features of Westminster-style government such as political party cohesion and executive-legislative fusion. Following the example of the UK, this could involve promoting effective committee involvement in constitutional review. In the UK, this encompassed the creation of a committee that is dedicated, independent and sufficiently staffed and resourced to allow it to offer a rigorous view on executive branch assessment on rights issues. In an Irish context, this could involve the creation of a constitutional law committee empowered at a pre-legislative stage to scrutinise (i) executive proposals asserted to be compliant with constitutional commitments, as well as (ii) executive determinations that a proposal *cannot* be pursued because it is unconstitutional. Based on the comparative overview undertaken in Part III, the committee would ideally be non-partisan in its sense of mission, proportionately represent a range of political parties in the Oireachtas (and thus moral and political viewpoints relevant to constitutional interpretation), and be well resourced and staffed with its own legal advisers. It would be able to scrutinise determinations of the executive on constitutional issues and offer its own positions through issuing observations or reports. These observations might then be used as the basis for greater contest and debate in the Oireachtas during the legislative process. In arriving at its own conclusions, the committee could have regard to a wide range of sources, including the position of the executive and AG, its own good-faith reading of the constitution, the views of its legal advisers, and the submissions of witnesses whose interests or professed expertise are considered relevant to constitutional questions. For those hoping to promote a more meaningful and potent role for Parliament in the constitutional review process, combining the recent innovation of PLS with these types of institutional reform may provide a useful, if basic, road-map.

V. CAVEATS AND CONCLUSION

[149] Footnote 147.

This article concludes by briefly highlighting some barriers which may hamper attempts at cultivating greater parliamentary involvement over constitutional review, notwithstanding any reforms. For a start, I concede that these suggestions may appear idealistic, perhaps even hopelessly unrealistic, given the consensus that the Irish Parliament tends not to be one which stands out as a strong legislature in international comparisons, despite the State's ongoing period of minority government. The current experience of minority government has moved the constitutional order toward something approximating the tripartite separation of powers outlined in Arts 6, 15 and 28.[150] As Doyle puts it, for the first time in the history of the State the Government may be forced to introduce and faithfully execute legislation with which it might profoundly disagree.[151] This undoubtedly represents a significant shift in the constitutional balance of power between the executive and Parliament.[152] However, even with these developments it may still be fanciful to envisage political actors wishing to introduce fundamental reforms that may add further institutional roadblocks to the achievement of policy objectives when in government. From the perspective of a minority government, these reforms may simply aggravate an already acute sense of political paralysis.[153] For a government commanding a plurality or majority, they may be considered an unwanted hindrance to achieving valuable political objectives. Another important and related question is whether legislators would even be inclined to accrue additional responsibility in a sensitive sphere of activity, namely debates concerning constitutional commitments. As a matter of political culture politicians have long regarded these questions to be the domain of lawyers and judges.[154] There is a risk that pre-enactment review will not promote anything close to meaningful moral or political deliberation about constitutional issues on the part of legislators. Instead, it may simply promote formulaic consideration of rights-based questions by policy-makers seeking to "litigation-proof" legislation by focusing squarely on judicial doctrine and attempting to predict how a court will rule.[155]

Even if we afford greater recognition to the fact that extrajudicial constitutional interpretation can co-exist with judicial review,[156] a third thorny question will invariably arise—perhaps the most fundamental. This is the interlocking question of how much deference

[150] Doyle, *The Constitution of Ireland*, fn.53, p.97.
[151] Doyle, *The Constitution of Ireland*, fn.53, p.62.
[152] Doyle, *The Constitution of Ireland*, fn.53, p.62.
[153] Doyle notes how some "commentators have alleged that this has led to few major Bills and no Controversial Bills". Doyle, *The Constitution of Ireland*, fn.53, p.96. For commentary in this vein see Noel Whelan, "New politics means little legislation", *Irish Times*, 28 February 2017.
[154] Hickey, "Revisiting *Ryan v Lennon*", fn.61 at 150.
[155] Dixon, "The Core Case for Weak-Form Judicial Review", fn.13 at 2230.
[156] Whittington, "Extrajudicial Constitutional Interpretation", fn.22 at 848.

the courts should show to the political branches in formulating doctrine and evaluating the constitutionality of legislation, and how much deference non-judicial actors should in turn show the judiciary in articulating constitutional understandings and taking political actions.[157] The experience of the systems I consider appear to suggest that political cultures which embrace judicial review—particularly those with strong-form review—find it difficult to sever articulation of constitutional or statutory rights from highly legalistic analysis. Interpretation of rights and values tends to be understood as a technical legal exercise, the sole preserve of senior judges and elite lawyers versed in formal legal craft. The experience of these jurisdictions might suggest a broader trend; that the existence of judicial review leaves little scope for more open-ended political or moral input on these issues by parliamentarians. If this is the case, it may well be quixotic to envisage parliamentary deliberations on the constitutionality of bills being severed from court-mimicking in favour of reasonable alternative interpretation anchored on more open-ended moral and political readings of constitutional text. It may be equally unlikely to imagine the judiciary—which has jealously guarded its self-proclaimed role as guardians of the Constitution—sanctioning an explicit departure from judicial precedent anchored on a good-faith alternative constitutional understanding.[158] As O'Donnell J. has pithily put it, because of this current framework there is a risk that any attempt to cultivate a measure of political constitutionalism through parliament "flirts with futility".[159]

Simply put, it will be extremely difficult to determine in the abstract whether the kind of reforms I am advocating will be capable of morphing broader constitutional culture. These questions are fundamental, going to the heart of who we consider best placed to speak and give shape to our Constitution's enduring commitments. They admit no easy answers. Regardless,

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[157] Whittington adds the possibility of "extrajudicial constitutional interpretation suggests that our concern should not simply be with identifying the best method for interpreting the Constitution, but with grappling with how we should proceed given that we do not agree on how best to interpret the Constitution or on what particular interpretations flow out of our methodologies". Whittington, "Extrajudicial Constitutional Interpretation", fn.22, at 848.

[158] *See Boland v An Taoiseach* [1974] I.R. 338 at 370–371 per Griffin J.; *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2017] IESC 27 at para 4.1, per Clarke J. The late Mr Justice Brian Walsh encapsulated this attitude well when he wrote extra-judicially that: "The Constitution gives the judicial power a very special position … If the interpretation of the Constitution is such that responsible citizens who form their own conclusions think the time has come to alter the Constitution then the machinery for doing so is available. But until that is done the courts and the judges must interpret it as it is … Interpretation of the Constitution is not a matter on which private judgment is permissible. Rather people must look to those to whom the Constitution has committed the function of interpreting the Constitution and follow carefully and understand these interpretations." Brian Walsh, "The Judicial Power, Justice and the Constitution of Ireland", in Deirdre Curtin and David O'Keeffe (eds) *Constitutional Adjudication in European Community and National Law* (Buttersworth Ireland Ltd, 1992), p.157.

[159] Donal O'Donnell, "The Sleep of Reason" (2017) 40(2) *Dublin University Law Journal* 191 at 204.

given the importance of the issues raised for our democracy, I am confident it remains a conversation eminently worth having.