

Revisiting the Debate on Irish “Semi-Presidentialism”: Tradition or Evolution?

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Abstract: Ireland is generally (but often reluctantly) characterized as a semi-presidential model of government. The 1937 Constitution of Ireland provides that the President of Ireland must be elected by direct vote of the people, but also that the head of government and the cabinet are dependent on the confidence of the lower house of the legislature. A certain uneasiness around this semi-presidential categorization is linked to the weak powers of the Irish Presidency. Recently, academic discussion has been revamped in light of a perceived “activism” of the current President Michael D. Higgins. On foot of these recent occurrences, this short contribution revisits the role of the President in the Irish constitutional system, and reflects on its powers and prerogatives.

Keywords: President of Ireland, Constitution of Ireland, Separation of powers, Semi-presidentialism, Discretionary powers

1. Introduction

Ireland (*Éire*) is a parliamentary democracy, where a directly elected Head of State¹ features alongside what is referred to as “the Westminster model of responsible government”.² In particular, the 1937 Constitution of Ireland (*Bunreacht na hÉireann*) provides that the President of Ireland (*Uachtarán na hÉireann*) “shall be elected by direct vote of the people”,³ but also that the head of government and the cabinet are dependent on the confidence of the

¹ Coakley describes the office as that of a “classic ceremonial Head of State” (J. Coakley, ‘An Ambiguous Office? The Position of Head of State in the Irish Constitution’, in *Irish Jurist*, v. 48, 2012, 43, at p. 53). Notably, however, the Constitution does not expressly describe the President as Head of State. Between 1937 (when the Presidency was conceived) and 1949, the British King retained some residual albeit purely ceremonial powers relating to certain aspects of Ireland’s foreign relations. There was, as result, some doubt and debate as to whether the President could be described as a Head of State during that time. Any such doubt would have been removed, however, by the passage of the Republic of Ireland Act 1948, removing the King’s remaining few powers in respect of the Irish state.

² O. Doyle, T. Hickey, *Constitutional Law: Text, Cases and Materials*, Second Edition, Clarus Press, Dublin, 2019, p.131. See also E. Daly, T. Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law*, Manchester University Press, Manchester, 2015.

³ Article 12(2) of the Irish Constitution.

lower house (*Dáil Éireann*) of the legislature (*Oireachtas*). For this reason, Ireland is generally qualified as a “semi-presidential” model of government.⁴

Elgie, in his influential comparative work, has been one of the most prominent supporters of such semi-presidential categorization.⁵ He showed that, “even though the Irish President undoubtedly has relatively few powers, there is nothing unique about the Irish case in this regard”.⁶ However, constitutional law scholarship still exhibits a certain uneasiness,⁷ claiming the uncommon nature of the Irish presidency and highlighting its very weak powers.⁸ Such weakness is rooted in the governmental control over most of the President’s functions, as provided in Article 13(9) of the Irish Constitution, which states that “the powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or in the advice or nomination of, or on receipt of any other communication from, any other person or body”. In interpreting the latter provision, most scholars agree that even those constitutional powers that do not appear *prima facie* to be subject to government advice, such as the supreme command of the defence forces, “are in fact qualified by the general obligation to act on the advice of the Government”.⁹

Although, as highlighted by Casey,¹⁰ the utility of the office of the president has been the subject of some discussion, the role of the president remained for a long time a relatively understudied topic in Irish political science and constitutional law scholarship. The academic debate has, nonetheless, progressively gained momentum in the past twelve years. As recalled by Gallagher, the somewhat uneasy presidential election of 2011 gave rise to a first wave of debates focusing on “whether the Irish presidency should be seen as a political role or as one that is ‘above politics’”.¹¹ More recently, scholars have questioned certain examples of “activism” of the

⁴ O. Doyle, T. Hickey, *Constitutional Law: Text, Cases and Materials*, Second Edition, Clarus Press, Dublin, 2019. On the debate see also L. Mezzetti, *The Irish Form of Government: A Merely Apparent Semi Presidentialism*, in G.F. Ferrari, J. O’Dowd (eds), *75 Years of the Constitution of Ireland: An Irish-Italian Dialogue*, Clarus Press, Dublin, 2014, p. 169. See generally on semipresidentialism and in comparative perspective M. Volpi, *Il semipresidenzialismo tra teoria e realtà*, Bononia University Press, Bologna, 2014.

⁵ R. Elgie, ‘The President of Ireland in Comparative Perspective’, in *Irish Political Studies*, v. 27, n. 4, 2012, p. 502.

⁶ Ibid.

⁷ In that regard Doyle and Hickey argue that “Ireland barely qualifies for the club” (O. Doyle, T. Hickey, *Constitutional Law: Text, Cases and Materials*, Second Edition, Clarus Press, Dublin, 2019, p. 131). Gallagher suggests that “Ireland has a ‘centi-presidential’ rather than a ‘semi-presidential’ system of government” (M. Gallagher, ‘The Political Role of the President of Ireland’, in *Irish Political Studies*, v. 27, n. 4, 2012, pp. 522-538).

⁸ J. Coakley, K. Rafter (eds), *The Irish Presidency: Power, Ceremony and Politics*, Irish Academic Press, Dublin, 2014.

⁹ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing Plc, Oxford, 2018, chapter 4.

¹⁰ J. Casey, *Constitutional Law in Ireland*, Third Edition, Round Hall, Dublin, 2000, p. 92.

¹¹ M. Gallagher, *The Political Role of the President of Ireland*, in *Irish Political Studies*, v. 27, n. 4, 2012, pp. 522-538.

current President Michael D. Higgins. In June 2022, for example, President Higgins was said to have “overstepped the mark” by fiercely condemning the housing crisis as “a disaster”.¹² On that occasion, some constitutional lawyers considered the speech of the President as impinging on the Government’s prerogatives. Among others, Kenny, in an interview in the Irish Examiner, argued that President Higgins’ remarks on housing were “one of the most significant interventions from a sitting President” and suggested that usually the “President wouldn’t weigh in on matters of active political controversy or be seen to criticise Government policy and performance”.¹³ Another earlier episode that generated a fierce discussion¹⁴ was the refusal of President Higgins to attend a commemoration event in the form of a church service in Armagh – an event marking the centenary of Ireland’s partition and the creation of Northern Ireland.¹⁵ On that occasion, in particular, the bone of contention was the lack of consultation with the Government before declining the invitation to participate. Newspapers reported widely the criticism from former prime minister John Bruton, who alleged that President Higgins was in breach of Article 13(9) of the Irish Constitution.¹⁶ While, in that instance, most constitutional lawyers concurred in saying that no violation occurred, they remarked on a certain distance between President Higgins’ stance and his predecessors’ more restrained approach.¹⁷

On foot of these recent occurrences, this short contribution revisits the role of the President in the Irish constitutional system, and reflects on its powers and prerogatives. After these introductory remarks, Section 2 briefly

¹² *President’s speech on housing may have ‘overstepped the mark’, law expert says*, 15 June 2022, available at <https://www.breakingnews.ie/ireland/presidents-speech-on-housing-may-have-overstepped-the-mark-law-expert-says-1320007.html>, last consulted: 30 January 2023. See also P. Cunningham, *Government avoids war of words with President Higgins*, 19 June 2022, available at <https://www.rte.ie/news/analysis-and-comment/2022/0619/1305671-higgins-housing/>, last consulted: 30 January 2023.

¹³ S. Murray, *Explainer: What are the powers — and limits — of the President?*, 15 June 2022, available at <https://www.irishexaminer.com/news/arid-40896065.html>, last consulted: 30 January 2023.

¹⁴ R. McGreevy, *Constitutional experts back President Higgins over John Bruton*, 17 September 2021, available at <https://www.irishtimes.com/news/ireland/irish-news/constitutional-experts-back-president-higgins-over-john-bruton-1.4677175>, last consulted: 30 January 2023.

¹⁵ The event was referred to as the ‘Service of Reflection and Hope’ and took place in Armagh on 21 October 2021. The church service was jointly organised by the main Christian churches on the island of Ireland.

¹⁶ E. Taggart, *Why the President is facing criticism for declining an invitation to a Northern Ireland centenary event*, 17 September 2021, available at <https://www.thejournal.ie/president-criticism-decline-invitation-northern-ireland-centenary-event-5551943-Sep2021/>, last consulted: 30 January 2023.

¹⁷ However, as it will be discussed in section 4, this is not an entirely new debate or one that commenced only with President Higgins. G.W. Hogan, G.F. Whyte, D. Kenny and R. Walsh in Kelly, *The Irish Constitution*, Fifth Edition, Bloomsbury Professional, Dublin, 2018 at p. 269 note that certain of President Mary Robinson’s interventions on topics such as Northern Ireland and divorce were also considered by some to have frayed the boundaries of the convention that the President should remain ‘above politics’.

outlines the main features of the Irish constitutional system to set the scene for the discussion on the core tenets of the role of the President (Section 3). Section 4 zooms in on the presidential discretionary powers and reflects on the limits of the presidential remit in light of recent constitutional practice. Section 5 offers some concluding remarks.

2. Setting the Scene

Ireland gained independence from the United Kingdom in the early twentieth century, through a series of constitutional events, namely the approval of the *Dáil Éireann* Constitution in 1919 followed by the 1922 Free State Constitution,¹⁸ the Statute of Westminster 1931,¹⁹ and the enactment of the 1937 Constitution of Ireland (*Bunreacht na hÉireann*).²⁰ The latter's official text includes 52 articles²¹ and remains the current foundational law of the Irish State. It establishes the system of government, distributes the powers among its organs, establishes the courts and sets out the protection of fundamental rights.²²

As noted above in the introduction, Ireland is a parliamentary democracy. The National Parliament (*Oireachtas*) includes two Houses, i.e. the House of Representatives (*Dáil Éireann*) and the Senate (*Seanad Éireann*), as well as the President.²³ The *Oireachtas* has the “sole and exclusive power of making laws for the State” and “no other legislative authority has power to make laws for the State”.²⁴ While the President is formally a constituent part of the *Oireachtas*, his role in relation to the making of laws is largely ceremonial. The President, in particular, has no formal veto power in respect of legislation.²⁵ The Government, which has the executive power, is responsible to *Dáil Éireann*.²⁶ The Government consists “of not less than

¹⁸ O. Doyle, T. Hickey, *Constitutional Law: Text, Cases and Materials*, Second Edition, Clarus Press, Dublin, 2019, p. 107.

¹⁹ This is a statute of the UK Parliament removing from it the right to legislate for the Dominions of the British Empire, except by request of and with the consent of the relevant Dominion.

²⁰ On Irish constitutional history see G. Hogan, *The Origins of the Irish Constitution 1928-1941*, Royal Irish Academy, Dublin, 2012. An interesting overview with particular reference to the judiciary is also offered by D. O'Donnell, *Some Reflections on the Independence of the Judiciary in Ireland in 21st Century Europe*, in *Trinity College Law Review*, v. 19, 2016, pp. 1, 10.

²¹ While the Articles in the official text are numbered 1-50, this figure includes Articles 28A and 42A. This does not include 15 transitory articles: Articles 51-64, and Article 34A. These are omitted from the official text (see Articles 51(4) and 52(2)).

²² For a general account see F. Ryan, *Constitutional Law*, Third Edition, Round Hall, Dublin, 2018.

²³ Article 15 of the Irish Constitution.

²⁴ Article 15(2)(1) of the Irish Constitution.

²⁵ As it will further be discussed in Section 3 of this contribution, subject to Articles 26 and 27 of the Constitution, the President signs into law all bills passed or deemed to have been passed by the *Oireachtas*. G.W. Hogan, G.F. Whyte, D. Kenny and R. Walsh in Kelly, *The Irish Constitution*, Fifth Edition, Bloomsbury Professional, Dublin, 2018 at p. 452 observe that “The President has no power to veto bills passed by both House of the *Oireachtas*... Save in the case of referring the Bill to the Supreme Court, the President cannot decline to sign a law within the time limits prescribed.”

²⁶ Article 28(4)(1) of the Irish Constitution.

seven and not more than fifteen members” who are appointed by the President, as will be further discussed in the subsequent sub-section. The *Taoiseach*, or Prime Minister, is usually the political leader of the largest party (usually holding a majority in coalition with, or with the support of, other smaller parties) in the *Dáil*. Although the Government is collectively responsible to the *Dáil*, Doyle, citing Hogan and Morgan, posits that “a convention of individual ministerial responsibility also exists”, and a Minister must answer in the *Dáil* questions in respect of all matters related to their own department.²⁷

Article 6 of the Irish Constitution provides that the powers of government are of three types: legislative, executive and judicial. Article 6 does not explicitly provide for the principle of the separation of powers, but this derives from the combined reading of this Article with other constitutional provisions, namely Arts 15, 28 and 34, and has been endorsed by Irish courts on numerous occasions.²⁸ In *Attorney General v. Hamilton*, Finlay J posited that:

“The doctrine of the separation of powers under the Constitution has been identified by this Court as being both fundamental and far-reaching, and has been set out in various decisions of this Court in very considerable detail. Yet, it undoubtedly flows from Article 6 of the Constitution [...]. It is particularly derived from the opening phrase in Article 6, s. 1: "All powers of government, legislative, executive and judicial" and it has led to a very rigid division of rights and responsibilities between the three organs of State, and has led to the necessary categorisation of State activity as falling within one or other of these three separated areas. Elaborate principles of the relationship between the three organs of State have flowed from this doctrine.”²⁹

In particular, as mentioned earlier, the constitutional text on its face designs a seemingly rigid relationship between the Government and the *Oireachtas* which follows the Westminster model. In *Conway v Ireland*, Clarke J indicated that “...the division of responsibilities between Government and Oireachtas in the particular way in which that division is specified in the Irish Constitution forms an important part of the Irish constitutional architecture”.³⁰ However, a longstanding criticism rooted in the actual constitutional practice is the existence of rather weak parliaments somewhat “controlled” by the executive.³¹ Among others, Casey suggests that the government, by enjoying a parliamentary majority, can somewhat dominate

²⁷ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018, chapter 3, section III passim.

²⁸ D.G. Morgan, *The Separation of Powers in the Irish Constitution*, Round Hall, Dublin, 1997.

²⁹ *Attorney General v. Hamilton* [1993] 2 IR 250.

³⁰ *Conway v. Ireland* [2017] IESC 13, para. 24.

³¹ B. Chubb, *The Government and Politics of Ireland*, Third Edition, Routledge, 1970. For a more recent account see O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018.

the legislature but also equip itself by statute with new powers.³² Daly and Hickey indicate that the government dominates the legislative process to “an extent that renders parliament close to redundant”.³³ Doyle, more recently, argues that the Irish system entails a “sprawling but more-or-less unified governance apparatus, directed and coordinated (to varying degrees) by the Government”.³⁴ Notably, in practice, the *Oireachtas*’ sole power to make laws is considerably diluted by legal provisions that delegate certain rule-making functions to the Government, subject to some overarching constraints.

This fundamental separation of powers in the Irish Constitution is also guaranteed by the President of Ireland, who has a number of discretionary powers “that constrain the powers of the *Oireachtas* and Government”.³⁵ The role and powers of the President are provided for in Articles 12 and 13 of the Irish Constitution, which will be examined in the following section.

As noted by Gallagher, the bar for an impeachment of the President is rather high requiring two-thirds of the members of one House voting in favour of a charge of ‘misbehaviour’ against the President, and two-thirds of the members of the other House declaring that the charge has been sustained.

3. The Office of the President in the Irish Constitutional Framework

One of the chief innovations of the 1937 Constitution, compared to its predecessors, was the introduction of a directly elected presidency. Coakley recalls that, during the parliamentary discussions on the draft constitution, the proposed new office of President of Ireland “was one of the innovations that the opposition treated with most suspicion”.³⁶ In light of the rise of dictatorships throughout 1930s Europe, several members of Parliament at the time of the Constitution’s passage were understandably wary of the role, one observing that while the Presidency “does not establish a dictatorship, it asphalts the road by which an individual could work into a dictatorship”.³⁷ Elgie suggests that the adoption of the direct election of the President in Ireland “was consistent with a general historical trend”, yet “was a relatively unusual choice to make in 1937, particularly in the European context at that time” and characterises Ireland as “a relatively early adopter” of this

³² J. Casey, *Constitutional Law in Ireland*, Third Edition, Round Hall, Dublin, 2000, p. 231.

³³ E. Daly, T. Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law*, Manchester University Press, Manchester, 2015, p. 105.

³⁴ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018, p. 111.

³⁵ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018, chapter 2.

³⁶ J. Coakley, *An Ambiguous Office? The Position of Head of State in the Irish Constitution*, in *Irish Jurist*, v. 48, 2012, pp. 43-70.

³⁷ Deputy James Fitzgerald Kenney TD, 67 *Dáil Debates* Col. 1237, May 28, 1937, cited in G.W. Hogan, G.F. Whyte, D. Kenny and R. Walsh in *Kelly, The Irish Constitution*, Fifth Edition, Bloomsbury Professional, Dublin, 2018 at p. 246, fn. 9.

constitutional feature.³⁸ The subsections below outline the process for the election of the President and critically discuss its powers.

3.1. *The Election of the President and its Term of Office*

Article 12(2) provides that the President is “elected by direct vote of the people”³⁹ and that “[e]very citizen who has the right to vote at an election for members of *Dáil* shall have the right to vote at an election for President”.⁴⁰ Any citizen aged 35 or over can seek nomination as a candidate in such elections. In order to be a candidate, a person must be nominated by at least 20 members of the *Oireachtas* (*Dáil* or *Seanad*) or by the councils of no fewer than four administrative counties (i.e. County councils),⁴¹ although former or existing Presidents may become candidates on their own nomination. However, no member of the *Oireachtas* nor any County Council can designate more than one candidate.

Once elected, according to Art. 12(3)(1), the President “shall hold office for seven years”. His term can end earlier if “he dies, or resigns, or is removed from office, or becomes permanently incapacitated, such incapacity being established to the satisfaction of the Supreme Court consisting of not less than five judges”. In that connection, Article 14 creates a Presidential Commission, consisting of the Chief Justice, the chairperson of the *Dáil* and the chairperson of the *Seanad*, to exercise the powers of the President in circumstances in which the President is unable to do so. A President can be re-elected, but cannot serve more than two terms.

Since 1938, nine people have held the office of President, two being women and two being from the minority Protestant community. Several Presidents, including the first President, Douglas Hyde, have been elected or re-elected unopposed.⁴² The authors of *Kelly: The Irish Constitution* observe that four of the incumbents of the Presidency have served two terms; additionally, the current occupant of the role is due to finish his second term in 2025. Of the remaining Presidents, they observe “one served one term, one died in office, and two resigned” though none has ever been impeached or removed from office.

Until 1990, the Presidency was generally dominated by the centre-right, though the election of Mary Robinson (nominated by the centre-left)

³⁸ R. Elgie, *The President of Ireland in Comparative Perspective*, in *Irish Political Studies*, v. 27, n.4, p. 502.

³⁹ Article 12(3)(1) of the Irish Constitution also states that “The voting shall be by secret ballot and on the system of proportional representation by means of the single transferable vote”.

⁴⁰ Specifically, this means that any Irish citizen who is ordinarily resident in the State and registered to vote and not otherwise disqualified from voting is entitled to vote for the Presidency.

⁴¹ This route to candidature was first successfully used in 1997 by former Eurovision winner Dana Rosemary Scallan, and has, since then, provided a useful route for independent candidates who lack the official backing of the larger political parties in the *Dáil*.

⁴² G.W. Hogan, G.F. Whyte, D. Kenny and R. Walsh in *Kelly, The Irish Constitution*, Fifth Edition, Bloomsbury Professional, Dublin, 2018 at p. 247 note that, as only one candidate was nominated on each occasion) there was no ballot held in 1938, 1952, 1974, 1976, 1983 and 2004. Three Presidents have been elected and three have been re-elected unopposed.

that year broke the mould.⁴³ In that regard, Murphy and Reidy, in assessing presidential elections held between 1945 and 2011, suggest that from 1990 to 2011, presidential elections took place in the context of a changing party system and volatile electorate, showing evidence of an increasing voter disconnect from the party system.⁴⁴ They argue that, since the 1990 election, a broadening of the field of candidates occurred with presidential election campaigns being characterised by intensely personal contests.⁴⁵ In a similar vein, Doyle underlines that, in the currently fragmented political landscape, the nomination process has opened up to a wider range of candidates, with local councils playing an important role in nominations that they had not exercised before 1997.⁴⁶

In other words, prior to 1997, the larger political parties in the *Oireachtas* generally dominated the nomination process, though the 1997 and subsequent elections saw the nomination of more independent candidates, using county and city council nominations to circumnavigate the dominance of the larger political parties. In fact, in the 2011 Irish presidential elections seven candidates participated, and Michael D. Higgins was ultimately elected as president. O'Malley contends that, on that occasion, voters “sought someone appropriate for the office with less emphasis on partisan heritage or ideological position”.⁴⁷ Further, he suggests that, while Higgins was elected with an unprecedented number of votes, he “was the least unacceptable option rather than someone whom voters voted ‘for’”.⁴⁸ The most recent election of 2018 was characterised by a similarly large pool of candidates (six) and even more uncertainty, again linked to the fractured party backdrop.⁴⁹ The final list of candidates included no candidate from either of what were then the two largest two political parties, while three of the candidates were TV personalities from ‘Dragons’ Den’, a show in which entrepreneurs pitch their business ideas to a panel of investors. The election “provided a record breaking number of first preference votes for President Michael D. Higgins, while also having the lowest turnout in presidential election history”, with scholars questioning the overall process of nomination.⁵⁰

⁴³ For an illuminating account of the 1990 election (described by O'Reilly as “the most extraordinary election in the history of Irish politics”) see E. O'Reilly, *Candidate: The Truth Behind the Presidential Campaign*, Attic Press, Dublin, 1991. See also M. O'Sullivan, *Mary Robinson: the Life and Times of an Irish Liberal*, Blackwater Press, Dublin 1993.

⁴⁴ G. Murphy, T. Reidy, *Presidential Elections in Ireland: From Partisan Predictability to the End of Loyalty*, in *Irish Political Studies*, v. 27, n. 4, 2012, pp. 615-634.

⁴⁵ *Ibid.*

⁴⁶ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018.

⁴⁷ E. O'Malley, *Explaining the 2011 Irish Presidential Election: Culture, Valence, Loyalty or Punishment?*, in *Irish Political Studies*, v. 27, n. 4, 2012, pp. 635-655.

⁴⁸ Notably, the President is elected “on the system of proportional representation by means of the single transferable vote” (Article 12(3)(1) of the Irish Constitution).

⁴⁹ A. Duggan, *Irish Presidential Election 2018*, in *Irish Political Studies*, v. 34, n. 2, 2019, pp. 303-314.

⁵⁰ A. Duggan, *Irish Presidential Election 2018*, in *Irish Political Studies*, v. 34, n. 2, 2019, pp. 303-314.

Interestingly, the Constitutional Convention, which had been set up in 2012⁵¹ to consider a number of possible changes to the Constitution and make relevant recommendations,⁵² gave consideration to the age requirement of 35 years to be elected to the Office of President, as well as to its terms of office and the process of nomination. In its first report, released in 2015, the Convention recommended no change to the term of office of the President, but advised giving Irish citizens the possibility to participate in the nomination process for presidential candidates. It also recommended that the age of candidacy be reduced, but it did not propose a specific age to which it should be reduced. The Government brought forward the latter recommendation and the Thirty-fifth Amendment of the Constitution (Age of Eligibility for Election to the Office of President) Bill 2015 was passed by both Houses of the *Oireachtas* in April 2015. It proposed reducing the minimum age for being elected President from 35 to 21. The Bill was put to a referendum in May 2015 and was rejected, thus confirming the current age requirement provided for in Article 12 of the Irish Constitution.

Notably, the candidate who is successful in the presidential election becomes President of Ireland by publicly making the oath set out in Article 12(8) of the Irish Constitution, which includes a religious reference to “Almighty God”. In that regard, it is worth recalling that such references have been decried by a number of human rights bodies and civil society organizations in the past few years.⁵³ The 1995 Constitution Review Group⁵⁴ recommended *inter alia* that Article 12(8) be amended to allow a non-religious affirmation. The Constitutional Convention also encouraged the removal of the religious elements of the declarations, although it did not make any explicit recommendation for a constitutional amendment. Further, in 2018, a number of members of the Parliament and civil society representatives brought a case in front of the European Court of Human Rights (ECtHR), arguing that Ireland was in violation of Article 9 (freedom of thought, conscience and religion) of the European Convention on Human

⁵¹ This was set up by a Resolution of both Houses of the *Oireachtas*, available at https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/constitutional_convention.html, last consulted 30 January 2023.

⁵² During the 2010 electoral campaign, the Labour party proposed a Constitutional Convention which would draft and adopt an entirely new constitutional text for the Irish people, bringing about a ‘Second Republic’. The *Fine Gael* party by contrast placed emphasis on specific structural constitutional reforms. The compromise reached within the Programme for Government made once both parties agreed to form a governing coalition, “leant heavily in favour of FG’s manifesto proposal for a Citizens’ Assembly, rather than on the wider, loftier ambitions of the Labour Party’s Constitutional Convention”. Although named Constitutional Convention, its scope was limited to several specific areas, including a review of the electoral system and a reduction in the length of the presidential term of office and when its election would be held, as well as a possible reduction in the voting age, and, time permitting, any other matters deemed significant by the Convention.

⁵³ See, for instance, the UN Human Rights Committee’s 1993 remarks on the religious dimensions of the declaration, suggesting that it breached Article 18 of the International Covenant on Civil and Political Rights. See G.W. Hogan, G.F. Whyte, D. Kenny and R. Walsh Kelly, *The Irish Constitution*, Fifth Edition, Bloomsbury Professional, Dublin, 2018 at p. 247 and *Irish Times*, 15 July 1993.

⁵⁴ For an account see A Butler, R O’Connell, *A Critical Analysis of Ireland’s Constitutional Review Group Report*, in *Irish Jurist New Series*, v. 33, 1998, pp. 237-265.

Rights (ECHR).⁵⁵ The applicants *inter alia* claimed that, while they could aspire to be nominated and elected to the Presidency, the religious elements of the declaration required under Articles 12(8) were contrary to their belief preventing them from taking up this office. In May 2021, however, the ECtHR declared the case inadmissible on foot of the fact that the applicants failed to provide reasonable and convincing evidence that they are at real risk of being directly affected by the requirements of Article 12(8) of the Irish Constitution. Although unsuccessful, the case stirred public debate though it was largely dominated by concerns around the Roman Catholic legacy in the Irish Constitution and the value of religious freedom, rather than zooming out to the role of the Presidency and the function of the oath in contemporary constitutional practice.

Article 12(6) of the Irish Constitution establishes that the President cannot be a member of either House of the *Oireachtas*, and, if he previously held this role, he must vacate his seat. Further, the President must not hold any other office or position of emolument, but constitutional practice has allowed the President to hold purely honorary positions, such as being the patron of charities or philanthropic organisations.

It is worth recalling that Article 12(10) of the Irish Constitution provides a procedure for the impeachment of the President “for stated misbehaviour”, which requires a two-thirds majority vote in each House of the Parliament. However, as mentioned, this has never been used.

3.2. *The President’s Role and Functions: An Overview*

According to Article 12(1) of the Irish Constitution, the President “shall take precedence over all other persons in the State” and “exercise and perform the powers and functions conferred” onto them by the Constitution and by law. In that connection, Casey suggests that “so carefully the Constitution spells out the powers and functions of the President that there can be no room for implying others”, although additional powers could be conferred onto him by law.⁵⁶ Notably, no such additional power conferred by law “shall be exercisable or performable by him save only on the advice of the Government.”⁵⁷

According to Doyle, these functions and powers can be broadly subsumed under three main roles fulfilled by the President. First, the President is the nominal holder of fundamental constitutional powers which must be exercised either “automatically or on the advice of another constitutional organ”; secondly, he is the holder of limited discretionary constitutional powers; thirdly, he speaks to or on behalf of the Nation.⁵⁸

With regard to the first role, Article 13(1) (1 and 2) provides that the President's powers include that of appointment of the *Taoiseach* on the nomination of *Dáil* and members of the Government upon the nomination of the *Taoiseach* (Prime Minister), after the *Dáil’s* approval. Further, the President accepts the resignation or terminates the appointment of

⁵⁵ ECHR *Shortall and Others v. Ireland* (application no. 50272/18), 18 November 2022. On the issue of religious oaths see also *Buscarini v San Marino* (2000) 30 EHRR 208.

⁵⁶ Article 13(10) of the Constitution.

⁵⁷ Article 13(11) of the Constitution.

⁵⁸ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018.

Government Ministers on the advice of the *Taoiseach*.⁵⁹ Appointed by the President, on the advice of the Government, are also Judges and commissioned officers of the Defence Forces. The President also appoints the Attorney General on the nomination of the *Taoiseach*, and the Comptroller and Auditor General on the nomination of the *Dáil*. The President of Ireland is Supreme Commander of the Irish Defence Forces,⁶⁰ but under the Defence Act of 1954,⁶¹ military command is exercised by the Irish Government through the Minister for Defence who in practice manages and controls the forces. The Constitution also vests the prerogative of clemency in the President, but again this must be exercised on the advice of the Government.⁶² This power entails three main components: the power to pardon, the power to commute the punishment, and the power to remit the punishment imposed by any court exercising criminal jurisdiction. The power to commute and remit punishments may be conferred by law on other authorities; the Criminal Justice Act 1951 confers the power on the Government, which may, by order, delegate its functions in this context to the Minister for Justice.

With regard to the second role, the most notable discretionary power vested in the President concerns dissolving the *Dáil*. Typically, the *Dáil* is summoned and dissolved by the President but on the advice of the *Taoiseach*. Notably, however, once the *Taoiseach* (and by implication the government) no longer has the support of the majority of the *Dáil*, the President may (on the advice of the *Taoiseach*) choose to dissolve the *Dáil* (thereby triggering an election), but can alternatively refuse to dissolve the *Dáil*, in which case members of the *Dáil* must seek to nominate an alternative *Taoiseach*.⁶³ There is some interesting debate about the role of the President following such refusal. There is no express power to invite other deputies to form a government. The authors of *Kelly: The Irish Constitution* observe that “the Constitution does not accord any such role of political initiative to the President” and suggest that “a President might prudently calculate that intervention might appear invidious, and might prefer to stay aloof from the process.” Thus far, this power of refusal has never been exercised, although in the Eighties the potential for such a refusal was mooted.⁶⁴ The President

⁵⁹ Article 13(1)(3) of the Irish Constitution.

⁶⁰ The President is also assigned a military ‘Aide de Camp’, i.e. a high-ranking officer in the defence forces whose primary function it is to be in attendance to the President at all official duties and in particular on State ceremonial occasions.

⁶¹ Defence Act, 1954, available at <https://www.irishstatutebook.ie/eli/1954/act/18/enacted/en/html>, last consulted 30 January 2023.

⁶² Article 13(6) of the Irish Constitution.

⁶³ G.W. Hogan, G.F. Whyte, D. Kenny and R. Walsh *Kelly, The Irish Constitution*, Fifth Edition, Bloomsbury Professional, Dublin, 2018 at pp. 258-259.

⁶⁴ J. Casey, *Constitutional Law in Ireland*, Third Edition, Round Hall, Dublin, 2000, p. 84. In January 1982, the then *Taoiseach* Dr Garret Fitzgerald, having lost a *Dáil* vote on the Government’s budget, sought a dissolution of the *Dáil* from President Hillery. It was later claimed that members of the opposition (members of the same party of which President Hillery had previously been a member) had called the President to encourage him not to dissolve the *Dáil*, though the President evidently resisted these attempts to influence him. The President later dissolved the *Dáil*. The incident became the subject of controversy during the 1990 Presidential election when the then front-

may also convene a meeting of either or both Houses of the *Oireachtas*.⁶⁵ Before doing so, the President must first consult with the Council of State though its role is advisory only; having consulted with the Council, the President makes his own decision on the point.⁶⁶ This emergency power has never been exercised though various Presidents have used a different measure, Article 13(7), to address the Houses of the *Oireachtas* on matters of national or public importance.

Further, Article 26 allows the President to refer a Bill to the Supreme Court to determine whether any of its provisions are unconstitutional.⁶⁷ This provision is conceived of as an exception to the general obligation on the President, under Article 25, to sign every Bill that has been passed by the *Oireachtas*.⁶⁸ This is probably one of the most significant features of the presidential role, and can entail a wide control on legislative action. Doyle suggests that a Presidential reference to the Supreme Court actually “carries greater political salience than the possibility of a litigant challenge”.⁶⁹ Interestingly, once a piece of legislation has been referred by the President and upheld, it gains a “constitutional immunity” from future challenge.⁷⁰ Only fifteen bills have been referred thus far, but seven of those have been considered unconstitutional.⁷¹ Just by way of example, it is worth recalling that one of the most important cases of referral occurred in 1995 with the *Abortion Information Case*.⁷² That case concerned a bill laying down the conditions subject to which information relating to abortion services lawfully available in another State could be given to an individual woman and to the general public. That law permitted physicians, health advisory services, and counselling services to inform women about abortion services available abroad within the context of a discussion on pregnancy issues, but

runner for the role, Brian Lenihan Snr. denied having made phone calls seeking to persuade the President not to dissolve the *Dáil*, a denial contradicted by an earlier recorded interview in which he had confirmed making such calls. The controversy undermined Lenihan’s bid to become President; ultimately, Mary Robinson won the election. For an illuminating discussion of the controversy, see E. O’Reilly, *Candidate: The Truth Behind the Presidential Campaign*, Attic Press, Dublin, 1991, especially Chapter 5.

⁶⁵ Article 13(2)(3) of the Irish Constitution.

⁶⁶ The Council of State is an advisory body to the Presidency in the exercise of their discretionary powers. It is regulated in Article 31 of the Irish Constitution.

⁶⁷ Notably, when a constitutional issue arises, the President must consult with the Council of State prior to making a referral to the Supreme Court but the decision whether to refer a Bill to the Supreme Court is the President’s alone.

⁶⁸ Article 25 of the Irish Constitution states that a bill can only be signed by the President on the 5th, 6th, or 7th day after it is presented for his signature. At the request of the Government, the President may sign any Bill the subject of such request on a date which is earlier than the fifth day.

⁶⁹ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018.

⁷⁰ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018.

⁷¹ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018.

⁷² In the matter of Article 26 of the Constitution and in the matter of the Regulation of Information (Services out-side the State for Termination of Pregnancies) Bill, 1995 [S.C. No. 87 of 1995].

prohibited making direct referrals or appointments for abortion services or promoting the procedure. Further that law banned dissemination of the information to the general public. The then President Mary Robinson sent the measure to the Supreme Court for review, but the judges upheld the law. While an analysis of this much contested decision is out of the scope of this article, it suffices here to recall that the Court citing Finlay C.J. in *Tuohy v. Courtney*⁷³ stated that

“... in a challenge to the constitutional validity of any statute in the enactment of which the *Oireachtas* has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights”.

By adopting this approach the Court concluded that the Bill referred to was not repugnant to the Constitution, and represented “a fair and reasonable balancing by the *Oireachtas* of the various conflicting rights”.⁷⁴

Another important discretionary power concerns Money Bills, i.e. a “Bill which contains only provisions dealing with all or any of the following matters, namely, the imposition, repeal, remission, alteration or regulation of taxation; the imposition for the payment of debt or other financial purposes of charges on public moneys or the variation or repeal of any such charges; supply; the appropriation, receipt, custody, issue or audit of accounts of public money; the raising or guarantee of any loan or the repayment thereof; matters subordinate and incidental to these matters or any of them”.⁷⁵ The *Seanad* may request the President to refer the question whether the bill is or is not a Money Bill to a Committee of Privileges. In that instance, the President has discretion as to whether to appoint such Committee of Privileges, which is composed of “an equal number of members of *Dáil Éireann* and of *Seanad Éireann* and a Chairman who shall be a Judge of the Supreme Court”. The Committee of Privileges will then report back to the President and its decision is deemed to be final and conclusive.

Notably, Article 24 affords the President a role in agreeing to shorten the time for consideration of a Bill by the *Seanad* on request of the *Taoiseach*. The President, having consulted with the Council of State, may concur in such an abridgement. In the case of money bills and Article 24 abridgements it might be argued that the President's role is to largely designed as a safeguard for the relatively weak powers of the *Seanad*.

Finally, as mentioned, the President's third role is to speak to and on behalf of the Nation. Having consulted with the Council of State, the President may address the Houses of the *Oireachtas* on any matter of national or public importance.⁷⁶ Nonetheless those messages must have obtained the

⁷³ *Tuohy v. Courtney* [1994] 3 I.R. 1 at p. 47.

⁷⁴ In the matter of Article 26 of the Constitution and in the matter of the Regulation of Information (Services out-side the State for Termination of Pregnancies) Bill, 1995 [S.C. No. 87 of 1995].

⁷⁵ Article 22(1) of the Irish Constitution.

⁷⁶ Article 13(7) of the Irish Constitution.

approval of the Government. The President can also address the Irish people directly, (“may...address a message to the Nation at any time” on any matter of national or public importance),⁷⁷ with formal addresses being subject to the Government’s consent. For more informal speeches, the approval of the executive is not explicitly required, but, as Doyle and Hickey argue, there is a rather blurred distinction between what can be considered a formal address and what is instead an informal day-to-day contribution to the life of the country.⁷⁸ Further, the Irish Constitution does not make explicit how often and how freely a President can convey their views on issues short of delivering a “message to the Nation”. As will be discussed in Section 4, it has been observed that, in more recent years, Presidents have rather openly addressed directly the public or civil society, without seeking prior approval from the Government. The instance mentioned in the introduction to this contribution of President Higgins’ statement on the housing crisis is in fact one of those cases of informal addresses and public engagement with current issues that matter to the people, but entailing a subtle criticism of the Government’s conduct. Arguably, the President enjoys, alongside all citizens, a right of free expression of convictions and opinions (guaranteed by Article 40(6)(1)(i) of the Irish Constitution) and a right to communicate (implicitly protected by Article 40(3) thereof) though the Constitution circumscribes his freedom in various ways,⁷⁹ particularly in making formal addresses under Article 13(7), given that the content of such formal addresses is subject to Government approval. These restrictions lend weight to the view that the President should broadly remain ‘above politics’ and not intervene in matters of public controversy, though the contours of this convention have arguably been tested considerably by the current incumbent, as will be further discussed in Section 4.

It is finally worth recalling that the President is not answerable to the *Oireachtas* or to any court “for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions”,⁸⁰ save in the case of impeachment. The Courts, however, have interpreted this clause as applying primarily to functions involving an exercise of the President’s own discretion, observing that the provision does not shield from judicial review a decision that “requires [the President’s] intervention

⁷⁷ Ibid.

⁷⁸ An example of the latter might include the President’s recent suggestion that school students should generally be relieved of homework, remarks made to primary school students in 2023. P Hyland, ‘President Michael D Higgins has suggested homework should be done in school to allow time for creative pursuits’ *Irish Independent*, January 20 2023.

⁷⁹ Notably, the President also may not leave the State during his term of office without the consent of the Government: Article 13(9) of the Constitution.

⁸⁰ Article 13(8)(1) of the Irish Constitution. See, for instance, *Draper v The President* (unreported; accounts of the case appears in the Irish Times 2, 13 and 14 May 1981 and in G.W. Hogan, G.F. Whyte, D. Kenny and R. Walsh, *Kelly, The Irish Constitution*, Fifth Edition, Bloomsbury Professional, Dublin, 2018 at pp. 272-273) where the Supreme Court rejected an attempt to preventing the President from granting a dissolution of *Dáil Éireann*.

for its effectiveness in law” where it is “in fact the decision and act of the Executive.”⁸¹

4. The President’s Powers: Weak but Expanding?

Casey, in his authoritative constitutional law book,⁸² highlights that the letter of the Irish Constitution evidences that the President is intended to play a mainly ceremonial role. He also claims that no leadership role for the President is conceived of in the Constitution. In fact, he argues that the limited extent of his discretionary powers makes the President a guarantor of the “basic constitutional scheme” and a “constitutional long stop”.⁸³ However, Gallagher has rightly pointed out that a mere literal reading of the Irish Constitution “does not convey a clear sense of what kind of political actor the President is and of whether the role is essentially active or passive”. Most recently, constitutional lawyers seems to agree that the role of the President has *de facto* evolved in the last twenty years, and even more so since 2011, under Michael D Higgins’ presidency. Doyle recalls that the election of Mary Robinson in 1990 can be conceived of as a turning point in the role of the presidency.⁸⁴ He suggests that Robinson “adopted a notably more expansive version of her role, using the Presidency to highlight issues relating to the Irish diaspora, peace in Northern Ireland and the less privileged”.⁸⁵ While the then *Taoiseach*, Charles Haughey, argued that she was constitutionally required to seek government approval prior to giving press interviews or speaking independently, Robinson adopted a rather different interpretation of the constitutional provision stating that she would require Government approval only for formal addresses. Such constitutional argument was key in enhancing role of the President. In that regard, Doyle contends that she “pushed the informal boundaries of the office”, and ultimately Presidents have become “significant voices in public discourse”.⁸⁶

This is particularly true for Michael D Higgins, whose inaugural speech in 2011 actually asserted an important role for his term of office:

“My Presidency will be a Presidency of transformation, recognising and building on the many positive initiatives already under way in communities, in the economy, and in individual and collective efforts throughout our land. It will be a Presidency that celebrates all of our possibilities. It will seek to be of assistance and encouragement to investment and job creation, to innovation and original thinking – a

⁸¹ *State (Walshe) v Murphy* [1981] IR 275 at p. 283.

⁸² J. Casey, *Constitutional Law in Ireland*, Third Edition, Round Hall, Dublin, 2000, p. 92. See also Coakley cited above in note 1.

⁸³ *Ibid.*

⁸⁴ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018, chapter 4.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

Presidency of ideas – recognising and open to new paradigms of thought and action”.⁸⁷

His inaugural speech in 2018 was even more adamant in crafting an important responsibility for the presidency. President Higgins stated: “In offering a vision for the next seven years during the election I spoke of a real republic as being a life lived together, one where there is a commitment to equality, to strong sustainable communities, to the sharing of history and to shaping of the future together; recognising our vulnerabilities, drawing on and enhancing our individual and collective capacities. Delivering this vision involves us all”.

In constitutional scholarly work, the acknowledgement that the Presidency has become a constitutional “institution from which important contributions can be made to societal debates”⁸⁸ has not however changed the assessment that the Presidency remains largely weak and ceremonial in nature. Political scientists also tend to suggest that presidency entails a social rather than political leadership, but they indeed concede that “the boundary between political and non-political matters is a porous one” which leaves the door open to an evolution of the role.⁸⁹ Those assessments, however, do not seem to capture the full picture or what we could refer to as the “material constitution” in the sense Mortati has used this phrase.⁹⁰ In fact, there seems to be a subtle evolution of the role of the President even within the constitutionally constrained powers. It is true that the limited discretionary powers that the President has either never been used or have been exercised very cautiously and sparingly. Given the current Irish political landscape, which is far more fragmented than in the past but still rather stable, it seems also unlikely that the President's power to refuse to grant a dissolution of the *Dáil* (and hence block an election) to a *Taoiseach* will come into question soon. However, with the President becoming a more poignant voice in the public debate and exercising what Gallagher terms as ‘soft powers’⁹¹ through the expression of certain views, the use of discretionary powers may increase. Further, the President provides, in practice, what might be described as informal oversight of the Government’s actions (albeit arguably not interfering formally with it). If we accept the view that the legislature is somewhat overshadowed by the dominant role of the government, such evolution is to be considered a welcome reinforcement of the check and balances in the system. Notably, the *Taoiseach* is required, by Article 28(5)2 of the Irish Constitution, to keep the President “generally informed on matters of domestic and international policy.” This implies that the Constitution does not envisage an entirely passive President; it is

⁸⁷ Inaugural speech of President Michael D Higgins, 11 November 2011 https://www.rte.ie/news/special-reports/2011/1111/308589-higgins_speech/, last consulted 30 January 2023.

⁸⁸ O. Doyle, *The Constitution of Ireland: A Contextual Analysis*, Hart Publishing, Oxford, 2018.

⁸⁹ J. Coakley, K. Rafter, *The President of Ireland: A Constitutional and Political Figurehead?*, in *Irish Political Studies*, v. 27, n. 4, 2012, pp. 493-501.

⁹⁰ C. Mortati, *La Costituzione in senso materiale*, Giuffrè editore, 1940 (rist. 1998).

⁹¹ M. Gallagher, ‘The Political Role of the President of Ireland’, in *Irish Political Studies*, v. 27, n. 4, 2012, pp. 522-538.

difficult to envisage a wholly one-way conversation between the Head of Government and Head of State that would not involve at least some input or expression of views from the latter.

5. Concluding Remarks

The issue of reforming the presidency has been considered at different junctures, and with diverse *foci*, but seems at present unlikely. Further, the direct election of the President has never been rigorously questioned, nor so (in recent times at least) the powers of the President. Even though the Constitution Review Group of 1996 suggested a reduction of the President's powers, specifically with regard to the right to refuse a dissolution of the *Dáil* in certain circumstances, this has never materialised.

In a similar fashion, the debate on the role and functions of the President of Ireland has been intermittent, coinciding with impending presidential elections, or on the occasion of controversial actions by a President who is perceived as stepping outside their narrow constitutional mandate. The qualification of Ireland as a semi-presidential state is still contested and heralded as more fictional than real. However, in the last few decades, Presidents have enhanced their informal role in speaking of political issues, while not getting specifically involved in party politics, somewhat entailing a discursive counterweight to the Government's power. Even if the President's constitutional powers are not likely to be expanded any time soon, the role has become more prominent, and time will tell whether this will lead to a more marked evolution of constitutional practices.

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