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Conclusion

Irish popular sovereignty from a domestic and comparative perspective

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Introduction

Popular sovereignty is routinely described as a 'cornerstone' of the Irish constitutional order. The Irish people, conceptualised as a collective self-governing entity, are understood to be not alone the passive, originating source of all state authority but also active participants in the process of constitutional governance – in particular through the functioning of the constitutional referendum process, which regularly gives them the opportunity to accept or reject proposals to amend the Constitution of 1937. In many other liberal democracies, 'the People' are often relegated to playing a dormant or residual role in constitutional governance - and the notion of the 'popular will' tends to be viewed with considerable suspicion. In contrast, the popular will enjoys a sacrosanct status in Irish constitutional thought, and popular sovereignty is assumed to be the ultimate constitutional good.

However, despite this valorisation of popular sovereignty, the meaning and interpretation of the term within the Irish constitutional order has not been analysed in any great depth. The various chapters in this edited collection set out to remedy this situation. This particular chapter seeks to draw together some of the rich threads of legal analysis set out elsewhere in this book – and put the Irish situation in a wider comparative context.

The first part of this chapter examines the status of popular sovereignty within Irish constitutional law. It analyses how popular sovereignty is viewed as both the foundational basis for the constituted structure of the Irish state and also an active, law-generating force within its functioning. This persisting role given to the people in constitutional governance primarily plays out through the referendum mechanism. However, it also exerts an indirect influence on the evolution of constitutional case-law, and the development more generally of Irish constitutional culture..

The chapter then proceeds to analyse how the significance of popular sovereignty within the Irish constitutional order stands out in sharper relief when viewed from a comparative perspective. In particular, the way in which such popular sovereignty is conceptualised within the Irish constitutional order as being inherentlyunconstrained, i.e., not limited or bounded by other overarching constitutional principles, is notable. This constitutes a radically democratic commitment to making the People the ultimate controlling source of constitutional legitimacy, which contrasts with the reluctance of many other liberal democracies to go down a similar route.

However, in celebrating this commitment, as most Irish commentators do, certain qualifications need to be borne in mind. For all the importance in particular of the referendum mechanism, the exercise of popular sovereignty is still bounded and mediated in significant ways. This commitment to radical democracy also becomes highly diluted when it comes to the day-to-day functioning of the constituted organs of the Irish state. Furthermore, certain factors have smoothed the path of Irish popular sovereignty. Expressions of popular majoritarianism as channelled through the referendum process have not generated the same degree of political conflict that for example followed the Brexit referendum of 2016 – despite their potential to limit individual rights or impact

disproportionately on particular minorities, as perhaps illustrated by the 'pro-life' referendum of 1983 and the 'citizenship' referendum of 2004. But this relative lack of political conflict does not mean that 'loser's consent' to the process should always be regarded as a given, or that the reasons why other constitutional systems are sceptical of expressions of the popular will should be automatically discounted. In turn, this suggests that unthinking celebration of the place of popular sovereignty within the Irish constitutional order, or complacency about its functioning, should be avoided. In addition, as discussed in the postscript to this chapter, some critical thought needs to be given as to how popular sovereignty may be re-conceptualised in the future – especially if Irish unification becomes a real possibility.

Before commencing this discussion, one definitional point should be noted. For the purposes of the arguments developed in this chapter, 'popular sovereignty' is understood to mean a collective process of self-rule, whereby the people of a state territory are conceptualised as a unitary political entity and asked to engage in what Grewal and Purdy have described as 'majoritarian process of formal univocal constitution-making' – whereby 'a popular majority qualifies as speaking for "the people" as a whole by satisfying certain procedural criteria for proposal and amendment'.[1] Other definitions of popular sovereignty exist. But this one arguably best accords with how the concept has historically been understood in the Irish context, as reflected in the discussion below.

Popular sovereignty as foundational basis and active constituting principle of the Irish constitutional order

In presenting the draft text of *Bunreacht na hÉireann* to Dáil Éireann in May 1937, Eamon de Valera stated that '[i]f there is one thing more than another that is clear and shining through this whole Constitution, it is the fact that the people are the masters'.[2] This oft-quoted remark neatly encapsulated the primary objective of the new Constitution.[3] It was designed to affirm that the Irish people were their own sovereign and democratic masters, and the ultimate source of authority for all constituted organs of the state. To reinforce this, the text of its Preamble, together with the provisions of Arts 1, 5 and 6, repeatedly affirm the sovereign status of the people as the source of all lawful authority – while the Constitution itself was put to the people and approved in a plebiscite in July 1937.[4]

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[1] DS Grewal and J Purdy, 'The Original Theory of Constitutionalism' (2017–8) 127(3) Yale Law Journal 664–705, 682.

[2] 67 *Dáil Deb* Col.40, May 11, 1937: quoted by JA Murphy, 'The 1937 Constitution – Some Historical Reflections' in T Murphy and P Twomey (eds), *Ireland's Evolving Constitution, 1937–97*: *Collected Essays* (Hart 1998), 13.

[3] Its predecessor, the Constitution of 1922, was similarly designed to affirm the principle of Irish popular sovereignty, while also establishing the institutional framework of the new Irish Free State. However, it was irrevocably tainted in republican eyes by the manner in which its provisions were made subordinate to the Anglo–Irish Treaty of 1921. See B Kissane, *New Beginnings: Constitutionalism & Democracy in Modern Ireland* (University College Dublin Press 2011), 28–56.

[4] In contrast, the 1922 Constitution formally derived its authority from legislation enacted by Dáil Éireann sitting as a constituent assembly (the *Constitution of the Irish Free State (Saorstát Éireann) Act 1922*), which was subsequently paralleled by legislation passed by the UK Parliament (the *Irish Free State Constitution Act 1922*) and brought into force following a royal proclamation issued on 6 December 1922.

The 1937 Constitution thus affirmed the foundational status of popular sovereignty within the Irish constitutional order. Its provisions assume that the people of Ireland constitute a unitary political entity, capable of deliberating and acting together to promulgate a fundamental law for themselves. This collective self-organisation is deemed to be the originating source of all legal authority, including that of the Constitution itself and all the various organs of the state it establishes and empowers.

This represented a decisive break with the British constitutional tradition, which treated legal sovereignty as vested in the constituted organs of the state – specifically the Crown-in-Parliament – rather than in the people as such.[5] The new Irish constitutional order essentially dethroned the British sovereign, both prospectively and retrospectively: not alone did the sovereign cease to play any residual role in the post-1937 constitutional order, he was also displaced as the primordial source of existing lawful authority and replaced by the popular will.[6] The newly established constitutional framework was not acknowledged to be an inheritance from the Crown: instead, it was conceptualised as something called into being by the constituent power of the people themselves.[7]

But the role of popular sovereignty within the new post-1937 constitutional order was not just confined to serving as its originating source of legal authority. The Irish republican tradition had long embraced a Rousseauian concept of the popular will, dating back to Wolfe Tone, with the Irish people conceptualised as a unitary political entity, capable of exercising non-delegable sovereign power – with the Gaelic nationalist revival of the late-19th and early-20th century serving to reinforce this tendency.[8] Furthermore, this tradition also defined itself in opposition to the distant, mediated, elite-driven authority of the Westminster Parliament and the British Crown more generally.

As such, when independence came, the architects of the new Irish constitutional order wished to do more than simply establish the constituted form of the new state on popular sovereignist foundations. They also wished to establish a more permeable, immediate, persisting relationship between the constituent people and the constituent organs of state, and in particular the Oireachtas

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[5] For the classic exposition of this idea, see AV Dicey, *Introduction to the Law of the Constitution*, Ch. 1 (8th ed.) (Macmillan 1915). For an excellent discussion of Dicey's distinction in this respect between legal and political sovereignty, see J Kirby, 'A. V. Dicey and English Constitutionalism' (2019) 45(1) History of European Ideas 33–46. For the later development of Dicey's views as to the potential for referendums to play a potential veto role within the functioning of the UK constitutional order, which was influenced in particular by his strong opposition to Irish Home Rule, see M Qvortrup, 'A.V. Dicey: The Referendum as the People's Veto' (1999) 20(3) History of Political Thought 531–546; H Tulloch, 'A.V. Dicey and the Irish Question 1870–1922' (1980) 15(1) Irish Jurist 137–165.

[6] As Kissane puts it, the Bunreacht 'sought to refound the state on the basis of first principles', with popular sovereignty being to the fore: Kissane, *New Beginnings*, n.3, 76–77.

[7] De Valera's first draft of what became the Preamble to the 1937 Constitution contained the phrase 'the people … give themselves this constitution fundamental organic law': see Kissane, *New Beginnings*, n.3, 76.

[8] See D Figgis, *The Gaelic State in the Past and Future* (Manusel 1917).

as the legislative branch, than had been possible under Westminster rule – while also keeping channels open for the direct exercise of popular sovereignty, through plebiscitary-style mechanisms.

This ambition is neatly encapsulated in a quote from Kevin O'Higgins TD speaking in the 1922 Constituent Assembly, cited by Laura Cahillane in her chapter in this book:

[P]ersonal, actual contact between the people and the laws by which they are governed is advisable in a country where the traditional attitude of the people is to be against the law and against the Government. The Referendum, we consider, will be a stimulus to the political thought and the political education of the people.[9]

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This desire to close the gap between government and governed, and to ensure that popular sovereignty would continue to play an active role in constitutional governance after the establishment of the state, fed through into the design of the Free State Constitution of 1922. As Cahillane details in her chapter, many of its provisions were inspired by a desire to give direct or indirect expression to the principle of popular self-rule. In particular, it made provision for both constitutional and legislative referendums and a Swiss-style power of popular initiative.[10] However, these ambitions failed to translate into reality. The power to amend the Constitution conferred on the Oireachtas, originally time-limited, was used, in Cahillane's words, to facilitate the 'dismantling of the entire edifice'.[11] The provisions establishing legislative referendums and the power of popular initiative were repealed, while the constitutional referendum mechanism was never triggered.

In contrast to its predecessor, the 1937 Constitution was less ambitious in its popular sovereignist ambitions. It carried over many of the features of the post-1922 constitutional order, which were designed to close the gap between the people and the constituted organs of the state, in particular the use of single transferable vote (STV) as the electoral system. (More on this below.) But the legislative referendum and the power of initiative were not resurrected. However, the ambition to ensure a continuing role for popular sovereignty in constitutional governance remained. And so, Articles 46 and 47 of the *Bunreacht* provide that constitutional amendments must be approved by popular referendum – thus giving the people, conceptualised as a univocal political entity, a direct and continuing role in shaping the constitutional order.

Popular sovereignty and the referendum mechanism

This constitution-shaping role is mediated, and limited in scope.[12] To start with, it only involves a popular vote on proposed new constitutional wording. If a matter is not deemed to be a 'constitutional' question, a category defined by a combination of the text of the 1937 Constitution and judicial interpretation of its provisions, then there is no provision in the 1937 Constitution for it

[9] *Dáil Deb* vol 1 col 1211 (5 October 1922). Kevin O'Higgins, Minister for Home Affairs.

[10] Articles 47, 48 and 50 of the 1922 Free State Constitution.

[11] See Cahillane, Ch 2.

[12] Leah Trueblood has argued this is an inherent characteristic of referendums more generally, in questioning the accuracy of describing them as exercises in direct democracy: see L Trueblood, 'Are Referendums Directly Democratic?' (2020) 40(3) Oxford Journal of Legal Studies 425–448.

to be put to a referendum.[13] As a result, many pressing issues of fundamental national importance never get near a referendum vote – whereas some issues put to the people are minor in scope and substance. Tom Hickey, a perceptive critic of some of the over-inflated rhetoric that can surround the referendum process, has highlighted the example of the referendum on judicial pay in 2011:

[E]ven if the changes brought about might have been somewhat significant as a matter of constitutional law, the implications were quite limited in the overall scheme of *public policy* [italics in the original] … What about on other important questions concerning distributive justice and the common good [which are not subject to the referendum process] – questions pertaining to revision of the tax code and social welfare priorities, for instance: the taxing of corporations and of goods that damage the environment, the funding of special needs education, and so on?[14]

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Furthermore, referendum proposals must first be set out in legislation passed by both Houses of the Oireachtas – meaning that the executive is usually able to dictate both the form and substance of the issues submitted to the popular vote.[15] Indeed, at times, the executive has been accused of instrumentalising the referendum process as a mechanism for advancing a self-interested political agenda.[16]

Even where referendum proposals are not the sole brainchild of the executive, the framing and content of such proposals tend to be shaped by a complex mix of political and legal factors, involving a range of different actors such as politicians, courts and campaigning civil society organisations.[17] The 'people' as a unitary, univocal collective are only engaged at the end of this process, and given a limited binary choice of approving or rejecting a specific amending text. This means that, as Eoin

[13] There is nothing in the *Bunreacht* that would preclude the calling of a consultative referendum on a particular issue, but it would lack the binding status of referendums conducted under Articles 46 and 47.

[14] T Hickey, 'Popular Sovereignty in Irish Constitutional Law' (2017) 40(2) Dublin University Law Journal, 147–170.

[15] See David Kenny's chapter in this book, Ch 11, for a nuanced analysis of the role of the executive in triggering and structuring the referendum process.

[16] See Hilary Hogan's chapter in this book, Ch 10, which emphasises what she sees as the dominant and distorting role played by the executive in the 2004 citizenship referendum. As Eoin Daly has noted, this possibility is an inherent feature of any form of plebiscite-style mechanism designed to channel popular sovereignty: 'any such free-floating reserve of popular sovereignty represents a resource for instrumentalisation – and indeed manipulation – by the constituted organs of government': see E Daly, 'Popular Sovereignty after Brexit', draft paper, available at www.academia.edu/38507679/Popular_sovereignty_after_Brexit.

[17] See in general the excellent analysis in E Carolan, 'Constitutional Change Outside the Courts: Citizen Deliberation and Constitutional Narrative(s) in Ireland's Abortion Referendum' (2020) *Federal Law Review* 1–14. Note also Trueblood's argument that 'the more specific the propositions on the ballot, the more mediated

referendums are, in that more [preliminary] work has been done to construct political preferences, and the guidance given to representatives about how to execute those preferences'.: Trueblood, 'Are Referendums Directly Democratic?', 433.

Carolan puts it, 'the referendum is more likely to be the end point of a process of constitutional change rather than the vehicle or impetus for it'.[18] The Irish referendum process is not a popular initiative mechanism and should not be confused for one.

However, despite all these mediating factors, referendum votes remain moments of final decision, a 'yay or nay' that confirms or nullifies a project of constitutional change. Furthermore, this decision cannot be reviewed by courts – subject only to the hypothetical possibility of a referendum outcome being overturned on the basis of substantial distortion or manipulation of the voting process, with the courts having emphasised the highly demanding nature of this threshold for intervention and the 'sacrosanct' nature of any 'freely given' popular vote.[19] No 'basic structure' doctrine forms part of Irish law, or any constraining commitment to abiding by the dictates of human dignity: the will of the people as expressed through a referendum result does not have to conform to any overarching framework of normative values, or respect the pre-existing territorial integrity or institutional structure of the state.[20] The Oireachtas can always ask the people to reconsider their decision, as happened for example with the repeat referendum votes on the Nice and Lisbon Treaties.[21] But the option of a second refusal is always there: the people voting as a collective entity retain the power to grant or deny an exigent executive a sought-after constitutional amendment, no matter how intensively they are canvassed.[22]

It is in this sense that the people remain, as Eoin Daly neatly puts it in his chapter in this book, the unaccountable 'final arbiter of constitutional legislation'.[23] Popular sovereignty manifests itself in the collective exercise of this highly circumscribed yet unimpeachable 'final say'.

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[18] Carolan, ibid.

[19] *McKenna v An Taoiseach (No. 2)* [1995] 2 IR 10, at 41 (Hamilton CJ). See also *Hanafin v Minister for Environment* [1996] 2 IR 321; *McCrystal v Minister for Children* [2012] IESC 53; *Jordan v Minister for Children* [2015] IESC 33. See also Jennifer Kavanagh's chapter in this book, Ch 9, for a detailed analysis of this case-law.

[20] See Barrington J's remarks in *Riordan v An Taoiseach (No 2)* [1999] 4 IR 321, 330, that 'there can be no question of a constitutional amendment properly before the people and approved by them being itself unconstitutional'. As Maria Cahill incisively notes in her Introduction to the first part of this book, this reflects an embedded preference for maintaining 'procedural constitutional integrity' over 'substantive constitutional integrity': see further M. Cahill, 'Ambivalent Self-Determination: Freedom from and Deference to Foreign Laws', in Oxford Handbook of Irish Politics (forthcoming, 2021).

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[21] See the votes on the (rejected) 24th Amendment to the Constitution Bill 2001 and the (approved) 26th Amendment to the Constitution Bill 2002 (Treaty of Nice); and the rejected 28th Amendment of the Constitution Bill 2008 followed by the successful insertion of the 28th Amendment approving ratification of the Treaty of Lisbon in 2009.

[22] Indeed, as David Kenny notes in Ch 11 of this book with particular reference to the 2011 referendum on the inquiry powers of Oireachtas committees and the 2013 referendum on Seanad abolition, Irish 'referendum culture' has come to be characterised by a degree of popular scepticism about government proposals and the intentions underlying them.

[23] See Daly chapter in this book, Ch 4.

Having said that, the existence of this power would not be of much importance if the referendum mechanism was not regularly utilised to decide significant issues. For example, in another concession to popular sovereignty, Article 27 of the *Bunreacht* makes provision for the majority of the members of Seanad Éireann and not less than one-third of the members of Dáil Éireann to petition the President to refer a Bill passed by the Dáil over the objections of the Seanad to a popular referendum, if certain conditions are met.[24] But the in-built government control of the Seanad has turned this provision into a dead letter. It is possible to imagine a counter-factual constitutional history of post-1937 Ireland, where a similar fate befell the referendum provisions of Articles 46 and 47. For example, if the Irish courts had treated the fundamental rights and international relations provisions of the *Bunreacht* as amounting to little more than aspirational and unenforceable political guidelines,[25] or if successive governments had steered away from triggering the referendum process in attempting to achieve their policy goals,[26] it might have become a vestigial organ of the Constitution.

Indeed, as noted by Gavin Barrett in his important contribution to this book, the referendum mechanism was rarely invoked during the first few decades of the *Bunreacht'*s existence:

[a] period of almost 35 years elapsed after the successful (pre-Second World War) adoption of the Constitution itself in 1937 and its first successful (post-Apollo XVI and post-Beatles) amendment by referendum in 1972 (which itself was only the fourth ever attempt to amend the Constitution by referendum).

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But, even within this relatively fallow period, the referendum mechanism proved to be important. Two of the unsuccessful referendums in this period featured attempts to change the voting system from STV to first past the post.[27] The negative outcomes of both of these referendums locked in STV as the Irish voting system of choice, ensuring that the Irish electoral system would remain unusually responsive to popular voting preferences (as again discussed further below).

In any case, as Barrett sets out in detail in his chapter, the pre-1972 trickle subsequently turned into a flood. Thirty-eight referendums have been held in the intervening four and a half decades, resulting in multiple amendments being made to the constitutional text. Some have involved issues

[24] These include the requirement set out in Article 27.5.1° that the President decides that the referred Bill 'contains a proposal of such national importance that the will of the people thereon ought to be ascertained'.

[25] For example, had the Supreme Court decided *Crotty v An Taoiseach* [1987] IR 713 differently, and adopted the analysis of Art. 29.4 put forward by Finlay CJ and Griffin J in dissent, the significance of the referendum process would have been considerably diminished. For a media take that rightfully identifies *Crotty* as a major hinge point in this regard, see V Martin, 'A Quarter of a Century of Voter Power' *The Irish Times*, 21 May 2010.

[26] In Australia, the strikingly low success rate of referendums has disincentivised politicians from attempting constitutional reform: see in general P Kildea, 'The Constitutional and Regulatory Dimensions of Plebiscites in Australia', (2016) 27 Public Law Review 290.

[27] See the 1959 vote to reject the Third Amendment of the Constitution Bill 1958, and the 1968 vote to reject the Fourth Amendment of the Constitution Bill 1968.

of low political salience, or technical questions of institutional reform. Others have involved high-profile and divisive issues such as divorce, same-sex marriage and abortion access.

The combined impact of these popular votes has been considerable. In particular, the referendum mechanism has been used to obtain popular endorsement of far-reaching changes to the constitutional text, which are intimately bound up with Ireland's extended transition from its Catholic nationalist past to its secular–liberal present,[28] and its gradual integration into transnational treaty governance frameworks such as the European Union (EU) and the Belfast Agreement.

The referendum mechanism has thus become a vehicle for determining key issues related to the social and political transformation of the state, including Ireland's participation in wider processes of Europeanisation and globalisation. As Maria Cahill notes in her introduction to Part 1 of this book, the public at large has been given the opportunity to participate and vote in referendums determining 'key strategic questions within our constitutional legal order'.[29] Each stage of treaty-driven EU integration, the liberalisation of abortion law, legal recognition of same-sex marriages, the decision to drop the territorial claim to Northern Ireland and instead approve the Belfast Agreement – all these important moments of constitutional evolution, both from a symbolic and a substantive perspective, have been approved by popular vote.

Furthermore, the referendum mechanism has functioned in a way that has ensured general acceptance of its legitimacy as a means of resolving these divisive issues. As Kenny notes, the referendum mechanism tends to be viewed as deliberative, fair and inclusive. It is widely regarded as enabling a genuine process of informed popular debate to take place, and as generating a decisive outcome which represents the authentic, reasoned view of the Irish public deliberating as a collective entity.[30]

This is not to say that the conduct or outcomes of particular referendums have not been bitterly resented. Hogan's criticisms of the 2004 citizenship referendum in this book are striking, and the abortion and divorce referendums of the 1980s left deep scars in the Irish body politic. But, in general, the legitimacy of the referendum mechanism, and its status as an authentic channel for the expression of the popular will, is almost universally acknowledged. As a result, it has consistently attracted 'loser consent' – which has been a significant issue with referendums in other states, such as the 2016 Brexit referendum in the United Kingdom (UK), and is even asserted by some commentators to be an inherent flaw of such a mechanism.[31]

Recent innovations may have helped to further reinforce the perceived legitimacy of this mechanism. A Referendum Commission was established under the *Referendum Acts of 1998 and 2001* to promote public awareness of the issues being put to the vote. More innovatively, deliberative mini-publics had been established over the last decade to debate contested

[28] CO'Mahony, 'Marriage Equality in the United States and Ireland: How History Shaped the Future' (2017) 2 *University of Illinois Law Review* 681–711, 699.

[29] M. Cahill, Ch 1.

[30] Kenny, Ch 11.

[31] See e.g., Trueblood's analysis of the problem of 'loser consent': Trueblood, 'Are Referendums Directly Democratic?', n. 12 above, at 434.

constitutional issues – namely the Convention on the Constitution which operated from 2012 to 2016, and the Citizens' Assembly which operated between 2016 and 2018.

The functioning of the deliberative mini-publics has in particular attracted plenty of acclaim. Their conclusions help build consensus around constitutional reform proposals that attract support within the particular cross-section of the citizenry that make up these mini-publics, and thus they arguably contribute to a wider deliberative focus in constitutional debate.[32] Having said that, as Doyle and Walsh argue in this book, the precise role and function of the deliberative mini-publics, and the extent to which their conclusions impact on wider public debate, is still unclear.[33] Their recommendations need to attract the support of a legislative majority to become viable referendum proposals – and thus in effect need executive buy-in.[34] But their establishment seems at least to have polished the image of the referendum mechanism as a positive, genuinely deliberative, democratic feature of the Irish constitutional order. Indeed, it is now possible to detect a widespread appetite for more use to be made of the referendum process in the future, at least among civil society and the political class – as indicated by the public debate as to whether additional constitutional reforms relating to issues such as gender equality could be put to the popular vote in the future.[35]

The constitutional referendum mechanism has thus enabled regular popular participation in shaping the Irish constitutional order. It remains a highly mediated process. However, largely because of the way in which it has become the vehicle for the democratic determination of certain highly significant issues (in both symbolic and practical terms), the mechanism has become an integral feature of Irish constitutional governance. As a result, the paramount status assigned to popular sovereignty in the 1937 Constitution's scheme of values has not become a wholly fossiled artefact – unlike the case with many other national constitutional orders.[36]

Popular sovereignty and the constitutional imaginary

However, while referendum votes remain the most direct expression of popular sovereignty within the Irish constitutional order, its influence is not just confined to the functioning of this particular mechanism. The idea that popular sovereignty constitutes the foundation of the Irish constitutional order, and should remain active within its functioning, has an indirect impact on other features of

[32] DM Farrell, J Suiter and C Harris, '"Systematizing" Constitutional Deliberation: The 2016–18 Citizens' Assembly in Ireland' (2019) 34(1) *Irish Political Studies* 113–123; O Doyle and R Walsh, 'Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy' *Working Paper*, published 22 June 2020, available at SSRN: https://ssrn.com/abstract=3633356 or http://dx.doi.org/10.2139/ssrn.3633356.

[33] Doyle and Walsh, Ch 12.

[34] O Doyle and R Walsh, 'Deliberation in Constitutional Amendment: Reappraising Ireland's Deliberative Mini-Publics' (2020) *European Constitutional Law Review* 1–26.

[35] See e.g., M Hilliard, 'Parts of Constitution "Sexist and Backward", Varadkar Says' *Irish Times*, 10 September 2018, available at www.irishtimes.com/news/ireland/irish-news/parts-of-constitution-sexist-and-backward-varadkar-says-1.3624159

[36] See the discussion below.

Irish law and politics – and the Irish constitutional imaginary more generally.[37] In particular, the idea that it represents the highest expression of democratic will-formation has exerted a powerful influence over (i) the constitutional jurisprudence of the Irish courts and (ii) attitudes towards the representative/political organs of the state – the legislature and executive.

Popular sovereignty and constitutional doctrine

To start with, popular sovereignty features as the ultimate trump card within the constitutional case-law of the Irish courts. The Supreme Court has been at pains to emphasise how all power exercised under the *Bunreacht* is derived from the will of the people and makes regular reference to this principle in interpreting the constitutional text. Thus, in *Hanafin v Minister of the Environment* Denham J described the Constitution as 'grounded in the will of the people', while O'Flaherty J referred to the 'sanctity of the role of the people in our constitutional scheme of things'.[38] Indeed, Jacobsohn has commented a little caustically on the high 'decibel level' and 'quasi-religious intonation' with which Irish judges have proclaimed 'their complete devotion to the demos'.[39]

But this veneration of popular sovereignty is not just rhetorical. In interpreting the text of the 1937 Constitution, the Irish courts have concluded that the exercise of public power by the constituted organs of state must align with the primacy assigned to popular sovereignty as the foundation stone of the constitutional order. Thus, in *Byrne v Ireland*, the Court concluded that powers derived from the royal prerogative had not been carried over into the post-1937 constitutional dispensation, because the concept of the prerogative – and its royal origins – was deemed to be incompatible with the principle of popular sovereignty.[40] In *Crotty v An Taoiseach*, the majority of the Court concluded that the executive's power to conduct foreign relations under Article 29(4) of the *Bunreacht* could not be used in a way which resulted in a 'diminution of Ireland's sovereignty which is declared in unqualified terms in the Irish Constitution' (Henchy J): such an erosion of state sovereignty was only permissible if explicitly endorsed in a referendum by the Irish people, the ultimate arbiters of the constitutionality of any form of state action.[41] Similarly, in the *Regulation of Information Bill* case, the Supreme Court rejected the argument that the power of the people to amend the Constitution was limited by the requirements of natural law.[42]

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[37] For an analysis of the concept of the 'constitutional imaginary', see G Torres and L Guinier, 'The Constitutional Imaginary: Just Stories about We the People' (2012) 71(4) *Maryland L. Rev.* 1052–1072.

[38] [1996] 2 I.L.R.M. 61 (12 June 1996).

[39] GJ Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4(3) *International Journal of Constitutional Law* 460–487 at 469.

[40] [1972] I.R. 241.

[41] *Crotty v An Taoiseach* [1987] IR 713, now best read together with *Pringle v Government of Ireland* [2012] IESC 47. As Cahill notes in her introduction to the first part of this book, *Crotty* highlights a telling feature of the Irish constitutional system: 'the Irish people can choose in referendum to divest the state of any and, in principle, all of its powers and competences, since there are no limits on the power of amendment. State sovereignty has effectively completely dissolved into popular sovereignty and popular sovereignty reigns supreme'.

[42] *In re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 I.R. 1.

The Irish courts thus treat popular sovereignty as the central structuring principle of the constitutional order. It enjoys a similar status as for example human dignity does within the case-law of the German Constitutional Court: the powers and functioning of all constituted organs of the state must respect the primacy of the popular will, rather than any particular concept of human rights or territorial sovereignty or state integrity. The will of the people is conceptualised as the supreme good, rather than any specific substantive set of values: in a modification to the classic Ciceroan formula, *vox populi* has displaced *salus populi* as the *suprema lex* of the Irish constitutional order.

In practice, the primacy thus accorded to popular sovereignty mainly impacts on the case-law of the Irish courts relating to the referendum mechanism: it is cited as a legal justification for judicial non-interference with successive referendum votes, or (as in *Crotty*) for the ring-fencing of issues that should be left to be determined by the popular vote. But the *Byrne* decision highlights its wider applicability. Even historically well-established aspects of separation of powers must yield to the primacy of popular sovereignty. More generally, so too must the functioning of the elected branches of the state. The Oireachtas and (less directly) the executive may indirectly represent the people: however, their authority is subordinate to the popular will, as directly expressed through the original and amended constitutional text.

In other words, the primacy of popular sovereignty establishes what Greene has described as the 'weaker legitimacy' of the constituted organs of the state 'vis-à-vis the People'.[43] This 'weaker legitimacy' has regularly been cited to justify the extensive judicial review powers of the Irish courts. More generally, it forms the basis for a wider concept of the constitutional order, which sees the functioning of the constituted organs of state as only forming part of a wider structure of democratic self-governance.

One particular judicial opinion is especially worthy of note in this regard. In *Doherty v Referendum Commission*, Mr Justice Hogan – the *primus inter pares* commentator on Irish constitutional law, in both his academic and judicial capacities – waxed lyrical about the overriding importance of popular sovereignty to the Irish constitutional order:

The Constitution envisaged a plebiscitary as well as a parliamentary democracy and, in doing so, it has created a State which can demonstrate – in both word and deed – that it is a true democracy worthy of the name. By providing in Article 6(1) for popular sovereignty in which the People would 'in final appeal … decide all questions of national policy', it envisaged a society in which all citizens would be called upon from time to time to make critical decisions regarding their future, the future of their neighbourhood and, ultimately, the future of their country.[44]

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Hogan J went on to emphasise that the

[43] A Greene, 'Parliamentary Sovereignty and the Locus of Constituent Power in the United Kingdom' (2021) International Journal of Constitutional Law, 1-35.

[44] *Doherty v Referendum Commission* [2012] IEHC 211, at para 21.

concept of popular sovereignty … which is reflected in Article 5, Article 6, Article 46 and Article 47 of the Constitution … has become our own constitutional cornerstone. It is that very cornerstone on which the entire referendum edifice is constructed.[45]

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Within these few short paragraphs, Hogan J articulates an entire constitutional philosophy. Popular sovereignty is conceptualised as not just the originating source of constitutional authority but also as a continuing constitutive force, with citizens periodically called upon via the referendum process to participate collectively in the shaping of the fundamental norms of their shared society. This 'plebiscitary' form of democracy – a concept which, as discussed below, is viewed as something of a contradiction in terms by certain influential strands of liberal constitutional thought – is described as co-existing with 'parliamentary democracy' within the framework of the Irish constitutional order. Most remarkably, to cap off his analysis, Hogan J suggests this 'plebiscitary' dimension is an integral part of Ireland's claim to be a 'true democracy worthy of the name'.

What is particularly significant about Hogan J's analysis is how popular sovereignty is conceptualised as giving Irish constitutional democracy an extra dimension, which the functioning of the institutions of 'parliamentary democracy' – i.e., the constituted organs of the state – cannot replicate by themselves. As the rest of the judgment makes clear, this extra dimension must be respected by the various organs of the state in exercising their constitutionally derived powers and functions – and defended and vindicated, if necessary, by the courts in their capacity as constitutional guardians.

But, furthermore, it also suggests that the institutional mechanisms of Irish parliamentary democracy have certain inherent limits, i.e., that their representative capacity is insufficient or unsuitable to serve as a perfect mirror for the popular will. Hence Hogan J's emphasis on the referendum mechanism supplementing parliamentary democracy in order to achieve 'true democracy': the people are conceptualised as capable of engaging in an authentic, collective participative process of democratic will-formation through the referendum process, which cannot be fully duplicated through the workings of the established institutional organs of the state.

i***Popular sovereignty and representative government***

This view of the limited representative capacity of the constituted organs of the state is deeply rooted in Irish constitutional thought. Its roots lie deep in the Irish republican embrace of a Rousseauian concept of the popular will, as mentioned at the beginning of this chapter, and its hostility to the legitimacy claims of the Westminster Parliament. At the point of independence, these tendencies translated over into a desire to establish a more immediate and permeable relationship between the people and the representative institutions of the new state. This gave rise to the popular referendum and initiative mechanisms set out in the 1922 Constitution, as discussed – and ultimately to the current referendum mechanism. But it also carried over into a persisting scepticism about the capacity of even the legislative branch of government to step into the sovereign shoes of the people and adequately reflect the popular will – a scepticism amplified in certain republican

[45] Ibid., at para 23. Hogan J also invoked a remarkable roll-call of the shapers of the Irish constitutional order, in describing this as the 'theory of popular sovereignty for which Griffith argued and Pearse fought and Collins died and de Valera spoke and Hearne drafted and Henchy wrote and Walsh decided'.

circles by the way in which the legislative amendment power set out in Article 50 of the Free State Constitution was used to hollow out its popular sovereignist dimension.[46]

By extension, this scepticism has encouraged a search for ways of minimising this gap between the people and their representative institutions – to establish a more 'personal, actual contact between the people and the laws by which they are governed', to use Kevin O'Higgins's words cited above, in addition to the functioning of the referendum mechanism.

This has influenced how both Houses of the Oireachtas are elected. Electoral systems are often left out of constitutional analysis, or else treated as a plumbing issue. But the choice and design of such systems can convey interesting information about the values and priorities of a constitutional system. Ireland is no exception in this respect. The very different ways in which the Dáil and Seanad are elected both reflect an ambition to ensure that the composition of the legislature reflects the complex diversity of public opinion – and thus, by extension, to bring their subsequent functioning closer to the process of communal will-formation associated with the ideal of popular sovereignty.

The use of proportional representation, in the form of the -single transferable vote (PR-STV), to elect the Dáil dates back to the *Government of Ireland Act 1920* and has been subsequently enshrined in both the 1922 and 1937 Constitutions – with two attempts to change it by referendum having been defeated, as discussed above. Its use is generally perceived to be a strength of Irish democracy, in part because of the close match it generates between votes cast and seat share.[47] In other words, a key facet of STV's appeal is that it does a better job in ensuring that the composition of the legislature reflects the electorate's multi-faceted electoral preferences than many other electoral systems (while retaining another factor that appeals to Irish voters: a strong local constituency link). This particular strength of STV – its superior ability to reflect public opinion in all its complexity – is viewed as outweighing its potential downsides, such as its tendency to generate fissiparous legislatures where governments can lack stable majorities.[48]

A similar desire to reflect the diversity of popular opinion was behind the attempt in the 1937 Constitution to establish the Seanad on corporativist lines. Senators were supposed to be elected by panels designed to represent specific segments of the public, as defined by their social roles. Its composition would thus reflect the social organisation of the general public and supplement the more directly representational composition of the Dáil.[49] This ambition did not succeed. Political party capture of the means of election has generated the current half-hearted simulacrum of a

[46] See Laura Cahillane, Ch 2; and also *State (Ryan) v Lennon* [1935] IR 170, as discussed by Cahillane.

[47] See in general R Sinnott, 'The Electoral System' in J Coakley and M Gallagher (eds), *Politics in the Republic of Ireland* (5th ed.) (Routledge 2010), 111–136.

[48] A proposal to replace PR-STV was rejected by the Convention on the Constitution in 2013, reflecting wider public preferences in favour of the status quo: see DM Farrell, J Suiter and C Harris, 'The Challenge of Reforming a 'Voter-Friendly' Electoral System: The Debates Over Ireland's Single Transferable Vote' (2017) 32(2) Irish Political Studies 293–310.

[49] J McGowan-Smyth, 'The Irish Senate: The Case for Seanad Éireann' (2000) 37(2) Representation 147–153.

second chamber.[50] Furthermore, this failure is generally not lamented. Corporativist thought has fallen radically out of fashion. However, the failure of the 2013 referendum on Seanad abolition, despite strong support for the proposal by the government of the day, shows a clear public desire to keep the second chamber as a check on the executive and its Dáil majority.[51] Despite STV, and its status as the primary representative channel for the views of the public, a certain ingrained suspicion of the political branches of the state remains. The Dáil's functioning – and by extension the functioning of Irish 'parliamentary democracy' more generally – is still not regarded as a full and complete expression of 'true democracy' in action.

The perception that more needs to be done to minimise this gap between 'parliamentary democracy' and the popular will is also driving a recent extension of the role of deliberative mini-publics. Having begun life as a mechanism for informing debate on constitutional reform, these mechanisms are now being used to debate a range of other issues, including potential legislative and policy reform. Thus, both the Citizens' Assembly established between 2016–2018and the Citizens' Assembly on Gender Equality established in 2020 have been given functions that extend beyond a narrow focus on constitutional questions.[52]

Again, the exact status and purpose of these mini-publics is somewhat ambiguous. They do not represent the general public, unlike the elected members of the Oireachtas. Nor can they adequately serve as an exact proxy for the public at large, given their small size, partially selective composition and the controlled circumstances in which they deliberate.[53] But, despite this ambiguity, their establishment has been widely welcomed, precisely because it offers a way of reducing the gap between the quotidian functioning of Irish parliamentary democracy and the views and attitudes of the people at large – and ultimately, the primary democratic ideal of the Irish constitutional order, namely popular sovereignty.

Popular sovereignty and the Irish constitutional settlement

Thus, in general, popular sovereignty is not just viewed as the originating source of the legitimacy of the Irish constitutional order. It plays a continuing direct role in constitutional governance via the referendum mechanism. Furthermore, in legal doctrine, it has been elevated to the status of ultimate controlling value of the Irish constitutional order – while mechanisms such as PR-STV and the citizens' assemblies serve to bridge the gap between this democratic ideal and the prosaic functioning of the representative institutions of parliamentary democracy.

Few if any voices challenge this primacy accorded to popular sovereignty in the Irish constitutional imaginary. Eoin Daly and Tom Hickey have mapped out an alternative understanding of how the principle of popular self-government could be conceptualised within the Irish constitutional order, drawing upon neo-republican and political constitutionalist theory while critiquing what they see as

[50] The Taoiseach's ability under Article 18 of the 1937 Constitution to nominate 11 Senators more or less assures the government of a majority.

[51] M MacCarthaigh and S Martin, 'Bicameralism in the Republic of Ireland: The Seanad Abolition Referendum' (2015) 30(1) Irish Political Studies 121–131.

[52] Farrell et al., '"Systematizing" Constitutional Deliberation', at n. 32 above.

[53] Carolan, 'Constitutional Change Outside the Courts', at n. 17 above.

the limits of the conventional orthodoxy.[54] In particular, Tom Hickey has criticised how this orthodoxy is built around an implausible image of the Irish people as a 'single agent, with a collective will'.[55] In his view, this assumes that the people share a 'thick, value-laden identity that renders [them] antecedent and superior to the Constitution', which glosses over the reality that 'the people are too vast to ever come together as one in any concrete sense'. In contrast, he argues that the constitutional text and existing case-law can be re-interpreted as supporting a different understanding of the ideal of popular sovereignty, one which views the people as 'immanent within, rather than as antecedent to, the democratic constitutional system'.[56] This line of analysis makes the case for a fundamental shift in thinking as to the locus of democratic self-governance in the Irish constitutional system, from the people conceptualised as a unitary, constituting political entity to the incremental and detailed functioning of the constituted organs of parliamentary democracy. But, for now at least, it remains very much a minority report. Hogan J's views in *Doherty* encapsulate constitutional orthodoxy, as it has persisted going back to the independence of the state.

Indeed, if anything, this orthodoxy has strengthened in recent years. The perceived success of the referendum mechanism in resolving highly contested social, moral and political issues, combined with the innovative use of mini-publics in tandem with PR-STV, has been credited with helping to engender a high degree of trust in Irish democracy. In particular, the functioning of the referendum mechanism is viewed as reinforcing a popular sense of participation in, and ownership of, the democratic process.

Furthermore, numerous commentators have attributed what they see as Ireland's relative immunity from divisive 'populist' politics to these persisting traces of popular sovereignty in its constitutional governance structure. Thus, for example, Simon Hix has argued that the 'Irish system of "supplemented democracy" (through STV, referendums, and deliberative mini-publics) has allowed for a highly responsive and representative polity' – which seems to have generated an 'apparent immunity to populism', despite the presence of some of the economic, cultural and socio-demographic factors that seem to have played a role in its emergence in other European states.[57] In this book, Cahill, Barrett and Kenny all make related arguments, suggesting that the way in which referendum votes have determined issues such as deeper European integration or same-sex marriage makes it difficult to frame these transformative processes in hostile populist terms, i.e., as involving elite imposition upon a relatively powerless public. As Cahill elegantly puts it, 'the lasting impression is that those decisions have come about as a direct result of our decisive democratic participation'.[58]

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[54] E Daly and T Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press 2015).

[55] Hickey, 'Popular Sovereignty', n. 14 above.

[56] Hickey cites Lars Vinx to the effect that 'there can be no people prior to or apart from constitutional law, and all talk of the people as the historical author of the constitution is taken to be a fiction without normative relevance': L Vinx, 'The Incoherence of Strong Popular Sovereignty' (2013) 11(1) International Journal of Constitutional Law 101–124, 102.

[57] S. Hix, 'Remaking Democracy: Ireland as a Role-Model', The 2019 Peter Mair Lecture (2020) Irish Political Studies. doi: 10.1080/07907184.2020.1721085.

[58] See the Introduction to Part 1 of this book.

In other words, the elements of popular sovereignty that remain active within the Irish constitutional order are widely regarded as deepening Irish democratic life. By supplementing the functioning of 'parliamentary democracy', they are credited with reducing a sense of voter disconnection from the levers of power. This chimes with Hogan J's views in *Doherty*, and Irish constitutional orthodoxy more generally. The persisting presence of popular sovereignty in the functioning of the Irish constitutional order, in direct or indirect form, is regarded as generating a 'true' democratic order – one in which, to return to de Valera's formulation, the people remain the ultimate masters of their own (constitutional) house.

This also feeds into a wider sense that the Irish constitutional order has achieved a workable balance between the turbulent energies of the popular will, on the one hand, and the quotidian functioning of everyday parliamentary democracy on the other. This view has historically pervaded much of Irish legal and political commentary – and, after the rocky years of the 2008 economic crisis and the ensuing troika bailout, seems to have returned to fashion.[59] It is reflected throughout much of this book, and in discussions of Irish constitutionalism more generally. By and large, the latter is regarded as a success story: it is viewed as having delivered stable, rights-protective, rule of law-respecting constitutional governance, while ensuring that the population at large play a decisive and continuing role in shaping its future evolution.

Irish popular sovereignty from a comparative perspective

All of this stands in interesting contrast to the sense of constitutional 'unsettlement' that many other liberal democratic states are experiencing.[60] Across the world, multiple different states are experiencing constitutional turmoil. Deep fracture-lines have opened up even within historically well-established constitutional systems, such as those of the United States and the UK – while the 'rule of law crisis' ongoing in states like Poland and Hungary, and the 'democracy decay' experienced in Brazil, India and other countries, is fuelling a mini-industry of concerned academic commentary. Different dynamics are fuelling this turmoil in different states. However, a common factor is that much of this 'unsettlement' is being generated by the perception that liberal constitutionalist frameworks unduly restrict majoritarian expressions of the popular will, or otherwise limit democratic contestation in unhealthy and unjustifiable ways. This is often the focus of 'populist' attacks on the status quo. But it even surfaces as an issue when constitutional constraints operate to disadvantage political parties campaigning on explicitly anti-populist platforms, as is arguably the case with the Democratic Party in the United Staes at the time of writing (November 2020).

This turmoil stands in stark contrast to the comparative constitutional serenity of the Irish context – and in particular to the widespread view that it strikes a good balance between respecting popular sovereignty and facilitating effective constitutional governance. Indeed, in comparison to many other states, the Irish constitutional framework appears highly 'settled', especially when it comes to accommodating expressions of the popular will. Given that, are there comparative lessons to be learnt from the Irish experience?

In asking this question, it is worth noting initially that the status accorded to popular sovereignty within the Irish constitutional order, and the continuing role it plays in constitutional governance through the referendum mechanism, is from a comparative perspective a relatively unorthodox state of affairs. In many other constitutional orders, the 'people' conceptualised as a unitary political

[59] For an excellent analysis of these dynamics, see Kissane, *New Beginnings*, n. 3 above.

[60] N Walker, 'Our Constitutional Unsettlement' (2014) Public Law 529–548.

entity play no further role once the constituted form of the state is up and running.[61] Instead, a 'relational' concept of popular sovereignty is embraced, as Girard puts it in his chapter in this book.[62] As Martin Loughlin puts it, in passages cited by Girard, 'political power is generated from the particular relationship that evolves between the sovereign and subject, government and citizens',[63] and it 'becomes public power only when assuming an institutional form' in the form of a representative body or some other constituted organ of the state.[64]

As a result, the people as a collective entity generally play little if any active role in constitutional governance, beyond their role in choosing elected representatives and thus in periodically creating and dismantling governments.[65] Richard Tuck has described modern constitutionalism as predicated on the figure of the 'sleeping sovereign': the people, acting as the collective source of constituent power, establish a constituted regime of self-government and then go into deep hibernation.[66] Even the constitutional amendment power is usually exercised through the legislative branch of government, and is often subject to judicial control via 'basic structure' doctrines.[67] Referendums, where used, are primarily deployed by political elites on an *ad hoc* basis to poll public opinion on controversial constitutional reforms: their formal legal status is often uncertain, and their outcomes (when held) are often experienced as an intrusion or destabilisation of the established constitutional order.[68]

The largely unquestioned and unqualified veneration of popular sovereignty within Irish constitutional discourse is thus something of an outlier – within European constitutional orders, at

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[61] For a useful analysis of the relationship between the concepts of popular sovereignty and constituent power, see A Kalyvas, 'Popular Sovereignty, Democracy and the Constituent Power' (2005) 12 Constellations 223; also, S Tierney, 'Constitutional Referendums: A Theoretical Enquiry' (2009) 72(3) Modern Law Review 360–383, especially at 365–366.

[62] Girard, Ch 5.

[63] M Loughlin, *The Idea of Public Law* (Oxford University Press 2003), 81.

[64] Ibid. at 78. Lefort's famous description of sovereignty as a 'empty throne', with ruling authority within liberal democratic societies being exercised by temporary and shifting power networks comprised of a diverse range of political and legal actors, is relevant here: C Lefort, *Democracy and Political Theory* (University of Minnesota Press 1989), 150.

[65] A Somek, 'Any Further Bids on Popular Sovereignty?' keynote address at the *Transnational Law Institute Conference*, 'Transnational Sovereignities: Constellations, Processes, Contestations', King's College London 2016, available at www.academia.edu/24523920/Any_Further_Bids_on_Popular_Sovereignty. See also A Somek and M Wilkinson, 'Unpopular Sovereignty?' (2020) 83(5) *Modern L. Rev.* 955–978.

[66] R Tuck, *The Sleeping Sovereign*: *The Invention of Modern Democracy* (Cambridge University Press 2016).

[67] GJ Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4(3) International Journal of Constitutional Law 460–487; Y. Roznai, Unconstitutional Constitutional Amendments – The Limits of Amendment Powers (Oxford University Press, 2017). Click here to enter text.

[68] E Daly, 'Constitutionalism and Crisis Narratives in Post-Brexit Politics' (2020) 68(4) Political Studies 895–915.

least. In general, the contemporary constitutional imaginary views popular sovereignty with a certain degree of suspicion. The popular will is treated as something inherently undefinable, intangible and/or potentially uncontrollable, which is best channelled through the mediated, indirect and constrained structures of representative politics rather than being set loose via plebiscites and other forms of direct democracy.[69]

This reflects liberal scepticism about whether the sum of individual citizens that make up the 'people' are capable of exercising meaningful political agency as a collective entity[70] – and also of the authoritarian and exclusionary potential of appeals to a Rousseauian-style 'general will'.[71] It also reflects neo-republican concerns about the Schmittian-style 'thick' identity that tends to be assigned to the popular will when defined in such unitary and univocal terms; the 'winner takes all' political narratives that are often attached to its expression through plebiscitary mechanisms such as the referendum; and the way that such expressions of the 'will of the people' can be mobilised by political forces and used as a cudgel against opponents – i.e., some of the type of concerns expressed by Hickey in his critique of how popular sovereignty is currently conceptualised within the Irish constitutional imaginary.[72]

This scepticism colours attitudes to referendums, popular initiatives and other plebiscitary mechanisms, which are widely regarded as lacking in deliberative content and ripe for political manipulation.[73] It also encourages the de facto marginalisation of popular sovereignty within constitutional hierarchy of values, and the elevation of principles such as human dignity to fill its place – as well as the development of the abovementioned 'basic structure' doctrines and other constitutional tools designed to limit the final and determinative nature of popular voting. Furthermore, it reinforces the tendency within much of contemporary liberal constitutionalism for national democratic determinations to be limited by a range of transnational standards – and for national electoral systems to be structured in ways that favour stability and the mediating influence of established political party structures, rather than amplifying the protean flux of public opinion.[74]

This reflexive suspicion of the unruly and protean nature of the popular will, and the way it has influenced constitutional design, has long been the subject of pointed academic critique. Unger has memorably described 'fear of popular action' as the 'dirty little secret' of contemporary

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[69] C O'Cinneide, "The People Are the Masters": The Paradox of Constitutionalism and the Uncertain Status of Popular Sovereignty within the Irish Constitutional Order' (2012) 48 *Irish Jurist* 249–274; Somek and Wilkinson, 'Unpopular Sovereignty', at n. 65 above.

[70] Kelsen argued that the people to whom constitutional authorship was conventionally attributed were '[s]plit by national, religious and economic conflicts … more a bundle of groups than a coherent mass of one and the same aggregate state': H Kelsen, 'On the Essence and Value of Democracy' [1927] in A Jacobsen and B Schlink (eds), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) 89. Click here to enter text.

[71] See e.g., A Weale, *The Will of the People: A Modern Myth* (Polity Press 2018).

[72] Hickey, 'Popular Sovereignty', at n. 14 above. See also Trueblood, 'Are Referendums Directly Democratic?', at n. 12 above.

[73] See further Kenny, Ch 11.

[74] Somek and Wilkinson, 'Unpopular Sovereignty?', at n. 65 above; P Rosanvallon, *Good Government: Democracy Beyond Elections* (Harvard University Press 2018).

constitutionalism.[75] Sheldon Wolin famously lamented how the opportunities for ordinary citizens to join together in a common political purpose had been minimalised in contemporary 'fugitive democracies'.[76] Somek argues that the link between popular sovereignty and collective political action has been largely severed in contemporary European democracies, reducing the former to the status of an 'ethereal' concept lacking in any real substance.[77] Colón-Ríos makes the case that constitutionalism now often functions so as to impose limits on democratic participation in the name of 'elite-favouring values', thus dulling the emancipatory potential of the ideal of popular sovereignty.[78]

Recently, such academic criticisms – extensively articulated in scholarly journals, with little impact – have been joined by strong political attacks on the perceived constraining impact of contemporary constitutionalism. These attacks have predominantly come from the 'populist' right, who have been eager to appeal to the concept of a thwarted 'will of the people' held back by the machinations of legal and political elites. In this respect, they have often served as exemplars of the abovementioned liberal/neo-republican fears discussed above. However, these attacks have nevertheless struck a nerve. As Neil Walker has argued, by focusing on the neglect of the 'unitary collective particular' in modern constitutionalism, they tap into anxieties felt by many who may be otherwise 'critical of the inflated narratives and methods of populism' – including a concern that inadequate weight has been attached to the collective dimension of democratic self-government.[79] For example, these concerns were pivotal in the Brexit referendum vote in the UK in 2016, an event often too readily analysed in populist terms.

As a consequence, the current constitutional unsettlement has brought the concept of popular sovereignty back into the centre of political and legal debate. It has also encouraged new interest in the possibility of giving the people, conceived in collective/unitary terms, a greater role in constitutional governance – while, in so doing, avoiding the pitfalls associated with 'will of the people' rhetoric.

As such, the Irish experience, with its direct and indirect channelling of popular sovereignty forming an integral part of a broadly stable constitutional order, fits squarely into this frame of analysis. It thus inevitably has become a comparative point of reference. Indeed, in some quarters, it has been described a 'role-model' for how its 'supplemental' channels of popular self-government have deepened its democratic culture, while avoiding the traps of populism – an analysis that chimes with Hogan J's views in *Doherty*.[80]

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[75] R Unger, *What Should Legal Analysis Become?* (Verso 1996), 72–73.

[76] S Wolin, 'Fugitive Democracy' (1994) 1(1) Constellations 11–25.

[77] A Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014).

[78] J Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and Constituent Power* (Routledge 2012).

[79] N Walker, 'Populism and Constitutional Tension' (2019) 17(2) International Journal of Constitutional Law, 515–535. See also Blokker's incisive argument that the 'political imaginary' of contemporary democracy has been neglected in favour of its 'constitutional imaginary': P Blokker, 'Political and Constitutional Imaginaries' in S Adams and J Smith (eds), *Social Imaginaries: Critical Interventions in a Paradigm-in-the-Making* (Rowman & Littlefield 2019) 1–38.

[80] See e.g., Hix, 'Remaking Democracy: Ireland as a Role-Model', n. 57 above.

There is plenty to be said for this analysis. By giving the general public the 'final say' over any form of constitutional amendment, the referendum mechanism ensures popular participation in the shaping of the Irish constitutional order. Furthermore, as discussed above, the way this mechanism has been used to decide potentially divisive issues of European integration and social transformation has given it real bite – and ensured public ownership of the outcomes.

More generally, the sacrosanct status of popular sovereignty, and the perceived need to close the gap between the people and the constituted organs of the state, has had a democratising impact. The use of deliberative mini-publics has been innovative. The use of PR-STV ensures both a high degree of voter choice and a relative match between voter preferences and the composition of the Dáil – which, in tandem with the popularly approved continuing scrutiny role of the Seanad, arguably amplifies the democratic responsiveness of the legislative branch of government.[81] The primacy accorded to the popular will in constitutional case-law has stymied the development of 'basic structure' doctrines, and ensured that the constitutional ordering of the state remains permanently open to democratic contestation.

Furthermore, all this has been achieved without the Schmittian bugbear of the 'will of the people' lurching too frequently into sight. Irish political discourse remains largely free of the thick identity claims feared by Hickey and others – subject to the notable exception of the anti-immigrant discourse surrounding the 2004 referendum, as noted by Hogan and Kearney in their contributions to this book.

Having said all that, it would be too simple to present the Irish take on popular sovereignty as a model to be casually emulated elsewhere – or as a settled constitutional state of affairs, that can be unequivocally applauded without critical reservation. A number of important qualifiers have to be added to the picture just presented.

To start with, Ireland is not a wonderland of democratic experimentalism. As repeatedly emphasised above, the referendum mechanism remains highly mediated, and limited in scope: plenty of key political decisions, such as the acceptance of the 2011 troika bail-out package, never go near a popular vote. The ground-breaking experiments with deliberate mini-publics have also been limited in scope, and have generated mixed outcomes.[82] PR-STV may generate a Dáil broadly reflective of public attitudes, but that comes with a price – namely a tendency for the executive to dominate the chamber, often through controversial use of the 'money bill' rules and other strategies designed to control the business of the Dáil.[83] As Alex Leyden notes in his chapter in this book, the representative capacity of Irish local government remains highly circumscribed. Furthermore, the electoral success enjoyed by Sinn Féin running on a strong anti-establishment ticket in the February 2020 general election is a clear indication of wide dissatisfaction with the political status quo. That sense of dissatisfaction is generally not targeted at the constitutional order, as such. But it should be read as counselling against any undue complacency about democratic bona fides of the Irish constitution.

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[81] M Gallager, 'Ireland: The Discreet Charm of PR-STV' in M Gallagher and P Mitchell (eds), *The Politics of Electoral Systems* (Oxford University Press 2005), 511–532.

[82] See Doyle and Walsh, Ch 12.

[83] D Kenny and C Casey, 'The Resilience of Executive Dominance in Westminster Systems: Ireland 2016–2019' (2021) Public Law 335 - 374.

Furthermore, the good regard in which the referendum mechanism is generally held might reflect the outcome of recent referendums. The decisive votes in 2015 and 2018 in favour of same-sex marriage and abortion access met with warm approval across much of the political spectrum. However, if either of these referendums had produced a different outcome, or the vote had been less clear-cut, then views of the process might have been very different. This is particularly the case in respect of same-sex marriage, where concern was expressed before the referendum about the use of a majoritarian mechanism to determine an issue regarded by many as impacting upon fundamental rights, in circumstances where it might have been possible to go down a legislative route instead of resorting to a constitutional amendment.[84]

More generally, Irish politics have historically not been characterised by sharp cleavages – at least since the edge was taken off the Civil War divide after the 1930s. Ideological divides exist in Irish politics, but they have rarely generated the type of bitter political and social divides experienced by e.g., the UK in the wake of the 2016 Brexit referendum, or in the United States during the years of the Trump administration. This has encouraged the growth of the broadly deliberative 'referendum culture' outlined by Kenny in his contribution to this book – which, as he points out, may be very difficult to replicate elsewhere. Also, only time will tell how stable or enduring this culture will prove to be. In particular, general 'losers' consent' to referendum outcomes cannot always be presumed to be a perpetual given.

Furthermore, the post-1937 Irish constitutional system has never faced a situation where it had to deal with a constitutional amendment that was widely perceived to threaten its 'basic structure' of democratic values, or which ran clearly counter to established international human rights norms.[85] As a result, the liberal and neo-republican objections to plebiscitary-style mechanisms outlined above have never really become 'live' political issues in the Irish context. This contrasts with the situation in other countries: for example, the Swiss constitutional system has had to grapple with the use of its popular initiative mechanism to ban minaret construction, a prima facie breach of core international non-discrimination requirements.[86] As a consequence, Irish fidelity to popular sovereignty as the supreme constitutional value has never come under any sustained normative pressure.

All of this suggests that excessive complacency and self-congratulation needs to be avoided when it comes to applauding the persisting role played by popular sovereignty in the Irish constitutional order. The Irish constitutional system is striking for its attachment to popular sovereignty as a continuing source of constitutional authority, both directly through the referendum process, and indirectly via its wider impact on the constitutional imaginary. However, the circumscribed nature of this commitment to popular sovereignty should be acknowledged. So too should the specific nature of the Irish political context, which has formed the backdrop for the current stability of the Irish

[84] See in general O'Mahony, n. 28 above.

[85] It could of course be argued that the insertion of the Eighth Amendment into the Constitution in 1983, recognising the equal right to life of mothers and the foetus in the womb, impacted on fundamental rights. But the political marginalisation of pro-choice arguments in that referendum campaign, and in the decades that followed until the death of Savita Halappanavar in 2012, meant that the de facto constitutionalisation of a total abortion ban was not widely regarded as a breach of fundamental rights until late in the existence of the Eighth Amendment.

[86] D Moeckli, 'Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights' (2011) 11(4) Human Rights Law Review 774–794.

constitutional settlement – and might limit the comparative lessons that might be extracted from the Irish experience.

Postscript – The Future of Popular Sovereignty

It remains to be seen how the concept of popular sovereignty as it has developed within the context of the Irish constitutional order will evolve in the future. Much may depend on events. It is possible that the intense recent wave of referendums is a passing phase, which will tail off as the social and legal issues that generated it – European integration, the decline of Catholic morality, the pressures of secular modernisation – stall, become quiescent or otherwise play themselves out. This might make popular sovereignty much less of an active presence within Irish constitutional governance: to vary Richard Tuck's metaphor cited earlier, the periodically snoozing sovereign that is the Irish people conceptualised as a collective political entity might over time enter something of a dormant state.

However, as mentioned previously, the appetite for referendum voting does not appear to be satiated. As Barrett notes, the Citizens' Assembly on Gender Equality may generate proposals for further referendums – while recent public discussion of the possibility of referendums on the right to property and public ownership of water utilities suggests that new fronts may yet open up in this regard. It is clear that the general public approves of its power to enjoy the final say on constitutional issues, and that popular sovereignty remains central to the Irish constitutional imaginary. As such, it is unlikely that the sovereign will rest undisturbed for long.

It will however be interesting to see whether some changes may yet take place in how popular sovereignty is conceptualised. Brexit has put the issue of a possible re-unification referendum on the table, as Harvey discusses in his contribution to this book. Any deepening relationship with Northern Ireland, whether or not it will ultimately result in a unified Ireland, may provoke new thinking about popular sovereignty – not so much about the principle of popular self-government as such, but instead about the assumed unitary status of the Irish people.

For example, might a future constitutional settlement structured around unification involve some form of 'double lock' mechanism, where certain types of future constitutional changes will require the consent of both the population at large and also the Unionist minority? Would it require a new constitutional convention, where Arato's concept of 'post-sovereignty' might be in play, i.e., the idea that the normative limits of 'sovereignty' as a democratic principle should be acknowledged and 'thematised' in the formulation of new constitutional norms?[87] Might there also be space for some form of symbolic recognition of 'relational' approaches to sovereignty, as analysed by Hurley in her chapter in this book? Or might such developments unfold organically within the existing framework of the Irish Constitution, even in the absence of a root and branch reconfiguration linked to unification?

Only time will tell. What is clear for now is that the centrality of popular sovereignty to the Irish constitutional order is deeply rooted – and remains integral to both popular and elite understanding of what respect for 'true democracy' entails.

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[87] A Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (Oxford University Press 2016).