Opinion on the Constitutional Limits of the "Money Message" Procedure under Article 17.2 of the Constitution of Ireland

Dr David Kenny, Assistant Professor of Law, Trinity College Dublin
Dr Eoin Daly, Lecturer in Law, National University of Ireland, Galway

Executive Summary
This academic opinion assesses the constitutionality of the contemporary application of the "money message" procedure under Article 17.2 of the Constitution. It begins by outlining the procedure's basis in the Constitution and the Standing Orders. It goes on to examine current use of the procedure, looking at the treatment of certain pieces of legislation from the current Dáil term to illuminate the practice, and noting that the procedure is used very expansively, much more so than the very similar Westminster procedure around "money resolutions". It continues by assessing the compatibility of the procedure as currently practiced and instantiated in the standing orders with the Constitution, and concludes that there are several potential constitutional problems that arise.

First, the broad interpretation of the procedure seems to place unjustified limits on the capacity of the legislature to pass any legislation independently of the executive organ of the State, in contravention of the separation of powers and the exclusive lawmaking power of the Oireachtas contained in Article 15.2. Secondly, there are judicially-established constitutional limitations on the ability of the legislature to delegate lawmaking power to the executive (the principles and policies test); the logic that underlies this test should mean that Article 17.2 is not read to vest a veto over lawmaking in the executive, and that the legislature's power must be respected and protected. Thirdly, the government's power under Article 17.2 is not entirely discretionary; it must be exercised responsibly for a purpose related to finances and not for any other purpose, such as purely political opposition to a Bill. We conclude that, based on the overall framework set down by the Constitution with regard to the separation of powers, the use of the money message procedure must be at least in some way limited to ensure that the legislature can, in some real sense, make law, which is its exclusive constitutional responsibility under Article 15.

1. Introduction

Increasingly, the money procedures in parliamentary democracies have been under scrutiny.[1] There is a longstanding practice and tradition in the Westminster parliamentary tradition that the government has significant control over taxation and expenditure, with oversight by the lower house. This is clearly reflected in many aspects of the Irish Constitution. However, there is substantially more uncertainty as to the limits of this control, and the tendency of our electoral system to produce majority or strong coalition governments means that the limits of these powers have not heretofore been tested. More specifically, there is some uncertainty as to the scope of the power, given to the government in Article 17.2 of the Constitution, to effectively block a Bill using the "money message"procedure, where it is understood as a "law … for the appropriation of revenue or other public moneys". In particular, there is some uncertainty as to whether Bills entailing minor or incidental expenditure are subject to this procedure. This question is of critical importance as it determines the extent to which the Oireachtas, as the national parliament, has the effective power to pass legislation independently, or against the wishes of the government. It is integral to the way we understand the relationship between the two primary political organs of the State, the legislative and executive powers.

In this opinion, we consider the question of what, if any, limits exist on the use of the "money message" procedure contained in Article 17.2 of the Constitution of Ireland and Order 179 of the Standing Orders of Dáil Éireann, 2016. We conclude that the present understanding and use of the money-message procedure is based on too wide a definition of "law[s] … for the appropriation of revenue or other public moneys" under Article 17.2. We also note that the present understanding and use of the procedure potentially subjects an indefinite range of Bills, many involving minor or incidental expenditure, to an effective veto by the government – and that this risks undermining the central role given by the Constitution to the Oireachtas as the State's "sole and exclusive" legislative organ.

At the outset, we would note the limitations on this opinion. We have limited access to information. We do not, for example, have access to neither the details of specific decisions nor the general outlook of the Ceann Comhairle and Bills Office on this issue, and can only infer this from the decisions made on particular bills of which we

[1] See recent controversy in Australia: "In the Matter of the Third Paragraph of Section 53 and the Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018" Solicitor General Opinion No 1 of 2019; and in the UK on the "Cooper-Letwin" Bill, the European Union (Withdrawal) Act 2019, discussed below.

are aware. We also do not have access to the recent Salient Rulings of the Chair,[2] and do not know if there are any recent rulings which would cast light on this topic. Further information or context could qualify the views expressed here.

We are also not seeking to comment on any particular bill and whether it should or should not require or be granted a money message. Our sole question is whether there is any constitutional limit on this procedure. Any reference to a particular bill is therefore for the purposes of illustration only, and should not be seen as advocating for the treatment of that bill in any particular manner.

It is important first to stress two further points about this consideration of constitutionality. First, the question of the appropriate constitutional interpretation is separate from the question of whether the courts would be willing to intervene in this area. The latter question is complex, and would require detailed consideration. The courts have expressed reluctance to intervene in matters related to the Standing Orders and internal workings of the Houses.[3] In general, the Courts will take a "hands-off" approach in relation to the internal workings of the State's political organs, based on a concern to respect the separation of powers. However, the Supreme Court also stated, in a slightly different context, that the financial procedures in the Constitution would be subject to "careful scrutiny",[4] and various *obiter dicta* (non-binding judicial comments) have suggested that the courts will intervene in extreme cases of constitutional error in the legislative process.[5] More importantly, however, the fact that there are areas that courts consider to be non-justiciable and not subject to judicial oversight does not mean that the Constitution does not operate. It rather means that the duty falls elsewhere to ensure those limits are respected. In areas that lack judicial oversight, there may be particularly acute duty on the other branches of government to make sure to stay within constitutional bounds.[6] Our focus here, then, is not to mimic or predict the outcome of a judicial decision on this question, but to consider the constitutional question holistically. The relevant political actors, including the government, may well have some latitude in

[2] The last formally complied version (4th edition) was issued 2011; we do not have access to any of the Salient Rulings postdating this.

[3] See *Callely v Moylan* [2014] IESC 26; *Maguire v Ardagh* [2002] 1 IR 385 at 537 per Keane CJ.

[4] *Collins v Minister for Finance* [2016] IESC 73 at [61]: "the question requires to be carefully scrutinised to ensure that the requirements, which the Constitution sets as a precondition to lawful expenditure, have been complied with" See Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th ed., Bloomsbury Professional, 2018) at [4.3.80] [hereafter "*Kelly*"].

[5] See *Callely v Moylan* [2014] IESC 26, per Fennelly J; *Kerins v McGuiness* [2019] IESC 11; *McDonnell v Brady* [2001] 3 IR 588.

[6] See *Kerins v McGuiness* [2019] IESC 11; *O'Brien v Clerk of Dáil Éireann* [2019] IESC 12.

interpreting certain constitutional provisions, but they are nonetheless bound to observe these provisions reasonably and consistently notwithstanding the lack of any judicial oversight.

Secondly, the view expressed here is based on our opinion of the constitutional limits of the procedure, framed in the context of the present standing orders and the current use of the procedure. It is not our goal to suggest alternative approaches, though we briefly mention some possibilities in our conclusions on the constitutional question.

2. The Money Message Procedure

The "money message" procedure in Article 17.2 has been, until recently, an obscure part of Irish constitutional law. It is one of several core constitutional provisions on finances, which creates a "double lock" on expenditure, requiring cooperation of the Dáil and the government.[7] Article 11 provides for one central fund of state revenues, that shall be "appropriated for the purposes and in the manner and subject to the charges and liabilities determined and imposed by law." The executive is charged in Article 28.4.4 with preparations of Estimates of State Receipts and Expenditure for each financial year and to present them to Dáil Éireann for consideration. Articles 21 and 22 provide for a special Oireachtas procedure for Money Bills, which gives express primacy to the Dáil and a very limited role to the Seanad in respect of any Bill dealing with taxation or debt.[8] The Constitution provides that the Ceann Comhairle makes a determination as to whether a Bill is a Money Bill, and this is final and conclusive, save for a limited appeal procedure specified in Article 22.2.[9]

Article 17 provides for the Dáil's consideration of the executive's estimates. Having done this, it continues in Article 17.2:

> "Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach."

[7] *Collins v Minister for Finance* [2016] IESC 73 at [62].

[8] This broadly resembles the British procedure, where there is a diminished role for the House of Lords in respect of Money Bills or financial provisions in bills.

[9] This procedure involves a request to the President from the Senate; the President can decide to refer the question to be determined by a special Committee of Privileges formed for this purpose.

This article leaves many questions unanswered, including the definition of an appropriation in this context; the process for determination of whether a bill involves an appropriation; and the nature and extent of the discretion for government to refuse to recommend the expenditure. This lack of specificity is not unusual in the Constitution's provisions related to money and finance. The text of the Constitution is somewhat scant in its provisions about financial procedures, with the Constitution's framework being described as "general and partial rather than precise and comprehensive".[10]

The scant constitutional provisions of Article 17.2 are supplemented by the Standing Orders, which flesh out to some degree the financial procedures of the Dáil.[11] Order 179 of the Standing Orders of Dáil Éireann, 2016 provides for the money message procedure:

> "Bills involving the appropriation of revenue or other public moneys.
> 179. (1) A Bill which involves the appropriation of revenue or other public moneys, other than incidental expenses, shall not be initiated by any member, save a member of the Government.
> (2) The Committee Stage of a Bill which involves the appropriation of revenue or other public moneys, including incidental expenses, shall not be taken unless the purpose of the appropriation has been recommended to the Dáil by a Message from the Government. The text of any Message shall be printed on the Order Paper.
> (3) An amendment to a Bill which could have the effect of imposing or increasing a charge upon the revenue may not be moved by any member, save a member of the Government or Minister of State."

An important distinction is recognised here between non-incidental expenditure and incidental expenditure. Bills proposing non-incidental expenditure cannot be proposed save by a member of government. This is seen to flow from a combination of Article 17 of the Constitution and the government's power under Article 28 to prepare estimates of receipts and expenditure for a financial year, which are considered by the Dáil under Article 17.1 and must be approved by legislation

[10] *Kelly* (n 4) at [4.3.75], citing *Collins v Minister for Finance* [2016] IESC 73
[11] Note that Order 178 has similar measures in respect of taxation/charges. We are not addressing the issue of charges in this opinion.

within that year.[12] If only incidental expenditure is at issue, a Bill may be introduced but may not progress to Committee stage without a "money message". This is seen to flow from Article 17.2.

No Standing Orders, past or present, defined the terms "appropriation" or "incidental expenses", nor are these, to our knowledge, elucidated in the Salient Rulings of the Chair.[13]

Previous language used in Standing Orders may be somewhat instructive. This current language was introduced in 1996,[14] following a recommendation of the Sub-Committee of the Committee on Procedure and Privileges on Reform of Dáil Procedure.[15] Before this, the Standing Orders had approached the matter slightly differently, differentiating between a Bill which had "as its main object the appropriation of revenue or other public money"—which should not be initiated by any member save a member of the government—and a Bill which "involves the appropriation of revenue", which required a money message before Committee stage could be taken.[16] Rather than turning on the idea of an incidental expenditure, this distinction was centred on the idea of the Bill being *primarily directed* towards an appropriation or a Bill that *involved* an appropriation. This may cast some light on the meaning of "incidental": it was introduced to clarify that the money message procedure applied to expenditure that was not the *primary purpose* of the Bill, but was an incidental or ancillary to the primary purpose.

Compliance with Order 179(1) is judged with by the Ceann Comhairle[17] (with the assistance of the Bills Office) upon initial submission of a Bill, when it will be ruled out of order if it fails to comply with this Order.[18] If a Bill is deemed admissible, the First and Second Stage may be taken, but if the Bill passes the Second Stage, it is examined again by the Ceann Comhairle (with the assistance of the Bills Office) for the purposes of Order 179(2) before it proceeds to Committee Stage. If it is found to

[12] Catherine Lynch, Darren Lawlor, "Private Members' Bills (PMBs): Admissibility, Government messages and detailed scrutiny" Oireachtas Library and Research Service Note, June 14th 2018 at 6-7.
[13] Though see (n 22) below re Salient Ruling 151.
[14] It was then Standing Order 139.
[15] "First report of the Sub-committee of the Committee on Procedure and Privileges on Reform of Dáil Procedure" (1996) Pn 2814 at 69. The report does not record the reason for the change.
[16] Standing Order 123 (1986).
[17] Salient Ruling 219 clarifies that it is the business and duty of the Ceann Comhairle to interpret the Standing Orders. He or she may rule on matters not specifically covered in the Standing Orders when appropriate (Salient Ruling 221).
[18] Library and Research Service note (n 12) 8.

involve an incidental expenditure, the sponsoring member is so advised by the Ceann Comhairle.[19] The Department of Public Expenditure and Reform handles requests for money messages, though the decision is ultimately the collective responsibility of Cabinet. If such a message is received, it is printed on the order paper, and the Bill may progress to Committee Stage. Under the Standing Orders, there is no time frame for such a decision to be made; no requirement for any formal decision *be* made (it is a negative requirement, preventing the taking of Committee Stage without such a message); and no requirement that any reason or explanation be given for the decision.

Several further nuances should be added. First, the rule does not prevent the taking of the Detailed Scrutiny procedure by a Committee.[20] Secondly, there is a difference between "Oireachtas" money messages—where the money would be spent from the voted expenditure of a Department, say—and Central Fund money messages—where non-voted Exchequer funding would be used. Expenditures can draw from both sources, so that both sorts of message may be needed. Thirdly, under a recent Memorandum of Understanding (MoU) that came into force on January 15th 2019, certain additional procedures not set down in the Standing Orders will be applied going forward: money message determinations will be finalised following the proceedings at the detailed scrutiny stage; the government has undertaken to respond by granting or denying a money message within a specified time (six weeks); and the government has agreed to give reasons for a refusal to grant such a message.[21]

Ambiguities in this procedure

There is no definition, either in the Constitution or the Standing Orders, of core terms such as "appropriation" or "incidental expenditure" and very limited guidance elsewhere.[22] This has several consequences. First, there is no clear way to know how bills are distinguished for the purposes of Standing Order 179(1) and

[19] Library and Research Service note (n 12) 9.

[20] This is clarified by the recent "Memorandum of Understanding between the Government and Dáil Éireann on Private Members' Bills" (Report of the Sub-Committee on Dáil Reform, December 5th, 2018) [hereafter "MoU"].

[21] MoU (n 20).

[22] Salient Ruling 151 in the 2011 edition publication gives limited insight into the understanding of appropriation in the context of amendments from private members, including that contingent or potential expenditures are included, as are Ministerial powers that cannot be exercised without expenditures. Ruling 152 makes it clear that an amendment *becomes* out of order if it emerges in the course of debate that it puts a charge on public funds. Ruling 153 notes that amendments cannot require a Minister to report on a matter, but makes an exception for Social Welfare Bills "in recognition of the fact that it would otherwise be impossible to table amendments to it that were in order as not involving a potential charge".

179(2).[23] Secondly, there is no clear authority on the limits of the term "incidental expenditure". The Library and Research Service note on this topic gives the following suggestions: "Such incidental expenses may include the research, consultation and development of a new policy, its implementation, monitoring, a subsequent review process and possible enforcement costs."[24] This is broad, and unclear as to its scope, leaving it uncertain as to whether any financial consequences of a Bill do not fall into it. Thirdly, it is unclear if there is any distinction drawn as to the direct and indirect consequences of a Bill. Is there any difference, from the point of view of it being an appropriation or expense, between an expense that results directly from the operation of those sections, or as an indirect consequence of the section? Fourthly, it is not clear what the government's reasons for rejecting a money message must be. Must they solely focus on financial considerations, or can other reasons of policy or politics motivate such a decision?[25]

Some of these questions may have been answered in recent Salient Rulings of the Chair, though they are not answered in the most recently published collections of the Salient Rulings from 2011.

Judicial Guidance on the Scope of "Appropriation"

There has been no direct judicial consideration of Article 17.2, which is unsurprising given that the Article has been the subject of very little controversy until recently. A landmark State finances cases—*Collins v Minister for Finance*—considered the term "appropriated" in the context of Article 11 and the issuing of promissory notes by the State to support financial institutions in the aftermath of the Financial Crisis.[26] The context of this case meant that the focus was on whether a lawful appropriation under Article 11 had to have an upper limit or determinate sum. It thus did not comment on the term in a way that is illuminating for the purpose of the money message procedure.

---

[23] As noted above, the text of the previous Standing Orders probably help elucidate the intended meaning. A similar distinction used in Westminster between the primary purpose of a Bill and other purposes is probably instructive. See Malcolm Jack, *Erskine May: Parliamentary Practice* (24th ed., Lexis Nexis, 2011) [hereafter "*Erskine May*"].

[24] Library and Research Service note (n 12) 8. This cannot, of course, be taken to be an official definition.

[25] That the government did not previously have to give any reason for refusal does not answer this question. The structure and purpose of the Constitution might properly require certain government behaviours even if there was no mechanism by which the government's conformity with these norms could be known or reviewed. Again, the nature of constitutions is that they set out standards which guide state action even if they do not provide for say, judicial remedy in the event of breach.

[26] [2013] IEHC 530; [2016] IESC 73. The High Court adopted a Hamiltonian definition, related to lawful authorisation, though this was not adopted by the Supreme Court.

An analogy may be made, however, with the constitutional provisions dealing with international agreements. While normally international agreements concluded by the Govenrnment need only by "laid before" the Dáil, Article 29.5.2° provides that international agreements "involving a charge upon public funds" must be "approved" by the Dáil. On the one hand, the terminology used differs in some respect from Article 17.2, given that instruments "involving" expenditure is arguably a wider formulation than laws that are "*for*" the appropriation of revenues—which arguably suggests a degree of intention or directness that is not implied by Article 29.5.2°. However, judicial authority on the latter provision may nonetheless be useful. In *The State (Gilliland) v Governor of Mountjoy Prison*, the Supreme Court held that "purely incidental or consequential expenses which may fall on some organ of the State by reason of the adherence of the State to an international agreement but which are not created by one or other of the terms of that agreement itself, would make such agreement fit into the category of international agreements which shall be laid before Dáil Éireann, … but not within the category of those the terms of which require approval from Dáil Éireann."[27] Critically, this suggests that costs involved merely in implementation or execution of an instrument are not regarded as "involving a charge on public funds".

3. Current Application of the Procedure

Part of the reason for the obscurity of the money message procedure is that it has seldom been a matter of controversy. With a general trend of strong coalition government and heavy reliance on the party whip, it has been rare for government to not have functional control of the legislative process.[28] With this, the government tended to vote down private members' bills as a rule, preferring that legislation originate from government and be written in consultation with government departments and the Office of the Parliamentary Draftsman. However, in the term of the current minority government, the number of private members' bills being introduced has increased, and without a government majority in the Houses, progression of such bills is greater than at any point in recent parliamentary history.

In this circumstance, the money message has risen in prominence. As of June 11th, the Library and Research Service reported 52 bills were awaiting committee stage, with 40 requiring a money message, and 12 not. In total, 6 bills had been granted

[27] [1987] IR 201 at 236.

[28] See generally Michael Gallagher, "The Oireacthas: President and Parliament" in Coakley and Gallagher (eds.) *Politics in the Republic of Ireland* (5th ed. Routledge, 2010) at 201.

money messages by the government. By early 2019, we understand that the number of bills awaiting committee stage had reached at least 69.

Until the recent MoU, it appeared that the government's preferred approach was to simply not grant a money message, without any comment. This ground the overwhelming majority of private members' bills to a halt. As noted by a former Clerk of Dáil Éireann writing in the Irish Times, this use of the money message procedure is "unprecedented in the past 50 years".[29]

It is hard to say, without detailed knowledge of the workings of the process, what approach is taken to the determination of whether a money message is required[30]. We have been told by parties subject to the process that the view of the Bills Office is that essentially *any* cost of *any* sort—direct or indirect, major or marginal—would be sufficient to trigger the money message procedure. Even a fractional marginal cost in public servant time for implementation, say, would count, as would a very indirect effect.

Looking at some of the examples from the current Dáil term, there is some evidence that this is the approach adopted.

Minor/enforcement costs

Several examples suggest that very minor costs or the cost of general criminal law enforcement are considered sufficient to trigger the money message procedure.

The **Sale of Tickets (Sporting and Cultural Events) Bill 2017** is a private member's bill for which a money message was deemed to be required. This was so despite the direct costs of this Bill being very minor: it would create a minor new criminal offence, and have some minor administrative costs for implementation.

The **Provision of Objective Sex Education Bill 2018** is private member's bill of modest scope for which a money message was deemed to be required. The Bill would have two primary effects: first, it would exempt the area of sexual education from protections for school ethos under the Education Act 1998; secondly, it would augment very slightly the duty of the minister in respect of curriculum reform, such that when the Minister is preforming his/her duty under s 30 of that Act to review

[29] Kieran Coughlan, "Government relying on little-known rule to block Bills" The Irish Times, June 26th, 2017.
[30] There is, as noted above, very limited guidance in Salient Rulings. See above (n 22).

the curriculum for relationships and sexuality education, the Minister would ensure certain listed goals and priorities were met. It would not require the Minister to undertake such a review, or change the s 30 duty in substance. The costs of this are extraordinarily small, and either already covered by the Minister's duty under the 1998 Act, or so minor in terms of administrative expense that they are negligible.

Indirect costs

The **Statute of Limitations (Amendment) Bill 2018**—which was deemed to require a money message—would alter the Statute of Limitations in respect of thalidomide victims. This has, as far as we can tell, no direct costs of any sort. The only costs associated with the bill would be whatever exceptionally minor administrative costs it might incur to implement, and the possibility that some legal challenge against the state might incur damages/legal costs under a head of liability established elsewhere in law.

Inconsistency of this practice with House of Commons Rules

It seems likely that none of these bills would require a "money resolution" under the rules of the House of Commons in Westminster, the analogous procedure in the parliament of the United Kingdom. This procedure is instructive here as there are long-standing well-developed conventional understandings of the scope of the resolution procedure and its limits, and the system has very substantial overlap with our own.[31] It was noted in the *Collins* case that the Irish constitutional order replicated to a large degree the Westminster model,[32] and while constitutional requirements in Ireland might be different due to the general differences in the constitutional orders and the separation of powers,[33] Westminster practice is still instructive for comparative purposes.

According to *Erskine May*, the authoritative text on parliamentary practice, for expenditure in a bill to require such a money resolution, it must be "new and

[31] Salient Ruling 227 notes that procedure in other parliaments is of interest but not binding on the Ceann Comhairle.

[32] The Supreme Court noted that these features of the Irish Constitution "clearly reflect the history and development of the Westminster system. Indeed the framers of the … Constitution did not merely retain the broad division of functions between Executive and Parliament, but also retained the primacy within the legislative branch of the popularly elected House" [2016] IESC 73 at [55].

[33] See the warning of the Supreme Court in *Kerins v McGuiness* [2019] IESC 11 at [8.21]-[8.23] on over-ready or lazy use of comparison with the UK. We see this procedure, however, as being a useful point of comparison given the closeness of the financial systems in each parliament.

distinct"; that is "not already covered by legislative authorisation".[34] There are also limitations on what is taken to constitute an expenditure, requiring a money resolution from the Crown.[35] For example, where the expenditure incurred would be to pay compensation or damages where "such a liability arises as an incidental consequences of a proposal to apply or modify" the existing law.[36] Similarly, the widening of the jurisdiction or court or tribunal, or the creation of a new criminal offence, does not require a money resolution, even though "such proposals may have the incidental consequence of increasing the costs of the administration of justice".[37] Crucially, minor administrative expenses do not require a money resolution:

> "Where the implementation of legislation will entail administrative work by the government department which is unlikely to impose more than a minimal continuing demand on its resources, a Money resolution is not required to authorize the notional costs of the work involved."[38]

Another salient example of the limitations of the money resolution procedure is the recent Cooper-Letwin Bill, which became the European Union (Withdrawal) Act 2019. This did not require a money resolution despite the fact that the Bill's ultimate aim of securing a delayed Brexit would, it was claimed, cost billions of pounds in EU contributions etc.[39] The Clerk of Legislation and the Speaker of the House of Commons determined that no such resolution was required, being satisfied that the legal operation of the Act would not be the cause of any additional expenditure, but other prior enactments which were covered by appropriate money resolutions.[40] This is an important illustration both of the requirement that the expenditure be new and not authorised elsewhere, and also that it is the legal effects of the bill—not, as in this case, its desire to bring about a consequence or make a particular consequence more likely—that is the core of a financial determination in this procedure.

---

[34] *Erskine May* (n 23) at 746. *Erskine May* notes that it is thus "possible, though infrequent" that a resolution may be unnecessary because a previous statutory authorisation will be sufficient capacious to include the proposed expenditure. In cases of doubt, a resolution is required.

[35] Other exceptions noted include expenditures that will be incurred by bodies that charge fees or trade, exemptions from Crown penalties, and reimposition of a charge that had been temporarily suspended.

[36] *Erskine May* (n 23) at 752.

[37] *Erskine May* (n 23) at 752. This is also true for new tribunals to deal with matters dealt with by existing courts, which do not require money resolutions. Note that there is a limit to this, in the even the if such a change is going to require "substantial and quantifiable extra resources".

[38] *Erskine May* notes that expenditure less than £250,000 pounds annually are generally considered minor and allowed without a money resolution.

[39] House of Commons Debates, 3 April 2019, c1128, William Cash MP.

[40] House of Commons Debates, 3 April 2019, c1130.

Applying these understandings to the examples given above, it would seem that the Irish practice on money messages is substantially more conservative than its Westminster counterpart. None of the three bills discussed above, for example, would require a money resolution under the UK approach.

Moreover, having a conventionally agreed limit (£250,000) on acceptable minor administrative costs allows members to attempt to avoid a money resolution by clarifying an upper limit to such minor expenditure. For example, the European Union (Withdrawal) (No. 2) Bill introduced by Nick Boles MP in January 2019, amongst other things, empowered a Liaison Committee of the House of Commons to draw up a Brexit plan in default of a ratification of a withdrawal. The Bill obliged the Secretary of State to assist with this process within the financial limitations set out by this parliamentary convention: "The Secretary of State must provide such assistance to the Liaison Committee of the House of Commons as it may request (provided that the cost of providing that assistance does not exceed £250,000)."[41]

Inconsistency in Application of the Standard

It is also of concern that the standard applied in Ireland does not seem to be entirely consistent. There are several bills from this Dáil session that have been deemed not to require a money message. Most of these have spending implications that seem at least as significant as the above examples. These include Bills with obvious enforcement and administration costs or which create new oversight roles;[42] which create criminal offences;[43] or which would initiate a constitutional referendum.[44] Our point here is not to suggest that these bills should require a money message, but rather that the decision that they do not require one calls into question the consistency of application of the standard.

[41] See s 2(2) the European Union (Withdrawal) (No. 2) Bill.

[42] See Garda Síochána (Amendment) Bill 2017, giving new powers to the policing authority in respect of Garda oversight; the Central Bank (Variable Rate Mortgages) Bill 2016, which seemingly creates a new oversight role for the Central Bank; the Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Act 2018, which, amongst other things, expands remit of Financial Services Ombudsman and amends Central Bank Acts to provide for additional regulatory oversight; and the Health and Social Care Professionals (Amendment) Act 2017 (not a private member's bills) which amongst other things given new regulatory functions to state boards; the University College Galway (Amendment) Bill 2017, which assigns additional roles to the governing authority of the College.

[43] See Ramming of Garda Vehicles Bill 2015. Though the language of this bill is confusing, we take it to be creating a criminal offence in s 2.

[44] Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No. 2) Bill 2016; Thirty-fourth Amendment of the Constitution (Presidential Voting) Bill 2014.

Grant of Money Message

The Library and Research Service in June 2018 listed six private members' bills for which money messages were given.[45] Without the government giving any reasons for the grant or refusal of such messages, it is impossible to know if there is any cogent or coherent rationale for why these bills and not others have been granted a money message. The former Clerk of the Dáil raised concerns about this:

> "You would expect a refusal to grant a Money Message – given its import under the Constitution – should only be based on fiscal grounds and not on any ulterior political motive. Moreover the fact that three other Private Members' Bills have received a Money Message in this Dáil indicates there may be no consistency in approach by the Government from a fiscal perspective."[46]

The advent of the MoU, and the commitment of the government to give reasons for refusal in future, may provide an opportunity for some scrutiny of this.

4. Constitutional Concerns with the Money Message Procedure

The money message procedure, as currently practiced, raises constitutional concerns. In particular, a salient concern is that too extensive an interpretation of the procedure may place unjustified limits on the capacity of the national parliament to pass legislation independently of the executive organ of the State, which is a separate constitutional entity from the legislature and which is subordinate or subject, in many ways, to the authority of Dáil Éireann in particular. Even in the UK, where constitutional norms are unwritten and largely based on historical conventions, concerns have arisen at various times about inappropriate use of the equivalent money resolution procedure unduly fettering the power of parliament.[47] Given that Bunreacht na hÉireann protects, in express terms, the power to make laws in Article 15.2, and gives that power solely and exclusively to the Oireachtas, there is a real risk that Article 17.2 could be read or applied excessively to the detriment of that power in a constitutionally problematic way.

[45] Intoxicating Liquor (Breweries and Distilleries) Bill 2016; Parole Bill 2016; Competition (Amendment) Bill 2016; Garda Siochána (Amendment) (No.2) Bill 2014; National Famine Commemoration Day Bill 2017; Recognition of Irish Sign Language for the Deaf Bill 2016.

[46] Coughlan (n 29).

[47] It is noted in *Erskine May* that on occasion the Speaker has been concerned that money resolutions, drafted in excessive detail, were used to limit the power of private members to amend bills. *Erskine May* (n 23) at 758.

There can be no doubt that the government has a very broad power in respect of state finances and money bills.[48] The question is whether there is any constitutional limit to this power, as instantiated in Article 17.2. Can it be used in any way, and any manner? Can it be elaborated on in the standing orders in any way, shape or form without this calling into question its constitutional propriety?

We think that it cannot—that there must be constitutional limits to the procedure lest it functionally undermine the legislative power of the State and effectively cede it to the executive. This argument can be made both based on the overall structure and ethos of the Constitution and by reference to the particular constitutional rules about the relationship between parliament and the legislature. In short, the interpretation and application of this constitutional rule, either in the Standing Orders and/or in parliamentary practice, cannot be such as to functionally limit or frustate the legislative powers of the Oireachtas. This would undermine the separation of powers envisaged by the Constitution, and particularly the stipulation in Article 15.2 that the Oireachtas is the "sole and exclusive" legislative authority for the State.

Structure of the Separation of Powers

The Irish Constitution sets up a tripartite separation of powers between the legislature (Oireachtas), executive (government), and judiciary. It does not give exhaustive definitions as to the powers of each branch—the executive power, for example, is not fully defined by the text—but generally speaking it is clear that each branch should operate independently, within the specific functions assigned to it, but for the checks and balances set out in the Constitution.[49]

In particular, the relationship between the executive and legislature is spelt out in some detail, with the legislature's function in lawmaking said to be exclusive. Articles 11, 17 and 22 then balance the financial workings of the state between the executive and legislative branches, with a "double lock" on taxation and spending. But there is no executive veto, no overriding ability for the executive to control lawmaking. Indeed, the structure of the constitution suggests the opposite intention: that the executive's legal powers over lawmaking exists only in respect of certain, limited financial matters. In practice, the reality of strong government majorities in the Houses and the strict use of the party whip has created a context of executive dominance of the Houses in practice. But this has been only a contingent political

[48] See *Collins v Minister for Finance* [2016] IESC 73.
[49] See *Kelly* (n 4) at [3.2.90]-[3.2.178].

reality, which exists only insofar as the executive has *de facto* control on votes in the legislature. It is not a constitutional mandate; the executive's power over lawmaking is based only on political factors or *realpolitik*, not on constitutional law.

If "appropriation" in the context of Article 17.2 (applied via the Standing Orders as interpreted) is taken to be as broad as postulated by current practice—suggesting that essentially any expenditure at all, no matter how small or indirect, triggers the requirement of a money message—then this would allow the money message procedure to serve as an executive veto to all or almost all legislation. On this reading, it is hard to write legislation of any sort that does not incur costs—especially since all legislation must be executed or implemented in some way, and this invariably entails indirect costs in the form of the time and resources of public servants.[50] Since this interpretation potentially makes all legislation subject to the money message procedure, fundamentally this takes the lawmaking power—vested solely and exclusively in the Oireachtas in Article 15—away from the Oireachtas, in making it functionally impossible to pass any legislation without the formal approval of the executive.

This surely cannot be the meaning or intention of Article 17.2, as it would cut against not only Article 15 but also the whole spirit and intention of the separation of powers in granting to each branch distinct sets of powers and functions. Had it been intended to place such a major check on the legislative power—to allow the executive to functionally veto laws—then one would expect this to be set out in express terms as a power of veto, not as a minor money procedure. (One might also expect it to be an executive power under Article 28, rather than a seemingly minor qualification on the power of the Dáil in Article 17.) To read Article 17 in this way would cause a fundamental disequilibrium in the scheme of the separation of powers to the detriment of the legislature, and so the reading is untenable. Based on the overall framework set down by the Constitution with regard to the relationship bewteen legislative and executive powers, it seems clear that the use of the money message procedure is intended as the exception, not the norm in the legislative process.

[50] Truly costless bills will be few and far between, as essentially every practical measure incurs some implementation costs. Only purely declaratory bills would really fall into this category. The fact that a small number of bills have been found not to require a money message, with no apparent consistency in this practice or obvious reason for this, does not redeem the procedure, and does not suggest the lawmaking power is sufficiently respected.

When read in light of the structure and purpose of the Constitution, then, "appropriation" must, at the least, mean something similar to the Westminster understanding: a new and direct expenditure—that is not trivial, entirely incidental, indirect or covered by other appropriations—requires its purpose to be authorised by government. However, other expenses—minor administrative expenses, minor implementation cost, creation of criminal offences cognate to existing ones, the indirect possibility of liability, and like expenditures—must not be included within the scope of appropriation in order to ensure that the legislature can, in fact, make law in practice, which is its exclusive constitutional responsibility under Article 15. We also rely on general principles of legal and constitutional interpretation in assuming that the Constitution intends a meaningful distinction between "laws … for the appropriation of revenue" in Article 17.2 and other laws which fall outside its scope—and that this precludes any interpretation whose effect is to bring all, or virtually all laws within the scope of the money message mechanism. We are bound to prefer constitutional interpretations which give harmonious effect to the interlocking provisions and principles of the Constitution, and which accord with its purposive as well as its literal meaning. We also note the literal formulation laws "*for*" the appropriation of revenue, which seems to have a deliberately narrower scope than other provisions referring, for example, to legal instruments "*involving*" expenditure or appropriation.[51]

The Principles and Policies Analogy

An existing, judge-made constitutional rule illustrates the importance and strength of the division between the legislative and executive power. The non-delegation doctrine—also known as the principles and policies test—limits the extent to which the legislature can alienate the lawmaking power from itself, even by express consent. A law cannot give to ministers or other executive actors the power to make or unmake law. Limited delegation is possible, but only insofar as the Act of the Oireachtas guides the discretion of the minister or other actor with "principles and policies" contained in the Act itself. The courts have held that all matters of principle should, in theory, be dealt with in the Act itself, and only matters of filling out detail should be left to the delegate. Otherwise, the power of making laws would rest with someone other than the Oireachtas.[52] The test is not applied entirely strictly: typically, if some or most principles and policies are in the parent Act, this will

[51] See discussion of Article 29.5.2° and *State (Gilliland) v Governor of Mountjoy Prison* [1987] IR 201 at 236 above at page 9.
[52] See *Cityview Press v An Comhairle Oiliúna* [1980] IR 381. See *Kelly* (n 4) at [4.2.23]-[4.2.51].

satisfy the courts, which may be pragmatically sensible given the limitations on lawmaking and the need for flexibility and adaptation in governance.[53]

The purpose of this doctrine is to ensure that the executive does not essentially usurp the lawmaking power, using its usual majority in the legislature to simply give itself the power, in law, to make policy and lawmaking decisions, cutting out the legislature entirely. Even in a situation of majority government, the Constitution ensures the legislature's power cannot be trampled. The existence of this test shows the strength of the Article 15 lawmaking power, and its strict locus within the legislative branch. It cannot be alienated from the legislature, even with the legislature's consent, as this would alter the equilibrium set out in the separation of powers.[54] As the Supreme Court in *Collins* noted, the Constitution requires "that the organ mandated to take… a decision does so, and the function is not abdicated to, or usurped by, any other branch".[55]

By analogy, the provisions of Article 17 should not be interpreted or applied via the standing orders in such a way that gives a near-complete veto over lawmaking to the executive, as this would offend against Article 15 and erode the division between the different powers of government. The principles and policies test illustrates that the executive should not have *legal* control over lawmaking, and this should be mirrored in interpreting the Article 17 procedure. What the constitutional case law on delegation of legislative power illustrates, in particular, is that the Courts will not accept the legislative primacy of the Oireachtas being reduced to an empty formula by too extensive a role being divested to the government in this regard.

<u>Government's Reasons for Refusing Messages</u>

The government's decision on money messages, where Article 17.2 applies, seems largely unfettered. However, it would probably be wrong to say it is completely unconstrained or an absolute discretion. Article 17 is, at its core, a constitutional provision that relates to state finances, and the power given to the executive relates to its role in the control of state finances. It would therefore seem to follow that the government's reasons for refusing a money message have to be financial, rather

[53] See *Leontjava and Chang v DPP* [2004] 1 IR 591. See *Kelly* (n 4) at [4.2.50]-[4.2.51

[54] This also shows that the fact that the Standing Orders, made by the Dáil, are in part responsible for the current Money Message procedure does not make it acceptable; the Dáil is not empowered to alienate its own lawmaking power.

[55] *Collins v Minister for Finance* [2016] IESC 73 at [82]. *Collins* considered the principles and policies test in the context of financial authorisations.

than, say, purely political opposition to the bill. To be clear, this is not to say that the government is constitutionally obliged to give reasons, or that these reasons should be subject to scrutiny or review. It is rather to say that, as a matter of constitutional obligation, the government should make this determination having regard to the financial implications of the bill and on that basis alone. In certain contexts, the government or Taoiseach enjoy "discretionary" constitutional powers that are not guided or constrained by specified criteria. But the discretionary character of such powers, where it exists, is clearly stated or implied. By contrast, Article 17.2 sets out a specific criterion or rule which the government is to apply. It is a rule-bound, not a discretionary power.

Similarly, it would seem that the government must make a decision; that is, it must actively consider whether or not a money message should be granted. It would surely be a violation of the legislature's lawmaking power if, a money message having been requested, the government did not consider this and make a decision one way or another. That the constitutional provision and standing order are phrased in the negative—a Bill may not proceed or be passed without such a message—should not occlude the fact that the government surely has an active constitutional duty to fulfil its role under Article 17.2 and in so doing facilitate the legislative process. To do otherwise would be to interfere unconstitutionally with the legislature's power.

5. Conclusion: Ensuring Constitutional Compliance

Our purpose in this opinion is solely to give our view on the constitutionality of various aspects of the current procedure on money messages. It is not our role to comment on what course of action should be taken to avoid or address the possible constitutional problems identified here.[56] Suffice it to say that there are many ways in which constitutional infirmity in the money message procedure could be avoided and guarded against. Any such approach would also have to respect the government's power to control expenditure; the government has a wide latitude in this area, though as we have argued, not as wide as current practice suggests. For example, the Standing Orders might be amended to clarify and limit the definition of appropriation for the purposes of Article 179(2). Alternatively, the Ceann Comhairle

[56] The All Party Oireachtas Committee on the Constitution suggested the rule in the Standing Orders was too strict, and should be amended to allow passage of Bills to final stage; *7th Report: Parliament* (Pn 11281) (2002). A majority of delegates in the Constitutional Convention recommended change of Article 17.2 to increase the power of parliament in these matters, though the report is not detailed on this point; "Seventh Report of the Constitutional Convention: Dáil Reform" (March, 2014) at 6-7.

could issue Salient Rulings as to the meaning of appropriation or incidental expenditure to the same end.[57] If such a measure at least exempted minor and indirect expenditures in a manner similar to the Westminster rules, this would seem to meet the minimal requirement that the legislature's power to make laws should not be frustrated or undermined by the operation of this procedure.

[57] The Ceann Comhairle is not bound by precedent, though past Salient Rulings are as a prudential matter complied with. See Salient Ruling 222 and 229, and the introduction of 2011 4th ed. of the Salient Rulings. However, Salient Ruling 258 suggests that it is "not a function of Chair to interpret Bills, Acts or the Constitution". (*Cf* Salient Ruling 315.) While there may be many circumstances where this is the correct approach, this Ruling could not mean that the Ceann Comhairle should not ensure readings of the Standing Orders comply with the Constitution, which surely must be a core duty of the Ceann Comhairle in issuing rulings. This is particularly true given that the courts are reluctant to intervene and give guidance on the internal workings of the Houses; the internal mechanisms of the Houses must ensure constitutional compliance. Salient Ruling 153 contains an exception to a general rule that is designed to ensure the power of the Houses to amend bills is not entirely taken away in certain contexts (see above n 22). The same spirit would animate a Salient Ruling designed to address these problems.