

The Constitution
of Ireland
A Contextual Analysis

Oran Doyle

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The President

Election and Removal of the President – Roles of the President – Evolution of the President’s Role

I. INTRODUCTION

ONE OF THE principal innovations of the 1937 Constitution was the introduction of an elected presidency. Article 12.1 describes the President as taking ‘precedence over all other persons in the State’. Although the President’s internal status as Head of State was secured by the Constitution, the King of England continued to accredit ambassadors and conclude international agreements on behalf of Ireland until 1949. As we saw in chapter two, it was only with Ireland’s departure from the Commonwealth and the Republic of Ireland Act 1948 that the President became recognised externally as Ireland’s Head of State. Consistent with the model of responsible government, the President has few significant powers. She largely functions as a ceremonial Head of State, mostly exercising the sorts of powers that would be exercised by the Queen in the United Kingdom or governors general in Canada, Australia or New Zealand. However, the President has a small number of roles that are more consistent with European Heads of State in the interwar years. Moreover, the fact that Presidents have an electoral mandate allows them to play a more active role in public than one would typically expect of a governor general. In recent decades, successive Presidents have played a more interventionist role.

In chapter three, I argued that the fundamental separation of powers in the Constitution is bipartite, between the Government on the one hand and the courts on the other hand. However, the Government is subject to a number of important political constraints, which we shall explore further in chapter seven. The President is a further mild source of political constraint on the Government. First, the President holds a small number of discretionary powers that constrain the powers of the Oireachtas and Government. Secondly, even where the President

must act on the advice of the Government or Taoiseach, her involvement dignifies the function in a way that creates a moral check on the Government. Governments sometimes engage in politically sharp practice, but it would be unseemly to involve the President in such practice. Thirdly, the way in which successive Presidents have enhanced their informal role has allowed them to speak to political issues, while not getting involved in party politics. Because the President's values may differ from those of the Government, this provides a counterweight of rhetorical power.

II. THE ELECTION AND REMOVAL OF THE PRESIDENT

The President is directly elected by proportional representation – single transferable vote. The electorate is the same as for the Dáil, except that British citizens are not entitled as such to vote. To be eligible to stand for election as President, a citizen must be 35 years old. In 2015, the people rejected a referendum proposal to reduce this age threshold to 21, the same as applies for election to the Dáil or Seanad. The term of office is seven years; no President can serve more than two terms. The nomination process lies largely in the control of politicians. Although former or sitting Presidents can nominate themselves for a second term, thereby preserving their political neutrality while in office, all other candidates must be nominated either by at least 20 members of the Oireachtas or by four local county councils. No member of the Oireachtas nor County Council can nominate more than one candidate. Until 1997, this effectively meant that a candidate had to have the support of one of the larger political parties to stand for the Presidency. Since then, however, the fracturing of political parties and a general relaxation of political control has opened up the nomination process to a wider range of candidates.

Article 14 establishes 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. This could arise because of incapacity, death, resignation, impeachment, or mere absence from the State. Given that the President must ordinarily sign a Bill into law no sooner than the fifth day and no later than the seventh day after its presentation for signature, the Presidential Commission reasonably frequently performs this function. Article 12.10 provides a procedure for the impeachment of the President, which requires a two-thirds majority vote in each House of the Oireachtas. No consideration has ever been given to the exercise of this power.

III. THE ROLES OF THE PRESIDENT

On assuming office, the President takes an oath to maintain the Constitution of Ireland and uphold its laws. In the current constitutional structure, the President has three roles. First, she is the nominal holder of many fundamental constitutional powers. However, these must be exercised automatically or on the advice of another constitutional organ. Secondly, she is the holder of a small number of discretionary constitutional powers, two of which are significant. Thirdly, she has a role – formally recognised in the constitutional text but informally expanded by recent Presidents – of speaking to or on behalf of the Nation. We shall consider each of these in turn.

In relation to nominal powers, the President plays a largely formal role in government formation. As we saw in chapter three, she appoints the Taoiseach on the nomination of the Dáil, and Government Ministers on the nomination of the Taoiseach. Unlike the Queen in the United Kingdom and the Head of State or governor general in some other former dominions, she has no power to request a particular party-leader to seek to form a government. The President accepts the resignation or terminates the appointment of Government Ministers on the advice of the Taoiseach. And she appoints judges on the nomination of the Government. Some constitutional provisions explicitly qualify the grant of power to the President but there is a more general saver in Article 13.9: the powers and functions conferred by the Constitution on the President can only be exercised and performed by her on the advice of the Government, unless explicitly specified otherwise. Thus, even constitutional powers that do not appear to be qualified, such as the vesting of the supreme command of the defence forces in the President, are in fact qualified by the general obligation to act on the advice of the Government. Moreover, although the Oireachtas can confer additional functions or powers on the President, as happened with the Republic of Ireland Act 1948, the Constitution provides that any such powers can only be exercisable on the advice of the Government. The extent to which she is subject to the Government is emphasised by Article 12.9 which precludes the President from leaving the State without the permission of the Government.

The President's discretionary powers must mostly be exercised after consultation with the Council of State, consisting of current constitutional office-holders, all former Presidents, Taoisigh and Chief Justices, and up to seven members appointed by the President. It exercises a purely advisory role in relation to the President's functions, differentiating it

significantly from bodies with similar names in continental Europe. The President has discretionary powers in resolving some procedural disputes between the Seanad and the Dáil, which have never been exercised. Under Article 27, the President can decline to sign a Bill where a majority of members of the Seanad and at least one third of the members of the Dáil present a petition that the Bill contains a proposal of such national importance that the will of the people ought to be ascertained. This potentially counteracts the ability of the Dáil to override the Seanad on legislative issues. The President may decline to sign such a Bill, unless and until either it is passed by the people in a referendum or a new Dáil, following an intervening general election, resolves that it should be passed.

The President has two instances of significant constitutional power that have played a role in the operation of constitutional government. Article 13.2.2° allows the President to refuse a dissolution of the Dáil to a Taoiseach who has ceased to retain the support of a majority in the Dáil. This is the sole discretionary power in respect of which the President need not consult with the Council of State, presumably because this might not be possible in a time-pressured situation of high political drama. This power has never been exercised but it did come sharply into focus on two occasions. In January 1982, the Fine Gael Labour coalition fell when it lost a vote on its budget. President Patrick Hillery had anticipated that he was likely to come under pressure from his former political party, Fianna Fáil, to refuse a dissolution. Hillery was of the view that it would be unwise to refuse the Taoiseach's request for a dissolution: it was far from clear that the political alignment in the Dáil would allow the Fianna Fáil leader to be elected Taoiseach; moreover, any intervention would embroil the President in party politics. On the night in question, he deftly directed his aide de camp that he would not accept any phone calls from anyone other than the Taoiseach. Eight phone calls were made by or on behalf of the Fianna Fáil leader who threatened to visit the President's residence in person. Hillery told his staff to bar the gates but this did not prove necessary. The Taoiseach arrived and requested the dissolution of the Oireachtas, which Hillery granted.¹ In 1994, a political crisis led the Labour Party to leave its coalition with Fianna Fáil and instead form a coalition with Fine Gael and the Democratic Left. Had Fianna Fáil Taoiseach Albert Reynolds requested a dissolution, it would have been open to President Mary Robinson to exercise her discretionary power

¹ J Walsh, *Patrick Hillery: The Official Biography* (Dublin, 2008, New Island) 473–8.

to refuse the dissolution. There had not been a vote of no-confidence in the Reynolds Government but Reynolds had clearly lost the support of a majority of the Dáil. Robinson let it be known that she would refuse a dissolution if it were requested. Reynolds made no request.²

Article 26 allows the President, following consultation with the Council of State, to refer a Bill to the Supreme Court to determine whether any of its provisions are unconstitutional. This is an exception to the general obligation on the President, under Article 25, to sign every Bill (other than a Bill to amend the Constitution) that has been passed by the two Houses of the Oireachtas. Article 26 references are an important feature of the Irish constitutional order. The possibility of Presidential intervention may amount to a check on legislative overreaching. An immediate Presidential reference carries greater political salience than the possibility of a litigant challenge at some point in the future. Moreover, legislation that has been referred by the President and upheld gains a constitutional immunity from future challenge. This contrasts with legislation that is upheld in the course of ordinary proceedings, which gains no such immunity. Perhaps partly as a result of this, the President has referred few Bills but the rate of attrition is high: of only 14 Bills referred since 1937, seven have been held unconstitutional.³ Seven of the references occurred between 1994 and 2004; there has been none since. The Supreme Court has questioned whether the abstract review of the Article 26 procedure is preferable to an ‘action in which specific imputations of unconstitutionality would fall to be determined primarily on proven or admitted facts.’⁴ Nevertheless, the fact that only a President can commence a process whereby legislation gains this constitutional immunity is significant.

The President’s third role is to speak to and on behalf of the Nation. The Constitution provides the President with a number of public communication powers. Having consulted with the Council of State, she may convene a meeting of the Houses of the Oireachtas, address the Houses of the Oireachtas and address the Nation. Every such message or address, however, must have received the approval of the Government. In more recent years, Presidents have informally expanded this role into

²G Hogan, ‘Ceremonial role by far most important for President’, *The Irish Times* 21 October 1997.

³G Hogan, D Kenny and R Walsh, ‘An Anthology of Declarations of Unconstitutionality’ (2015) 54(2) *The Irish Jurist* 1, 16–20.

⁴*In re Article 26 and the Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181, 186.

one of generally speaking on behalf of civil society, without seeking Government approval. This has allowed Presidents to articulate themes for their presidencies, which they can then implement through their choice of engagements.

IV. THE EVOLUTION OF THE PRESIDENT'S ROLE

The picture that emerges from these provisions is largely a textual crystallisation of the powers exercised by a Governor General in British Dominions during the 1930s. Coffey has recently argued that the basis for the office of President was modelled not on the Governor General but instead on continental Heads of State who could exercise a 'suspensive veto'.⁵ This allowed the President to suspend an action from taking place until another body determined its suitability. However, not all of these powers survived the drafting process. Both the Article 26 reference and the Article 27 plebiscite could be characterised as involving a suspensive veto, as could the role of the President in relation to constitutional amendments in the first three years of the Constitution under Article 51 (see chapter ten). However, no President has exercised powers under Articles 27 and 51, while Article 26 references to the Supreme Court remain infrequent. Notwithstanding the influence of continental models on the Presidency, therefore, the comparison with Governors General remains instructive.

Nevertheless, the direct election of the President vests her with a popular mandate that a Governor General could never obtain. Although this democratic mandate cannot transcend the constitutional limitations of the office, it has allowed Presidents to develop a role parallel to that strictly envisaged by the Constitution. A review of the Presidents since 1937 illustrates the way in which the role has changed in the last 28 years. The first President (1938–1945) was Douglas Hyde. Significantly, given the overwhelming Catholicity of the nascent State, Hyde was a Protestant. A scholar of the Irish language and a leading figure in the Gaelic Revival of the late nineteenth and early twentieth centuries, Hyde was jointly nominated by all political parties. The next 28 years saw the Presidency held by two retired Fianna Fáil politicians: Seán T O'Kelly (formerly Deputy Prime Minister and Minister for Finance) from 1945 to 1959,

⁵DK Coffey, *Drafting the Irish Constitution 1935–1937: Transnational Influences in inter-War Europe* (London, Palgrave Macmillan, 2018) ch 4.

then de Valera himself from 1959 to 1973. Erskine Childers, again a Fianna Fáil nominee, died in office in 1974 and was replaced by Cearbhall Ó Dálaigh. Ó Dálaigh had been Chief Justice and was jointly nominated by all political parties. In 1976, Ó Dálaigh exercised his powers under Article 26 to refer the Emergency Powers Bill to the Supreme Court to test its constitutionality.⁶ This Bill formed a significant part of the Government's response to the IRA's terrorist campaign, prompting the Minister for Defence to describe the President as a 'thundering disgrace'. When news of this emerged, the President demanded that the Taoiseach sack the Minister for Defence. The Taoiseach refused and Ó Dálaigh resigned the Presidency, seeing the issue as symptomatic of a general lack of regard for the office of President on the part of the Government.⁷ Patrick Hillery, former Fianna Fáil Minister for Foreign Affairs and EEC Commissioner, was then President for the next 14 years.

Apart from the Ó Dálaigh years, Presidents largely assumed an unobtrusive role, impeccably performing the constitutional and ceremonial aspects of their role without intruding into public debate. The election of Mary Robinson as President in 1990 broke this mould. A former human rights lawyer and professor of constitutional law in Trinity College Dublin, Robinson was nominated by the Labour Party and others. She was thus the first non-Fianna Fáil President to be elected. She 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. In expanding the role, she was facilitated by the Government significantly increasing the budget of the Presidency.⁸ In 1991, the then Taoiseach, Charles Haughey, informed Robinson of Government legal advice to the effect that she constitutionally required government approval prior to giving press interviews or speaking independently of government, as to do so would constitute 'addressing the nation'. Robinson argued for a different interpretation of the constitutional restriction, to which Haughey ultimately acceded, that would require Government approval only for formal addresses.⁹ This was crucial in establishing the freedom of the President to become an independent voice.

⁶ See discussion in ch 9.

⁷ D Ferriter, *Ambiguous Republic: Ireland in the 1970s* (2012, Profile Books, London) ch 9.

⁸ M Robinson, *Everybody Matters: A Memoir* (London, Hodder and Stoughton, 2012) 147.

⁹ *ibid* 161–2.

The Robinson Presidency changed the public's expectations of the role, which in turn changed the views of political parties on whom to nominate. Not only did political parties realise that their own candidates required a different profile, they also relaxed the party whip in county councils to allow further nominations come forward through that route. 1997 saw the nomination of one Member of the European Parliament, two charity workers, one former winner of the Eurovision song contest and US religious talk show host, and another former law professor from Trinity College Dublin. Mary McAleese, the former law professor, won the Presidency and served two terms. Although nominated by Fianna Fáil, she was in a very different mould from the previous Presidents nominated by that party. She successfully used the Presidency to focus on reconciliation between Protestants and Catholics, particularly in her native Northern Ireland. This process culminated in the highly successful visit of Queen Elizabeth II to Ireland in 2011, the first by a reigning English monarch to an independent Ireland.

2011 again saw a wide range of candidates, the election being won by Michael D Higgins. Although a former member of the Labour Party and Government Minister, Higgins was closer to the profile of Robinson and McAleese than that of previous Presidents. His ministerial portfolio had covered issues related to arts and heritage. A published poet, his public profile hovered somewhere between that of public intellectual and politician. Whereas Robinson and McAleese largely avoided commentary on socioeconomic issues in their Presidencies, Higgins has pushed the boundaries of the office significantly further, offering at times pointed critiques of what he sees as the neoliberalism prevalent in public life, particularly in responses to the financial catastrophe. In a speech to the European Parliament in 2013, Higgins noted the dangers of regarding 'our people as dependent variables to the opinions of rating agencies, agencies unaccountable to any demos'.¹⁰ There is now a popular expectation that the President be a leader of civil society, resolutely removed from party politics and impeccably neutral in the performance of constitutional functions, while engaging public debate on broad themes of public concern. This evolution of the role of the President is one of the five significant changes in the balance of power that have occurred since 1937, which I identified in chapter one. Although the President has not acquired any substantive powers, the profile of the President allows for

¹⁰<http://www.thejournal.ie/michael-d-higgins-speech-european-parliament-873314-Apr2013/> (visited 22 August 2017).

significant contestation of public policy choices. Presidents have mostly avoided even indirect conflict with the Government; nevertheless, the evolution of the Presidency has somewhat diminished the Government's domination of the political scene.

V. CONCLUSION

The President in Ireland largely plays a ceremonial role, similar to that exercised by Governors General in former dominions of the United Kingdom. However, reflecting the continental model that influenced the drafting process, the President exercises real power under Article 26, referring potentially unconstitutional legislation to the Supreme Court. The potential of such a reference increases the political significance for the Government of ensuring that the Bills it presents to the Oireachtas are constitutional. The President also exercises an important power where a Taoiseach loses the support of a majority in the Dáil. Nevertheless, the greater importance of the presidency relates to the evolution of its informal role. Since the election of Mary Robinson in 1990, successive Presidents have pushed the informal boundaries of the office, allowing themselves to become significant voices in public discourse. Although they have generally avoided even indirect conflict with the Government, they have transformed the Presidency into an institution from which important contributions can be made to societal debates. Notwithstanding this evolution, however, the Presidency exercises little political power.

FURTHER READING

- John Walsh, *Patrick Hillery: The Official Biography* (Dublin, 2008, New Island)
- John Coakley, 'An Ambiguous Office? The Position of the Head of State in the Irish Constitution' (2012) 47(2) *Irish Jurist* 43
- Donal Coffey, *Drafting the Irish Constitution 1935–1937: Transnational Influences in inter-War Europe* (London, Palgrave Macmillan, 2018) ch 5
- Diarmuid Ferriter, *Ambiguous Republic: Ireland in the 1970s* (2012, Profile Books, London) ch 9
- Mary Robinson, *Everybody Matters: A Memoir* (London, Hodder and Stoughton, 2012)