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*123 THE DECLINE OF ARTICLE 26: REFORMING ABSTRACT CONSTITUTIONAL REVIEW IN IRELAND

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Abstract: Ireland's abstract review mechanism contains a design choice that appears to have had a significant impact on how it is used: under Art.34.3.3 of the Constitution, Bills which are found to be constitutional under the Art.26 procedure are permanently immune from further legal challenge. I suggest that the immunity provision under Art.34.3.3 be abolished to encourage the President to avail of the Art.26 mechanism, removing one of the design features of Ireland's form of abstract review linked to its decline. In Part I, I outline the concept of abstract review and examine how Ireland's abstract review mechanism has operated in practice. In Part II, I argue that the immunity in Art.34.3.3 is theoretically inconsistent with the “living Constitution” approach adopted by the Irish courts and, at a practical level, it appears to have discouraged the President from referring Bills to the Supreme Court. I argue that the decline in Art.26 references has been aided by the weight afforded by the Government to legal advice from the Attorney General. The comparable convenience of sounding out legal advice has meant that the Government is less inclined to use its soft power to encourage the exercise of the Art.26 reference procedure. In Part III, I propose the abolition of Art.34.3.3 to encourage greater use of the Art.26 mechanism. Keywords: abstract review - Art.26 - Art.34.3.3 - the President - the Council of State - the Supreme Court - Attorney General - constitutional law

INTRODUCTION

Abstract review allows Bills to be scrutinised by a court in the absence of a litigant. Proponents of abstract review argue that it serves as a useful mechanism to allow the constitutionality of a Bill to be considered, without waiting for an appropriate individual to instigate a legal challenge. It shifts the burden from the public to the political branches to take proactive steps to assess whether a Bill is constitutionally sound. Further, it is said to serve a constructive purpose in deepening dialogue between different branches of government, allowing the *124 political branches to test the parameters of their law-making power and inform their understanding of the Constitution. It can encourage innovation in policy-making, as governments can test the scope of their power whilst avoiding the concern that they may be imposing an unconstitutional measure on the public. Institutional design choices taken by constitutional drafters are critical to how abstract review functions in practice, and whether it helps or hinders the pursuit of those objectives.

In Ireland, abstract review under Art.26 of the Constitution is exercised independently by the President, the Head of State in all but name.[1] Ireland's abstract review mechanism contains a design choice that appears to have had a significant impact on how it is used: under Art.34.3.3, Bills which are found to be constitutional under the Art.26 procedure are permanently immune from further legal challenge. This immunity is inconsistent with standard constitutional principles, as ordinarily there is no limit on how many times a law can be challenged in the Irish courts. There has been no use of the Art.26 mechanism in Ireland since 2005, which I suggest is related, in part, to the immunity attached to Bills referred under the Art.26 mechanism. The failure to use the Art.26 mechanism does not mean that pre-enactment constitutional review has vanished;

rather, as Casey and Kenny have persuasively argued, that power is instead functionally exercised by the Government's legal adviser, the Attorney General. [2] The immunity for Bills that survive challenge under the Art.26 mechanism serves as a “push” factor, while the comparative ease of seeking the Attorney General's advice serves as a “pull” factor. Yet the latter is a much less transparent process than the Art.26 mechanism, and has been linked to policy distortion and the cultivation of an excessively cautious approach to law-making.

In this article, I suggest that the immunity provision under Art.34.3.3 be abolished to encourage the President to avail of the Art.26 mechanism, thereby removing one of the design features of Ireland's form of abstract review linked to its decline. In Part I, I outline the concept of abstract review and examine how Ireland's abstract review mechanism has operated in practice. In Part II, I argue that the immunity in Art.34.3.3 is theoretically inconsistent with the “living Constitution” approach adopted by the Irish courts, and that at a practical level it appears to have discouraged the President from referring Bills to the Supreme Court. I argue that the decline in Art.26 references has been aided by the weight afforded by the Government to legal advice from the Attorney General. The comparable convenience of sounding out legal *125 advice has meant that the Government is less inclined to use its soft power to encourage the exercise of the Art.26 reference procedure. In Part III, I propose the abolition of Art.34.3.3 to encourage greater use of the Art.26 mechanism.

I. ABSTRACT CONSTITUTIONAL REVIEW

Judicial review can take several forms. Concrete judicial review allows legislation to be challenged by individuals who can demonstrate that they have personally been affected by the operation of the law. Concrete judicial review and the accompanying doctrine of locus standi is widespread in common law jurisdictions.[3] Abstract judicial review allows a court to consider the constitutionality of legislation in the absence of a litigant. [4] Dedicated constitutional courts with the sole power to conduct abstract review of legislation exist in many major continental systems, including Germany and Spain, as well as many countries from the former Soviet Union. [5] In the United Kingdom, a form of abstract review exists for the resolution of questions of devolved competency in Scotland and Wales. [6] Within abstract review, there can be several design variants: a law may be referred to the constitutional court after it has been enacted, [7] or a Bill may be referred to the constitutional court once it has been approved by Parliament but before it becomes law. [8] The specifics of who can trigger abstract review varies from country to country. It often encompasses openly political actors: a Prime Minister or President, or the head of the legislative assembly, or a defined number of elected officials. In Germany, for example, abstract review can be triggered by the federal government, one of the Länder governments, or one-third of the members of the Bundestag. [9] In addition, many systems allow a judge in a lower court to refer a question to the constitutional court in the context of existing judicial proceedings, akin to the reference procedure for the Court of Justice of the *126 European Union. [10] Abstract review acts as an additional stage in the creation of law, as it “in effect require(s) the court to undertake a final ‘reading’ of a disputed bill or law”. [11] A number of countries, including Ireland, have a combination of both models. [12] Through the Constitutional or Supreme Court's previous judgments and jurisprudence, as well as the “threat of future censure”, abstract review can profoundly shape legislative outcomes. [13] It does not even have to be regularly made use of to have a powerful impact [14]; the mere threat of abstract review can compel political actors to achieve legislative consensus by taking the views of the opposition into consideration [15]; a process Alec Stone Sweet describes as “auto-limitation”. [16]

The benefit of abstract review is that it is provides swift guidance to the executive and legislative branches and the wider public on whether a particular law is constitutional. It can, for example, prevent a dominant political group from enacting measures which are contrary to the constitutional rights of the public, thereby acting as a “valuable democratic safeguard”, ensuring that questionable laws are scrutinised before coming into force.[17] Crucially, abstract review can also facilitate legislative action in circumstances where political actors claim they cannot pursue a certain course of action owing to constitutional constraints. [18] The Art.26 procedure is a valuable means of establishing whether the Constitution does, in fact, forbid a certain course of action or whether the Constitution is used largely as a pretext for political inaction. This also aids democratic law-making insofar as it ensures that measures favoured by the public at large are not stymied on the basis of excessively cautious concerns on constitutionality.

Abstract review has also been subject to criticism on the grounds that it lacks a genuine litigant, threatens to embroil the judiciary in hotly contested political disputes, and can be used as a powerful leverage tool by the opposition to challenge the law-making agenda of those in office.[19] From this perspective, the existence of abstract review means that the Supreme Court or constitutional *127 court is compelled to participate in the law-making process when it is at its most controversial, granting the court considerable power over the future of the law in question, as well as the legislature's future agenda. This can be a recurring pattern: the more referrals the court receives, the more scope the court has for articulating constitutional principles, standards and requirements.

Abstract judicial review, as already noted, has been criticised on the basis that it lacks the presence of a real-life litigant. Proponents of concrete judicial review argue that its normative justification stems from the fact that the State must publicly justify its law when confronted with a litigant who has suffered the worst effects of its operation.[20] It forces lawmakers to consider the impact of the law on marginalised minority groups who lack political capital. [21] It has been suggested that the presence of a plaintiff with a personal stake in the outcome of the case tends to provoke the most compelling arguments on the merits of the law. [22] Indeed, courts themselves can struggle to assess the impact of a law removed from the reality of a legal dispute, and "torn out of the context of life". [23] Without a plaintiff, a court may fail to anticipate side-effects or unintended consequences of the law. [24]

Article 26: Ireland's Reference Procedure

Ireland's is an example of "hybrid" judicial review, combining both concrete and abstract forms of judicial review.[25] Any of the Irish superior courts can consider the constitutionality of legislation, but only the Supreme Court can consider the constitutionality of a Bill in the abstract. After a Bill has passed through the Houses of the Oireachtas, the President then signs the Bill, and it becomes law. There are two exceptions. Under Art.27, a majority of members of the Seanad and one-third of the members of Dáil Éireann can petition the President to refer a Bill to the public for a referendum, or back to a newly constituted Dáil Éireann. This provision has never been used, owing to the fact that the governing party almost invariably has a majority in both *128 Houses. [26] Article 26 is the other exception, and it allows the President, after conferring with the Council of State, to refer a Bill to the Supreme Court to assess its constitutionality before it is signed into law. Three types of Bill are exempted from this procedure: Bills to amend the Constitution, money Bills, and Bills enacted under the "emergency" clause in Art.24. [27]

Of the 14 Bills that have been referred to the Supreme Court, half have been found to be unconstitutional.[28] That is not particularly surprising. Given the gravity of the President convening the Council of State and opting to refer the Bill to the Supreme Court, there is a greater likelihood that it is constitutionally suspect. [29] As Presidents have rarely chosen to make use of the Art.26 procedure, it carries "greater political salience than the possibility of a litigant challenge". [30] The immunity granted to a Bill that survives an Art.26 reference will make the Supreme Court particularly anxious to examine all potentially unconstitutional aspects of the Bill to the fullest degree. If even one provision of the Bill is found to be unconstitutional, the Bill in its entirety will fall—something that is unique to Art.26 references. [31] As the Court is examining the constitutionality of the Bill in the abstract, it is free to bypass the usual constraints of civil procedure. This means that the Court is permitted to consider "arguments that might never have been made, or in respect of which an individual plaintiff might not have had standing to advance". [32] At a practical level, it is perhaps easier for the Court to make a finding of unconstitutionality before the legislation has been enacted and embedded in the lives of citizens, thus avoiding the drastic effects of a finding of unconstitutionality. [33] The usual criticism of the abstract review process—namely, the absence of a litigant—is counterbalanced by the fact that *129 the overwhelming majority of judicial reviews taking place in Ireland do have a plaintiff, and the Art.26 reference procedure is a much rarer beast that sits alongside the standard judicial review provisions in Art.34.

The President and the Council of State

It is worth pausing at this juncture to briefly outline the role of two constitutional organs: the President and the Council of State. The President serves as an independent Head of State, and is elected by public vote.[34] His or her role is largely ceremonial, [35] but some notable powers

allocated to the President in the Constitution include the capacity to summon or dissolve the Dáil on the advice of the Taoiseach of the day, [36] (and refuse the latter where the Taoiseach has lost the support of the Dáil [37]) as well as the formal appointment of the Taoiseach, members of Government [38] and the judiciary. The President is tasked with signing all Bills passed by the Oireachtas into law. [39] At this juncture, the President may instead opt to refer a Bill to the Supreme Court under Art.26. Short of stated misbehaviour, [40] the President is immune from oversight either by the Oireachtas or the courts in the performance of his or her duties. [41]

Article 31 of the Constitution outlines the composition of the group known as the Council of State, whose role is to "aid and counsel the President" in relation to the exercise of his or her powers. The workings of the Council of State are rather opaque, given that it is an entirely confidential process, and records of its deliberations are not made public.[42] While the Presidency is an independent office, the Government is not lacking in representation at the Council of State. Both the Taoiseach and Tánaiste sit on the Council of State, as well as the Ceann Comhairle, the chairman of the Dáil, who tends to come from the Governmental party, given that the Executive invariably dominates the legislative branch. In addition, the Attorney General is also a member of the Council of State and tends to have a prominent role in presenting the Bill and answering questions. [43] The Presidents of the High Court, Court of Appeal and Supreme Court are also present: the practice appears to be that the Chief Justice adds little to the discussion, [44] given that he or she will sit on the Supreme Court to scrutinise the Bill, in the event that the Art.26 mechanism be initiated. [45] *130 Other members include the chairman of the Seanad, and former Taoisigh, former Chief Justices, former Presidents and seven individuals chosen at the President's discretion. The Council of State can gather at the behest of the President and discuss the merits of referring the Bill to the Supreme Court. The decision to refer the Bill to the Supreme Court rests solely with the President; the Council can only offer its advice. Notably—unlike many continental systems of abstract review—the power to refer a Bill to the Supreme Court does not rest with openly political actors, but rather with the President, which is designed to be an independent office. [46] The independence of the President has rarely been questioned, and the office of the Presidency has consistently enjoyed high levels of public trust and popularity. It has been suggested that the largely ceremonial and uncontroversial role that the President occupies in Irish public life ensures that any exercise of discretion in this regard by the President commands respect. [47]

But while the office of the President may be independent, the obligation to convene the Council of State means that the decision to exercise the Art.26 mechanism is not designed to be a process independent of government input. First, the Council of State includes a number of prominent Government actors—Taoiseach and Tánaiste—who will be familiar with the provisions of the Bill, given that the Bill will invariably have been drafted on the Government's instruction.[48] The Attorney General, who will have played a crucial role in advising the Government on the Bill, and likely to have overseen the drafting of the Bill, briefs the Council of State. The Government is likely to have representatives from its own political party present, usually the Ceann Comhairle, the Cathaoirleach of the Seanad, as well as former Taoisigh. [49] These government actors are at a distinct advantage as compared to the rest of the members of the Council in terms of their familiarity with the provisions of the Bill, its background context, and the potential concerns on constitutionality. Secondly, any gathering of the Council of State will take place under conditions of some urgency: the President has only seven days from when the Bill is presented to him or her for signature to decide whether it should be referred to the Supreme Court. [50] In short, those who have initiated and drafted the Bill sit alongside individuals who are being briefed on the Bill for the first time and have only a few short days to become acquainted with what may be highly *131 complex and technical legal issues. This is not to suggest that other members of the Council of State do not play an important role in advising the President, or that the President cannot disagree with the Government, but rather to point out that government actors are not lacking in opportunities to make their views known. Through their representatives on the Council of State, the Government has ample scope to robustly defend the Bill's merits or, indeed, encourage its referral to the Supreme Court.

A referral to the Supreme Court has occurred on only 14 occasions since the enactment of the Irish Constitution, most recently in 2005, in Re Article 26 and the Health (Amendment) (No. 2) Bill 2004.[51] The process has clearly been used sparingly. [52] There has occasionally been some political pushback, most notably the tension that erupted after one President referred an Emergency Powers Bill to the Supreme Court at the height of the IRA's terror campaign. [53] On the

whole, however, it appears that the Art.26 mechanism has served its original purpose by allowing the Government to test the parameters of its law-making powers, and has acted as a reasonably constructive dialogic process between the judiciary and the other branches of government. But in the past two decades, Art.26 references have almost disappeared entirely from the constitutional landscape.

II. WHY HAS ARTICLE 26 FALLEN OUT OF FAVOUR?

No use of the Art.26 mechanism has been made since 2005. In the intervening years there has been no shortage of controversial Bills or issues which might have prompted such a referral (and, indeed, public speculation as to such a move), yet there has been a complete failure to make use of it. The Council of State has been convened on a number of occasions since 2005. In 2010, President Mary McAleese convened the Council of State to consider the Credit Institutions (Stabilisation) Bill.[54] President Michael D. Higgins, who assumed office in 2011, convened the Council of State in 2013 to deliberate on the Protection of Life During Pregnancy Bill [55] and the International Protection Bill in 2015. [56] A number of TDs and Senators wrote to the President in 2014, urging him to refer the Water Services Bill to the Supreme Court, which he *132 declined to do. [57] Given that the President, on the advice of the Council of State, has an absolute discretion to refer a Bill to the Supreme Court, and that the deliberations of those meetings are not made public, we cannot know with any great certainty why the process has ground to a halt. There are, however, a number of factors that might illuminate why this is the case. The first is that there appears to be increased unease with the absolute nature of Art.34.3.3 which, as already indicated, ensures that a Bill that has been upheld by the Supreme Court under an Art.26 reference can never be challenged in the courts again. [58] By way of preliminary observation it may be said that this immunity is normatively undesirable insofar as it is inconsistent with the "living Constitution" approach long adopted by the Irish courts. More practically, the immunity conferred by Art.34.3.3 seems to have discouraged the use of the Art.26 mechanism by the President. Finally, given that the Government increasingly relies on the Attorney General to provide a functional form of pre-enactment constitutional review, there is little incentive to encourage the President to refer a Bill to the Supreme Court.

Immunity inconsistent with "the living Constitution"

In ordinary circumstances there is no limit on how many times a piece of legislation can be challenged for its constitutionality. While the prospect of success may be remote if there is recent Supreme Court precedent, there are pieces of legislation which have been subject to repeated litigation over the years.[59] A rigidly originalist approach has not found favour within Irish constitutional culture. [60] It has long been recognised that Ireland has a "living Constitution" [61] which acts as an "ongoing conversation across generations". [62] Naturally, there are rules in the Constitution that are so clearly specified that they could not be open to a new interpretation by a court. Article 16.1, for instance, states that everyone aged twenty-one and over is eligible to become a member of Dáil Éireann. A court could not with any seriousness suggest that "twenty-one" could now be interpreted to mean "eighteen". A number has a fixed meaning, and it is impossible that it could come to mean something else due to the passage of time. [63] The scope and meanings of fundamental rights, or *133 broad concepts such as social justice, [64] are more liable to shift and gradually develop in tune with the norms of an ever-evolving society. Societal norms and attitudes can vary widely from one generation to the next. Technological and scientific developments mean that aspects of human life are possible which could not have been predicted when the Constitution, or even the legislation in question, was drafted. For example, no one could have envisaged in 1937 that it would be possible for a large group to gather and communicate in real time without being in the same place, [65] or that a woman could give birth to a baby that was not her biological child. [66] The expanding possibilities of how one can be "present" at a place, or who counts as a "mother" has ramifications for our understanding of those words in the text of the Constitution. Given that society is in a permanent state of evolution, so is our Constitution. It follows that the constitutionality of a law is not immutable. The courts are required to revisit established meanings of certain constitutional provisions if the Constitution is to stay relevant to the society it governs. As a result, a law that is found to be compatible with the Constitution today may not be so found in 30 years' time. Murray C.J. made reference to this precise argument in A v Governor of Arbour Hill when he noted that:

> "It is entirely conceivable … that an Act found unconstitutional in this, the 21st century, might

> well have passed constitutional muster in the 1940s or 50s. It would be impossible and absurd for the court to inquire into and identify the point in time when society could have been deemed to have evolved so as to call in question the constitutionality of an Act."[67]

Yet this is precisely what Art.34.3.3. forces the Supreme Court to do. If a Bill passes muster under the Art.26 reference procedure, it is then exempt from any further challenge and can remain indefinitely on the statute book until the legislature sees fit to remove it, or the Constitution is amended through a referendum. Serious doubts regarding the provision for immunity were eventually put aside when Art.34.3.3 was added in 1941,[68] but it has become increasingly apparent, with the passage of time, that constitutional understandings are prone to dramatically shift and develop. What this highlights is that the rationale underpinning Art.34.3.3 fits uneasily with the "living Constitution" jurisprudence that underpins the rest of constitutional *134 theory and caselaw. [69] It assumes, as US Supreme Court Felix Frankfurter warned, "that constitutionality is a fixed quantity". [70] The fact that judgments in Art.26 references are not infallible is demonstrated by the fact that the Supreme Court itself has rolled back on its reasoning as expressed in Art.26 references on at least two occasions: in McGimpsey v Ireland [71] and Director of Public Prosecutions v Best. [72]

The "push" factor: immunity discourages use of Article 26

The provision for immunity has a more practical consequence: how it influences the behaviour of constitutional actors tasked with the instigation of Art.26. The President is the party formally tasked with initiating Art.26 references but, as previously noted, the Government of the day has a significant role to play in advising the President via the medium of the Council of State.

It has been speculated that the immunity from further challenge has actually incentivised previous Presidents to refer certain Bills in the past: it has been suggested, for example, that President Robinson referred the 1995 Abortion Bill to the Supreme Court precisely to ensure that it was exempt from subsequent legal challenge.[73] In recent decades, however, there seems to have been a marked reluctance by the current President to make Art.26 references, on the basis that any Bill that survives a challenge under Art.26 will be enshrined in law. Speaking to one national newspaper in 2013, President Michael D. Higgins stated that:

> "I have to, as President, operate with a certain amount of prudence in relation to how I interpret my powers under Article 26. It's a deep process, because I know that if I refer a piece of legislation to the Supreme Court, I am closing off the opportunity for other citizens, for citizens to challenge it later on. So what I have to bear in mind is this: if something strikes me in the legislation as raising a constitutional issue, is this best tested by my Article 26 exercise of power? Is this better tested by a factual statement of a case?"[74]

In 2020, a statement released in the wake of President Higgins's decision to sign the controversial Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Records Bill into law hinted at a similar sentiment. The Commission of Investigation Records Bill was introduced in *135 anticipation of the publication of a report by the Commission of Investigation into certain Mother and Baby Homes run by the State and religious orders for unmarried mothers during the twentieth century. The Bill purported, amongst other matters, to ensure that none of the personal data gathered by the Commission would be destroyed and that a copy of the records gathered would be given to the Minister for Children, as well as the State's family and child agency. Public disquiet grew around the provisions of the Bill when it became apparent that the Minister's copy of the records would be sealed for 30 years. The Minister for Children argued that the Bill was a necessary means of preserving historical records, and that the Government was bound by the confidentiality provisions of legislation dating from 2004.[75] Legal advocates and survivors' groups argued that it would unlawfully prevent relevant parties from accessing their personal data, as well as administrative records belonging to the Homes. [76] The Bill passed both Houses of the Oireachtas, and was sent to the President for his signature. The President considered, on balance, that there was no pressing issue of constitutionality to merit an Art.26 reference, but his statement noted that:

> "When considering any piece of legislation, the President must also be cognisant of Art.34.3 of Bunreacht na hÉireann, which provides that no Court can question the validity of any legislation following a referral by the President to the Supreme Court. The President's

> decision to sign this legislation leaves it open to any citizen to challenge the provisions of the Bill in the future."[77]

Arguably this creates an additional unfairness: ordinary citizens will then be forced to suffer the impact of a potentially unconstitutional law until one of them takes the initiative to start a legal challenge. This is no mean feat: litigation is a time consuming, expensive and draining process. Many people who are unfairly impacted by a law will conclude it is not worth the disruption of commencing a legal challenge. On the other hand, the fact that the legislation is immune from challenge if it survives an Art. 26 reference would mean that members of the public might have to live permanently with an injustice, in the event that a problematic aspect of the law has escaped the attention of the Supreme Court.[78]

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The "pull" factor: the Attorney General

The second reason that the Art.26 mechanism may be on the decline is that successive Irish governments have a more convenient, less cumbersome process to encourage the President to exercise his discretion. Two legal mechanisms, although superficially different, may in reality perform the same function insofar as they both respond to the same problem.[79] The Art.26 mechanism, in the past, appeared to be a way for the Government to test the limits of its law-making powers. [80] In recent years, as Kenny and Casey argue, this function has been supplanted by increased reliance on the advice of the Attorney General, the legal adviser to the Government. [81] The traditional function of Art.26 has been unofficially usurped by another process of pre-enactment constitutional review, which is more amenable to the Government. Instead of referring a Bill to the Supreme Court, what the Government does is to seek out the advice of the Attorney General. It seems as though a practice has arisen whereby no Bills are passed unless the Attorney General (or at the very least, the Attorney General's office) is satisfied that the Bill is constitutional. [82] Placing heightened reliance on the Attorney General, from the Government's perspective, has a number of obvious advantages. First, the Attorney General's advice can be sought at a much earlier stage, before a Bill is even drafted, as can his or her opinion on whether a proposed law or policy is constitutional. Any necessary amendments or redrafting can be incorporated into the formulation of the Bill. Under the Art.26 mechanism, however, if any provision of the Bill is unconstitutional, it is struck down in its entirety, meaning that the Government must go back to the drawing board. Further, the Government has complete control over the process of requesting advice from the Attorney General (although not, of course, of the content of that advice). The Attorney General is a political appointment, made at the discretion of An Taoiseach. The Attorney General sits with the Cabinet and is bound by cabinet confidentiality, and can provide his or her advice directly, or even informally, to the Government.

The control the Government has over the Art.26 mechanism is less clear cut. Although the formal theory is that the President is an independent constitutional officer, who exercises his or her discretion to refer the Bill to the Supreme Court, there is some suggestion that that may not be entirely accurate. Ruairí *137 Quinn, who served as a cabinet minister in a number of coalition governments over a span of 30 years, claimed in his 2005 memoirs that ministers use a certain formulation of words in the Houses of the Oireachtas to signal to the President that the Government wishes the Bill to be referred to the Supreme Court. Quinn wrote that:

> "While not allowed to request the president to directly refer a bill that has been passed by the Dáil and the Seanad, a minister's open acceptance of a legitimate doubt is code to achieve the same thing. Accordingly, suitably briefed by my civil servants, I gave the appropriate responses on the floor of the Dáil and the Seanad in response to questions … President Hillery did refer the bill to the Supreme Court."[83]

But such elaborate practices do not need to be in place for the Government to exercise its soft power to encourage the President to initiate the process. The Government has considerable representation on the Council of State, and can use those avenues of influence to urge the President to refer the Bill to the Supreme Court. Regardless, even if the Government hopes that the President will refer a Bill to the Supreme Court—or, indeed, pressures the President to do so—they cannot be certain that that will happen. The President is, according to the Constitution, an independent office, and the Government cannot openly control what the President decides to do. But if the Government prefers to rely on the advice of its Attorney General, it has no incentive

to encourage the President to make use of the Art.26 mechanism. In addition, the advice of the Attorney General is nearly always unpublished. It cannot then be parsed by Opposition TDs and their legal counsel, or other legal experts in the public arena who dispute the accuracy of the Attorney's advice. Referring the matter to the Supreme Court inevitably means that the merits of the Bill will be argued, in great depth, by counsel in public, followed by the release of the Court's judgment. The Government might have to endure considerable criticism from the Opposition, the press and the wider public from a finding that the Bill is unconstitutional. A further disincentive for the Government is that the Supreme Court could issue a ruling which contradicts the Government's claim that they cannot act on a certain law or policy, given constitutional constraints.[84]

From the Government's perspective, it is understandable why the Attorney General is a far more appealing option. But while it may be more convenient for the executive branch for pre-enactment constitutional review to be conducted in a shroud of secrecy, it is not evident that it serves the interests of anyone else, including the public at large.[85] The Attorney General serves a *138 vital role as the legal adviser to the Government. But when he or she presents the Government with legal advice on the constitutionality of a Bill, they are inevitably acting in the context of a lawyer-client relationship. This highlights the uneasy tension between the Attorney General's role as guardian of the public interest while simultaneously acting as legal adviser to the Government. [86] In recent years, the Attorney General appears to have advised the Government that a number of measures were unconstitutional; this is despite the fact that a number of legal practitioners and academics have disputed the advice as being excessively cautious and based on narrow readings of both case law and the text of the Constitution. Prominent examples include the Government's claim that a referendum was necessary to legalise same-sex marriage, [87] and the repeated veto of the introduction of a number of laws designed to tackle Ireland's housing crisis, citing constitutional concerns. [88] For a number of years, successive governments have argued that it would be unconstitutional to introduce legislation to allow adopted persons to access information on their birth parents other than on a case-by-case basis, a position that was heavily disputed. [89] That advice has since been retracted. [90] This gap between judicial doctrine and political practice, acting on the advice of the Attorney General, can be explained only by highly conservative readings of constitutional text and case law. This is perhaps unsurprising; if a Bill is marginal or borderline constitutional, legal advice has a tendency to tread on the side of caution. The aim of the Attorney's advice is to anticipate a likely finding of unconstitutionality by the courts. There is little incentive for the Attorney to approach these issues in an innovative or expansive manner. [91] Relying on the Attorney General's advice as the sole means of pre-enactment constitutional review stifles the development of constitutional thought and innovation. It limits political imagination by acting as a bulwark against any measures which deviate too radically from the status quo.

It is, of course, understandable that the Government and its legal advisers have no desire to pass Bills which are constitutionally suspect. They would *139 argue that to do so would be in breach of their obligation to ensure that the Oireachtas upholds the Constitution, and cannot knowingly promulgate laws which clash with constitutional values. But there can be scope for reasonable disagreement over the constitutionality of a particular law. The Government's scrupulous adherence to the Constitution would, of course, be admirable, were it not for the appearance that it is highly selective in which provisions it chooses to interpret so narrowly. The Government appears to be perfectly prepared to adopt courses of action that are highly questionable in other circumstances. For example, despite the fact that there is a clear 15-member limit on members of Cabinet in Art.28.1, successive governments have continually defended the practice of appointing additional “super junior” ministers who attend cabinet meetings.[92] Another practice that has been subject to sustained criticism is that, during the 32nd Dáil, the minority Government regularly vetoed Private Members Bills by relying on the “money message” provision in Art.17.2, which states that any law which allows for the appropriation of public money must have been approved by the Government. In practice, the Government appears to cite the provision to defeat or delay nearly all Private Members Bills, even if any anticipated expenditure is virtually nil. [93] In 2019, a number of NGOs collectively voiced their disquiet at the practice, where they pointed out that “nearly all Opposition Bills with majority support in Dáil Éireann have been blocked in this manner, and it raises serious questions for how our democracy functions”. [94]

This is merely to illustrate that, if the Government were truly committed to a particular law or policy, it would ensure the Bill was passed through the Houses of the Oireachtas and encourage

the President to refer the Bill to the Supreme Court if there were genuine doubt over its constitutionality. Instead, it seems as though particular laws or policies which are considered to be constitutionally dubious in the eyes of the Government and its advisers are abandoned, without any real attempt to gauge whether the courts would take the same approach in practice. This has been described as “learned meekness”.[95] The drafters of the Irish Constitution designed a mechanism to deal with these precise scenarios. It can provide legal certainty to the Government, rather than waiting for the right plaintiff to challenge the law. It appears that that process has informally been abandoned in favour of a solution that is by far preferred by those in Government, but not particularly beneficial to anyone else. This development has produced significant informal constitutional change. Unlike other jurisdictions, the Irish judiciary are considered to be the sole interpreters of the Constitution. That the executive and legislative branches do not formally put forward alternative, competing accounts of constitutional norms has been linked for the small-c conservative approach to law-making in this jurisdiction. *140 Casey and Daly, for example, argue that the political branches adopt a highly conservative and risk-averse approach to law-making partly because of a “culture of legalism” which, they argue, treats constitutional interpretation as a specialised craft to which politicians are ill-suited. [96] They suggest that it would be normatively desirable to allow the executive and legislative branches to advance their own understandings and interpretations of the Constitution.

However, from another perspective, this is precisely what the Executive is currently doing. As noted above, it is well documented that successive governments have opted not to pursue certain laws or policies on the basis of internal legal advice that does not necessarily correspond to the prevailing approach adopted by the courts. One way of understanding this phenomenon is that the Executive is engaging in its own interpretation of the Constitution, informed by the advice offered by its own legal advisers—even if it does not acknowledge or consider itself as performing that role. Of course, it could be argued in response that the Executive is not really advancing its own interpretation of a constitutional provision. It is relying on the advice of highly qualified, specialist lawyers: the Attorney General, lawyers in the Office of the Attorney General or external barristers who have been contracted to provide their opinion. But legal expertise is never entirely absent when the legislative or executive branches are openly permitted to advance a competing interpretation of a constitutional provision. When the President of the United States or the Senate Leader publicly advances their understanding of the scope of a particular constitutional provision, or whether a particular Bill is constitutionally sound, they do so with the aid of a team of specialist lawyers and advisers.[97] Where the Executive prefers to rely on a process of pre-enactment constitutional review carried out by its internal legal advisers, rather than the judicial branch, then it is the Executive's competing interpretation of the Constitution that prevails. If the Executive internally outlines and obeys the scope of its own constitutional parameters, the outcome is functionally equivalent to a system where the Executive openly adopts an alternative, rival interpretation of the Constitution.

III. ABOLISH ARTICLE 34.3.3

It is challenging to state with absolute certainty why the number of Art.26 references has dropped so dramatically. It is difficult to see how the Government could be dissuaded from using the Attorney's advice as a form of ex ante constitutional review. Nor can the President's concerns about the lack of litigant really be addressed: the very nature of the Art.26 reference mechanism means that the Bill is considered in the abstract. But one option might be to make it more appealing for the President to exercise his or her *141 discretion to refer a Bill to the Supreme Court, by abolishing Art.34.3.3, so as to allow future litigants to take challenges to any Bill which survives the Art.26 process and is signed into law.

The Art.26 mechanism was designed to shield the President from having to sign a Bill which the President suspected might be constitutionally dubious.[98] The provision for immunity from challenge was later added to the Constitution, for fear that judgments under Art.26 would be relegated to the status of advisory opinions. [99] This is one of the primary justifications for Art.34.3.3, namely that it reflects the gravitas of the mechanism. It acts as a “strong discouragement” for the President to refer Bills to the Supreme Court, ensuring that the President will exercise his or her power with circumspection. [100] The Constitution Review Group, considering whether a Bill should remain immune from scrutiny, noted that allowing further challenges could undermine the object of the Art.26 procedure. What is the point, one might ask, of assessing the constitutionality of a Bill if that decision could be reversed at a later date? From

this perspective, Art.34.3.3 reflects the weight of the Supreme Court's judgment, and of the use of the mechanism as a whole, disincentivising it as a procedure for the Government's day-to-day legal advice. The Supreme Court should not descend into some kind of legal consultant for the Government, issuing judgments on the mechanics of a particular law or policy. Such a contingency would not only undermine the Supreme Court itself by detracting from genuine litigants but would absolve the legislature of its responsibility to make laws. One scholar notes approvingly that Art.26, coupled with the provisions of Art.34.3.3, is both “neat and symmetrical”. [101] If the decision could subsequently be subject to another challenge, he argued, it would undermine the judgment of the Supreme Court as it would be “relegated to the level of an opinion”. [102]

Yet, this is true of every other Supreme Court decision which always remains subject to further challenge. Eternal permanence is not necessary for judgments of the Supreme Court to be afforded appropriate institutional deference and respect. A substantial number of those judgments remain binding precedent, but many others have been revised and overruled in the fullness of time. The immunity contained in Art.34.3.3 is divorced from the standard that is applied to every other case that appears before that Court. The fact that it deviates so drastically from the normal approach appears to hinder, rather than help, the advancement of constitutional dialogue.[103] It does not only mean that legislation that has been upheld under Art.26 is permanently shielded from challenge. Another worrying side effect of Art.34.3.3 is that it is so absolute *142 in its consequences that it seems to have entirely discouraged the use of the Art.26 procedure. Its institutional design seems to contain a self-undermining flaw, stemming from a failure to fully grasp how a key constitutional institution like the Presidency would be disposed toward the question of immunity.

The reference procedure appears to be an example of a mismatch between the formal process and the incentives facing the relevant stakeholders. The drafters imagined that Presidents who had genuine concerns about the constitutionality of a Bill would refer it to the Supreme Court for further scrutiny and a final judgment on its constitutionality. This worked, but only up to a point. The problem is that Presidents in such a situation, who are uneasy with the constitutionality of Bill, appear to be reluctant to exercise their power under Art.26 for fear that it will become a permanent aspect of the statute book. Consequently, they do not exercise the referral power and hope instead that an individual citizen will take a legal challenge. Perversely, the President acting in good faith may be more likely not to follow the formal constitutional process designed for him or her by the drafters.

This dilemma seems to have become even more entrenched in the past 15 years. Article 34.3.3 may have worked when there were no other countervailing forces to disincentivise the President from exercising his or her discretion under Art.26. But the combination of the Government's new-found reliance on the Attorney General and its subsequent reluctance to encourage the President to make use of the reference process seems to have upset the delicate balance of the Art.26 mechanism. While Presidents may always have been wary of treading into controversial territory, they may have been more receptive to referring the measure with the encouragement of the Council of State. What, perhaps, could not be anticipated by the drafters of the Constitution is the Government's apparent reluctance to encourage the exercise of the referral power through the Council of State.

This echoes a common problem facing those tasked with constitutional design: the difficulty in anticipating how future institutions will operate in practice. Institutional design must take account of the incentives facing various political actors in this scenario and, as it stands, the formal process of abstract review fails to take account of the pragmatic reality facing Presidents. It is difficult to imagine how the Government could be incentivised not to place considerable reliance on the Attorney General; it has never been openly acknowledged that the Attorney has moved to fill the function of pre-enactment constitutional review. But one step that could be taken is to remove Art.34.3.3 in order to make it more palatable for the President to exercise his or her discretion to refer a Bill to the Supreme Court. In 2012, the then Minister for Justice Alan Shatter T.D. announced that he was considering a number of proposals to amend the Art.26 procedure, including the removal of immunity after a certain period of time had lapsed.[104] While a referendum was held in 2014 to allow for the creation of a new Court of Appeal, no further steps were *143 taken to amend the Art.26 procedure. Perhaps it is now time to give renewed attention to that proposal and to consider the removal of Art. 34.3.3.

CONCLUSION

In this article a few key conclusions are drawn. First, it explores some of the reasons why Art.26 references have vanished from Ireland's constitutional landscape. I suggest, first, that the absolute nature of Art.34.3.3—the immunity of the Bill from further challenge—has made Presidents reluctant to make use of the mechanism. A President who is satisfied with the Bill may have an incentive to refer it to the Supreme Court to provide certainty and ensure that it remains on the statute book. Perversely, the President who is most concerned about the constitutionality of a Bill may be less likely to refer it, given the prospect that the law could be permanently calcified. It is true that there were regular, if small, numbers of Bills referred to the Supreme Court, despite the presence of Art.34.3.3. But it is undeniable that Art.26 has disappeared entirely from use of late, and one factor relevant to this appears to be the reluctance of the President to make use of the mechanism when legislation can be left indefinitely on the statute book.

The second reason appears to be that recent governments lack the incentive to exercise soft pressure to encourage the President to initiate Art.26. As noted above, the reference procedure process did not appear to be a failure from the get-go: after a relatively slow start, the process appeared to work, despite the existence of Art.34.3.3. The answer to what is causing the slowdown is not solely the existence of Art.34.3.3, or the process would not have operated whatsoever until now. Pre-enactment constitutional review has not disappeared; it has just been replaced by another, far less transparent mechanism in the form of advice to the Government from the Attorney General. For the reasons outlined above, this is a more convenient mechanism for the Government to gauge the limits of its law-making power. The immunity clause in Art.34.3 may have been designed to stop the Supreme Court from becoming the Government's legal adviser, but ironically the opposite has, in fact, taken place. As Casey and Kenny have convincingly argued, the Government's legal adviser has—in one important respect—supplanted the Supreme Court.[105]

More broadly, for public lawyers and academics, Art.26 provides a lesson in institutional design. Drafters can struggle to anticipate how institutions will operate in practice, and it can be many decades after a constitution is drafted that a particular process starts to unravel. Careful attention must be paid to the incentives of the actors who will be called upon to exercise the procedure. If the procedure is incompatible with such incentives, there is a risk of allowing the formal process to become redundant. Consideration must also be given to *144 how other political actors can move to supplant a cumbersome or rigid process with an informal mechanism that works in their interests. These practices are, by their very nature, far more challenging to describe and analyse, and can carry damaging repercussions for transparency and accountability. The drafters of the Constitution did not foresee that those in government would turn to the Attorney General, rather than employing the public, transparent and constitutionally mandated process of referring a Bill to the Supreme Court.

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1. The drafters stopped short of describing the new office of the President as the Head of State, given that Ireland remained part of the Commonwealth in 1937. But to all intents and purposes the President is now considered to serve as "the personification of the State". See, The Constitution Review Group, Report of the Constitution Review Group (Dublin: Stationery Office, 1996).

2. David Kenny and Conor Casey, "Shadow Constitutional Review: The Dark Side of Pre-enactment Political Review in Ireland and Japan" (2020) 18(1) International Journal of Constitutional Law 51; David Kenny and Conor Casey, "A One Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency" (2020) 43 Dublin University Law Journal 89.

3. James R. Rogers and Georg Vanberg, "Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective" (2002) 46(2) American Journal of Political Science 379.

4. It has been suggested that the distinctions between these two forms of judicial review may be more similar in practice than might at first appear. See, Alec Stone Sweet, "Why Europe rejected American judicial review—and why it may not matter" (2003) 101 Michigan Law Review 2744 at 2771-2780.

5. Wojciech Sadurski, Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (Berlin: Springer, 2005).

6. Aileen McHarg and Christopher McCorkindale, "The Supreme Court and Devolution: The Scottish Continuity Bill Reference" (2019) 2 Juridical Review 190; Paul Craig and Mark Walters, "The courts, devolution and judicial review" (1999) Public Law 274.

7. Alec Stone Sweet, "The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe" (1990) 19(1) Policy Studies Journal 81 at 84.

8. Virgílio Afonso da Silva, "Beyond Europe and the United States: the wide world of judicial review" in Erin F. Delaney and Rosalind Dixon (eds), Comparative Judicial Review (Cambridge: Cambridge University Press, 2018), p.318 at 325.

9. Donald P. Kommers, "The Federal Constitutional Court in the German Political System" (1994) 26 Comparative Political Studies 470 at 474.

10. da Silva, "Beyond Europe and the United States: the wide world of judicial review" in Comparative Judicial Review (2018), p.318 at 327.

11. Sweet, "The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe" (1990) 19(1) Policy Studies Journal 81 at 84.

12. da Silva, "Beyond Europe and the United States: the wide world of judicial review" in Comparative Judicial Review (2018), p.318.

13. Sweet, "The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe" (1990) 19(1) Policy Studies Journal 81 at 87-88.

14. Georg Vanberg, "Abstract Judicial Review, Legislative Bargaining and Policy Compromise" (1998) 10(3) Journal of Theoretical Politics 299 at 315.

15. Footnote 15 at 314.

16. Alec Stone, The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective (Oxford: Oxford University Press, 1992), p.122.

17. The Constitution Review Group, Report of the Constitution Review Group (Dublin: Stationery Office, 1996).

18. See, for example, Hilary Hogan and Finn Keyes, "The Housing Crisis and the Constitution" (2021) The Irish Jurist 87.

19. Vanberg, "Abstract Judicial Review, Legislative Bargaining and Policy Compromise" (1998) 10(3) Journal of Theoretical Politics 299 at 300.

20. Mattias Kumm, "Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the point of Judicial Review" (2007) 1 European Journal of Legal Studies 153 at 165. Of course, reforming Art.26 does not remove this justification—in fact, it enhances it, because it ensures that individual litigants can return to the courts in the future to point to a harm they believe they have suffered as a result of the law.

21. Tom Hickey, "The Republican Core of the case for Judicial Review" (2019) 17 International Journal of Constitutional Law 288 at 305.

22. Lea Brilmayer, "The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement" (1979) 93 Harvard Law Review 279.

23. Felix Frankfurter, "A Note on Advisory Opinions" (1924) 37(8) Harvard Law Review 1002 at 1003. See also, Re Private Rented Dwellings Bill 1981
[1983] I.R. 181 at 186.

24. On the flipside, the requirements of locus standi mean that a specific plaintiff has to advance arguments that apply to them only. See, David Kenny, "A Dormant Doctrine of Overbreadth: Abstract Review and Ius Tertii in Irish Proportionality Analysis" (2010) 32 Dublin University Law Journal 24.

25. See, Arts 34 and 26 of the Irish Constitution. For historical background, see Gerard Hogan, "John Hearne and the Plan for a Constitutional Court" (2011) 33 Dublin University Law Journal 75.

26. The authors of Kelly: The Irish Constitution note that this is likely thanks to "the political realities which almost always ensure that a Government majority in the Dáil will be reflected in a government majority in the Seanad (so that the hypothesis of the Article— an anti-Government majority in the Seanad allied with an anti-Government minority in the Dáil—is virtually never in practice realised". See, Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, J.M. Kelly: The Irish Constitution, 5th edn (Dublin: Bloomsbury Professional, 2018), pp.495-496. Moreover, any referendums other than those to amend the Constitution require the measure to be approved by at least 33.3% of voters on the register; a more onerous standard than the normal majority of votes cast. See, Art.47.2.1.

27. Joseph Jaconelli, "Reference of Bills to the Supreme Court—A Comparative Perspective" (1983) 18 Irish Jurist 322 at 323.

28. Gerard Hogan, David Kenny and Rachael Walsh, "An Anthology of Declarations of Unconstitutionality" (2015) 54(2) The Irish Jurist 16.

29. Hogan, Kenny and Walsh, "An Anthology of Declarations of Unconstitutionality" (2015) 54(2) The Irish Jurist 16.

30. Oran Doyle, The Constitution of Ireland: A Contextual Analysis (Oxford: Hart, 2018), p.76.

31. Re Art.26 and the Housing (Private Rented Dwellings) Bill 1981
[1983] I.R. 181 at 186.

32. Hogan, Kenny and Walsh, "An Anthology of Declarations of Unconstitutionality" (2015) 54(2) The Irish Jurist 17.

33. Gerard Hogan, "The Matrimonial Homes Bill Reference" (1994) 16 Dublin University Law Journal 175 at 179-180. This consideration has been somewhat ameliorated by the practice of suspending declarations of unconstitutionality; see, for example, NHV v Minister for Justice
[2018] 1 I.R. 246.

34. Article 12.2.

35. Gerard Hogan, “Ceremonial role by far most important for the President”, The Irish Times, 21 October 1997.

36. Article 13.2.1.

37. Article 13.2.2.

38. Article 13.1.

39. Article 13.3.1.

40. Article 12.10.

41. Article 13.8.1.

42. See, Right to Know CLG v Commissioner for Environmental Information
[2021] IEHC 273, paras 75-79.

43. Stephen Collins, “State's most bizarre body to advise on abortion Bill”, The Irish Times, 28 July 2013.

44. Ruadhán Mac Cormaic, “Council of State gathers at Áras for meeting on abortion bill”, The Irish Times, 29 July 2013.

45. The apparent conflict of interest has been subject to some criticism. See, Eoin O'Dell, “The Council of State and the recusal of judges” 9 January 2012, and “The Chief Justice, the Council of State and Article 26 references to the Supreme Court” 29 July 2013, both available at cearta.ie [Accessed 18 January 2022].

46. See, Art.13.8.1 and Art.12.6.3.

47. David Gwynn Morgan, “Mary Robinson's Presidency: Relations with the Government” (1999) 34 The Irish Jurist 256 at 259.

48. There is, of course, the remote possibility that a Private Member's Bill could be at issue; but the Government of the day tends to dominate the legislative process.

49. In addition, all of Ireland's Taoisigh have come from one of two dominant parties, Fianna Fáil or Fine Gael (W.T. Cosgrave, who served as President of the Executive Council, was a member of Cumann na nGaedheal—the precursor to Fine Gael). Former Taoisigh and former Chief Justices are the only lifelong members of the Council of State.

50. Article 26.1.2.

51. See, Hogan, Whyte, Kenny and Walsh, J.M. Kelly: The Irish Constitution (2018), p.479.

52. Elgie, in his comparative analysis of the Irish Presidency, notes that “even compared only with those countries with weak but directly elected presidents, the Irish President is particularly disinclined to assert this power”. See Robert Elgie, “The President of Ireland in Comparative Perspective” (2012) 27(4) Irish Political Studies 502 at 510.

53. J.J. Lee, Ireland 1912-1985: Politics and Society (Cambridge: Cambridge University Press, 1989), p.482; Morgan, “Mary Robinson's Presidency: Relations with the Government” (1999) 34 The Irish Jurist 256.

54. “McAleese signs controversial Bill”, The Irish Times, 21 December 2010.

55. Stephen Collins, “State's most bizarre body to advise on abortion Bill”, The Irish Times, 28 July 2013; Ruadhán Mac Cormaic, “Council of State gathers at Áras for meeting on abortion bill”, The Irish Times, 29 July 2013.

56. Sarah Bardon, “President refers ‘rushed’ asylum Bill to Council of State”, The Irish Times, 23 December 2015.

57. Stephen Collins, “President Higgins ignores pleas and signs Water Services Bill into law”, The Irish Times, 29 December 2014.

58. The provision states that: “No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26.”

59. Braney v Special Criminal Court
[2020] IESCDET 95; DPP v Quilligan and O'Reilly (No. 3)
[1993] 2 I.R. 305.

60. Conor O'Mahony, “Societal Change and Constitutional Interpretation” (2010) 1(2) Irish Journal of Legal Studies 71.

61. See the comments of Murray J. in Sinnott v Minister for Education
[2001] 2 I.R. 545 at 680.

62. Jordan v Minister for Justice
[2015] 4 I.R. 232 at 215-216.

63. Murray C.J. noted that for the purposes of constitutional interpretation, “words denoting numbers, places or identified persons admit of no debate”. See, Curtin v Dáil Éireann
[2006] 2 I.R. 556 at 609.

64. A v Governor of Arbour Hill Prison
[2006] 4 I.R. 88.

65. See, for example, the debate on whether remote sittings of the Oireachtas are constitutional. See, Ciarán Toland, Conor Casey and Hilary Hogan, “Remote sittings of the Houses of the Oireachtas: a constitutional solution to a potential democratic deficit” 7 April 2020, available at constitutionproject.ie [Accessed 18 January 2022].

66. Mary O'Connor, “When is a Mother not a Mother? The Commissioning Mother of an Irish Surrogate Child” (2020) 23 Irish Journal of Family Law 14.

67. A v Governor of Arbour Hill
[2006] 4 I.R. 88 at 130.

68. See, Gerard Hogan, The Origins of the Irish Constitution 1928-1941 (Dublin: Royal Irish Academy, 2012), pp.700-705.

69. Jaconelli, “Reference of Bills to the Supreme Court—A Comparative Perspective” (1983) 18 Irish Jurist 322 at 327.

70. Frankfurter, “A Note on Advisory Opinions” (1924) 37(8) Harvard Law Review 1002 at 1004.

71. McGimpsey v Ireland
[1990] 1 I.R. 110.

72. Director of Public Prosecutions v Best
[2000] 2 I.R. 17.

73. Alan Greene, “Those criticising the President for signing Bills into law are overestimating his power”, thejournal.ie, 29 January 2015 [Accessed 18 January 2022].

74. Fionnan Sheahan, “Higgins admits he's reluctant to close off legal challenges to bills by public”, Irish Independent, 12 October 2013.

75. Department of Children, “Statement by the Minister O'Gorman, TD, on the Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Records, And Another Matter, Bill 2020”, 13 October 2020. See, Ailbhe Connolly, “The hurt around the Mother-and-Baby Home legislation”, RTÉ News, 1 November 2020.

76. Dr Maeve O'Rourke, “Here's a full analysis of the problems with the Government's Mother and Baby Homes Bill”, thejournal.ie, 21 October 2020.

77. President of Ireland, “President signs Commission of Investigation (Mother and Baby Homes and certain related matters) Records Bill” 25 October 2020.

78. Short of the law's being repealed or amended by the Houses of the Oireachtas, or an amendment to the Constitution.

79. Ralf Michaels, “The Functional Method of Comparative Law” in Mathias Reimann and Reinhard Zimmermann (eds), Oxford Handbook of Comparative Law (Oxford: Oxford University Press, 2006), pp.339-382.

80. It should be noted, as an aside, that given Ireland's executive nearly always has control over its legislative branches, it is correct to speak of “the government” rather than “the legislature” in this context. See, David Kenny and Conor Casey, “The Resilience of Executive Dominance in Westminster Systems: Ireland 2016-2019” (2021) Public Law (forthcoming).

81. Kenny and Casey (above, fn.3).

82. Casey writes that: “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 a Bill that the relevant Minister will present the draft to Cabinet for agreement in order to introduce it to the Oireachtas.” See, Conor Casey, “The Constitution Outside the Courts—the Case for Parliamentary Involvement in Constitutional Review” (2019) 61 The Irish Jurist 36 at 46.

83. Ruairí Quinn, Straight Left: A Journey in Politics (Dublin: Hodder, 2005), p.204.

84. Hogan and Keyes, “The Housing Crisis and the Constitution” (2021) 65(1) The Irish Jurist 87.

85. As Casey puts it: “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.” See, Casey, “The Constitution Outside the Courts—The Case for Parliamentary Involvement in Constitutional Review” (2019) 61 The Irish Jurist 36 at 44.

86. Professor David Gwynn Morgan has previously suggested that the office of the Attorney General be separated into distinct roles. See, David Gwynn Morgan, “The Attorney General's juggling act must end”, The Irish Times, 15 March 1993; David Gwynn Morgan, “No major problem in separating AG's roles”, The Irish Times, 16 March 1993.

87. Conor O'Mahony, “Principled Expediency: How the Irish Courts can compromise on same-sex marriage” (2012) 35 Dublin University Law Journal 199.

88. Hogan and Keyes, “The Housing Crisis and the Constitution” (2021) 65(1) The Irish Jurist 87.

89. “Way cleared for law releasing birth data to adopted people” The Irish Times, 5 November 2019. See, Conor O'Mahony et al., “Opinion on the application of the Irish Constitution and EU General Data Protection Regulation to the Adoption (Information and Tracing) Bill 2016 and the Government's ‘Options for Consideration’” (Dublin: Adoption Rights Alliance, 2019).

90. “Attorney General tells Taoiseach referendum not needed to grant adopted people birth cert access” 15 January 2021, thejournal.ie.

91. Kenny and Casey, “Shadow Constitutional Review: The Dark Side of Pre-enactment Political Review in Ireland and Japan” (2020) 18(1) International Journal of Constitutional Law 51 at 65.

92. Hogan, Whyte, Kenny and Walsh, J.M. Kelly: The Irish Constitution (2018), p.516.

93. See, Smith v Ceann Comhairle
[2019] IEHC 746.

94. “Blocking of Opposition Bills is troubling”, Letters to the Editor The Irish Times, 7 October 2019.

95. Tom Hickey, “Revisiting Ryan v Lennon To Make the Case Against Judicial Supremacy” (2015) 53(1) The Irish Jurist 125 at 147.

96. Conor Casey and Eoin Daly, “Political constitutionalism under a culture of legalism” (2021) 17(2) European Constitutional Law Review 202.

97. Conor Casey and David Kenny, “The Gatekeepers: Executive Lawyers and the Executive Power in Comparative Constitutional Law” (2022) International Journal of Constitutional Law (forthcoming).

98. Hogan, The Origins of the Irish Constitution 1928-1941 (2012), p.702.

99. Footnote 99, pp.701-705. The provision was inserted by legislation during the three-year period immediately after the Constitution's enactment when no referendum was required for amendment.

100. Michael Gallagher, “The Political Role of the President of Ireland” (2012) 27(4) Irish Political Studies 522 at 526.

101. Jaconelli, “Reference of Bills to the Supreme Court—A Comparative Perspective” (1983) 18 Irish Jurist 322 at 327.

102. Footnote 102.

103. Hogan, Whyte, Kenny and Walsh, JM Kelly: The Irish Constitution (2018), para.4.1.04.

104. Press Release, “Government approves in principle a future referendum on Article 34 of the Constitution” 17 July 2012, available at merrionstreet.ie [Accessed 19 January 2022].

105. Casey and Kenny, “A One Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency” (2019) 42 Dublin University Law Journal 89.