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REPUBLICANISM, THE DISTRIBUTION OF POWER AND THE WESTMINSTER MODEL OF GOVERNMENT: LESSONS FROM 20TH CENTURY IRISH CONSTITUTIONALISM

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Abstract

In recommending the constitution to Dáil Éireann in the summer of 1937, the Taoiseach, Eamon de Valéra, forthrightly asserted: "if there is one thing more than any other that is clear and shining through this whole constitution," he insisted, "it is the fact that the people are the masters."[2] The language is striking in the context of a republican analysis.

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[2] *Dàil Debates*, vol. 67, col. 40, 11 May 1937.

Following the lead of Philip Pettit and Quentin Skinner, neo-republican scholars theorize the idea of freedom by reference to the image of the master-and-slave relationship.[3] The slave's situation captures the very essence of domination, or *un*freedom. He lives *in potestate domini*: in the power of a master. His choices are reliant entirely on his master's will. His master can therefore interfere in his choices on an unchecked or arbitrary basis and it is this fact, republicans suggest, that explains the slave's state of unfreedom.

The republican concern for the checking of power is fundamental in this analysis of the Westminster model of "responsible government" and its incorporation into the nascent Irish state in the constitutions of 1919 and 1922. For republicans, the "responsible" element is critical. The thought is that those who wield executive power do not enjoy it on an arbitrary basis: they are responsible, in the sense of being accountable or answerable, to parliament. Their power is controlled by the people's representatives and so the decisions taken by government ministers running the departments of state are taken with both eyes firmly fixed on the people's interests and the common good. In theory at least, executive power is exercised on the people's terms. In this way, the Westminster model of responsible government seems to do well by the republican account of freedom as non-domination.

This analysis is simplistic, of course, and ignores some grave problems in the Westminster model as it works in practice. Most obviously, it ignores the fact of the effective fusion of executive and legislative power, and the related tendency for executive control of parliament. As executive power shifted from crown to cabinet in the nineteenth century, an apparent contradiction developed in Westminster. Where previously parliamentarians could tackle ministers without fear of a consequent collapse of government, gradually they – or at least, by definition, a majority of them – began to understand their primary parliamentary role to be to maintain the government of the day in power. This challenges the ideal image presented of responsible government and suggests an apparent tendency towards the concentration, rather than the dispersion, of political power. More to the point, it suggests a fundamental tension between republican idealism and that model of government.

[3] On neo-republicanism, see for example, P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), Q. Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998).

This article addresses this and related questions by reference to the 20th century Irish constitutional experience. It critiques the Irish constitutions of 1919, 1922 and 1937 in respect of the distribution of political power. It looks at the apprehensions of the main political actors of the period regarding the extent to which the Westminster model tended to concentrate excessive power in the cabinet, and assesses the efforts made to counteract that tendency. It also considers the performance of Dáil Éireann in the exercise of its three essential constitutionally-mandated functions: the appointment and dismissal of governments, the holding of government to account, and the making of laws. The article identifies a tension between theory and practice – between how the constitution appears to envisage parliament working and how it actually works – and argues that this tension seriously undermines the republican credentials of the Irish constitution.

While the focus is very much on the Irish experience in the twentieth century, two broader themes underlie the arguments. First, there is this general concern that the question of the compatibility of the model of responsible government with republican idealism remains under-explored. The thought is that perhaps the weaknesses of that model are such that republican theory might instead recommend "consociational" or "consensus" type models.[4] Second, there is the concern that the excessive control of political power-wielders in systems modeled on the British constitution receives inadequate attention amongst constitutional scholars and those engaged in public law. The danger is that scholars engaged in the legal, human rights and related fields may tend towards the dangerous misapprehension that the task of protecting the citizen against the abuse of public power, so far as constitutionalism is concerned, is for the courts alone, by way of the fundamental rights provisions and judicial review.[5] This evokes the arguments made by republican-minded public law scholars such as Adam Tomkins and Richard Bellamy against the notion of "legal constitutionalism" (as distinct from their preferred notion of *political*

[4] On the distinction between "Westminster" models and "Consensus" models, see generally A. Lijphart, *Patters of Democracy: Government Forms and Performance in Thirty-Six Countries*, 2nd ed., (New Haven: Yale University Press, 2012), p. 9-45.

[5] Such an approach is problematic for all kinds of reasons, not least those relating to participation and access. More substantively, the vexed questions on the representativeness of judges and the legitimacy of judicial activism also arise.

constitutionalism), which refers, amongst other things, to the tendency to see law as an activity that is not only distinctive from but also superior to politics, and to a tendency to see law as an enterprise that is to take place only in the courts.[6] The suggestion is that the public law community cannot ignore the ways in which a "republican" constitution mandates a broader democratic culture, as well as specific political institutions, with a view to protecting the citizen from arbitrary power.

The article is in three parts. Part I assesses the incorporation of the Westminster model into the nascent state in the constitutions of 1919 and 1922. Part II turns to the constitution of 1937, and presents this tension between the theoretical design and the institutional practice. Part III looks to institutional reforms that might do well by the republican account of freedom. Before taking up these tasks, the remainder of this introduction offers an overview of that account of freedom.

Overview of republican freedom

The neo-republicanism associated with Philip Pettit and Quentin Skinner emerged in the wake of a "republican revival" in the middle and towards the end of the 20th century, following seminal works by historians such as Gordon Wood and J.G.A. Pocock.[7] Neo-republican scholars draw on the themes that emerged in the Roman republic, such as the rule of law, the idea of a "mixed constitution," and an objection to factional approaches to public affairs. Republican ideas were heavily shaped by Machiavelli, and later by 17th century English republicans, most notably, James Harrington.[8] Another great surge in

[6] See R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), A. Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005), pp. 10-31.

[7] The "revival" is associated with works such as: G.S. Wood, *The Creation of the American Republic: 1776-1787* (Chapel Hill: The University of North Carolina Press, 1969) and J.G.A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975).

[8] J. Harrington, *The Commonwealth of Oceana and A System of Politics*, J.G.A. Pocock ed., (Cambridge: Cambridge University Press 1992 [1656]).

republican thought came in the writings of Jefferson, Madison and the American founding generation.

The themes of republican thought already mentioned – and others such as the importance of civic virtue and of vigilance on the part of citizens regarding abuse of power, the objection to corruption, the concern about majority tyranny and so on – are all concerned fundamentally with one goal: the checking of power. Republicans therefore insist on the dispersion of power, in both its public and its private forms. No individual or institution in a republic enjoys unchecked, or arbitrary, power. Arbitrary power, or *domination*, which republicans equate with unfreedom, prevails when one agent – whether an individual or a group of individuals – can interfere in the choices of another or others at *will*. Hence James Harrington's immortal phrase: a republic is "an empire of laws and not of men."[9]

This republican way of thinking about freedom contrasts with the classical liberal or libertarian account, associated with Thomas Hobbes and Jeremy Bentham amongst others, which insists that freedom consists simply in non-interference, not in non-domination. That is, an agent enjoys freedom simply to the extent that his choices go unobstructed. Whether the obstruction is on an arbitrary or a non-arbitrary basis is irrelevant, at least insofar as the concept of freedom is concerned. The conclusion, of course, is that an individual could be as free, or even more free, under a monarchical regime than under a republican form of government: a monarch may happen to interfere in the lives of his subjects with less frequency and intensity than a republican government in the lives of citizens.[10] In the contemporary context, a citizenry may be well be more free under an all-powerful government than under a government that is meaningfully accountable for its decisions to the people's representatives in parliament.

The Hobbesian argument prompts republicans to respond by invoking the image of the "kindly master."[11] The slave of a kindly master – a master who enjoys the power to

[9] Harrington, *The Commonwealth of Oceana*, p. 170.

[10] It is worth bearing in mind that this debate took place against the backdrop of the execution of Charles I in 1649.

[11] This idea is widely invoked in the neo-republican literature. See for example, Pettit, *Republicanism*, p. x

interfere in the choices of his slaves but who, for whatever reason, chooses not to exercise his powers of interference – therefore enjoys "freedom," on Hobbesian lights. Republicans simply point out the incongruity of the idea that a slave could be described as "free." Applying the Hobbesian thesis to the present context, an excessive concentration of political power is, in itself, unobjectionable. A group of individuals – such as those who comprise a particular cabinet – may enjoy *any* degree of power over *any* length of time. The concern amongst proponents of freedom as non-interference would be for how power is exercised, not for whether or to what extent it is enjoyed. They might ask: to what extent does the cabinet actually introduce laws that obstruct (or *interfere* with) the choices of individuals living under their authority? Republicans, by contrast, would ask: to what extent is the power of the cabinet "hemmed in" by law such that they do not rule on an unconstrained basis? In the case of the Westminster model of government, republicans would thus follow Bernard Crick in asserting that parliamentary control of the executive – rightly conceived – is not the enemy of good government, but its primary condition.[12]

I. The constitutions of 1919 and 1922: the entrenchment of responsible government

In light of the political culture that the primary actors had experienced, it is probably unsurprising that the system of government established in independent Ireland should have so closely resembled the Westminster model. Before assessing its incorporation into the Irish constitutional order, mention of two aspects of that model is warranted. One of its most prominent features – and the feature that perhaps most clearly distinguishes it from the presidential model of government – is what Walter Bagehot famously referred to as "the close union, the *nearly complete fusion*, of the executive and legislative powers."[13] That is, where in a presidential system of government the executive power is elected directly by the people and is a branch separate from the legislative branch, in the Westminster model the executive is elected by, and accountable to, the legislature. [14] The government is both chosen by and comprised of members of the legislature. The notion of majority government

[12] B. Crick, *The Reform of Parliament* (London: Weidenfeld and Nicolson, 1970), p. 259.

[13] W. Bagehot, *The English Constitution* (London: C.A. Watts & Co. Ltd.), p. 65 (emphasis added).

necessarily follows: once the government loses the confidence of a majority of members of the legislature, it loses the authority to govern.

The other relevant feature of the British system of government is "party government" involving cohesive and disciplined political parties. The emergence of the modern political party in the nineteenth century is generally attributed to the confluence of two factors.[15] First, the dramatic extension of the electorate in that period, which in Britain came with the passage of the Reform Acts of 1832 and 1867, meant that individual politicians could less easily deploy patronage and bribery to win elections: they began to rely on organized party machines.[16] Second, once executive power had shifted away from the crown and towards the cabinet – a shift that occurred gradually but that was essentially completed by 1841 – party discipline was required in order to avoid regular dismissal of the government by the parliament.[17] Where previously parliamentarians could harangue ministers and hold them to account without any concern around a consequent collapse of government, subsequently, parliamentarians were restricted by that concern. It was they that determined whether a government would remain in office or collapse. This made disciplined parliamentary parties inevitable, with government backbenchers loyal to their colleagues in cabinet.

[14] On "responsible government," see C. Turpin and A. Tomkins, *British Government and the Constitution*, 7th ed., (Cambridge: Cambridge University Press, 2011), pp. 566-572.

[15] Duverger suggested in 1951 that "in 1850 no country in the world (except the United States) knew political parties in the modern sense of the word…In 1950 parties function in most civilized nations…" See M. Duverger, *Political Parties: Their Organization and Activity in the Modern State*, B. and R. North tr. (London: Metheun & Co. Ltd., 1951), p. xxiii.

[16] See G. Sartori, *Parties and Party Systems: A Framework for Analysis, Volume I* (Cambridge: Cambridge University Press, 1976), p. 21.

[17] John Manning Ward specifies the debate on Robert Peele's motion of no confidence in Lord Melbourne's Whig government as the definitive episode completing this shift. See J. Ward, *Colonial Self-Government: The British Experience 1759-1856* (London: MacMillan, 1976), pp. 172-208. Gillian Peele suggests that in the eighteenth century the "authority of the cabinet was still derived from the sovereign and the continuation of a government was dependent on the sovereign's good will rather than on the ministry being able to command parliamentary support…Only in the nineteenth century did the Crown lose the power to choose who should become prime minister and to veto ministers to whom the monarch objected." See G. Peele, *Governing the UK*, 3rd ed. (Oxford: Blackwell Publishers, 1995), p. 92.

In the context of the general analysis around the distribution of political power, these developments placed an apparent contradiction at the heart of the constitutional order, and one that is essential to the arguments made in this article: the control and accountability of government relied upon members of a parliament in which a majority of members, by definition, regarded its principal parliamentary function to be to maintain the government in power. The irony is that as parliament became stronger in terms of *formal* constitutional power, it became less inclined to use that power, and so weaker in terms of *actual* constitutional power.[18] Holding the executive to ultimate account now came at a cost: the collapse of government. Moreover, it came at potentially a great cost to each parliamentarian: an election and the subsequent loss of one's seat. This might prompt a skeptical observer to wonder whether the upshot of these developments was that dominating control had simply shifted from an individual to a group agent: from king to cabinet? The people still lived *in potestate domini*.

There was almost no attempt by the Irish "revolutionaries" and "republicans" to construct a system of political institutions featuring a genuine separation of powers.[19] A system of responsible government virtually identical to that of Britain was incorporated by the Dáil Éireann Constitution, which was adopted by the technically illegal First Dáil in January 1919. It was subsequently entrenched by the Free State Constitution in 1922 – albeit with some elements designed to counteract the tendency to concentrate power – and by Bunreacht na hÉireann in 1937.[20]

[18] It is interesting to note that as Bagehot wrote *The English Constitution* in 1867, the system he was describing was in the process of changing dramatically. He suggested, for instance, that the House of Commons "lives in a state of perpetual choice" and that "at any moment it can choose a ruler and dismiss a ruler." See W. Bagehot, *The English Constitution*, p. 158. Notably, in the period between 1832 and 1867 no less than seven cabinets had been replaced by the House of Commons, that is, without an intervening general election.

[19] See B. Farrell, "The First Dàil and its Constitutional Documents" in B. Farrell ed., *The Creation of the First Dàil: A Volume of Essays from the Thomas Davis Lectures* (Dublin: Blackwater Press, 1994), p. 69.

[20] Farrell suggests that its five short articles "promise no revolution." Rather, "they incorporate, in a basic but clearly discernable form, the main elements of the British cabinet system of government." See Farrell, "The First Dàil and its Constitutional Documents," in Farrell ed., *The Creation of the First Dàil*, p. 69.

The significance of the 1919 constitution might easily be overlooked, perhaps because of the fact that it contained a mere five articles and because it was overtaken within such a short period of time by the 1922 constitution. But the 1919 constitution was of international historical significance. As Alan J. Ward has noted, because the British system operated according to constitutional conventions, the 1919 constitution "presented the most basic rules of the British model of government in a formal constitutional document for the first time."[21] Hence, Article 1 vested legislative power in Dáil Éireann. Article 2 assigned executive power to the members of the "Ministry" – or, in colloquial terms, the cabinet – which was to consist of a president and four executive officers. The president was to be elected by the Dáil and was empowered to nominate and dismiss the executive officers.[22] Each member of the cabinet was to be a member of the Dáil, to which the cabinet was to be "at all times responsible…"[23]

Although it was relatively insignificant in itself, it is noteworthy in the present context that there was at least some expression of concern amongst the deputies at the extent of the concentration of power in the cabinet. The Cumann na nGaedheal TD, JJ Walsh brought a motion, seconded by Seán MacEntee, proposing that executive power would be vested in Ministers assisted by committees of the Dáil, where the latter would enjoy genuine control of the executive. The idea was that parliamentarians would thus play a meaningful part in the process of government, reminiscent of their counterparts in the U.S. Congress. The motion is worth setting out in full:

> Whereas Mr. de Valéra has repeatedly publicly announced in America that the Constitution of the Irish Republic was based on the democratic foundations underlying the Constitution of the United States; and whereas the latter body provides for the consideration of all phases of legislative activity through the medium of Committees whose findings are subject only to the veto of the whole

[21] A.J. Ward, *The Irish Constitutional Tradition: Responsible Government and Modern Ireland, 1782-1992* (Dublin: Irish Academic Press, 1994), p. 156.

[22] The nomination was subject to subsequent approval by the Dáil.

[23] Dàil Éireann Constitution, Art. 2 (c).

> Parliament…and as no such machinery has yet been set up within the Irish Republican Government, with the consequent practically entire exclusion of three-fourths of the people's representatives from effective work on the nation's behalf, we now resolve to bring this Constitution into harmony with the American idea of Committees elected by the whole House, and clothed with similar powers.[24]

Walsh's motion was opposed in the Dáil. The Minister for Finance, Michael Collins, objected on the (surely disingenuous) argument that the constitution vested ultimate control of the cabinet in the Dáil.[25] Both Arthur Griffith and Eoin MacNeill opposed on the grounds that the proposal would amount to a "revolution" in the constitution. (The irony that actors at this juncture in Irish history might reject a proposal on the basis that it amounted to a "revolutionary" measure cannot go without mention.) In the end, by a vote of thirty-three to one, it was agreed to postpone the motion for a year, which, predictably, was its last meaningful mention.

For now, the point is to gesture at the significance of the 1919 constitution in the context of the concentration of political power in the cabinet. It established the essential arrangements for the political institutions that have remained to the present day. It is understandable, perhaps, that the main actors could not seem to summon the intellectual energy to rethink the model most familiar to them, or at least to integrate elements designed to counteract its most manifest weaknesses. They were, after all, engaged in a revolution of a more immediately demanding kind. But the dye had been cast: many of the problems around the concentration of power that continue to afflict the Irish constitutional order almost a century later had been set. This was a significant "constitutional moment" and, arguably, an opportunity lost.

The Free State constitution of 1922 followed a similar pattern. It entrenched the essentials of responsible government, with an effective fusion of executive and legislative power.

[24] As quoted in Ward, *The Irish Constitutional Tradition*, p. 159.

[25] It is inconceivable that Collins could have been ignorant of the extent of the dominance of the cabinet in practice. In this vein, Farrell suggests that there was "a certain *ad hominem* quality" about Collins's response. See Farrell, "The First Dàil and its Constitutional Documents," in Farrell ed., *The Creation of the First Dàil*," p. 71.

Much as others have suggested of its predecessor, the German scholar Leo Kohn wrote that the 1922 document "reduced to precise terms the conventional rules of the British Constitution."[26] The debates around it, however, as well as some of its detail, justify a more comprehensive analysis. There was a clear awareness amongst leading political actors of the period, most notably the Minister for Home Affairs Kevin O'Higgins, of the tendency of the Westminster model to concentrate excessive power in the cabinet.[27] Although the efforts to counteract that tendency ultimately failed, they were at least innovative, and remain worthy of consideration in the context of contemporary reform ideas.

The drafters of the Free State constitution were restricted by the requirement that the provisions of the Anglo-Irish Treaty be respected. Article 51 thus recognized the monarch as head of the executive, and provided that executive authority would be exercisable through the representative of the crown, the Governor-General, "in accordance with the law, practice and constitutional usage" of Canada. In other words, the Governor-General, although theoretically administering the King's control, was in practice obliged to accept the advice of the "Executive Council" (the cabinet).[28] The Executive Council was to consist of between five and seven Ministers, all of whom would be members of the Dáil, and was "responsible to Dáil Éireann."[29] It was to be "collectively responsible for all matters concerning the Departments of State administered by Members of the Executive Council" and would "meet and act as a collective authority."[30] Article 53 required the Governor-

[26] See L. Kohn, *The Constitution of the Irish Free State* (London: George Allen & Unwin Ltd., 1932), p. 80.

[27] O'Higgins managed the Dáil debate on the constitution on behalf of the government.

[28] This arrangement had very stark anti-republican implications: it is a classic illustration of the idea of domination-without-interference. The idea was that the Governor General would never interfere, but that he, or rather, the King, enjoyed the capacity to interfere should he have so chosen. Despite this provision, the Free State constitution could also lay claim, in virtue of Article 2, to having satisfied the ultimate republican condition: that all powers of government are derived from the people. Indeed, it is worth noting that Kohn described it as "in spirit, an essentially republican constitution on most advanced continental lines." See Kohn, *The Constitution of the Irish Free* State, p. 80.

[29] Constitution of the Irish Free State, Art. 51.

[30] Constitution of the Irish Free State, Art. 54.

General to appoint the President of the Executive Council "on the nomination of Dáil Éireann," hence entrenching the practice of majority government. Similarly, the President would nominate the members of the Executive Council following their approval by the Dáil, while the Executive Council would resign should the President "cease to retain the support of a majority in Dáil Éireann."[31]

The innovating feature of this constitution, certainly in respect of the distribution of power, was the provision for the so-called "extern minister."[32] The concept was directly concerned with empowering the parliament *vis-à-vis* the cabinet, and can be traced to the Quaker businessman and subsequent first vice-chair of the Irish Free State Senate, James Douglas, who introduced the idea at a meeting of the Constitution Committee (of which he was a member) in early 1922.[33] It involved an effective division of the responsibilities of government into two categories: the "sensitive" and "political," on the one hand, and the "technical," or "non-political," on the other. The political responsibilities – the likes of Finance, Defence, and "probably Home Affairs" were mentioned in the debates – would be administered by members of the Executive Council.[34] The extern ministers would administer the non-political responsibilities, such as Education, Industry and Local Government.[35] These ministers would be nominated by the Dáil on the recommendation of an "impartially representative" committee of the Dáil, and would not be subject to collective responsibility.[36] They would not necessarily be members of the Dáil, but would

[31] Constitution of the Irish Free State, Art. 53.

[32] The term "extern minister" is popularly used but was not in the constitution. The rather clunky term used in the constitution was "ministers who shall not be members of the Executive Council." For good analysis (upon which this article relies and draws upon), see Kohn, *The Constitution of the Irish Free State*, pp. 271-283, and Ward, *The Irish Constitutional Tradition*, pp. 204-209, 216-220.

[33] See Brian Farrell, "The Drafting of the Irish Free State Constitution" (1970) 5 *The Irish Jurist* 115, p. 131.

[34] See Dáil Éireann, *Debates*, vol. 1, 5 October, 1922, col. 1245.

[35] See Dáil Éireann, *Debates*, vol. 1, 5 October, 1922, col. 1245.

[36] As Minister for Home Affairs Kevin O'Higgins reasoned: "why lose your best servant because he does not agree with you on matters outside the scope of his work?" See Dáil Éireann, *Debates*, vol. 1, 20 September, 1922,

be individually responsible to that chamber, and would be entitled to speak in that chamber.[37] In an early draft of the constitution prepared by the Constitutional Committee – with words that clearly illustrate the concern around the tendency of party politics to promote factionalism – these ministers were to be chosen "with due regard to their suitability for office" and would be, as far as possible, "generally representative of the Irish Free State as a whole rather than of groups or of parties."[38]

The Minister for Home Affairs Kevin O'Higgins, betraying awareness that it was an experimental project, explained the essential motivation for the concept:

> It is well worth trying whether we could not devise a better system of Government than that system by which men constantly, as a matter of routine, vote against their own judgment, and almost against their own conscience, for fear of bringing down the particular Party Government to which they adhere. We should try that. There is nothing admirable in the Party system of Government. There is much that is evil and open to criticism. If we can find, or think we can find, a better system, we ought to try.[39]

In similar vein:

> [The extern ministers] are to bring forward proposals from [their] Department in a way that will leave free thought and discussion here [in the Dáil], and that will eliminate the evils of the party system by which men vote for a particular Ministry under the crack of the party whip rather than bring down the Administration…

col. 487.

[37] Constitution of the Irish Free State, Art. 55

[38] The Constitution Committee prepared three drafts: Draft A, Draft B and Draft C. This provision is contained in Article 54 of Draft B. Draft B, which had been supported by James Douglas, Hugh Kennedy and C.J. France, was adopted by the provisional government as the basis for the document subsequently submitted to the United Kingdom. The full text of this draft is available in B. Farrell, "The Drafting of the Irish Free State Constitution" (1971) 6 *The Irish Jurist* 111, p. 114-124.

[39] See Dáil Éireann, *Debates*, vol. 1, 5 October, 1922, col. 1271.

> These proposals will make the Irish Parliament what the British Parliament is not. It will make it a deliberative Assembly that will weigh carefully on their merits the measures brought before it, and solely with an eye to the results of these measures in the country. It will ensure that men will not vote for a particular measure that they think will have evil results for the country, simply to save that particular Administration.[40]

The concept was thus concerned with counteracting the stultifying effects of the doctrine of collective responsibility and with placing parliament in control of the ministers. The ministers would bring forward reform proposals on matters relevant to their departments.[41] The members of parliament could reject them without any consequent requirement that the minister, or indeed the cabinet, would resign.[42] The clear logic is that the minister would bring forward proposals with an eye on the considered opinions of the members of parliament – the representatives of the people – and that both the minister and the parliamentarians would engage in deliberation based on the common good. They would not be institutionally bound to operate with one eye, at least, firmly fixed on party or factional concerns.

Although the extern minister experiment failed, it had already been fatally undermined by the time it had been set into operation by the constitution. Critically, under the draft by the Constitution Committee that had been favoured by the Provisional Government, the extern

[40] See Dáil Éireann, *Debates*, vol. 1, 6 October, 1922, col. 1306-1307.

[41] O'Higgins insisted that the extern ministers would "stand or fall by the administration of their own particular departments, and by the measure in which they win the approval or disapproval of the Dáil for the administration of those departments…A Minister for Education would formulate his Education plans with due regard to the probable support he would receive in the Dáil as a whole and without regard to the views of the Dáil on [,for example,] external affairs… See Dáil Éireann, *Debates*, vol. 1, 20 September, 1922, col. 488.

[42] O'Higgins emphasized the point about Dáil control, in a casual but effective style: "I was speaking of this particular proposal to a Deputy the other day, and he said: 'Oh, yes, these men that we cannot get at.' Now, that is not correct. These particular outside ministers are as much amenable to the Dáil, and as much available for the Dáil to question, as any other member of the Ministry…In fact, the Dáil…can appoint these outside Ministers, and a Committee of the Dáil so appointed can remove them, and there is no question that these are men who will be in some way beyond the control of Parliament." See Dáil Éireann, *Debates*, vol. 1, 20 September, 1922, col. 486.

ministers would *not* have been members of the Dáil.[43] The thought was that this would be essential to insulating them from the "evils" of party politics. This proposal met resistance in the Dáil, however, on the argument – whether well-grounded or otherwise – that it would have undermined the ministers' individual responsibility to the legislature.[44] Hence, in the final document, extern ministers could simultaneously be members of the parliament, although they were not required to be.[45] This effectively doomed the project, as a president was hardly likely to nominate non-partisans when he had the option of nominating from amongst his own parliamentary party ranks.[46] In the event, all such ministers subsequently appointed were members of the Dáil – and indeed, were Cumann na nGaedheal party men – and so the non-partisan element of the experiment never got off the ground.[47]

If this was the primary cause of the failure, there were two other concerns that have relevance to any consideration of a revival of the concept. First, there was no obvious way of distinguishing between government responsibilities that should fall within and outside of the "executive" category, and there was much controversy, for instance, when Industry was

[43] The favoured draft was Draft B.

[44] See for example the intervention of Deputy Darrell Figgis on the matter at Dáil Éireann, *Debates*, vol. 1, 6 October, 1922, col. 1302. O'Higgins had emphatically rejected this argument in the debates, but was overruled on the matter.

[45] The articles on government composition were referred to a Dáil committee, chaired by George Fitzgibbon QC, which included four members of the pro-Treaty Sinn Féin party, three of Labour, one Farmers' Party deputy, and two independent deputies. John Coakley points out that although the report of the committee was formally rejected by the Dáil, its provisions were incorporated through a series of amendments. See J. Coakley, "Selecting Irish Government Ministers: An Alternative Pathway?" (2007) 58(3) *Administration* 1, p. 12.

[46] There was much controversy following the announcement of the nominees for external ministers in October 1923. Opposition members of the nominating committee insisted that the candidates had been pre-selected by Cumann na nGaedheal at party meetings. The leader of the Labour Party, Thomas Johnson, complained that "the decisions were made at Party meetings beforehand and the names were tabled… A decision had been made and the committee was a farce." See Dáil Éireann, *Debates*, vol. 5, 10 October, 1923, col. 194.

[47] For details, see Coakley, "Selecting Irish Government Ministers: An Alternative Pathway?" (2007) 58(3) *Administration* 1, pp. 15-16.

included and Agriculture excluded in 1923.[48] Indeed, Leo Kohn suggested as far back as 1932 that any such division was "devoid of any reality in the conditions of the modern state."[49] The point, so far as it goes, is surely no less persuasive in the present day: the current debates in the Department of Education and Skills around reform of the patronage model in the primary schooling system, for instance, divide opinion heavily and are "political" by any measure. Teasing out Kohn's argument a little, however, there seems nothing objectionable – at least on the basis of the argument around what counts as "political" – if this department were to be administered by an extern minister, as that minister would be accountable to, and indeed controlled by, the people's elected representatives.

Second, and perhaps more substantively, the concept arguably made for incoherence in government in respect of government expenditure.[50] That is, all ministers spent public money, but only some of them were collectively responsible for finance. This led, perhaps inevitably, to tensions between ministers in the short period of the experiment.[51] In the end, the fifth amendment to the Free State constitution, introduced by ordinary vote of the Dáil in 1927, permitted all twelve ministers to be members of the Executive Council.[52] Although the theoretical possibility of appointing an extern minister thereby remained, the president could then choose not to appoint any, and none was appointed subsequently.

The extern minister experiment in the 1922 constitution should not be summarily dismissed as a failure: as the Labour leader Thomas Johnson insisted in 1926, "this experiment…has

[48] See Ward, *The Irish Constitutional Tradition*, p. 219.

[49] Kohn, *The Constitution of the Irish Free State*, p. 280.

[50] This point is also made by Kohn, who suggested that "the work of every department, however technical its scope, involves expenditure which necessarily must fall on the central fund of the state." See Kohn, *The Constitution of the Irish Free State*, p. 280.

[51] For details, see Ward, *The Irish Constitutional Tradition*, p. 219.

[52] Constitution (Amendment No. 5) Act (No. 13 of 1927). Under Article 50, the constitution could be amended by ordinary vote of the Oireachtas for a period of eight years.

not been tried, and whatever value was in it has not had a chance of finding expression."[53] Whether it is compatible with the model of responsible government, or capable of meaningfully counteracting the tendency of that model to concentrate dominating power in the hands of the cabinet, is unclear, but it is worthy of further consideration. Given the chance to operate in appropriate conditions, it may very well prove a helpful remedy, and one that republican theory might recommend. These conditions might include, for instance, that the "impartially representative" committee of the Dáil tasked with appointing these ministers would not be controlled by government, but instead by the parliamentarians, with the aim of promoting non-factional deliberation in making the appointments.[54] A further condition might be that such ministers resign their membership of any political party upon taking office, or even that they resign their membership of the Dáil should they be members prior to appointment. The critical condition – and one that the aforementioned conditions might help foster – would be that a non-partisan culture develop around the extern minister concept. On the other hand, it may be that once responsible government takes root, the concentration of power in the cabinet is inescapable and that, as John Coakley suggests, much bolder constitutional reform – such as reform requiring that all ministers be non-parliamentarians – is needed to strengthen the role of the Dáil and to distribute power more appropriately.[55]

While the extern minister feature was perhaps the most innovative of the 1922 constitution – at least so far counteracting the concentration of political power is concerned – it was not the only feature designed for that purpose. There was also provision, in Article 47 and Article 48, for a kind of direct democracy in the form of the Initiative procedure. Both articles were quite convoluted, and a brief outline suffices here in any case. Article 48 envisaged that fifty thousand registered voters could petition the Oireachtas to enact a particular measure, and that if the Oireachtas rejected the proposition, that the proposed law be put to the people in a referendum. Article 47 envisaged that the people – again in a

[53] See Dáil Éireann, *Debates*, vol. 17, 1 December, 1926, cols. 420-422.

[54] This matter is discussed further in the concluding section.

[55] See Coakley, "Selecting Irish Government Ministers: An Alternative Pathway?" (2007) 58(3) *Administration* 1, p. 22.

referendum – could block a proposed bill that had been passed by the Oireachtas from becoming law, should the opportunity to do so be afforded to them by a resolution assented to by three-fifths of the members of the Seanad.

These provisions were never used, and were removed from the constitution by the Cumann na nGaedheal government in 1927. Their removal was prompted in part by concerns relating to the declared intention of de Valéra to use the Initiative procedure to secure the abolition of the oath of allegiance, which would have violated the Anglo-Irish Treaty, thereby provoking a constitutional crisis. Ward has suggested, however, that the removal of these provisions was also prompted by the experience that Cosgrave and Cumann na nGaedhael had had in government, which had engendered in them a belief in the merits of stronger executive power.[56]

Article 53 contained a further significant antidote to executive dominance inasmuch as it provided that the "Oireachtas shall not be dissolved on the advice of an Executive Council which has ceased to retain the support of a majority of Dáil Éireann."[57] In other words, once the government has lost the confidence of the Dáil, it can no longer dissolve the Dáil and cause a general election. This distinguished the Irish arrangement from that of Westminster, where a Prime Minister could advise the head of state to dissolve parliament even *after* he had lost the confidence of a majority of the House of Commons. This provision very much empowered the Dáil *vis-à-vis* the executive inasmuch as it would be up to the Dáil – and not the government – to decide whether or not to call a general election. The Dáil could instead decide to form a new government from amongst its members. In the Westminster system, by contrast, the government could use its power in this regard to protect itself and to ward off potential votes of no confidence. That is, it could conceivably win a formal vote of confidence that it would not otherwise win by effectively threatening a general election (i.e. on members of parliament all of whom would be concerned about the chance of losing their seats in such an election) were it to lose that formal vote of confidence.

[56] See Ward, *The Irish Constitutional Tradition*, pp. 223-224.

[57] Constitution of the Irish Free State, Art. 53.

These features were also motivated by essentially republican inclinations: the aim was to check power. It is unclear, of course, if in practice such constitutional arrangements might actually promote non-domination. The Initiative procedure, for instance – much as it might counter the concentration of power in the executive – would have the effect of intensifying the political clout of majority groups, and perhaps of engendering a kind of majority tyranny so loathed by republicans. A procedure of this kind in the Swiss constitution, for instance, enabled a fringe group of politicians to launch a federal popular initiative in 2007 proposing an amendment to the constitution that would prohibit the construction of minarets.[58] Despite opposition from the Swiss government and parliament, as well as human rights organizations, the prohibition was approved in the resulting referendum.

If nothing else, it is instructive to observe from these provisions, and from the debates around them, that many of founding generation – conservative though they may have been – were quite conscious of the shortcomings of the Westminster model. They were concerned about the extent to which aspects of that model undermined parliament as a deliberative assembly and turned the minds of political representatives away from the common good. The concern seemed to diminish subsequently, however, as the leading actors became accustomed to the experience of government and to the holding of power. By the time de Valéra came to government in 1932, most of these features had been all but undone. The great "republican" then took up the baton and began arrogating power with as much or more gusto.

II. The constitution of 1937 and de Valéra's taste for strong government

For technical and political reasons relating mainly to partition, the 1937 constitution stopped short of formally declaring a "republic."[59] It is nonetheless generally understood as

[58] See generally M. Stüssi, "Banning of Minarets: Addressing the Validity of a Controversial Swiss Popular Initiative" (2008) 3 *Religion and Human Rights* 135.

[59] The absence from the document of the term itself was strategic on de Valéra's part. He went as far as to suggest that "if the Northern Ireland problem were not there…in all probability there would be a flat downright proclamation of a republic in this Constitution." See *Dail Debates*, vol. 68, 14 June, 1937, col. 430. This is a

at least a partly republican document. Certainly, de Valéra – the primary political influence – thought of himself as a republican, whether justifiably or otherwise.[60] He also regarded the constitution as republican in all but name.[61] There is much in the strict text of the 1937 constitution that might be deemed, at least in the superficial sense, "republican." Basil Chubb suggests that the provisions relating to the popularly-elected President, the "symbol of republican status," might be understood in that way.[62] Similarly, much like its predecessor, the text ostensibly embraces separation of powers theory. Article 6 refers to "all powers of government, legislative, executive and judicial…" Article 15.2.1 provides that "the sole and exclusive power of making laws for the State is…vested in the Oireachtas." Article 13.1 provides that the Dáil nominates the prime minister – now known as the Taoiseach – and approves the members of government, while Article 28.10 asserts that the Taoiseach shall resign upon ceasing to retain the support of a majority of the Dáil.[63] Article 28.2 declares that "the executive power of the State shall be exercised…by or on the authority of the Government…," while according to Article 28.4.1, "the Government shall be responsible to Dáil Éireann." Article 26 and Article 34, in different contexts, grant powers to the courts to invalidate legislation that is deemed repugnant to the constitution.

The Preamble, similarly, despite the reference to the "Most Holy Trinity" and to "our obligations to our Divine Lord, Jesus Christ," seems essentially republican. It refers to the

reference, apparently, to the view that an outright proclamation would have required an exit from the Commonwealth, which would in turn have ended any prospect of tempting Northern Ireland unionists into an all-island State. On this point, see B. Chubb, *The Government and Politics of Ireland*, 3rd. ed., (Harlow: Longman, 1992), p. 43.

[60] Farrell, for example, quotes de Valéra in a speech to the First Dàil as follows: "Sinn Féin aims at securing the international recognition of Ireland as an independent Irish Republic…" See Farrell, "The First Dàil and its Constitutional Documents" in Farrell ed., *The Creation of the First Dàil*, p. 62.

[61] See J.A. Murphy, "The 1937 Constitution – Some Historical Reflections" in T. Murphy and P. Twomey eds., *Ireland's Evolving Constitution 1937-97: Collected Essays* (Oxford: Hart Publishing, 1998), pp. 18-19.

[62] Chubb, *The Government and Politics of Ireland*, p. 43.

[63] The "Taoiseach" holds the office that had been held by the "President of the Executive Council" under the previous constitution.

notion of "the common good," and grounds the whole constitutional order on the idea of popular sovereignty: "we the people of Éire…do hereby adopt, enact, and give ourselves this Constitution." There was no longer need for the simultaneous recognition – incongruous as it had been – of both a monarch and "the people" as the ultimate source of political authority. The authority to enact the constitution, and to change it, is enjoyed by the people.

These provisions seem at one with de Valéra's assertion concerning the citizens as masters, with which this article began. The image presented is one of the citizens electing representatives to the Oireachtas specifically for the purpose of the making of the laws that are to govern them. Dáil Éireann, in turn, is to elect a government that governs the country, in the sense of running the departments of state, and that is to be accountable, *on an ongoing basis*, to parliament. The *text* of the constitution thus imagines the citizenry in command, through their representatives in parliament. They "control the control" of government in a way that seems to sit well with the republican account of liberty.

The shortcomings of this system of government – which was in essence carried over the 1922 constitution – have already been emphasized. De Valéra's enthusiasm for a new constitution had nothing to do with any eagerness on his part to enhance the role of parliament. In Chubb's words, he "found the system which he inherited an adequate instrument for his purposes and, indeed, well suited to a strong prime minister leading a loyal majority party that looked to him for initiative and direction."[64] Rather, his enthusiasm had to do with setting the polity in a Catholic frame and, to an even greater extent, with aiming a final kick at the Anglo-Irish Treaty that he had so dreaded.

Indeed, far from reforming the system of government, the 1937 constitution entrenched an even more intense version of the Westminster model. The extern minister concept, which had all but disappeared in 1927, was formally removed from Irish constitutional arrangements, while nothing of the Initiative procedure was revived. There was also a notable increase in the power of the prime minister, in the form of three new features.[65] First, the provision whereby an Executive Council that had lost its majority in the Dáil

[64] B. Chubb, *The Constitution and Constitutional Change in Ireland* (Dublin: Institute of Public Administration, 1978), p. 32.

could not seek a dissolution was removed. The new arrangement in Article 13.2.2 permitted a Taoiseach who had lost his majority to request a dissolution of the President, although the President could refuse such a request "at his absolute discretion," thereby enabling the President to ask the Dáil to form a new government if he was of the understanding that one could be formed.[66]

Second, and more significantly, under Article 28.9.1, the power to dissolve the Dáil is vested personally in the Taoiseach, so long as he continues to enjoy the support of a majority in the Dáil. This power, which had been enjoyed by the Executive Council as a collective body under the 1922 constitution, is considerable in practice, as the timing of a general election can be so pivotal to its outcome. Bagehot wrote of the "English" constitution that this power – which was enjoyed by the Prime Minister rather than the cabinet – meant that members of parliament were far more inclined towards deference to the executive: they are "collected by a deferential attachment to particular men…and they are maintained by fear of those men – by the fear that if you vote against them, you may find yourself soon to have no vote at all."[67] The fact that it is enjoyed personally by the Taoiseach enhances his authority considerably, both amongst members of "his" cabinet, as well as more generally in parliament and amongst the public.

Finally, where there was no provision in the 1922 constitution allowing the President of the Executive Council to dismiss a minister, under Article 28.9.4 of the 1937 constitution, the Taoiseach may request a minister to resign "at any time, for reasons which to him seem sufficient." De Valéra rejected arguments made by opponents in the Dáil that this might render ministers subservient. In words that evoke the republican image of the "kindly master," he argued that it was inconceivable that a Taoiseach could "in a purely arbitrary way…compel the resignation of a member unless there was concurrence on the part of the

[65] Chubb suggests that "the very title he chose, Taoiseach…suggests that the Irish Prime Minister is the essential pivot on which the government rests." See Chubb, *The Government and Politics of Ireland*, p. 187.

[66] Although this change may appear to undermine the Dáil and concentrate power in the Taoiseach, in fact it barely does, and was designed to overcome what had been an acknowledged difficulty with the arrangement under the 1922 constitution: that it was unclear what would happen if the Dáil could not agree on a new prime minister.

[67] Bagehot, *The English Constitution*, p. 158-159.

other members of the Government."[68] It is surely true that it is unlikely that a Taoiseach would use this power in an utterly capricious fashion as he could hardly hope to do so while continuing to enjoy the support of his parliamentary party upon which he relies for his Dáil majority. Nonetheless it is a significant departure from the 1922 constitution, as it vests a great deal of authority and even prestige in the Taoiseach. Its inclusion dispels any doubt that de Valéra had had any misgivings about the distribution of power in the Westminster model of government.

III. Tensions between theory and practice: a dysfunctional parliament?

The functions of parliament under the 1937 constitution, just as in the case of all parliaments operating on the Westminster model, are threefold: to appoint and dismiss governments, to hold those governments to account, and to make laws. The role of the Dáil in the appointment and dismissal of government – much like as in other Westminster-type parliaments – is essentially formal, despite the constitutional provisions that envisage the House as a powerful agent in the processes.[69] Generally, a particular proposed coalition will win a majority of seats, and the parliamentarians duly vote accordingly in a vote for Taoiseach and in approving his proposed members of cabinet.[70] The same point can be made with respect to Article 28.10 and the power of the Dáil to break a government.[71] Because of the solidity of political parties within the political culture, generally a government will either last a full term, or will choose to "go to the people" at whatever time

[68] See Dáil Éireann, *Debates*, vol. 67, 26 May, 1936, col. 1188.

[69] The important constitutional provisions are as follows: Art. 13.1.1 declares that "[t]he President shall, on the nomination of Dáil Éireann, appoint the Taoiseach…" while Art. 13.1.2 provides that "[t]he President shall, on the nomination of the Taoiseach with the previous approval of Dáil Éireann, appoint the other members of the Government."

[70] This is, of course, a simplified account. For a detailed historical analysis, see Gallagher, "The Oireachtas: President and Parliament" in Coakley and Gallagher, eds., *Politics in the Republic of Ireland*, pp. 204-207.

[71] Art. 28.10 provides that "[t]he Taoiseach shall resign from office upon ceasing to retain the support of a majority of Dáil Éireann…"

the leaders of a government and their advisors deem it most advantageous electorally. Government backbenchers will toe the line because to do otherwise would likely end their prospects of gaining high political office.

There is a clear and important democratic connection between the people and their government under this model: they elect the parliamentarians, who in turn appoint the government that has "won" the election. The difficulty, however, is that although the citizens elect their preferred government at election time, they have virtually no control over the continuance or discontinuance in office of their government *in between elections*. One of the outstanding theoretical features of the notion of responsible government is that government is perpetually concerned about the prospect of being dismissed by parliament, yet, just as in Westminster, governments in Ireland are barely at all concerned about the prospect on a month-to-month or even year-to-year basis.[72] They are concerned about their popularity amongst the electorate, certainly, with an eye on the next election, but they are not concerned about the prospect of being dismissed in the meantime by the people's representatives. This is not to argue that the party system is antithetical to republican ideals. The other side of the argument is that a system of 166 atomized parliamentarians, or even one with only casual ties amongst them, would be chaotic and unworkable. Governments would be made and broken much too regularly, and usually, no doubt, on the basis of populist and unworthy reasons. For now, the point is simply to bring attention to the dissonance between theory and practice, and to the to general problem so far as the control of public power is concerned.

The role of parliament in holding government to account is arguably more important than its role in the making and breaking of government. On this function, Article 28.4.1 of the 1937 constitution could not be more succinct: it provides only that "[t]he government shall be responsible to Dáil Éireann." Again, however, much as in the case of other Westminster-model countries, there is a dissonance between theory and practice. There are two systems

[72] Governments in Britain were defeated on votes of confidence on only three occasions in the 20th century: twice in 1924 and again in 1979. See Turpin and Tomkins, *British Government and the Constitution*, p. 568. Similarly, the Dáil did actually "bring down" a government on two occasions, while it should be acknowledged that governments have often "jumped before they were pushed." The argument is not that parliament is impotent in this regard. It is merely that they are much less potent in practice than in theory.

established by the Dáil standing orders for the purpose of the holding of government to account: the system of Parliamentary Questions (PQs) and the committee system.[73] The scholarship on PQs points overwhelming to a dysfunctional system.[74] It suggests that there is an essential culture amongst both ministers and senior civil servants of secrecy and obfuscation. The findings of the Beef Tribunal, for instance, capture the problem starkly. Mr. Justice Hamilton's report suggests that if questions had been answered in the Dáil as comprehensively as they had been in the Tribunal, the Tribunal – which lasted three years and cost in excess of €17 million in the pre-Celtic Tiger era – would never have been necessary.[75] The report found evidence of deliberate vagueness and a culture of evasiveness amongst civil servants, whose primary concern was to protect their minister and department.[76] On the other side, there is evidence of an excessive tendency amongst TDs to submit PQs relating to constituency-specific issues.[77] Very often, the purpose seems to be to generate a press release for the local newspaper proclaiming the fact that they had secured some grant or social welfare payment which had already been legally available without any input from the particular TD.[78]

[73] See Houses of the Oireachtas, "A Brief Guide to How Your Parliament Works," available at *http://www.oireachtas.ie/parliament/media/michelle/parliamentworks/Parliamentary-Guide-Eng-(web).pdf* [accessed September 27, 2012].

[74] See for example, S. Dooney and J. O'Toole, *Irish Government Today* (Dublin: Gill and McMillan, 2009), Chapters 1-3, M. MacCarthaigh, *Accountability in Irish Parliamentary Politics* (Dublin: Institute of Public Administration, 2005), Chapter 4.

[75] See The Report of the Tribunal of Inquiry into the Beef Processing Industry (Dublin: Statutory Office, 1994), as quoted in F. O'Toole, *Meanwhile Back at the Ranch: The Politics of Irish Beef* (London: Vintage, 1995), p. 241.

[76] See O'Toole, *Meanwhile Back at the Ranch*, p. 241.

[77] Shane Martin's analysis of PQs between 1997 and 2002 finds that 55 per cent of them do *not* have a constituency basis. By any measure, this suggests that a disproportionate number concern constituency issues, given that the parliament is concerned, fundamentally, with national laws and policies. See S. Martin, "Monitoring Irish Government" in E. O'Malley ed., *Governing Ireland* (Dublin: Institute of Public Administration).

[78] See F. O'Toole, *Enough is Enough: How to Build a New Republic* (Dublin: Penguin, 2010), pp. 67-70.

Much the same can be said of the committee system in the Irish parliament. Since 1992, the committees in the Irish parliament are structured to match or "mark" government departments. Each committee monitors a government department, discusses its estimates, and deals with the third stage of legislation that has been introduced by the relevant Minister. The analysis on the system in Ireland suggests that, despite considerable improvements in the 1990s, it is unfit for purpose. For MacCarthaigh, the chief cause of the dysfunction is the partisan political culture. He suggests that "if the committees used all their powers to look at such issues as secondary legislation, departmental strategy statements or the work of state agencies under the aegis of various departments, they could contribute significantly to a culture of parliamentary accountability" but notes that "the attraction of media attention rather than the obligation of democratic accountability" undermines the system.[79] Gallagher attributes the shortcomings to the fact that government ministers – just like all power-wielders – tend to dislike scrutiny, and so have a plain disincentive to improve the committee system. [80] He suggests that those most likely to benefit from a strong committee system – backbenchers and the opposition – have a related disincentive: they aim to be ministers themselves some day, and would prefer not to place their future selves under a heavier burden should they be successful. Gallagher further notes that the government parties tend to hold a majority of seats on the committees and that the "whip" system applies with the result that party loyalty and discipline is as entrenched as ever, to an extent inimical to the accountability required by the constitution.

The dominance of the executive is similarly evident in regard to the law-making function.[81] Indeed Article 15.2.1, which vests "sole and exclusive" law-making authority in the Oireachtas, might be described as the single greatest myth of the 1937 constitution.[82] It

[79] See MacCarthaigh, *Accountability in Irish Parliamentary Politics*, p. 142.

[80] See Gallagher, "The Oireachtas: President and Parliament" in Coakley and Gallagher, eds., *Politics in the Republic of Ireland*, p. 232.

[81] Chubb suggests that government ministers have a "virtual monopoly of initiating legislation and other policy proposals…" See Chubb, *The Government and Politics of Ireland*, p. 158.

[82] Hence the title to Basil Chubb's chapter: B. Chubb, "Constitutional Myth and Political Practice" in B. Farrell ed., *De Valéra's Constitution and Ours* (Dublin: Gill and MacMillan, 1988).

should be acknowledged that the law-making process must allow that the government of the day has the opportunity to have its legislative agenda pursued. This agenda has, after all, won the approval of the citizens in a general election. But this should not be taken to mean that the role of parliament in both the deliberative and scrutinizing senses are unimportant. Analysis of the process suggests that government dominates to an extent that parliament is barely relevant. When a government minister wishes to introduce new law, he brings a "memorandum for government" to the cabinet outlining the essentials of the proposed law. [83] Essentially, once he has the approval of his colleagues in cabinet, the bill will become law, more or less in the same form. It goes through a number of formal "stages," but the grip of the governing parties is such that, notwithstanding the power of the courts to invalidate laws that are deemed unconstitutional, it is only just an exaggeration to argue that the Minister's expressed *will* amounts to law.

The legislation goes through the Office of the Parliamentary Draftsman to the Oireachtas, and then through five stages. The second and third stages are the most significant, but only in a comparative sense. The second stage is the debate on the broad principles of the bill. Although the constitution might envisage this as the great event in the life cycle of the law (i.e. the Dáil exercising the power which it enjoys solely and exclusively) it is, of course, all a formality. The Minister reads out a script: the opposition reacts, generally negatively, and the bill is passed. There is little point in the opposition reacting positively by offering an alternative approach, as there is virtually no prospect that government backbenchers will breach the code of loyalty out of political conviction, and place their own political careers in jeopardy. The third is the "committee stage." Notably, once the bill has passed through the second stage, the relevant committee cannot amend the essential principles. In other words, the committees are left to tease out minor amendments and technical details, utterly undermining the committee concept and process.

In respect of all three of these constitutionally-mandated functions of Dáil Éireann, there is a dissonance between constitutional theory and institutional practice. The constitution theoretically envisions the House of Representatives as the primary agent controlling the government so that law and policy-making as well as the running of the departments of

[83] This snapshot relies on Gallagher, "The Oireachtas: President and Parliament" in Coakley and Gallagher, eds., *Politics in the Republic of Ireland*, p. 230-232.

state occur on the people's terms. But in practice, as those who designed the text well knew it would, it is the government of the day that is in control, scarcely at all checked by the Dáil. There is the argument, of course, that there is this ultimate democratic connection between the people and their government engendered through the ballot box at election time. This moment is highly significant, but it is worth dwelling on the fact that it is just that: a moment. To count as a republic in the sense theorized by scholars such as Pettit and Skinner, much more is needed for the control of the power-wielders in cabinet not to count as *arbitrary* control. This momentary democratic connection is thus inadequate for the vindication of de Valéra's assertion with which the article commenced.

In the case of each of the three constitutionally-mandated functions, the shortcomings are intimately connected with that contradiction that developed in the Westminster-model in the mid-18th century, mentioned at the outset. The temptation is to look for one great solution: to cast this model to the dustbin of history and to look to an alternative model such as a presidential system of government, or, to draw on Arendt Lijpart's scholarship, to a "consensus" type democracy rather than the "majoritarian" kind.[84] How this model might promote the ideal of non-domination is an immense scholarly question. It is surely simplistic, however, to deem one model "superior" to the other, whether generally, or when measured by republican ideals. It is likely that either model, in the abstract, is capable of accounting for the avowable interests of all citizens in diverse modern societies, and of promoting their equal freedom: it is in the detail that these models fail. Accordingly, this final section turns to consider concrete reforms that might enhance Dáil Éireann in the execution of its functions. The thought is that it is not the Westminster model that is at fault. It is the particular instantiation of that model that is problematic from the republican point of view, as well as the political culture that has developed around that model.

IV. Will the long-suffering political generation stand up for the republic?

The Fine Gael/Labour coalition government elected in March 2011 came to office at an exceptional period in modern Irish history. Fianna Fáil – the party that had dominated Irish

[84] See generally Lijphart, *Patters of Democracy* (New Haven: Yale University Press, 1999).

politics since the 1930s – had lost more than half of its first-preference vote from the 2007 election as well as fifty-seven of its seventy-seven Dáil seats. This followed the Fianna Fáil/Green coalition government of 2007-2011, which had governed during a period defined by the decline of the "Celtic Tiger" property boom, the near-collapse of the Irish banking system and the EU-IMF bailout of November 2010. The scene seemed thus set for reform of the political system: a public disenchanted with politics and an incoming government comprised of parties that had long suffered the frustration of the opposition role in parliament.[85]

The Programme for Government agreed by Fine Gael and Labour, entitled the "Government for National Recovery 2011-2016," contained some interesting commitments regarding constitutional and political reform.[86] It began with familiar rhetoric, insisting, for example, that "an over-powerful Executive has turned the Dáil into an observer of the political process rather than a central player," but this was backed up with concrete commitments.[87] On the accountability function, there were proposals on improving the system of PQs, including the introduction of "a role for the Ceann Comhairle [Speaker] in deciding whether a Minister has failed to provide reasonable information in response to a question."[88] There was also a commitment to the establishment of an Investigations, Oversight and Petitions Committee which would be a channel of consultation and collaboration between the Oireachtas and the Ombudsman. It would be "bi-partisan in structure and chaired by a senior member of the opposition."[89]

[85] By 2011, Fianna Fáil had been in government for twenty one of the twenty four years since 1987. Fine Gael had been in government only in the 1994-1997 period during that time.

[86] See Government for National Recovery 2011-2016, available at *http://per.gov.ie/wp-content/uploads/ProgrammeforGovernmentFinal.pdf* (accessed September 27, 2012).

[87] See Government for National Recovery, p. 19-20.

[88] See generally Government for National Recovery, p. 21.

[89] See generally Government for National Recovery, p. 21.

On the law-making function, there was a commitment to "break[ing] the Government monopoly on legislation and the stranglehold over the business of the Dáil." Specifically, committees would be empowered to introduce legislation. So too would backbench TDs, in virtue of a new *10 Minute Rule*. Similarly, there would be an "amendment to cabinet procedure instructions so as to allow government to publish the general scheme of a bill so that Oireachtas committees [could] debate and hold hearings at an early stage" in the legislative process.[90] There would also be a dedicated "Committee Week" every fourth sitting week, in which the Dáil plenary would sit only for questions and the order of business leaving the remainder of the day devoted to committee work.[91]

The emphasis on strengthening the committee system is encouraging. As Kaare Ström has argued, committees are "critical to the deliberative powers of parliaments" and a "necessary condition for effective parliamentary influence in the policy-making process."[92] A good system allows for specialization on policy matters and it tends towards balancing the excessive partisanship in Westminster model systems. Because the committees concentrate on particular policy areas – Education, Justice, Health etc. – policy-minded parliamentarians are afforded the opportunity to focus on particular areas, and to develop expertise in those areas.[93] The "small group psychology" that might develop amongst colleagues on a particular committee could challenge the intense party loyalty that, so often, undermines the constitutional vision of accountability. Ultimately, a strong committee system provides an opportunity for backbenchers to have a parliamentary role beyond being mere "lobby fodder."

[90] This proposal is encouraging. One of the conditions for a strong committee system is that committees be centrally involved in the law-making function: put simply, the earlier the involvement of committees in the process, the stronger their influence.

[91] See generally Government for National Recovery, p. 22-23.

[92] See K. Ström, "Parliamentary Committees in European Democracies" 4(1) *The Journal of Legislative Studies* 21, p. 47.

[93] See S. Martin, "The Committee System" in M. MacCarthaigh and M. Manning eds., *The Houses of the Oireachtas* (Dublin: Institute of Public Administration, 2010).

The fatal weakness in the committee system is not mentioned in the Programme for Government, however. This is the fact that the composition of committees, or, at least, the process of the appointment of members and of chairs, is controlled by the cabinet. To return to what might be deemed the elementary argument: it is absurd that those who are to *be scrutinized* control those who are to *do the scrutinizing*, in this case, in respect of their appointment. Of the thirteen substantive committees in the present Dáil, Fine Gael and Labour together hold twenty four of the twenty six chair and vice chair positions, with the chair of the Public Accounts Committee (as per the same constitutional convention that operates at Westminster) and the chair of the newly formed Public Service Oversight and Petitions Committee (as promised in the Programme for Government) held by members of the opposition.[94] This amounts to a 92% share for the government parties, compared to their 68% share of the overall seats in the Dáil. The government holds a majority on eleven of those thirteen committees, an equal share on one and a minority on one. Each committee also has two "convenors" whose task it is to ensure that a quorum is present for each meeting, but who essentially act as whips ensuring voting along party lines.[95] The proposals in the Programme for Government fall short to the extent that they fail to address this critical weakness.

To this end, reforms introduced at Westminster (perhaps ironically) in recent times are noteworthy. The expenses scandal of 2009 seemed to be the "rupture" that prompted Westminster power-wielders to accept the importance of institutional reform that would result in the holding of power to account. The "Report of the House of Commons Reform Committee," which was prepared by a Westminster committee chaired by the academic and parliamentarian Tony Wright, focuses much attention on this tendency of the government

[94] See Oireachtas Joint, Select and Standing Committees for the 31st Dáil and 23rd Seanad, at *http://www.oireachtas.ie/parliament/oireachtasbusiness/committees_list/* (accessed September 27, 2012).

[95] On the functions of convenors see Houses of the Oireachtas, Fact Sheet 2: The Role and Work of Oireachtas Committees, available at *http://www.oireachtas.ie/parliament/media/committees/factsheets/Fact-Sheet-2-The-Role-and-Work-of-Oireachtas-Committees-without-codes.pdf* (accessed September 27, 2012), p. 8. Martin suggests that "the allocation of committee chairs, although perhaps formally an issue for each individual committee, seems to be decided in negotiations more centrally among Party Whips…" See Martin, "The Committee System" in MacCathaigh and Manning eds., *The Houses of the Oireachtas: Parliament in Ireland*, p. x.

of the day to control parliamentary committees by controlling their membership and the appointment of chairs.[96] The report begins by outlining practice as it had been: at the beginning of each parliament there would be a standard division of places between the parties for each select committee, based on a calculation of the seats held by each party.[97] The party whips would bring individual names to fill the party "quota" on each committee. It would be up to the parties themselves to determine who would be selected, without any requirement for transparency. In other words, "mavericks" or those more inclined to thoroughly scrutinize decisions made by power-wielders could be excluded, and membership of a committee could be – or at least could be *perceived* to be – a matter of patronage or reward for loyalty. Similarly in respect of the appointment of committee chairs: while each committee was theoretically entitled to choose any of its members for the chair, in practice the matter hinged on the outcome of private negotiations between party whips the outcome of which would be passed on to individual committee members.[98]

In what would be a significant departure for the Irish parliament, the Wright Committee favoured retention of the system whereby each committee would be comprised of members of the parties in proportion to the balance of parties in the Chamber as well as the system whereby non-majority or opposition parties hold a proportionate number of chairs of committees.[99] The reform recommended is that the whole House would elect chairs of the committees *by secret ballot* (i.e. following agreement as to how many chairs each party group would have).[100] The thought is that by having been elected by the whole House, the

[96] See House of Commons Reform Committee: First Report of Session 2008-09, "Rebuilding the House," available at *http://www.publications.parliament.uk/pa/cm200809/cmselect/cmrefhoc/1117/111702.htm* (accessed September 27, 2012).

[97] See generally "Rebuilding the House," pp. 18-19.

[98] The report suggests that "it is common knowledge that the whips on all sides ensure that members of their own party are left in no doubt about the 'official' view as to the preferred candidate." See "Rebuilding the House," p. 21.

[99] See "Rebuilding the House," p. 25.

[100] The report recommends that the relevant minister and the principal front-bench Opposition spokesperson would voluntarily abstain from casting their votes for the chairs of the departmental committee relating to their

chairs would be representative of the whole House and would hold a clear mandate.[101] Subsequently, there would be election *by secret ballot* within each party of members from that party to particular committees, in accordance with the representation of each party within the House (i.e. each party would function as a kind of "electoral college").[102] These intra-party elections would be governed and supervised by parliament (through the Speaker) rather than by the parties themselves. In other words, the whips would no longer control this process: the power-wielders would no longer control those who were tasked with holding them to account.

The other critical matter determining the capacity of the parliament to function is the control of the agenda and the scheduling of business. To recall, the Programme for Government committed to breaking the "stranglehold [of the Executive] over the business of the Dáil" with the promise of new Friday sittings dedicated to private members' business. The Wright Committee Report – perhaps in part because of the extent of the public disgust at the political elite that led to its establishment – offers more radical reform proposals. After noting that the "default position" is that parliamentary "time 'belongs' to the Government" and that the Government enjoys "not merely precedence but *exclusive domination* of…the House's agenda," the report asserts that "it should be for the House as a whole to determine how much time to devote to…debate and scrutiny" of bills and that it is "unacceptable that Ministers can determine the scheduling of Opposition Days…[and] that they have untrammelled power to decide the topics for general and topical debates."[103]

The main proposal of the Wright Committee – premised on the principle that "time in the house belongs to the House" – is the establishment of a "Backbench Business Committee" with the power to schedule all business other than that which is exclusively Ministerial business (i.e. all business other than Ministerial-sponsored legislation and associated

responsibilities. See "Rebuilding the House," p. 27.

[101] See "Rebuilding the House," p. 26.

[102] See "Rebuilding the House," p. 28.

[103] See "Rebuilding the House," p. 49.

motions).[104] This committee would be comprised of between seven and nine members elected *by secret ballot* of the House as a whole, again, with due regard to party proportionality.[105] The chair would be elected in the same way, with frontbench members of all parties ineligible for membership. The committee would meet weekly to consider competing claims for time made by the select committees and backbenchers. Although Ministers would continue to enjoy the power to choose the time of pursuing their legislative agendas, they would no longer enjoy the power to dictate the length of debate, for instance. A debate at any given stage of a bill is, after all, *parliamentary* business rather than *government* business, and accordingly ought to be controlled by parliament. The point, ultimately, is that the weekly draft agenda for the House would no longer be assembled and arranged by the Government Chief Whip's Office. Rather, it would be controlled by a House Business Committee that would be designed to account appropriately for the interests of all parts of the House with a direct interest: backbenchers (through the Backbench Business Committee), Government and the Opposition.[106]

The Programme for Government makes certain commitments regarding the agenda and business of the Dáil: it proposes a *10 Minute Rule* and Friday sittings dedicated to private members' business, as already mentioned. It also expresses a general promise to "restrict the use of the guillotine motions…so that guillotining is not a matter of routine."[107] These kinds of reforms amount to little more than fiddling around the edges of the problem. The comparison with Westminster only goes so far, of course. The sheer size difference – six hundred and fifty as against one hundred and sixty six – cannot be ignored. Put simply, *more* backbenchers are *more* difficult to control. Nonetheless, the unchecked control of the agenda and schedule enjoyed by the executive in Dáil Éireann undermines that body as a

[104] See "Rebuilding the House," pp. 53-54.

[105] See generally "Rebuilding the House," p. 54.

[106] The agenda for the week would be put to the House as a composite motion, having been assembled by a House Business Committee. The members of this committee would be comprised of the elected members of the Backbench Business Committee along with frontbench members nominated by the three party leaders. For more comprehensive overview, see "Rebuilding the House," pp. 59-60.

[107] Government for National Recovery 2011-2016, p. 22.

deliberative forum capable of holding the government of the day to account. A Backbench Business Committee of the kind proposed for the House of Commons by the Wright Committee (and which, indeed, has since been established) would go a considerable way towards checking the power of the whips and counteracting the more destructive and unnecessary aspects of party discipline.[108]

V. Conclusion

With the growing power and importance of international institutions, it may be that the task of checking public power is more multifarious than before. If anything, this intensifies the urgency of empowering parliaments in Westminster-model countries such that those parliaments might fulfill their function of holding government to account. There are many aspects of the legal framework around this question in twentieth century Irish constitutionalism that have been ignored in this article. Little has been said, for instance, about important questions such as freedom of information laws, the office of the Ombudsman, or the role of Seanad Éireann. The focus has been specifically on the relationship between the cabinet and the lower house of parliament. The article has emphasized that the contradiction at the heart of the Westminster model of responsible government has proved troublesome in Ireland as it has elsewhere: the accountability of government to parliament relies on parliamentarians the majority of whom, by definition, see their primary parliamentary role to be to maintain the government in office.

There are limits, of course, to what can be achieved through formal legal and institutional change: the problems are partly cultural. Much depends on the extent to which parliamentarians tend to put their own career interests, or the interests of their party, ahead of the common good. (Although to this end, institutional reform, as well as effecting changes directly, can effect change indirectly too, in the sense of promoting conditions in which parliamentarians are more likely to develop virtue.) Much depends also on the

[108] The Backbench Business Committee has been operating since 15 June 2010. See *http://www.parliament.uk/bbcom* (accessed September 27, 2012).

expectations citizens have of their representatives, and on whether, for instance, they elect them on the basis of local or factional interests as distinct from national interests.[109]

But equally, much can be achieved through formal institutional reform. The ideas canvassed in this article, it is suggested, are worthy of careful consideration. It may be, for instance, that the extern minister idea from the 1922 constitution could be revived, and that many of the departments of state could be run by ministers directly accountable to parliament and not hindered either by concerns around party discipline or by collective responsibility. Moreover, the committee tasked with appointing these ministers could be controlled by the Dáil rather than by the government of the day, with the Backbench Business Committee at Westminster as a good working model. This would remove the primary cause of the failure of the project in the 1920s: the fact that the process was controlled by government rather than by parliament. The extern minister idea would go a considerable way towards returning parliament to the so-called golden era prior to 1841. Parliamentarians could harangue these ministers and hold them to account without the concern that the government would collapse and that an expensive election would be prompted, potentially causing the loss of those parliamentarians' seats. This would promote the idea that the people would be governed on their own terms.

Similarly, as JJ Walsh insisted in the Dáil debates on the 1922 constitution, a proper role for parliamentary committees would enhance parliament markedly, both in regard to its law-making and its accountability functions. The reforms of the ways in which committee members and their chairs are appointed, as well as the role of such committees in the law-making process would tend towards reversing the arrangements whereby, in Walsh's words, "three-fourths of the people's representatives [are excluded] from [undertaking] effective work on the nation's behalf."[110]

The article has been less concerned with specific reforms, however. The main concern has been to assess the general arrangements around the distribution of political power in the

[109] On this argument, see the section dealing with the skills and dispositions of citizenship in T. Hickey, "Civic Virtue, Autonomy and Religious Schools: What Would Machiavelli Do?" in F. O'Toole ed., *Up the Republic: Towards a New Ireland* (Dublin: Faber and Faber, 2012).

[110] See fn. 25.

constitutions since 1919. The article has argued that the constitutional arrangements, or more accurately the constitutional practices that have developed around those arrangements, undermine the "republican" credentials of Irish constitutionalism in the 20th century, owing to the excessive concentration of power in the cabinet. Reforms of the text of the constitution would not seem particularly necessary to render he constitution *more* republican. The text of Article 28.4.1, for example, seems to do perfectly well by republican idealism. It is the various legal and institutional arrangements around such constitutional provisions that are problematic. Much as there are deep challenges to making the Westminster model of responsible government *serve* the citizenry, the notion that the model is incompatible with republican idealism is simplistic. At its heart, after all, the model is concerned with holding power to account. It is concerned essentially with the idea that the political power-wielders are *responsible* to, in the sense of being answerable or accountable to, the people's representatives. To this end, republican idealism – far from requiring that the model be cast aside – seems to demand reform of the practices around the model along with the development of common good oriented virtues amongst both political actors and citizens.