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THE DEVELOPMENT OF JUDICIAL REVIEW OF LEGISLATION AND IRISH CONSTITUTIONAL LAW 1929-1941

VOLUME 2 OF TWO VOLUMES

BY

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CHAPTER 6

THE SUPREME COURT AND THE REFERENCE OF THE OFFENCES AGAINST THE STATE (AMENDMENT) BILL 1940

Background to the Offences against the State Act 1939

Although the Constitution of Ireland had come into force on December 29, 1937, almost two years were to elapse before the first major item of litigation was to come before the courts. Of course, almost no sooner had the work on the Constitution been concluded than the Government's attention had turned to a resolution of the Anglo-Irish Economic War and, then immediately thereafter, preparation in anticipation of the pending Second World War. The Attorney General's office had advised on the drafting of emergency legislation at the height of the Munich crisis in September 1938[1] and the Offences against the State Act 1939 had become law by the end of June

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[1] Fanning, *The Irish Department of Finance 1922-1958* (Dublin, 1978) at 308-9.

1939. While, of course, the 1939 Act partook of the character of emergency legislation, it was, in fact, a permanent statute which, in respect of many of its essential features, has remained virtually unchanged since its enactment.[2] While the 1939 Act has been - often justly - criticised, it was in its own way a more liberal and enlightened enactment than the earlier Article 2A of the Irish Free State Constitution and the Public Safety Acts which preceded it.[3]

On March 2, 1939 the Minister for Justice (Mr. P. Ruttledge TD) moved the Second Reading of the Offences against the State Bill in the Dail Eireann. His speech was restrained -

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[2] The major changes were the Offences against the State (Amendment) Act 1940 (which was necessitated by the High Court's decision in *The State (Burke) v. Lennon* [1940] IR 136); Offences against the State (Amendment) Act 1972 (which, *inter alia*, enabled the courts to treat the opinion of a Garda Superintendent that an accused was a member of an illegal organisation as evidence of that fact) and the Offences against the State (Amendment) Act 1998 (which was enacted largely as a temporary measure following the Omagh bomb in August 1998 and which, inter alia, extended the powers of detention following an arrest under s.30 of the 1939 Act).

[3] Thus, for example, s.30 of the 1939 Act originally provided for a maximum of 48 hours' detention following an arrest for a scheduled offence and s.44 provided for a right of appeal to the Court of Criminal Appeal against conviction in the Special Criminal Court. (Following the enactment of the Offences against the State (Amendment) Act 1998, the maximum period of detention has been extended to 72 hours, but the further period of detention can only be ordered by the District Court following an application in that behalf by the Garda Siochana and having heard the legal representatives of the detainee.) By contrast, s. 14 of Article 2A provided for a maximum of seventy two hours detention and s. 6(5) of Article 2A not only provided that no appeal would lie against the decision of the Special Powers Tribunal, but also

almost low key[4] - but he drew attention to the fact that some months previously, in December 1938, the remaining Anti-Treaty members of the Second Dail had purported to transfer the "Government of the Irish Republic" to the "Council of the Irish Republican Army."[5] This was a threat which the legitimate Government of the State could not lightly ignore.[6] The Minister also emphasised the reluctance with which the Government had asked the Oireachtas for these powers:

> "In 1932, when this Government was first elected, an amnesty was declared. In 1937, when the Constitution was passed, there was a similar position, a similar jail clearance. ...We have done everything possible to carry on as a Government with the least possible force and the least possible infliction of penalties on any citizen of our country. I am afraid, however, that we have reached a position that, I suggest, if it allowed to develop, is bound to deteriorate until in a very short time this country would find itself in a catastrophe."[7]

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sought to exclude the jurisdiction of the High Court in respect of certiorari applications.

4 Lee, *Ireland 1913-1985: Politics and Society* (Cambridge, 1989) describes (at 219) Ruttledge as "known for his IRA sympathies."

5 See Bowyer Bell, *The Secret Army - The IRA* (Poolbeg, 1998) at 154;

6 74 *Dail Debates*, Col. 1285-1290.

7 *Ibid.*, 1291-2,

On the powers of internment itself which were contained in Part VI of the Bill, the Minister did not elaborate at length:

> "Part VI of this Bill provides for internment. It is intended to deal with offences against the State in connection with cases in which there is a moral certainty, although legal proof is lacking. There, again, that provision comes into operation on a proclamation by the Government when the Government are satisfied that such an emergency exists, and, there again, it goes out by proclamation and...the Dail, by resolution, can annul this provision."[8]

The Offences against the State Act was duly signed into law on June 14, 1939. Pursuant to s. 19 of the 1939 Act, the IRA was immediately proclaimed to be an illegal organisation[9], but no move was taken either to establish the Special Criminal Court or to activate the power of internment.

The challenge to the internment powers

Following the resumption of the IRA bombing campaign in Britain in January 1939 which in turn had followed its "declaration of war" on the United Kingdom and the

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[8] *Ibid.*, 1291. For the background to the drafting of the 1939 Act, see Lee, *op.cit.*, 219-224.

imminent outbreak of hostilities between Germany and the United Kingdom, the Government could not longer afford to remain inactive.[10] On August 22, 1939 the Special Criminal Court was established following a Government proclamation[11] and Part VI of the 1939 Act - which provided for the power of internment - was duly activated. It was the exercise of the powers which led directly to *The State (Burke) v. Lennon*[12] and, subsequently, *In re Article 26 and the Offences against the State (Amendment) Bill*[13], the first major items of litigation involving the new Constitution. Not surprisingly, Gavan Duffy J.'s judgment in the High Court in *Burke* whereby he held the internment provisions of Part VI of the 1939 Act to be unconstitutional provoked a major constitutional crisis which was only remedied when the Supreme Court subsequently upheld the constitutionality of the Offences against the State (Amendment) Bill, 1940.

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9 Unlawful Organisation (Suppression) Order 1939 (S.R. & O. No. 162 of 1939).

10 Lee, *op.cit.*, 219-222; Coogan, *The IRA* (Harper Collins, 1995) at 124-125.

11 *Iris Oifigiuil*, August 22, 1939. Section 54(2) of the 1939 Act provided that:

> "If and whenever and so often as the Government makes and publishes a proclamation declaring that the powers conferred by this part of the Act are necessary to secure the preservation of public peace and order and that it is expedient that this Part of this Act shall come into force immediately, this Part of the Act shall come into force forthwith."

12 [1940] IR 136.

On the 16th day of September 1939 the Minister for Justice issued a warrant pursuant to s. 55(1) of the 1939 Act[14] directing the arrest and internment of one James Burke. The warrant was in the following terms:

> "I, Gerald Boland, a Minister of State, in exercise of the powers conferred on me by section 55 of the Offences against the State Act 1939 (No. 13 of 1939) and being satisfied that James Burke of Friarsquarter, Ballinrobe, Co. Mayo, is engaged in activities calculated to prejudice the preservation of the security of the State do by this warrant order the arrest and detention of the said James Burke under the said section."[15]

Following his arrest the applicant was detained as an internee at Arbour Hill Military Detention Barracks.

The State (Burke) v. Lennon

On the 22nd November 1939, James Burke's brother, Redmond, swore an affidavit which grounded an application

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13 [1940] IR 470.

14 This provided that:

> "Whenever a Member of State is satisfied that any particular person is engaged in activities calculated to prejudice the preservation of the peace, order or security of the State, such Minister may by warrant under his hand order the arrest and detention of such person under this section."

15 [1940] IR 136, 137.

for habeas corpus. The substantive application for habeas corpus was first due to be heard by a Divisional High Court (Maguire P, O'Byrne and Gavan Duffy JJ.) on Friday, November 24, 1939 when matters took a surprising turn of events. When the case was called on, Mr. Wood KC (for the applicant) said that he had to make his position clear:

> "It was, he submitted, a fundamental right of the citizen bringing a habeas corpus application to select the judge before whom he would move his application. Having selected his judge, he wished to have that judge dispose of the application. Mr. Wood cited a number of judgments of the King's Bench Division and of the High Court which, he said, laid it down that a person was entitled to proceed from judge to judge and that it was the duty of each judge to form his own independent opinion on the application. He submitted that he had never abrogated their right to have the application heard by one judge. The application for a conditional order had been made before one judge, Mr. Justice Gavan Duffy, who had directed them to serve a notice of motion. They had served the notice of motion in a form which preserved that right and with the intent to protect that right he was forced with respect, to decline to make his application before the court as now constituted and he would, when Mr. Justice Gavan Duffy found it convenient to hear him, make the application before him.

Mr. Justice O'Byrne - You served a notice of motion. Is not that notice of motion returnable to the High Court?

Mr. Wood - In its express terms, no.

The President: I wonder if I might ask you if your attitude would be affected by my informing you that this court was constituted at the request of Mr. Justice Gavan Duffy?

Mr. Wood - Not in the slightest. If I agreed it would be an abrogation of the constitutional right which my client has. The moment that I conceded that the Court as now constituted has jurisdiction to try my case would be to abrogate my right to the extent of at least two judges.

Mr. Justice Gavan Duffy - Having regard to the important issues raised, I should have thought that the larger the court the better....If an application is being made to me to hear the case sitting alone, I should feel bound to accede, but that application has not been made to me.

Mr. Wood - My position is this. The citizen for whom I appear has the right to go to each judge in turn and I am here in assertion of that right.

Mr. Justice O'Byrne - May I take it that you are declining to make your application before this Court?

Mr. Wood - May it please your lordships, that is so."[16]

At a later stage in the afternoon it was reported that Mr. Wood KC appeared before Mr. Justice Gavan Duffy in another Court. The exchange then continued:

"Mr. Justice Gavan Duffy - I take it that this is the case which was listed before the High Court this morning. What are you asking me to do now?

Mr. Wood - I am asking for an order of habeas corpus directed to the Attorney General and the Governor of Arbour Hill prison.

Mr. Justice Gavan Duffy - Is this an *ex parte* application?

Mr. Wood - Yes.

Mr. Justice Gavan Duffy - The effect of the order of the High Court this morning is that the notice of motion was returnable to the High Court and not specifically to me. I cannot hear a substantive

16 *The Irish Times*, November 25, 1939.

application for habeas corpus without notice to the other side.

Mr. Wood - They are here pursuant to your order.

Mr. Justice Gavan Duffy - If they are willing to go on and if the notice of motion is before me, but otherwise I would have to give them notice, however short, before hearing it."

After further exchanges, Mr. Justice Gavan Duffy is reported as having turned to Mr. Dixon SC (who appeared for the Attorney and Commandant Lennon) and asked him for his view:

"Mr. Dixon (who with Mr. Haugh KC had appeared for the Attorney that morning) stated that he was here as a mere spectator.

Mr. Justice Gavan Duffy - Then Mr. Wood, I would rule against you on that application. You can always make a fresh application. If you make a fresh application, I am willing to hear the case and to give you an early return date.

Mr. Wood - At the moment, I will not make that application. I will consider my position.

> Subsequently Mr. Sean McBride applied to Mr. Justice Gavan Duffy at his residence for liberty to issue a notice of motion to be heard on Tuesday next and for an order that the order of habeas corpus be directed to the AG and the Commandant Lennon to produce Seamus Burke before the Court. Mr. Justice Gavan Duffy granted the application."

It is worth pausing to inquire why Burke's legal team took the stance which they did: it can only be because they believed that Gavan Duffy J. was likely to be outvoted by both Maguire P. and O'Byrne J. and that the best prospect of securing the release of their client was to make the application before Gavan Duffy J. sitting alone. As Maguire P. and O'Byrne J. both subsequently sat on the Supreme Court for the Article 26 reference and given that - as will presently be described - they are believed to have joined the majority judgment, this suggests that the instincts of Messrs. Wood and McBride were correct.

The substantive habeas corpus application was duly heard by Gavan Duffy J. sitting alone as a High Court judge on November 28th and 29.th It is clear from contemporary newspaper reports that the Gavan Duffy J. responded sympathetically to the key arguments advanced on behalf of the applicant, one of which - on which Gavan Duffy J. was ultimately to rest his judgment - was that the internment provisions of the 1939 Act conferred judicial

powers on the executive, contrary to Article 34 of the Constitution:

> "Mr. Justice Gavan Duffy asked was not the difference between the Public Safety Act 1924 and the Offences against the State Act was that under the former the mere opinion of the Minister was sufficient whereas the latter laid down that he had to be satisfied. Mr. McBride said that that was so, but added that in satisfying himself the Minister was exercising a judicial function. The Constitution contained very stringent provisions to ensure that those in charge of the administration of justice should be free from financial considerations and political influence."[17]

By the second day, counsel for the State was already anticipating that an appeal to the Supreme Court might be necessary:

> "Mr. Maguire said that the AG was most anxious that this matter receive the opinion of the Supreme Court on the question of the constitutionality of the statute.
>
> Mr. Justice Gavan Duffy - That is, if I am against you on that.

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17 *The Irish Times*, November 29, 1939.

Mr. Maguire - Yes."[18]

Gavan Duffy J. reserved judgment at the conclusion of the second day of argument and delivered his ruling two days later on Friday, December 1, 1939. Bearing in mind that this was the first major constitutional case since the new Constitution had come into force two years earlier[19] and given the time pressures against which it was delivered, the judgment must be regarded as a remarkable *tour de force*. Having set out the background to the application and to the 1939 Act itself, Gavan Duffy J. then proceeded to give an admirable summary of the relevant provisions of the Constitution:

> "As to personal liberty, it is one of the cardinal principles of the Constitution, proclaimed in the Preamble itself, that the dignity and freedom of the individual may be assured; Articles 40-44 of the Constitution set out the 'Fundamental Rights' comprising personal rights, the imprescriptible rights of the family, the inalienable right and duty of parents to

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18 *The Irish Times*, November 30, 1939.

19 Gavan Duffy J. himself recognised this fact, saying ([1940] IR 136, 143):

> "I must look into the material provisions of the Constitution in order to see what place personal liberty finds there, and to see exactly what place personal liberty finds there, and to see whether the impugned enactment fits into the constitutional framework, and I must do so with special care, since this is the first case in which a claim of this kind has arisen for adjudication under the Constitution."

educate their children, the natural right to private property and freedom of conscience and religion. The fundamental personal rights, which are the personal rights of free men, include (Article 40) the right to equal protection of the law, the inviolability of the home, the rights of free speech, peaceable association and, in particular, the liberty of the person...These rights are, of course, qualified, because under modern conditions the rights of the citizen must be subject to legal limitations and absolute rights are unknown, or virtually unknown, in a democratic State. But in a significant clause of Article 40 the State guarantees in its laws to respect the personal rights of the citizen and, as far as practicable, to defend and vindicate them.....The right to personal liberty means much more than mere freedom from incarceration and carries with it necessarily the right of the citizen to enjoy the other fundamental rights, the right to live his life, subject, of course, to the law; and if a man is confined against his will, he has lost his personal liberty, whether the name given to the restraint be penal servitude, imprisonment, detention or internment...Habeas corpus is the direct security for the right to personal liberty, but a constitutional separation of powers and constitutional directions for the administration of justice as an independent

function of the State were necessary to make the remedy secure."[20]

This statement clearly placed the right to personal liberty in its proper context and clearly understood the role of the courts vis-à-vis the other branches of government in such matters.

Gavan Duffy J. next drew attention to the separation of powers provisions of the Constitution and the mechanism provided for judicial review of legislation:

> "The architects of the Constitution were alive to the need for protecting the rights declared in the Constitution; accordingly, in Article 5, they characterised the State as a democratic State, in which (Article 6) all powers derive under God from the People and are to be exercised only by or on the authority of legislative, executive and judicial organs established by the Constitution; effect is given to the division of powers by Articles 15, 28 and 34 and 35. Laws in any respect repugnant to the Constitution are expressly forbidden and invalidated by Article 15 and, as a special safeguard, exclusive original jurisdiction in cases raising the constitutionality of any law assigned to the High Court, together with a veto, a matter of first

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20 [1940] IR 136, 144.

> importance, upon any statutory encroachment on the appellate jurisdiction of the Supreme Court in any such case (Article 34); the Supreme Court is thus made ultimate guardian of constitutional right."[21]

The judge continued by referring in some detail to the provisions dealing with state of war and emergency (Article 28.3.3) and the provisions dealing with trial of offences (Article 38). He then added:

> "Manifestly these penal jurisdictions are all contemplated as importing lawful restrictions under the Constitution upon personal liberty, and Article 40 must be read in the light of Article 38....There is no provision enabling the Oireachtas or the Government to disregard the Constitution in any emergency short of war or armed rebellion. And the Constitution contains no express provision for any law endowing the Executive with powers of internment without trial."[22]

Gavan Duffy J. then proceeded to examine the central question raised by the application, namely, whether the internment powers contained in s.55(1) of the 1939 Act unconstitutionally vested the Minister with judicial powers. Section 55(1) was in the following terms:

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21 *Ibid.*, 144.

22 *Ibid.*, 145.

> "Whenever a Minister of State is satisfied that any particular person is engaged in activities calculated to prejudice the preservation of the peace, order or security of the State, such Minister may by warrant under his hand order the arrest and detention of such person under this section."

Gavan Duffy J. admitted that there could be no *a priori* answer to the question of whether the Minister was exercising judicial powers, since the word "satisfied" might or might not "imply something in the nature of a judicial inquiry: its implication depends on the context."[23] And the quasi-criminal context of the present case was regarded by Gavan Duffy J. as crucial:

> "The Minister has to be satisfied. There must be countless occasions in the official life of a Minister of State on which he has to be satisfied as to particular facts before taking a particular course, occasions on which nobody would for a moment expect him to act judicially in order to be satisfied: otherwise the daily routine of administration would become impossible. But under s. 55 the Minister...is not exercising any normal functions of his office; he is exercising a most exceptional statutory power, and a man's liberty depends on his exercise of it. The nature of the duty imposed on a 'Minister of State' by s.55 is the best

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23 *Ibid.*, 147.

guide to the meaning of the word 'satisfied' in the section. Part VI of the Act is its own best dictionary, and the grave duty which the section imposes does not suggest any loose use of the word 'satisfied', but, in my opinion, clearly suggests a serious inquiry resulting in a serious finding of 'satisfied' or 'not satisfied' as the case may be."[24]

The judge then proceeded to list five considerations which, in his view, were decisive on this question:

"First, the Constitution (Article 9) declares fidelity to the nation and loyalty to the State to be fundamental political duties of all citizens; there is, I think, much to be said for the proposition that the citizen engaged in activities conflicting with that fidelity and loyalty commits a misdemeanour for which he is liable to prosecution under the criminal law. Secondly, and quite apart from that consideration, it would be difficult, and I think, impossible, for a man to engage in activities calculated to prejudice the preservation of the peace, order or security of the State without offending the ordinary criminal law. Thirdly, I am further of opinion that the activities contemplated by s.55, if not otherwise unlawful, are made unlawful by this very enactment: if such activities are not in terms forbidden by our laws, they are at least prohibited by

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24 *Ibid.*, 148.

necessary implication in s.55 under pain of internment....Fourthly, the activities described by the section make the subject-matter of Part VI of the Act one "which, by its very nature, belongs to the domain of criminal jurisprudence: cp. *In re Board of Commerce Act 1919* [1922] 1 AC 191, 198. Fifthly, I am of opinion that indefinite internment under Part VI is indistinguishable from punishment for engaging in the activities in question and I consider that the decision of a Minister of State to order the arrest and internment of a man under s.55 is equivalent to a judgment pronounced against the internee for his dangerous activities. These considerations are - indeed, any one of them probably is - sufficient to show that the authority, not merely to act judicially, but to administer justice and an authority to administer criminal justice and condemn the alleged offender without charge or hearing and without the aid of a jury."[25]

It may be observed in passing that this argument was one which appeared to have held a peculiar attraction for Gavan Duffy J. As counsel, Gavan Duffy had advanced the very same argument some fifteen years earlier regarding the constitutionality of the internment before the former High Court in *R. (O'Connell) v. Military Governor of Hare Park*

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25 *Ibid.*, 151-2.

Camp [26] had trenchantly rejected the same argument. As Dodd J. said:

> "The assumption which underlay all his arguments was, it seems to me, that if a person in authority be bound to act 'judicially' in the exercise of his authority, he, for the purpose of the exercise, becomes a Court. Mr. Duffy cited the case of *The King v. The Police Superintendent of Chiswick St., ex p. Sucksteder* [27] and quoted the words of Scrutton L.J. where he said that the powers of a Secretary of State in making an order for the arrest and detention of an alien were of a judicial character and could not be delegated. No , one would be more surprised than the learned Lord Justice if he were told that in using those words he had decided that a Secretary of State, when he made the order, was a court. The difficulty arises from the poverty of language. Many men at some period or other of their respective lives are required to act 'judicially' but that only means that the act must be based on the personal judgment and not on the judgment of some other person. To infer from this that they in each case constituted a court would lead to extraordinary results. I am satisfied that the Minister for Defence when he made the order was not a Court; that there was no trial of the prosecutor,

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26 [1924] 2 IR 104.
27 [1918] 1 KB 578.

and that therefore Article 70 does not apply, and was not violated."[28]

Gavan Duffy J. then went on to hold that s.55 violated an internee's right to personal liberty. On this point he commenced first by observing that:

> "...a law for the internment of a citizen, without charge or hearing, outside the great protection of our criminal jurisprudence and outside even the special Courts, for activities calculated to prejudice the State, does not respect his right to personal liberty and does unjustly attack his person; in my view, such a law does not defend his right to personal liberty as far as practicable, first, because it does not bring him before a real Court and again because there is no impracticability in telling a suspect, before ordering his internment, what is alleged against him and hearing his answer, a course dictated by elementary justice."[29]

The judge then proceeded to reject the positivism of the majority of the Supreme Court in *The State (Ryan) v. Lennon*[30] as applicable to the present Constitution:

> "In my opinion, the saving words of the declaration that 'No citizen shall be deprived of his liberty save in

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28 [1924] 2 IR 104, 118-9.
29 [1940] IR 136, 154.

accordance with law' cannot be used to validate an enactment conflicting with the constitutional guarantees. The opinion of Mr. Justice FitzGibbon in *Ryan's Case* ....does not apply, in my judgment, to a Constitution in which fundamental rights and constitutional guarantees effectively fill the *lacunae* disclosed in the polity of 1922. The Constitution, with its most impressive Preamble, is the Charter of the Irish People and I will not whittle it away.....The right to personal liberty and the other principles which we are accustomed to summarise as the rule of law were most deliberately enshrined in a national Constitution, drawn up with the utmost care for a free people, and the power to intern on suspicion or without trial is fundamentally inconsistent with the rule of law as expressed in the terms of the Constitution. The legal position would be different, were I concerned with a war measure, a law 'expressed to be for securing the public safety and the preservation of the State in time of war' under Article 28; but I am not, for the Offences against the State Act 1939, is not such a law."[31]

There is no doubt that this was a persuasively written judgment with reasoning that a modern Supreme Court would find attractive. If the matter were *res integra* and

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30 [1935] IR 170.

31 [1940] IR 136, 155-6.

the Supreme Court free to reconsider the matter[32], it is virtually certain that it would nowadays prefer the reasoning of Gavan Duffy J. - at least as far as his treatment of the Article 40.4.1 issue is concerned - to that of the subsequent judgment of Sullivan C.J. in *Re Article 26 and the Offences against the State (Amendment) Bill, 1940* .[33] To illustrate this point it is probably not necessary to go further than the decision of the Supreme Court in *Re Article 26 and the Emergency Powers Bill,*

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32 Article 34.3.3 (which was inserted by the Second Amendment of the Constitution Act 1941) provides that:

> "No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill shall have been referred to the Supreme Court by the President under the said Article 26."

The special language of Article 34.3.3 ("shall have been referred") suggests that it was particularly drafted in order to make assurances doubly sure as far as the constitutionality of the 1940 Act is concerned by excluding such laws from the judicial review jurisdiction of the courts. And yet such a challenge might prove possible in the case of the 1940 Act. As noted by Kelly, *op. cit.*, at 494:

> "Since there are now substantial doubts as to whether that reference was a valid one...might it not be argued that as (I) the "old" Supreme Court had no jurisdiction to entertain that reference; (ii) therefore that Article 34.3.3 has no application to the "old" Supreme Court's pronouncement on the constitutionality of the 1940 Act and (iii) that the present Supreme Court is now free - should it so elect - to depart from the reasoning of the "old" Supreme Court and pronounce the 1940 Act to be unconstitutional?"

33 [1940] IR 470.

1976[34] where the Attorney General[35] specifically asked the Court:

> "to judge the Bill on the basis (with which the Court expressed no disagreement) that the seven-day arrest without trial, provided by the Bill, was unconstitutional unless saved by the emergency recital provided for by Article 28.3.3."[36]

If seven-day detention is unconstitutional on this basis, then, *a fortiori* (again assuming the matter to be *res integra*) internment without trial would not nowadays survive a similar constitutional challenge.[37]

Curiously enough, perhaps, the conclusion of Gavan Duffy J. that the Minister was necessarily administering justice in making an internment order would be likely to have less appeal to a modern Supreme Court which, in these matters, has always tended to prefer form to substance in Article 34 matters. While many examples could be given of this modern trend[38], it suffices to point to the Court's decision *in Goodman International v. Hamilton.* [39] Here the

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34 [1977] IR 159.

35 Declan Costello S.C., judge of the High Court, 1977-1995; President of the High Court, 1995-1997.

36 Kelly, *op.cit.*, 816.

37 It is less clear whether Gavan Duffy J.'s reasoning regarding the exercise of judicial powers by the Minister would enjoy similar support.

38 See generally Kelly, *op.cit.*, 337-347.

39 [1992] 2 IR 542

Court was required to pronounce on the constitutionality of the establishment of a Tribunal of Inquiry where, it appeared, the applicant company would, in effect, be required to defend itself against charges of fraud, tax evasion and other forms of impropriety. It was contended that the Tribunal was administering what amounted to a form of criminal justice, contrary to Article 34.1 of the Constitution. The Supreme Court, however, concluded that as the Tribunal did not satisfy all the tests enumerated by Kenny J. in *McDonald v. Bord na gCon*[40], it could not rank as the administration of justice for this purpose. These tests were:

> "(1) A dispute or controversy as to the existence of legal rights or a violation of the law;
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> (2) The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
>
> (3) The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
>
> (4) The enforcement of those rights or liabilities or the imposition of a penalty by the court or the executive power of the State which is called in by the court to enforce its judgment;

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40 [1965] IR 217

(5)The making of an order by the court which, as a matter of history is an order characteristic of the courts of this country."

In *Goodman* the Court held that, for example, the fifth test had not been satisfied, since the courts had never enjoyed the jurisdiction to make findings of fact "*in vacuo* and to report it to the Legislature." By this reasoning, the Court would probably hold that the making of an internment order failed this fifth test (since the courts historically never enjoyed such a jurisdiction) and would probably also incline to the view that the first test was not complied with on the ground that the Minister in making the order was not purporting to determine legal rights.[41]

As we shall presently see, the Government was later to express considerable surprise at this decision. In some ways, this surprise might have been justified, given Gavan Duffy J.'s comments on the draft Constitution prior to its enactment. In his first submission in late March 1937, the judge had first suggested an amendment to Article 38.1 which would have prevented interment without trial.[42] This

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41 Cf. the comments of Kenny J. in *Mulloy v. Sheehan* [1978] IR 438, 446 where he specifically differed from what Gavan Duffy J. had said in *Burke*:

> "My present view is that the use of the word 'satisfied' does not have the consequence that the person who has to be satisfied is exercising the judicial power of the State."

42 UCD P/1082/7B.

suggestion was not acted upon and in his subsequent "Notes on the Final Draft Constitution"[43] Gavan Duffy remarked in respect of Article 38.1 that "A law for internment without trial is not forbidden." These comments might suggest that in 1937 Gavan Duffy did not consider that the proposed new Constitution prevented the enactment of a law providing for internment, yet two years later he - convincingly, it is submitted - arrived at the opposite conclusion.[44]

The unsuccessful appeal to the Supreme Court

At all events, following the decision of Gavan Duffy J. releasing the applicant, the State sought to appeal this habeas corpus order to the Supreme Court. However, when the appeal opened on December 11th, 1939, Mr. McBride (who appeared for the applicant) raised the question as to whether the Court had jurisdiction to hear the appeal and the Court accordingly proceeded to determine this jurisdictional issue as a preliminary issue. Mr. McBride relied on the standard pre-Constitution authorities which established that the:

> "mere use in a statute of general words, which, taken literally, might comprehend an appeal against an

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43 UCD P/1082/7A, April 11, 1937.

44 For a discussion of Gavan Duffy J.'s judgment in this and other similar emergency cases, see, Golding, *George Gavan Duffy, 1882-1951* (Dublin, 1982) at 98-115.

order of discharge, cannot be held to involve such a grave departure from the constitutional right to personal freedom....There is no real distinction between an order of discharge and an acquittal on a criminal prosecution, and if the appellants' contention be correct, an appeal will lie against an acquittal by the Central Criminal Court."[45]

In response, Mr. Maguire KC relied on the express language of Article 34.4.4 of the Constitution which provides that:

"No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of the Constitution."

A majority of the Supreme Court, however, found for Mr. McBride on the jurisdictional question. The Court accepted that there had been no legislation enacted subsequent to the enactment of the Constitution which had regulated or excepted that appellate jurisdiction, so that, to all intents and purposes, Article 34.4.3 might be read for the purposes of the appeal as saying:

"The Supreme Court shall have appellate jurisdiction from all decisions of the High Court."[46]

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45 [1940] IR 136 at 158-9.

46 Sullivan C.J. noted (at 166) that the corresponding provisions contained in Article 66 of the Irish Free State Constitution had

This did not conclude the matter, since Sullivan C.J. led the majority of the Court to hold that Article 34.4.3 could not be read in isolation from the rest of the Constitution and that the special nature of the habeas corpus procedure served to create an exception from the general language of Article 34.4.3:

> "In the present case in determining the meaning of Article 34.4.3 of the Constitution I am entitled to have regard to the provisions of Article 40.4 and in considering that Article I am entitled to consider the principles formerly applicable in habeas corpus cases. I have already stated my opinion that the latter Article contemplates summary application, upon the hearing of which the right to release will be summarily determined. I think that in accordance with settled principles and established practice that determination is, and was intended to be, final. It follows that in my opinion an appeal does not lie to this Court from

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been interpreted as referring to "exceptions and regulations prescribed by Act of the Oireachtas after the Constitution came into force and did not carry on the limitations upon appeals imposed by statutes of the Parliament of the United Kingdom": see *Warner v. Minister for Industry and Commerce* [1929] IR 582 and *In re MM* [1933] IR 299. The Chief Justice continued by observing that:

> "We should give a similar interpretation to these words in Article 34.4.3 of the present Constitution and if we do so we cannot hold that the exception from the jurisdiction of the Court of Appeal established [by the House of Lords] in *Cox v. Hakes* 15 App. Cas. 506 is an 'exception prescribed by law' within the meaning of that Article."

> an order of the High Court made under Article 40.4 discharging a person from illegal custody....[In] this Court counsel for the Attorney General relied upon certain articles of the Constitution as indicating that an appeal should lie to this Court in any case in which the validity of any law is involved, having regard to the provisions of the Constitution. But that consideration cannot affect the jurisdiction of this Court to entertain an appeal from an order under Article 40.4 discharging a person from custody."[47]

It is clear that Sullivan C.J.'s argument did less than justice to the language of Article 34.4.4 in particular. The language of Article 34.4.4 clearly preserves the right of appeal where the validity of a "law"[48] was at issue and it is hard to see how the plain import of this special provision could be diluted by reference to factors such as pre-1922 habeas corpus practice. At the same time, while this aspect of *Burke* was subsequently overruled by the Supreme Court *in The State (Browne) v. Feran*[49], this literal approach to the interpretation of Article 34.4.3 has itself given rise to manifold difficulties, not least with

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47 [1940] IR 136, 186.

48 That is, as here, a law enacted by the Oireachtas created by the Constitution: see *The State (Sheerin) v. Kennedy* [1966] IR 379.

49 [1967] IR 147.

regard to the issue of whether an appeal lies against an acquittal in the Central Criminal Court.[50]

The Magazine Fort raid and its aftermath

Following the failure of the Supreme Court to entertain the State's appeal against Gavan Duffy J.'s decision, the Government concluded that it had no option but to release all the other prisoners who had been detained under Part VI of the 1939 Act, even though no formal application for habeas corpus appears to have been made by or on behalf of any other prisoner. This decision to release the other prisoners appears to have led to consequences which were potentially catastrophic. On December 23, 1939, the Magazine Fort at Phoenix Park - the Defence Forces main ammunition depot - was raided by the IRA in a military style operation[51] and over 1 million rounds of ammunition were stolen by over 50 men using four lorries. In the immediate post-Christmas period, an Army cordon was placed around Dublin and in surrounding areas and significant quantities of the stolen arsenal were

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50 See generally the debate in cases such as *The People v. O'Shea* [1982] IR 384 and *The People v. Quilligan (No.2)* [1989] IR 46. Cf. the arguments of Mr. McBride in the Supreme Court in *Burke* ([1940] IR 136, 159): "There is no real distinction between an order of discharge and an acquittal on a criminal prosecution, and if the appellant's contention be correct, an appeal will lie against an acquittal by the Central Criminal Court."

51 See generally Coogan, *The IRA* (Harper Collins, 1995) at 135-136.

recovered.[52] This raid had not only depleted the necessary reserves of the Defence Forces in a time of war - and munitions were already in short supply - but it gave a major propaganda boost to the IRA. *The Irish Times* was certainly not impressed with the resulting state of affairs:

> "It is obvious that the Government must have new powers to replace those of which it has just been deprived by the courts. It is still possible by ordinary legislation to amend the Constitution and we shall not be surprised if a Bill for that purpose is introduced in Dail Eireann on Wednesday. The same result, we understand, can be obtained by an amendment to the Emergency Powers Act. Whatever method may be used, one thing is essential: there must be no legal loopholes. The position is far too grave for constitutional or juridical niceties. We yield to nobody in our belief in democratic institutions, but, if those very institutions are to be preserved for us and our children and this country, there must be an end to all forms of playacting. There must be only one Government in the State and that Government's writ must be allowed to run without let or hindrance. It is all very well to regard the raid on the Magazine Fort as a rather clever jape - an encounter of wits in which the Government came off as second best: but, when all is said and done, it was an act of treason

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52 *The Irish Times*, December 26, 1939 and *The Irish Times*, December 28, 1939.

against the State. To mince words on such an occasion would be cowardice."[53]

The situation disclosed by *Burke's* case was clearly equally unacceptable to the Government and a new strategy was thereafter decided on. At a special meeting of the Government on New Year's Day 1940 the Government decided to approve the circulation of the text of the Offences against the State Bill, 1940.[54] This Bill substantially corresponded to Part VI of the 1939 Act, save that the new section 4(1) provided that such a detention order could only be made where the Minister was "of opinion" that the detainee was engaged in activities "prejudicial to the preservation of public peace and order or to the security of the State": the Minister was no longer required to be "satisfied" in the manner required by Part VI.[55]

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53 *The Irish Times*, December 30, 1939. As O'Halpin, *Defending Ireland: The Irish State and its Enemies* (Oxford, 1999) observes (at 247-8):

> "The Magazine Fort raid soon gave de Valera cause to regret his own leniency towards IRA hunger strikers. A humiliation for the army, and a tremendous shock to the government and public, it underlined the real dangers posed by domestic subversives and it demonstrated that the IRA's ambitions had grown despite...the delicacy of the national position. As well as displacing any residual national complacency, the raid promoted a flood of information from the public to both the Garda and the Army."

54 S. 11577.

55 In fact, the distinction between the phraseology of the Bill ("of opinion") and that of the 1939 Act ("satisfied") was to all intents and purposes immaterial. The rationale for Gavan Duffy J.'s conclusion was based on the effect of the ministerial warrant (which was held by him to be an "authority to administer criminal justice") as opposed to any mental element leading to the making

On the same day, *The Irish Press* reported that the President "may shortly refer a Bill to the Supreme Court, in accordance with Article 26 of the Constitution, for a decision as to whether any law is 'repugnant to this Constitution.'" It further indicated that this "probability arises out of the Government's plans for dealing with the present emergency", as these plans involved asking the Oireachtas to re-enact with "certain amendments" Part VI of the 1939 Act.[56] As *The Irish Press* - with its very close links to Fianna Fail - was apparently so certain of its facts, this suggests that the Article 26 reference was part of a pre-arranged plan on the part of the Government whereby the Article 26 procedure would operate as a substitute form of an appeal from Gavan Duffy J.'s decision.[57]

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of the warrant. Indeed, as Henchy J. later observed in *The State (Lynch) v. Cooney* [1982] IR 337, 378:

> "Indeed, it might well be contended that of s.55(1) of the Act of 1939 had used the words 'is of opinion' - thus connoting a laxer and more arbitrary level of ministerial assessment- Gavan Duffy J. might well have treated those words as an a fortiori reason for his finding of unconstitutionality."

56 *The Irish Press*, January 1, 1940.

57 This was clearly hinted at by the Taoiseach (Mr. de Valera TD) when speaking in the Dail on January 3, 1940 on the Emergency Powers (Amendment) Bill 1940 (this Bill also allowed for the internment of Irish nationals), but with reference to the Offences against the State (Amendment) Bill, 1940 which was going through the Dail at the same time (78 *Dail Debates* at Col. 1351-2):

> "The view of the legal advisers of the Government is that in view of all the circumstances and the situation as a whole the proper line to take is, if possible, to re-enact Part VI of the Offences against the State Act, giving an opportunity of having it referred to the Supreme Court for a decision as to

The 1940 Amendment Bill in the Houses of the Oireachtas

As it happens, two Bills were debated in the Oireachtas in the first week of January 1940. In the first of these, the Emergency Powers (Amendment) Bill, 1940, it was proposed to allow for the internment of Irish citizens. This had not been provided for in the original measure, the Emergency Powers Act 1939, but the amending Bill sought to rectify this. The point here, of course, was that the Emergency Powers Acts were enacted under cover of Article 28.3.3 of the Constitution and were, accordingly, immune from judicial review. This meant that even if the companion measure, the Offences against the State (Amendment) Bill 1940, was adjudged to be unconstitutional, the Minister for Justice would still have had the legal power to intern Irish citizens for so long as the Article 28.3.3 emergency remained operative.

During the sombre debate which took place that week, the Government made no secret of the fact that it viewed the

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whether internment is within the Constitution. In this matter I cannot presume to know what attitude the President will take, but again...we would say to ourselves that the President is likely, having seen a judge of the High Court rule to the effect that this Act as it stood originally was unconstitutional, and being possessed of a power before signature, to refer a Bill to the Supreme Court, we would say that he is likely to refer it."

situation as one of the utmost gravity.[58] Nor did the Taoiseach conceal his surprise and disappointment at the recent turn of events:

> "The Government, and all those interested in the passing of the Constitution were taken by surprise when they found that an Act which was passed by the Oireachtas last year was held to be unconstitutional. We were still more surprised when we found that the Supreme Court held that there was not a right of appeal even in a case in which the validity of an Act - in view of the Constitution - was in question...Last June we passed a certain Act intended to meet, not merely times of crisis, but the peculiar circumstances of our conditions here in ordinary peace time. That instrument for preserving the safety of the public was broken in our hands by the Court's decision. We have got to remedy that situation."[59]

Indeed, speaking in the Dail the Taoiseach seemed to hint that the whole system of judicial review might have to be re-considered if the judiciary were to continue to surprise the Government in this fashion:

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58 Thus, speaking on the Emergency Powers Bill, the Minister for Justice (Gerard Boland TD) commented (78 *Dail Debates* at Vol. 54)(January 3, 1940) that:

> "I am satisfied that if it had not been for the decision of the courts - I do not want to comment on the decision of the judge - that raid would not have occurred."

59 24 *Seanad Debates* at Col. 511 (January 4, 1940).

> "I say if the Constitution which was brought in here, which used common-sense language and which had to be submitted to the people for enactment is not to have the meaning which the Legislature and which the people think it has and if we cannot get some common ground on which there is an understanding of words, then we certainly cannot get on. If the Legislature and the judiciary are going to be at loggerheads in that way we shall have to change the situation."[60]

It is possible to interpret these words as containing something of a veiled threat to the Supreme Court and, indeed, Kelly described these comments as having been uttered in a manner as "a vein less plaintive and a good deal more disquieting"[61] than the comments which were made in the Seanad by the Taoiseach on the following day. However, in fairness to Mr. de Valera, it is important to note that the particular words in question were uttered in response to an opposition charge that the Emergency Powers (Amendment) Act 1940 might not enjoy constitutional protection on the ground that the "emergency" did not constitute a "state of war" for the purposes of Article 28.3.3. That contingency had already been deal with in the First Amendment of the Constitution

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60 78 *Dail Debates*, Col. 1353 (January 3, 1940).

61 Kelly, *Fundamental Rights in the Irish Law and Constitution* (Dublin, 1967) at 25.

Act 1939 and the Taoiseach's response was to the hypothetical possibility that the extended meaning now given to "time of war" in Article 28.3.3 might be judicially interpreted as not including our state of neutrality while our European neighbours were at war.[62] All the same, the Taoiseach did not mince his words and the Supreme Court cannot have been under any illusions as to where he and the Government stood on the matter.[63]

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62 This is made clear by a passage in the Taoiseach's speech immediately before the words just quoted (78 *Dail Debates* at Cols. 1352-3):

> "We think that in this present emergency, which creates a particularly difficult situation, unless the language of the ordinary man is to have no meaning, the [Emergency Powers (Amendment) Bill] is covered by Article 28.3.3...I think that Deputy Costello suggested that as this had only a reference to a time of war, it might be held that that the present was not a time of war. But there was an amendment passed a short time ago which assimilated a situation such as this to a time of war and which defined the expression 'time of war' as meaning a time such as the present. It seems to me, therefore, that unless words in the ordinary common way in which a man expresses himself are to have no meaning - in which case, of course, there is an end to everything - unless words in their plain meaning are to have no sense, it should mean that legislation under the present circumstances and under the present conditions cannot be nullified by an appeal to the Constitution."

63 Thus, speaking in the Seanad on January 4, 1940 on the Emergency Powers Bill, 1940, the Taoiseach said (24 *Seanad Debates* at Cols. 518-519):

> "If a case was made...and I have heard no case that this Bill is unconstitutional - perhaps I will wake up and find I have been dreaming all the time and that the Supreme Court will show me otherwise. But I hope that I am not dreaming. It will be a serious matter, if when people are interned under the Bill, when it is enacted, we should have a habeas corpus application action again and the people who are interned in the interests of the State have to be released again. It will

The Council of State meeting

Following the passage of the Bill by both Houses of the Oireachtas on January 5, 1940 it was then submitted to the President for signature. As anticipated[64], the President duly convened a Council of State meeting on January 8, 1940. This was the first meeting of the Council of State and the members who attended were first required by Mr. McDunphy, the Secretary to President Hyde, to make the declaration required by Article 31.4 of the Constitution.[65]

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be serious. It will be bad for the prestige of the Government.

Senators: Hear, hear !."

64 *The Irish Press*, January 6, 1940 forecast that the President would convene a meeting of the Council of State to consult them on the question of whether he should refer the Bill to the Supreme Court.

65 *The Irish Press*, January 9, 1940. It was further reported by The Irish Press that the meeting had lasted approximately one hour and that all members of the Council of State, with the exception of William Cosgrave T.D., had duly attended. Cosgrave's absence may be explained by the fact that such was the level of his distrust of de Valera that he tried to avoid all social contact with him: see Valiulis, "The Man they Could Never Forgive" in O'Carroll and Murphy eds., *De Valera and his Times* (Cork University Press, 1983) at 92. Cosgrave's rather curmudgeonly attitude to the entire procedure is, perhaps, best summed up by his comments at the Inaugural Meeting of the UCD Law Society (as reported in *The Irish Times,* February 29, 1940) a few weeks after the Supreme Court decision:

> "We have reached a stage in the making of laws when on one occasion recently the proceedings were suspended and the question 'how's that, Umpire' was fired by the President from the Council of State gun at the Supreme Court. The consideration of that question was costly in terms of time and money. By a majority the Supreme Court

The President also exercised his constitutional prerogative under Article 31.3 and appointed six members to the Council of State.[66] Although there appears to be no official record of the deliberations of the Council of State, an aide memoire prepared for the Taoiseach clearly demonstrates that he was in favour of the reference:

> "Is e mo thuairm-se gur ceart an Bille seo do chur fe bhreith na Cuirte Uachtaraighe. Bheinn ar a mhalairt de thuairim muna mbeadh an breith a thug duine de bhreithiunaigh na hArd-Chuirti uaidh le deanai. Is tuighte o bhreithiuntas an Bhreithimh sin go bhfuil se in-aghaidh an Bhunreachta comhacht do bhronnadh chun daoine do ghabhail agus do choinneail gan a dtriail agus a gciontu os comhair Cuirte. B'e tuairm an Riaghaltais na raibh comhachta den tsaghas sin i n-aghaidh an Bhunreachta agus is doigh liom go bhfuil an oiread san tabhachta ag baint leis an gceist nach mor i shocru go hudarasach."[67]

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gave its decision - a rare tribute to the ambiguity of the Constitution or the Bill or both."

66 The President appointed three Dail Deputies and three Senators as his nominees. All six were members of the opposition: Deputy James M. Dillon; Senator Robert Farnan; Senator Sir John Keane; Deputy Richard Mulcahy; Deputy William Norton and Senator Michael Tierney: *The Irish Press*, January 8, 1940.

67 S. 10484A. This may be translated as follows:

> "I am of opinion that the Bill ought to be referred to the Supreme Court. I would have been of the opposite opinion had it had not been for the recent judgment of one of the judges of the High Court. It is understood that the judgment of this judge suggests that it is unconstitutional to confer a power to arrest and detain persons without trial

Against this background of legal uncertainty and (we may fairly assume) widespread political consensus in favour of a reference, it is scarcely surprising that the President decided it was appropriate to refer the Bill to the Supreme Court.

The fact that the 1940 Bill had been referred at the time that it was gave rise to an interesting situation regarding the composition of the Court. As of the date of the reference the Court consisted of the following judges: Sullivan C.J., Murnaghan, Meredith, Geoghegan and Johnston JJ. The President of the High Court, Maguire P., was also an *ex-officio* member of the Court. As it happened, Johnston J., was due to retire on January 18, 1940 and the timetable for the reference made it impossible that the matter could have been disposed of in advance of that day.[68] This accordingly gave the Government an

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> and without charging them before a Court. The Government is of the view that such powers were not unconstitutional and I believe that the point is of such importance that it is necessary that it should be authoritatively determined."

[68] Thus, *The Irish Press*, January 10, 1940 observed that it had been reported in legal circles that:

> "...in view of the fact that counsel will have to be nominated, and that they will have to be given an opportunity of studying the case, apart altogether from the difficulty of estimating how long the case will take, it is very likely that the appeal will not be heard until after January 18."

opportunity to make an appointment to the Court at a very sensitive time.

At all events, on January 18, 1940 the Government nominated O'Byrne J. to fill the vacancy caused by the retirement of Johnston J.[69] Although O'Byrne J. was then a senior judge of the High Court with fourteen years' experience and was a judge of some considerable distinction[70], from the standpoint of the then Government there were several reasons why he might not have been promoted. First, O'Byrne had served from 1924-1926 as Attorney General in the Cosgrave administration as successor to Hugh Kennedy before he was himself appointed to the High Court. Secondly, O'Byrne had proved to be something of a thorn in the side of the Government during the turbulent years of 1933-1934. He had, for example, ordered the release of General O'Duffy following his arrest in December 1933 during the height of the Blueshirt controversy[71], a decision which had been greeted "with jubilation by Fine Gael leaders, who interpreted it as a major setback and embarrassment for the government."[72] The third reason is far more speculative: as a Supreme Court judge O'Byrne turned out to be something of a

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69 *Iris Oifigiuil*, January 23, 1940.

70 The *Irish Law Times and Solicitor's Journal* noted that the promotion of O'Byrne J. had "given much satisfaction following a distinguished academic and legal career": (1940) 74 *ILTSJ* 28.

71 [1934] IR 550.

72 Manning, *The Blueshirts* (Dublin, 1970) at 116.

judicial activist[73] and perhaps he could not safely be regarded as a certain vote in favour of upholding the constitutionality of the Bill.

There is, however, some evidence pointing in the opposite direction and, on this view, O'Byrne was nominated in the belief that he would be, so to speak, a "safe pair of hands" on issues of this kind. First, O'Byrne J. was chosen in preference to Hanna J. who was then the senior ordinary judge. It is true that Hanna J. was due in any event to retire in two years' time, but similar considerations had not prevented the Government nominating Johnston J. to the Supreme Court in March 1939, even though he had less than one year to serve on that Court before his retirement.[74] Secondly, O'Byrne J. had been a member of the Divisional High Court before whom Mr. Wood KC had declined to press the constitutional argument. Might this not have suggested to well-informed observers that O'Byrne J. would uphold the constitutionality of any internment provisions or, at least, that the Burke legal team had no confidence that he would not do so? Finally, it has been suggested that any liberal sympathies which O'Byrne J. may have harboured did not extend to cases involving political subversion or State

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73 He was, after all, the judge who subsequently delivered the judgment of the Supreme Court in *Buckley v. Attorney General* [1950] IR 67.

74 One possibility is that Hanna J. had been the High Court judge who had been highly critical of the special Garda forces in the politically sensitive case of *Lynch v. FitzGerald* [1938] IR 382.

security. After all, O'Byrne J. had been a pro-Treaty supporter whose views on security matters and the threat posed by IRA violence had been hardened by the bitter experience of the Civil War and its aftermath.[75] Of course, this speculation may be entirely misplaced and the Government may well have sought to make the best possible appointment without any regard whatsoever to the potential composition of the Court on the Article 26 reference. In this regard, it is only fair to add that Mr. de Valera appears to have completely fair minded regarding judicial appointments and that his Government had previously promoted several judges to the Supreme Court who had either had no Fianna Fail links or who had been closely associated with Fine Gael. [76]

However, the actual composition of the Supreme Court when it sat on Wednesday, January 24, 1940 to commence hearing arguments regarding the constitutionality of the Bill is of interest. On that day the Court consisted of Sullivan C.J., Maguire P., Murnaghan, Geoghegan and O'Byrne JJ. The Political Correspondent of *The Irish Press* had previously reported that:

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75 Confidential source.

76 These promotions included the promotion of Timothy Sullivan, then President of the High Court to Chief Justice (December 1936), Meredith J. (from High Court to Supreme Court) (December 1936) and Johnston J. (from High Court to Supreme Court)(March 1939).

"An interesting situation arises owing to the fact that one member of the Supreme Court, Mr. Justice Johnston, retires on January 18. Under the Constitution, a Bill referred to the Supreme Court by An t-Uachtarain, must be heard by five judges.

The President of the High Court may sit on the Supreme Court, but, I am informed, that it is unlikely that he will be asked to do so, while there are five Supreme Court judges able to act. If the Supreme Court does not hear and decide the case before January 18, then either the President of the High Court would sit on the Supreme Court or the vacancy on the Supreme Court would be filled before the hearing."[77]

But while the vacancy had subsequently been filled by O'Byrne J., the President of the High Court, contrary to predictions in earlier press reports, nonetheless sat on the Court. It was reported on the morning of the hearing that Meredith J. "may be unable to attend owing to indisposition"[78] and it appears that Maguire P. replaced

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77 *The Irish Press*, January 9, 1940.

78 *The Irish Press*, January 24, 1940. On the following day, the same newspaper reported that Meredith J. "had been unable to attend owing to indisposition." Meredith J. appears to have been judicially active during the previous week, since he is reported as having delivered a judgment on January 16, 1940: see *Great Northern Railway Co. v. Commissioner of Valuation* [1940] IR 247, 273. Meredith J. also appears to sat on the Supreme Court in *Irish Industrial Benefit Building Society v. O'Brien* (1940) 74 ILTR 52 where the case was at hearing on January 15, 17 and 18, 1940.

him as a result. The possible significance of these changes will be discussed presently.

The 1940 Bill before the Supreme Court

The oral argument commenced on Wednesday, January 24, 1940 and continued until the following Tuesday, January 31. The arguments received full coverage in the newspapers[79] and seemed to have attracted considerable interest in legal and political circles.[80] Leading counsel for the Attorney General, Martin Maguire SC[81], opened the case in support

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Meredith J. also spoke at the inaugural meeting of the Literary and Historical Society on the previous Friday, January 19, 1940: see Meenan ed., *Centenary History of the Literary and Historical Society* (Tralee, 1956) at p. 273. It may be noted, however, that the date of this meeting was given by the *Irish Law Times and Solicitor's Journal* as January 12, 1940: see (1940) 74 *ILTSJ* 21.

79 Thus, the main headline on *The Irish Press*, January 25, 1940 was "Bill and Constitution: Supreme Court Hearing On The President's Direction."

80 It was reported (*The Irish Press*, January 25, 1940) that "there was a large attendance of members of the Bar when the hearing of arguments was opened....Those present in the public seats included Mr. McDunphy, Secretary of the Council of State and Mr. M.A. Corrigan, Chief State Solicitor."

81 Kevin Haugh SC and Kevin Dixon, Barrister-at-Law appeared with Mr. Maguire for the Attorney. This was an exceptionally distinguished team. Immediately after the arguments on the Bill concluded, Mr. Maguire SC was appointed a judge of the High Court to replace O'Byrne J.: *Iris Oifigiuil*, February 6, 1940. Martin Maguire J. was a member of the Supreme Court from January 30, 1954 until his retirement on February 8, 1961. The *Irish Law Times and Solicitors' Journal* described his appointment to the High Court as being one which would "give general satisfaction", adding that Maguire J. had been a "popular figure" at the Bar: (1940) 74 *ILTSJ* 41, 42. Kevin Haugh SC was shortly thereafter appointed Attorney General (*Iris Oifigiuil*, March 5, 1940) and was later a judge of the High Court and Supreme Court. Kevin Dixon took silk later

of the Bill and A.K. Overend SC[82] and Cecil Lavery SC[83] argued against the validity of the Bill.[84] If one can judge by newspaper accounts, Mr. Maguire SC seems to have made a better impression on the Court. Whereas counsel opposing the Bill never seem to have quite struck the

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that year and was Attorney General from 1942-1946. He was a judge of the High Court from 1946 until his death at the age of 57 in 1959 and it has been justly said (Redmond, *Modern Irish Lives* (1998) at p. 83) that his "early death deprived the Irish judiciary of one of its more promising members who would probably have been promoted to the Supreme Court."

[82] Later judge of the High Court, January 11, 1943 until his death on April 16, 1947. Appointed to the High Court at the relatively late age of sixty-six, Mr. Overend did not appear to have had any party affiliation, but he did appear for the applicants in most of the major Article 2A cases during the mid-1930s. On his appointment he was described by the *Irish Law Times and Solicitor's Journal* as "an able lawyer, particularly in the field of constitutional law" and it was said that "the new judge was a popular and busy member of the Senior Bar": (1943) 77 *Irish Law Times and Solicitors' Journal* 12. On his death, the Irish judiciary was said to have "suffered its greatest loss since the death of Chief Justice Kennedy" and that "after the death of W.M. Jellet in 1936" Overend had generally been regarded "as leader on the Chancery side": (1947) 13 *Irish Jurist* 11.

[83] Later Attorney General 1948-1950 and judge of the Supreme Court, 1950-1966. It has been said (Redmond, *op.cit.*, 166) that by 1940 "he was regarded by his colleagues as the ablest advocate in practice", but Lavery J.'s judgments as a judge of the Supreme Court are far from impressive.

[84] Art O'Connor, Barrister-at-Law was the junior counsel appointed by the Court to argue against the validity of the Bill. It is interesting to note that Sean McBride, Barrister-at-Law was not so appointed by the Court, presumably because of the fact that memories of his IRA connections were still fresh in official minds. Perhaps even more pertinently McBride had been suspected of involvement in the murder of Kevin O'Higgins TD, then Minister for Justice, in August 1927. O'Higgins was related to Sullivan C.J. by marriage.

right note,[85] Mr. Maguire's submissions read as having been fluently presented and well-argued.

Towards the close of his argument, however, he seems have encountered stiff opposition from Murnaghan and Geoghegan JJ. Mr. Maguire SC had relied on the following extract from the speech of Lord Atkinson in *R. (Zadig) v. Halliday* [86]:

> "Preventive justice, as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do, but has not yet done, is no new thing in the laws of England."[87]

At this point Murnaghan J. intervened to say that the question arose:

> "whether in our Constitution there was room for what they called 'preventive justice.' Could it be shown

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85 Thus, at a key point, Mr. Overend S.C. could merely observe (*The Irish Press*, January 26, 1940):

> "Although it would be exceedingly difficult to put one's finger upon any precise provision of the Constitution to which it was directly contrary, nevertheless, it might be plainly contrary to the spirit of the Constitution."

86 [1917] AC 260.

87 *Ibid.*, 273.

that, under the Constitution, the State could arrest anyone on the prospect that he might commit a crime?

Mr. Maguire - It depends on the Constitution and what is meant by the rule of law within the Constitution.

Mr. Justice Murnaghan said he understood that the British Parliament could do anything - that they could pass a law that anybody who was likely to commit a crime could be interned.

Mr. Justice Geoghegan - If the two Houses of Parliament here passed a Bill which purported to authorise the arrest and internment of a person merely because some person contemplated that he would commit an offence, which is the Article that would enable that?

Mr. Maguire - There is no specific Article directing the likelihood of that. If there was, surely we would not be here arguing it at all.

In reply to further questions by Mr. Justice Geoghegan, Mr. Maguire said that the Constitution proceeded upon the basis that it prohibited certain things and enabled everything else. It enabled laws to be passed for the peace, good order and good government of the country.

> Mr. Justice Murnaghan - If this Constitution does preserve habeas corpus, it seems to me that if it enables people to be put into imprisonment because it is contemplated that they might commit a crime, you might as well take out *habeas corpus.*"[88]

On February 14, 1940, much to the relief, no doubt, of the Government, the Supreme Court upheld the constitutionality of the Bill. Having set out the background to the reference and having observed that Article 26 "admittedly refers to a Bill such as this which had been duly passed by

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88 *The Irish Press*, January 26, 1940. These remarks of Murnaghan J. were not accepted by the Court, thus providing further evidence for the contention that he dissented. On this issue, Sullivan C.J. said (at 582):

> "It was contended that the effect of the Bill is to take away the right to habeas corpus. There is no foundation for this contention. Notwithstanding the provisions of the Bill, a person who is detained is entitled under Article 40.4.2 to have the legality of his detention enquired into and to obtain an order for his release, unless the Court or Judge, enquiring into the matter, is satisfied that all the provisions of the Bill have been complied with and that the detention is legal. No doubt the Bill, when enacted, will have the effect of altering the law and, to that extent, will justify a detention which might otherwise be unlawful. This, however, cannot rightly be described as taking away the right to habeas corpus."

Sullivan C.J. was, of course, formally correct in that the 1940 Bill did not formally abridge the right to apply to the High Court for an order enquiring into the legality of a detention. Murnaghan J.'s comments were, of course, directed to the fact that the substance of the Constitution's guarantees of personal liberty were substantially eroded by the Bill.

both Houses of the Oireachtas"[89], Sullivan C.J. first drew attention to the fact that several internment statutes had been enacted by the Oireachtas of the Irish Free State prior to the enactment of the Constitution:

> "The existence and effect of these Acts must have been within the knowledge of the framers of the Constitution and, nevertheless, there is no express prohibition against such legislation. This is a matter to which we are bound to attach considerable weight in view of the fact that many Articles of the Constitution

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[89] The accuracy of this observation was, in any event, questionable. The Supreme Court at the date of the reference was the "old" Supreme Court of Justice: the establishment of the "new" Supreme Court contemplated by Article 34 of the Constitution did not take place until 1961: see Courts (Establishment and Constitution) Act 1961. Accordingly, at the date of the reference the "old" Supreme Court was not the Supreme Court referred to in Article 26 of the Constitution, since that "new" Court was only established some 21 years later. Article 58.1 of the Constitution provided that the Supreme Court of Justice existing at the date of the coming into force of the Constitution shall:

> "subject to the provisions of this Constitution relating to the determination of questions as to the validity of any law, continue to exercise the same jurisdictions respectively as heretofore..."

Since, however, the "old" Supreme Court enjoyed no such Article 26-type jurisdiction, it is not easy to see how that Court could validly have entertained the reference of the 1940 Bill. This jurisdictional issue was not, however, raised or at any stage debated during the course of the argument in 1940. Note, however, the dicta of O'Byrne J. in *Sullivan v. Robinson* [1954] IR 161, 174 to the effect that the reference in Article 58.1 "to the determination of questions as to the validity of any law" was wide enough to apply to Article 26 references. For a discussion of this issue, see Kelly, *op.cit.*, 1179.

prohibit the Oireachtas, in plain and unambiguous language from passing certain laws therein specified.

Where any particular law is not expressly prohibited and it is sought to establish that it is repugnant to the Constitution by reason of some implied prohibition or repugnancy, we are of opinion, as a matter of construction, that such repugnancy must be clearly established."[90]

The Chief Justice then quickly proceeded to dismiss arguments based on the Preamble[91] and on the alleged administration of justice by the Minister for Justice in making the detention orders.[92]

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90 [1940] IR 470, 478.

91 The Chief Justice commented (at 478-479):

> "Apart from the grammatical construction of the words of the Preamble, it seems to us difficult to understand how the dignity and freedom of the individual member of the State can be attained unless social order is maintained in that State. There is nothing in this clause of the Preamble which could be invoked to necessitate the sacrifice of the common good in the interests of the freedom of the individual."

92 The Chief Justice said (at 479):

> "In order to rely upon [Article 34] it would be necessary to establish that the Minister, in exercising the powers conferred upon him by the Bill, is administering justice within the meaning of the Article. This proposition seems to us to be wholly unsustainable."

But whereas in *Burke's* case, Gavan Duffy J. went to great lengths to develop his argument that the exercise of internment powers by the Minister amounted to the administration of justice,

Sullivan C.J. next rejected the contention - upon which Gavan Duffy J. had laid so much emphasis in *Burke* - that the 1940 Bill enabled the Minister to try the accused in respect of criminal offences in a manner contrary to Article 38.1 and that the detention thereby contemplated constituted a form of punishment in respect of a criminal offence:

> "In the opinion of this Court neither s.4 nor s.5 of the Bill creates or purports to create a criminal offence. The only essential preliminary to the exercise by a Minister of the powers contained in s.4 is that he should have formed opinions on the matters specifically mentioned in the section. The validity of such opinions is not a matter that could be questioned in any Court. Having formed such opinions, the Minister is entitled to make an order for detention: but this Court is of opinion that the detention is not in the nature of punishment, but is a precautionary measure taken for the purpose of preserving the public peace and order and the security of the State."[93]

In this context, Sullivan C.J. quoted extensively with approval from the judgments of the House of Lords in *R.*

Sullivan C.J. simply stated - without further explanation - that this argument was unsustainable.

93 [1940] IR 470, 479.

(Zadig) v. Halliday [94] where the validity of detention regulations made under the Defence of the Realm Consolidation Act 1914 was upheld. As Lord Finlay L.C. said in that case:

> "On the face of it the statute authorises in this sub-section provisions of two kinds - for prevention and for punishment. Any preventative measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State."[95]

The Chief Justice then continued by saying:

> "The principle underlying the decision in [*Zadig*] was acted upon and applied in this country in the case of *R. (O'Connell) v. Military Governor of Hare Park Camp*.[96] In that case the applicant was detained in custody under an order of an Executive Minister made under s.4 of the Public Safety (Powers of Arrest and Detention)(Temporary Provisions) Act 1924 which authorised such Minister to make such an order where he was of opinion that the public safety would be endangered by such person being set at liberty. It was contended that the section was repugnant to the

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94 [1917] AC 260.
95 *Ibid.*, 265.

> Constitution of the Irish Free State, which, in our opinion, was, in this respect, substantially to the same effect as the Constitution of Ireland. That contention was rejected and an application for habeas corpus was refused."[97]

This analysis of *O'Connell* is correct so far as it goes, but, of course, this case had been decided in the context of a purely temporary item of legislation which had been enacted just as the Civil War was coming to a close. Moreover, so far as the Divisional High Court was concerned, two of the three judges[98] clearly doubted the constitutionality of permanent internment legislation.[99] In addition, the Court of Appeal simply held that it no jurisdiction to consider the validity of a post-1922 law

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[96] [1924] 2 IR 104. (HC)

[97] [1940] IR 470, 481.

[98] Molony C.J., Pim and Dodd JJ.

[99] Dodd J. was quite emphatic on this point. He said ([1924] 2 IR at 118):

> "It would be possible, I think, to argue successfully that a permanent law giving the Executive power to deprive any citizen of his liberty without trial was contrary to the spirit of Article 6, and therefore, a violation of the Constitution; but that it a very different thing from a temporary law made in abnormal times and for a temporary purpose."

Dodd J. went on to refer with approval to the judgment of Lord Haldane *in Re Board of Commerce Act* [1922] 1 AC 191 where the Privy Council expressly recognised the right of a Dominion Parliament "where the interest of the State is of permanent and overriding importance" to do "by temporary Act what would be unconstitutional if the Legislature attempted to make it permanent." It was on this narrow basis alone - a temporary Act

while the transitory eight-year period was still running and never even considered the merits of the constitutional point.[100] On any view, therefore, *O'Connell* could not be regarded as a particularly strong authority for the wider proposition advanced by Sullivan C.J. In addition, however, Sullivan C.J.'s statement regarding the non-reviewability of a Minister's opinion is no longer regarded as good law. Although this view was subsequently endorsed by Maguire C.J. for the Supreme Court in *Re O'Laighleis*[101], by 1982 different views had prevailed. In *The State (Lynch) v. Cooney* [102] the Supreme Court expressly departed from these decisions, with O'Higgins C.J. stating:

> "While the opinion of the former Supreme Court, expressed in 1940 and in 1957, reflected what was then current judicial orthodoxy, judicial thinking has since then undergone a change. Decisions given in

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enacted at a time of emergency - that Dodd J. was prepared to uphold the constitutionality of the Public Safety Act 1923.

100 In the High Court in Burke, Gavan Duffy J. was decidedly unimpressed by arguments based on the authority of *O'Connell* . He said ([1940] IR 146-7):

> "[Counsel for the State] vigorously pressed upon me...the decision in *O'Connell's* Case whereby a transient Court upheld internment without trial under the Constitution of 1922; in my opinion, that case, if its authority survived the appeal, bears only a superficial resemblance to this, because it was decided under a Constitution differing radically from the Constitution in its provisions to secure personal liberty."

101 [1960] IR 93.

102 [1982] IR 337. This case concerned, *inter alia*, the reviewability of a ministerial decision, pursuant to s.31 of the Broadcasting Authority Act 1960, to ban television broadcasts by representatives of political parties closely associated with illegal organisations.

recent years show that the power of the courts to subject an administrative decision to judicial review is seen as having a wider reach than that delimited by those decisions of 1940 and 1957...The Court is satisfied that [s. 31 of the Broadcasting Authority Act 1960 authorising the prohibition of certain broadcasts] does not exclude review by the courts and that any opinion former by the Minister thereunder must be one which is bona fide held and factually sustainable and not unreasonable."[103]

Returning to the Offences against the State Bill reference, Sullivan C.J. then proceeded to reject the arguments based on the personal rights provisions of Article 40.3.1:

"The guarantee in this clause is not in respect any particular citizen, or class of citizens, but extends to all of the citizens of the State and the duty of determining the extent to which the rights of any particular citizen, or class of citizens, can properly be harmonised with the rights of the citizens as a whole seems to us to be a matter which is peculiarly within the province of the Oireachtas, and any attempt by the Oireachtas to control in the exercise of this function, would, in our opinion, be a usurpation of its authority."[104]

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103 [1982] IR 337,

These comments regarding Article 40.3.1 are not only at odds with the entire tenor of the text of this provision, but, even by the end of the decade, it was clear that the Supreme Court would no longer endorse this analysis. Thus, some seven years later in *Buckley v. Attorney General*[105] O'Byrne J. took a radically different approach, rejecting the argument of the Attorney that the task of harmonising personal rights lay exclusively with the Oireachtas:

> "It is claimed that the question of the exigencies of the common good is peculiarly a matter for the Legislature and that the decision of the Legislature on such a question is absolute and not subject to, or capable of, being reviewed by the Courts. We are unable to give our assent to this far-reaching proposition. If it were intended to remove this matter entirely from the cognisance of the Courts, we are of opinion that it would have been done in express terms as it was done in Article 45 with reference to the directive principles of social policy, which are inserted for the guidance of the Oireachtas and are expressly removed from the cognisance of the Courts."[106]

Subsequently, in the seminal decision of *Ryan v. Attorney General*[107] Kenny J. made it clear that he preferred the

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104 [1940] IR 470, 481.
105 [1950] IR 67.
106 *Ibid.*, 83.
107 [1965] IR 294.

latter analysis to that contained in the *Offences against the State Bill* reference and the era of judicial protection of unenumerated personal rights had well and truly begun.

Finally, Sullivan C.J. disposed of the argument based on the personal liberty provisions of Article 40.4.1 by saying:

> "The phrase 'in accordance with law' is used in several Articles of the Constitution and we are of opinion that it means in accordance with the law as it exists at the time when the particular Article is invoked and sought to be applied. In this Article, it means the law as it exists at the time when the legality of the detention arises for determination. A person in custody is detained in accordance with the provisions of a statute duly passed by the Oireachtas; subject always to the qualification that such provisions are not repugnant to the Constitution or to any provision thereof. Accordingly, in our opinion, this Article cannot be relied on for the purposes of establishing the proposition that the Bill is repugnant to the Constitution - such repugnancy must be established by reference to some other provision of the Constitution."[108]

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108 [1940] IR 475, 482.

If this statement had been subsequently followed, it would have largely emasculated Article 40.4.1 of any force or vitality. As Kelly observed:

> "There could scarcely be a more emphatic denial of any 'higher law' content in the word 'law' in that section, or a more positivist interpretation of it; and the Court did not betray - except for a most general reference to the common good - the anxiety shown by earlier courts such as those in *O'Connell's* and *Ryan's* cases to justify decisions, similar in concrete results, by adverting to the disturbed conditions of the times or the exceptional circumstances of the enactment under review."[109]

Not surprisingly, Sullivan C.J.'s dictum has not been subsequently followed. In *People v. O'Callaghan*[110] both O'Dalaigh C.J. and Walsh J. sought to distance themselves from this understanding of Article 40.4.1. O'Dalaigh C.J. noted that, while the 1940 Act allowed of preventive detention, it could only be operated in the most limited of circumstances:

> "First, there must be a Government proclamation declaring that the powers conferred by Part II of the Act are necessary to secure the preservation of public peace and order...Furthermore, even under this most

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109 Kelly, *op.cit.* 814.,

stringent Act a Minister of State is empowered to detain a person only if of opinion that he *is engaged* in activities which are prejudicial to the preservation of public peace and order...The Minister is not empowered to act because he is of opinion that a person is not detained *will engage* in such activities."[111]

Walsh J. clearly saw the 1940 Act as representing the absolute outer limit of what was constitutionally permissible:

"In this country it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that."[112]

The extent to which the positivistic reasoning of Sullivan C.J. has been entirely discredited is, perhaps, best

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110 [1966] IR 501.
111 *Ibid.*, 509.
112 *Ibid.*, 516-517.

illustrated by the Supreme Court's judgment in *King v. Attorney General* [113] where s.4 of the Vagrancy Act 1824 - which purported to provide for the arrest of a "suspected person or a reputed thief" found wandering abroad - was found to be manifestly unconstitutional. In holding that the section infringed Article 40.4.1, Henchy J. demonstrated the extent to which the Court had travelled since *the Offences against the State Bill* reference:

> "[The section] violates the guarantee...that no citizen shall be deprived of personal liberty save in accordance with law - which means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution." [114]

Where stands Sullivan C.J.'s judgment in the light of the foregoing? As we have just noted, one singular feature of the judgment is that it is has been overruled or departed from in nearly every important particular to the point where it might be said that it has been virtually discredited as a persuasive authority. As far as the substantive issue of internment is concerned, it seems fair to surmise that a modern Supreme Court would incline to a different view.[115] In the light of decisions such as the

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113 [1981] IR 233.

114 *Ibid.*, 257.

115 Writing in 1967 the present Chief Justice expressed the wish - long before he became a judge - that the Supreme Court "might make use of its new found freedom to break loose from

Emergency Powers Bill reference and *King*, it seems probable that the Court would hold that indefinite detention without trial without judicial supervision would amount to a violation of Article 40.4.1 and that if such measures are to be resorted to, they would require the cover of measures enacted by the Oireachtas pursuant to Article 28.3.3 following a declaration of emergency.

Of course, Sullivan C.J.'s decision must be viewed in its proper historical context. Gavan Duffy J.'s audacious - if legally correct - decision nearly caused a national catastrophe and the Supreme Court must have been conscious of such considerations. Such considerations were not, of course, confined to Ireland.

The experience of the House of Lords with Regulation 18B and *Liversidge v. Anderson*[116] is almost too well known to require elaborate analysis. Regulation 18B made under the Emergency Powers Act 1939 empowered the British Home Secretary to intern without trial "if the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations." In *Liversidge* the plaintiff had been interned pursuant to an order of the Home Secretary and he had begun an action for false imprisonment. The precise question raised was whether the plaintiff was entitled to particulars of the grounds upon

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the narrow legalism which permeates the 1940 decision": see Keane, "Preventive Justice" (1967) 2 *Irish Jurist* 233, 237.

116 [1942] AC 206.

which the Home Secretary had caused him to be detained. A majority of the House of Lords held that no such particulars need be furnished, since it held that on its proper construction the power conferred by Regulation 18B was a power the limits of which could not be inquired into by the courts, provided that the Home Secretary had acted in good faith.[117] Lord Atkin's famous dissent has been much admired and is now generally regarded as having correctly stated the law[118]. He remarked that he viewed with apprehension:

> "...the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive-minded than the executive....It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I."[119]

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117 See [1942] AC 206, 221-222, per Lord Maugham.

118 *R. v. Home Secretary, ex p. Khawaja* [1984] AC 74.

119 [1942] AC 206, 244. For a fascinating account of how Lord Atkin's remarks in his celebrated dissenting judgment caused him to be cold-shouldered by his fellow Law Lords, see the late

Lord Atkin concluded thus:

> "I know of only one authority which might justify the suggested method of construction. 'When I use a word', Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is' said Humpty Dumpty, 'which is to be master - that's all.' (*Through the Looking Glass*, c., vi). After all this long discussion the question is whether the words 'If a man has' can mean 'If a man thinks he has.' I am of opinion that they cannot, and that the case should be decided accordingly."[120]

Although *Liversidge* merely concerned the interpretation of a statutory instrument (which, presumably, could have been changed at any time by the appropriate Minister) and - unlike *Burke* and the *Offences against the State Bill* reference - did not concern the very validity of the underlying primary legislation, the decision nonetheless gave rise to enormous controversy. The Lord Chancellor, Lord Simon[121] attempted to persuade Lord Atkin to delete the

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Professor Heuston's definitive account: "*Liversidge v. Anderson* in Retrospect" (1970) 86 *LQR* 33.

120 *Ibid.* Among the many who wrote to congratulate Lord Atkin was none other than Gavan Duffy J. himself: Golding, *op.cit.*, 105.

121 Lord Simon had not sat, "no doubt because as Home Secretary as far back as 1915 he had signed a similar detention order which had given rise to the great case of *R. v. Halliday, ex*

reference to "Humpty Dumpty" in the draft judgments[122] - a course of action which may be regarded, depending on one's point of view - as either "most sinister"[123] or a "legitimate request for loyal co-operation in a difficult situation, phrased in courteous and moderate language."[124] Lord Maugham, who had presided, took the remarkable step of writing to *The Times* to protest "about what he took to be an offensive remark in relation to the Attorney-General and his eminent Junior"[125] and this in turn gave rise to a debate "in the House of Lords itself as to the propriety of one noble and learned Lord writing to the public press to correct or comment upon the judicial utterances of one of his colleagues."[126]

But even in the United States, however, a less drastic form of internment without trial was upheld. Following Pearl Harbour, the US military, acting pursuant to an executive order signed by the President, but without legislative authority from Congress, excluded US citizens of Japanese ancestry from the West Coast of the United States. The persons so excluded were relocated to other parts of the United States and subject to curfew orders

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p. Zadig [1917] AC 260": Heuston, *Lives of the Lord Chancellors, 1885-1940* (Oxford, 1964) at 564 ("Heuston I").

122 Heuston, *Lives of the Lord Chancellors, 1940-1970* (Oxford, 1987) at 59-60 ("Heuston II").

123 Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800-1976* (London, 1979) at 333.

124 Heuston II, *op.cit.*, 60.

125 *The Times*, November 4, 1941.

and other severe constraints on their personal liberty. In 1943 the US Supreme Court upheld the validity of the curfew orders[127] and in the following year in *Korematsu v. United States* [128] a majority of the Court upheld the constitutionality of the West Coast exclusion order. Over trenchant dissents, Black J. may be thought to have advanced a persuasive argument in defence of what at first might seem constitutionally indefensible:

> "Like curfew, exclusion of those of Japanese origin was deemed necessary [by the military authorities] because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. [These authorities found] that it was impossible to bring about an immediate segregation of the disloyal from the loyal. [Accordingly the judgment that] the exclusion of the whole group was a military imperative answers the contention that the exclusion was in the nature of a group punishment based on antagonism to those of Japanese origin....Compulsory exclusion of large groups of citizens from their homes, except under conditions of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to

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126 Heuston 1, *op.cit.*, 564.

127 *Hirabayashi v. United States* 320 US 81 (1943).

128 323 US 214 (1944).

protect must be commensurate with the threatened danger."[129]

Black J. concluded that the applicant had been excluded simply because the United States was:

> "at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily...There was evidence of disloyalty on the part of some and the military authorities considered that the need for action was great and time was short. We cannot - by availing ourselves of the calm perspective of hindsight - now say that at that time these actions were unjustified."[130]

In a case decided on the same day - *Ex parte Endo* [131] - the Court held that the continued detention programme was unlawful in the absence of statutory authority. The Court did not have to reach the constitutional issue in that case, but the logic of *Korematsu* was that the constitutionality of an internment law would have been

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129 *Ibid.*, 219-220.
130 *Ibid.*, 223-224.
131 323 US 283 (1944).

sustained. While the reasoning in the Japanese cases was severely criticized even at the time[132], it nonetheless illustrates the distance to which even the American courts were willing to go to accommodate a perceived military necessity. If that is so, perhaps, then we should not also avail "ourselves of the calm perspective of hindsight", and be too critical of Sullivan C.J.'s decision.

Disclosure that the opinion was a majority opinion

There was, in any event, a slight sting in the tail of Sullivan C.J.'s judgment. At the date of the reference of this Bill, Article 26.2.2 read as follows:

> "The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct."

Accordingly, as the Constitution then stood, Article 26 required the Court to give one judgment following a reference of the Bill, but it did not preclude the Court revealing that this judgment was not a unanimous one. Sullivan C.J. commenced his judgment by indicating that the Court had been divided on the constitutionality of the Bill:

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132 See, *e.g.*, Rostow, "The Japanese American Cases - A Disaster" (1945) 54 *Yale L.J.* 489.

"The decision now announced is the decision of the majority of the Judges and is, within the meaning of Article 26.2.2 of the said Article, the decision of the Court."[133]

President Hyde duly signed the Bill following the Supreme Court's decision. When the Ceann Comhairle announced to the Dail on February 21, 1940 that he had received a message to this effect, the following exchange then took place between Deputy Dillon and the Taoiseach. The former drew the latter's attention to the fact that of the six judges who had considered the constitutionality of the internment provisions (i.e., Gavan Duffy J. in respect of Part VI of the 1939 Act and the five members of the Supreme Court who had considered the 1940 Bill), three had adjudged the measure in question to be constitutional and three had formed the opposite view:

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133 [1940] IR 470, 475. These comments prompted a re-consideration of the necessity for a "one judgment" rule in constitutional cases and led directly to the such changes being effected by the Second Amendment of the Constitution Act 1941. Cf. the comments of Finlay C.J. in *Attorney General v. Hamilton* [1993] 2 IR 252, 269:

> "This was apparently seen to indicate a dissenting opinion which it was felt could greatly reduce the authority of the decision of the Court and, we are informed, and it is commonly believed, led directly to the insertion of the additional [one judgment provisions of Article 26.2.2 and Article 34.4.5] by the Act of 1941 in both Article 26 and Article 34."

"We are now in this very awkward situation: three members of the High Court having declared the Bill unconstitutional and three members of the High Court having declared it constitutional. Does the Taoiseach consider that a satisfactory position? .....There is no precedent as far as I am aware. I do not know, but perhaps the Taoiseach might like to inform the House.

The Taoiseach: I would like, if permitted, to say that the Deputy seems to have information which I have not got. The Constitution lays it down definitely that a decision of the Supreme Court is a simple decision, and there is no question, as far as I know, of a majority or a minority being referred to it.

Mr. Dillon: But, as a matter of fact, did not Mr. Justice Gavan Duffy, Mr. Justice Geoghegan and Mr. Justice Murnaghan hold that it was unconstitutional, and the Chief Justice, the President of the High Court and Mr. Justice O'Byrne hold that it was not?

The Taoiseach: I do not know where the Deputy got the information.

Mr. Dillon: I understood it was public property. Was it not stated that it was a majority decision of the Supreme Court?"[134]

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134 78 *Dail Debates*, Cols. 1723-1724. The reference to six members of the High Court, of course, was somewhat loose language on

At this remove, it is, of course, impossible to say whether Deputy Dillon's information was correct. Although Deputy

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the part of Deputy Dillon. Gavan Duffy J. was the only member of the High Court to adjudicate on the validity of the 1939 Act and it was the five members of the Supreme Court (Sullivan C.J., Maguire P., Murnaghan, Geoghegan and O'Byrne JJ.) who had determined the constitutionality of the 1940 Bill. It may be noted that, a little over a year later, speaking (86 *Dail Debates* at Col. 1854, April 24, 1941) on the Government's proposals to provide for a "one judgment" rule for both Articles 26 and Article 34, Deputy Costello said with reference to the judgment on the 1940 Bill:

> "...in fact, only one judgment was given, but it was announced by the Chief Justice, in delivering the judgment of the Court, that the judgment of the Court was the judgment of the majority. That, of course, was in accordance with the provisions of Article 26, but it gave rise to a considerable amount of speculation as to whether or not the judgment of the court was, in fact, unanimous, and I think that most of the speculation developed rather into certainty that there was one or two of the judges of the court who had not the same view as the majority."

But it is clear from the Taoiseach's remarks in the same debate (86 *Dail Debates* at 1861) that the events of 1940 had convinced him of the necessity for the "one judgment" rule:

> "The one thing I am looking for, and which I think we all ought to look for here, is that there should be a definite decision; that it should not be bandied about from month to month that, in fact, that decision was only come to by a mere majority of the Supreme Court. Then you would have added in, perhaps, the number of judges who dealt with the matter in the High Court before it came to the Supreme Court, as might happen in some cases. You would then have an adding up of judges and people saying: 'There were five on this side and three on the other, and therefore the law is the other way. That would be altogether undesirable. While there might be advantages on the other side, I think, on the whole, we ought to keep it here in a single judgment."

Dillon was a qualified barrister, he had never practised. However, he was well connected in legal circles and it seems unlikely that he would have made such a definite statement unless he was relatively sure of his facts.[135] A further point which provides some further corroboration is that, as we have already seen, counsel for the State was closely questioned by both Murnaghan and Geoghegan JJ. during the course of argument. For present purposes, there seems little alternative but to assume that Deputy Dillon was correct.

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135 For Dillon's own (somewhat ambivalent) attitude to the 1940 Act, see Manning, *James Dillon - A Biography* (Dublin, 1999) at 159. Dillon's actions were heavily criticised by *The Irish Law Times and Solicitors' Journal*. In an anonymous piece entitled "An Insult to the Judiciary" (1940) *ILTSJ* 83, the writer first complained that Dillon's comments "clearly overstep[ed] the bounds of propriety" and that continued:

> "The Chief Justice, in delivering judgment, referred to it as a dissenting judgment, but the names of the dissenting Judge or Judges were never mentioned. Nor did any of the Judges at any time during the hearing express an opinion that the Bill was unconstitutional. In face of that, it is manifestly untrue to say that any members of the Court 'held' the Bill to be unconstitutional.
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> What makes the matter particularly serious is that it is obviously impossible, and, in any event, incompatible with the dignity of the judicial office for the learned Judges whose names have been made use of in an undignified controversy to step down from the Bench to correct the false implications which have been spread abroad. Our public representatives are charged with the duty of upholding and maintaining our national institutions. To make use of the names of the Judges as weapons in a political controversy is scarcely in accord with that duty."

This brings us directly back to the issue of the actual composition of the Court. Writing in 1967, Professor Beth created a storm of controversy when he observed that:

> "It is of considerable political interest to note that Mr. Justice Meredith absented himself from this case and was replaced by a substitute, the President of the High Court, who was known to support the bill. Since the final decision was 3-2 this manoeuver may have created the majority by which the bill was upheld. At the least, it leaves the unpleasant suspicion that the Government, in effect, tampered with the Court."[136]

In a postscript to this work, Professor Beth acknowledged that the "suspicion voiced on p. 50 is quite unfounded...I happy to withdraw the allegation...." The continued sensitivity of this issue is evidenced by the fact that writing some fifteen years later in 1982 in the course of a book review of Golding's, "George Gavan Duffy", Walsh J. was still evidently unimpressed by Beth's retraction:

> "The author relies uncritically on Professor Loren Beth's booklet "Development of Judicial Review in Ireland" - a work which revealed that its author had less than a full understanding of the Constitution. In the first printing of the booklet Beth made the scandalous allegation

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136 *The Development of Judicial Review in Ireland* (IPA, 1967) at 50.

that Chief Justice Sullivan had 'packed' the Supreme Court to assist the Government. The allegation was totally without foundation and the sources offered by Beth to support it did not do so."[137]

Against this contentious background, it is, perhaps, best to examine this entire controversy afresh.

Composition of the Supreme Court on the reference

At the outset it is worth noting that at the date of the reference the Supreme Court had never previously declared an Act of the Oireachtas to be unconstitutional. This is relevant inasmuch as we may surmise that in the light of this consideration, coupled with the general security situation revealed by the Magazine Fort raid and the veiled hints of the Taoiseach speaking in the Oireachtas in the aftermath of Gavan Duffy J.'s decision, most legal observers might well have assumed in advance of the hearing that the Bill would have been unanimously upheld by the Court. All of this is merely to say that the 1940 Bill did not appear to present a case where the attitude of the individual judges of the Court who did in fact dissent could have been easily predicted in advance. Perhaps even more relevant is the fact that Chief Justice Sullivan was a

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[137] (1982) 17 *Irish Jurist* 384, 386. Walsh J. was rather unfair in his comments about Professor Beth. Beth's booklet is, in fact, an excellent critique of the development of judicial review in the first thirty years of the Constitution since its adoption in 1937,

scrupulous and punctilious judge who, it seems, was so concerned with protecting the independence of his office that he went to the length of declining to attend any public receptions hosted by the Government during his term of office.[138] In these circumstances, the suggestion that he might have manipulated the actual composition of the Court in order to accommodate the Government of the day seems inherently unlikely.[139]

But before examining the detail of the Professor Beth's suggestion, is also worth exploring what the possible instinctive attitudes of the individual members of the Supreme Court to the 1940 Bill are likely to have been:

Sullivan C.J.

Although Chief Justice Sullivan had been promoted to that office by Mr. de Valera in December 1936 following the untimely death of Chief Justice Kennedy, he was clearly identified as a Fine Gael supporter, having been previously appointed as President of the High Court in June 1924 by Mr. Cosgrave. Prior to his judicial appointment, he had appeared for the military authorities in many of the leading

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even if it is slightly marred in places by obvious errors and some gauche comments.

138 Confidential source.

139 There is the further incidental consideration that although Chief Justice Sullivan had been promoted to that office by Mr. De Valera in December 1936, he was closely identified as a Fine Gael supporter and would have been unlikely to have gone out of his way to assist a Fianna Fail Government.

cases during the Civil War period.[140] While he had taken a relatively liberal line in well-written judgments in a series of Article 2A cases which had come before him as President of the High Court, he was clearly uncomfortable with the entire concept of judicial review of legislation.[141] His conservative instincts, coupled with a traditional view of the judicial function, combined to make his vote to uphold the constitutionality of the Bill all but certain.

Maguire P.

As a judge, he shared Sullivan's conservative instincts and the latter's modest view of the judicial function. Prior to his judicial appointment, he had previously been a Fianna Fail T.D. and he was Attorney General from 1932-1936. As already noted, the applicant in *The State (Burke) v. Lennon* had declined to pursue his habeas corpus application before a Divisional High Court over which Maguire P. had presided, presumably because the applicant's legal advisers believed that it was likely that a majority of that Divisional High Court would out-vote

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140 Most notably in the *Childers* case, where, ironically enough, Maguire P. had appeared as junior counsel for the applicant: *R. (Childers) v. Adjutant General of the Provisional Forces* [1923] 1 IR 5.

141 Compare his judgments in *The State (O'Duffy) v. Bennett* [1935] IR 70 and *The State (Hughes) v. Lennon* [1935] IR 128 with his judgment in *The State (Ryan) v. Lennon* [1935] IR 170. In *O'Duffy* and *Hughes*, Sullivan P. was quite prepared to review decisions of the Constitution (Special Powers) Tribunal on orthodox judicial review lines (vires, error on the face of the record etc.),

Gavan Duffy J. and uphold the constitutionality of the internment provisions of Part VI of the 1939 Act. He was always likely to vote to uphold the constitutionality of the Bill.

Murnaghan J.

Murnaghan J. had previously been a Professor of Law at University College, Dublin prior to his appointment to the High Court in June 1924. He was then swiftly promoted to the Supreme Court in May 1925 following the resignation of O'Connor J. Although his judgments always read well, for much of the following thirteen years he was rather eclipsed by both Kennedy C.J. and FitzGibbon J. By 1940, however, following the death of Kennedy C.J. in December 1936 and the retirement of FitzGibbon J. in October 1938, he was the senior ordinary judge of the Court. Towards the end of his judicial career he showed some signs of activism in constitutional matters.[142] At the date of the reference, however, judged by past form - he had previously been part of the majority upholding the validity of the draconian Article 2A amendment in *The State*

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but his judgment in *Ryan* demonstrates his unease with the concept of judicial review of legislation.

142 He delivered the judgment of the Court in *National Union of Railwaymen v. Sullivan* [1947] IR 77 (holding Part III of the Trade Union Act 1947 to be unconstitutional) and the leading judgment in *Re Tilson* [1951] IR 1 (holding that the common law rule of paternal supremacy in custody matters was unconstitutional). As far as the latter judgment is concerned, see Hogan, "A Fresh Look at *Tilson's* Case" (1998) *Irish Jurist* 311.

(Ryan) v. Lennon[143] - one would, perhaps, have expected him to uphold the constitutionality of the Bill

Meredith J.

Meredith J. had a reputation as being something of a liberal, but his judicial record displays nothing of the confident individualism and judicial courage shown by Gavan Duffy J. More interestingly, it has been suggested[144] that Meredith J.'s reported indisposition may possibly have been something of a diplomatic illness and that he willingly himself from the Court because of his conscientious objections to capital punishment in particular and to all forms of coercive legislation (such as internment) in general. He had, furthermore, a reputation for indecisiveness and he may have been reluctant to sit in a case of this magnitude[145]. While Meredith J. may well have had such private views, this would not seem to be the most obvious explanation for his absence, since - to take but one example - he was a member of the Divisional High Court in *The State (Ryan) v. Lennon* [146] where, as have already seen, the courts upheld the validity of Constitution (Amendment No. 17) Act 1931 and rejected the habeas corpus applications of applicants facing trial before a

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143 [1935] IR 170.

144 Confidential source.

145 Confidential source. These two sources in question are different.

146 [1935] IR 170.

Military Court and where, if convicted, the death sentence could be imposed, even if this was the maximum penalty prescribed by the ordinary law.

Since Meredith J. did not actually sit on the hearing of the reference of the Bill, we can only surmise what his attitude might have been. Judged by his past record, it seems unlikely that he would have taken the lone, individualistic stand and dissented from the remainder of his colleagues if they all had been in favour of upholding the constitutionality of the Bill. Indeed, given Meredith J.'s remarks in *The State (Hughes) v. Lennon*[147] about the necessity to accept the "extremely distasteful" compromise of Article 2A and military courts as any alternative would have been "something more unwelcome", it is likely that he would have felt coerced to accept a similarly "distasteful compromise" in the shape of internment. While it is true that where (as here) the Court appears to have been nor less evenly divided, one could envisage the possibility of Meredith J. siding with those of his colleagues who considered that the Bill was unconstitutional, his pointed remarks in *Hughes* reveal a judicial mindset that made this course of action inherently unlikely.

Geoghegan J.

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147 [1935] IR 128, 148.

As Geoghegan J. had been a former Fianna Fail T.D. and Minister for Justice and Attorney General prior to his appointment directly to the Supreme Court in December 1936[148], one would have thought that his natural sympathies would have been to uphold the constitutionality of the Bill. In addition, his judicial record suggests that - like Sullivan C.J. and Maguire P. - he was a judge with conservative instincts. Indeed, most contemporary observers would presumably have expected Geoghegan J. to uphold the Bill. All of this makes Geoghegan J.'s stance on the Bill the more surprising, but it has been suggested[149] that this stance may perhaps be accounted for by the fact he inclined to vote with Murnaghan J. with whom, apparently, he had a good personal and professional rapport.

O'Byrne J.

While the background to O'Byrne J.'s promotion to the Supreme Court and his likely attitude to the Bill has already been discussed, what seems clear is that his vote proved to be the decisive one. To some extent, at least, it is surprising that, on this issue, he aligned himself with Sullivan C.J. and Maguire P. rather than Murnaghan and

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148 In an obituary in the *Irish Independent,* March 27, 1951 it was said that Geoghegan J. had made a "noteworthy contribution to constitutional law in [1936] when he assisted the Government in the preparation and enactment of the Constitution (Amendment) Act and the External Relations Act."

149 Confidential source.

Geoghegan JJ.. Certainly, there is here a huge contrast in terms of judicial style and approach between the wooden and pedestrian judgment of Sullivan C.J. in respect of the reference on the 1940 Bill on the one hand and the vibrant and incisive judgment of O'Byrne J. for the Court in the *Sinn Fein Funds* case[150] some seven years later on the other. One can only assume that a judge of O'Byrne's stature and independence must at least, have been tempted to join his two other colleagues in finding the Bill to be unconstitutional.

Returning now to Professor Beth's actual contention, it does not seem accurate to suggest that "Mr. Justice Meredith absented himself from this case" if by this it is meant that Meredith J. deliberately recused himself in order to facilitate his substitution by another judge who was more likely to uphold the Bill. The most likely explanation for Meredith J.'s absence is that which was given in the press, namely, that he was indisposed.[151] Nor does it seem accurate to infer that Sullivan C.J. deliberately replaced him by choosing Maguire P. (as opposed, for example, to some other judge) if by this it is suggested that the Chief Justice sought to manipulate the composition of the Court. Of course, Sullivan C.J. could perhaps easily have guessed that Maguire P. was very likely to support the Bill, but the key point here surely is that

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150 *Buckley v. Attorney General* [1950] IR 67.

in Meredith J.'s absence another judge was required to bring the Court up to its full constitutional strength.[152] In these circumstances, Maguire P. was the obvious candidate since he was the only other member of the Supreme Court who was available to sit. It is true that the President of the High Court had not often previously sat on the Supreme Court[153] and, indeed, this appears to have been the only occasion in which Maguire P. sat on the Court prior to his elevation to Chief Justice in 1946. But this was also the first occasion in which the Court was *required* to sit as a Court of five[154] and it was also operating under the 60 day time limit prescribed by Article 26.2.1. In these circumstances, if - as it would appear - Meredith J. was in fact indisposed, it seems entirely reasonable for Sullivan C.J. to have asked Maguire P. to sit.[155]

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151 The hearing took place, after all, in mid-January and Meredith J. may not have enjoyed the best of health: he died two years later in August 1942.

152 In the case of Article 26 references, the Supreme Court is required to consist of "not less than five judges": see Article 26.1.2.

153 A notable example is provided by *Re Westby, minors* [1934] IR 311 where the Supreme Court consisted of Sullivan P., FitzGibbon and Murnaghan JJ.

154 This was, of course, the first Article 26 reference. It was not until 1961 that the Court was required to sit as a court of five in cases concerning the validity of a law: see Courts (Supplemental Provisions) Act 1961, s. 7(5).

155 In the period from about the mid-seventies to the mid-nineties - where the Court was much more frequently been required to sit as a court of five in constitutional cases - it was by no means uncommon for the President of the High Court to sit. However, it would seem that the President of the High Court has sat on only one other Article 26 reference: Finlay P. was a member of the Court which heard the Criminal Law (Jurisdiction)

Conclusions

At this remove, therefore, so far as one can judge from the available evidence (such as it is) it would seem that Professor Beth's anxieties were misplaced. The real surprise, however, was that at least one and, in all probability, two, members of the Court were prepared to find the Bill unconstitutional and that the Bill only narrowly survived challenge. Given that the Supreme Court had never previously held any legislative measure to be unconstitutional, the Government must surely have expected that the Bill would have had a relatively easy passage. This belief was probably re-inforced by the fact that this was a war time measure and where the security implications of a finding against the Bill were plain to behold, as witnessed by the calamitous aftermath of Gavan

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Bill reference: see *Re Article 26 and the Criminal Law (Jurisdiction) Bill, 1976* [1977] IR 129. The curious thing is that while the President of the High Court is *ex officio* a member of the Supreme Court (Courts (Supplemental Provisions) Act 1961, s. 1(3)) and ranks second in seniority only to the Chief Justice, it has never been the practice for the President of the High Court to sit on that Court. The President normally sits only for some special reason (illness, prior conflicts on the part of other members of the Supreme Court etc.). In the last few years, following the enlargement of the Supreme Court in 1996, the President of the High Court has almost never sat on the Court, because there is a ready stream of ordinary Supreme Court judges who can "make up the numbers" for a constitutional case if one of the senior judges is ill or unavailable for some reason. Thus, in major constitutional cases, the general practice is that the Chief Justice, plus the four most senior available Supreme Court judges will sit. Save in the special circumstances just mentioned, the President of the High Court will not sit, even

Duffy J.'s original ruling in the High Court. Indeed, in any other number of circumstances the fate of the Bill might well have been different: had Meredith J. or even Johnson J. sat, a different majority might well have emerged and, as already noted, O'Byrne J. must have at least contemplated finding against the Bill. The fact that the judiciary had been so evenly divided over the constitutionality of sensitive security legislation at a time when a question mark hung over even the very survival of the State ought to have sent its own signal that the Constitution had indeed endowed the judiciary with potent powers which might well be used to rebuff the other organs of government in more settled times.

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though he is ranked *ex officio* as more senior than any of the four ordinary judges who do, in fact, sit with the Chief Justice.

CHAPTER 7

THE SECOND AMENDMENT OF THE CONSTITUTION ACT 1941 AND THE AFTERMATH TO THE OFFENCES AGAINST THE STATE BILL REFERENCE

The transitional amendment provisions

As we have already seen, conscious of the disastrous experience which had befallen the Constitution of the Irish Free State, the drafters of the 1937 Constitution had provided for an elaborate mechanism whereby that Constitution could only be amended by way of referendum, subject only to strictly limited transitional arrangements which were made unalterable by ordinary legislation. The special transitional arrangements were contained in Article 51 which provided in relevant part that:

> "1. Notwithstanding anything contained in Article 46 hereof, any of the provisions of this Constitution, except the provisions of the said Article 46 and this Article may, subject as hereinafter provided, be amended by the Oireachtas, whether by way of variation, addition or repeal, within a period of three years after the date on which the first President shall have entered upon his office.

2. A proposal for the amendment of this Constitution under this Article shall not be enacted into law, if, prior to such enactment, the President, after consultation with the Council of State, shall have signified in a message under his hand and Seal addressed to the Chairman of each of the Houses of the Oireachtas that the proposal is in his opinion a proposal to effect an amendment of such a character and importance that the will of the people thereon ought to be ascertained by Referendum before its enactment into law.

3. The foregoing provisions of this Article shall cease to have the force of law immediately upon the expiration of the period of three years referred to in section 1 hereof."

These elaborate precautions were designed to ensure that what Mr. de Valera described as "the foundations of the Constitution" were not upset through the use of the special amendment procedure in this three year interval.[86] Mr. de Valera had, in fact, rejected an amendment put down by Deputy Frank McDermott at re-committal stage to extend the three year period to eight years. He explained his thinking thus:

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[86] 68 *Dail Debates* at Col. 289 (June 10, 1937).

> "if some minor, some verbal amendment reveal themselves as necessary during the period laid down, I think it is only right that it should be possible to pass them easily...Otherwise you are going to have what I would regard as a very unfortunate position created and that is that an amendment to the Constitution, as such, will become a feature, so to speak, of our political life. I think that would be undesirable."[88]

A little later in the debate Mr. de Valera added that:

> "any matters of principle certainly should do to the people and that any other changes should only be changes of a minor character which were necessary to deal with some oversight."[89]

The first President, Dr. Douglas Hyde, entered upon his office on June 25, 1938 so that, by virtue of Article 51.1, the period for the transitional amendment of the Constitution by ordinary legislation expired on June 25, 1941. The First Amendment of the Constitution Act 1939 was enacted on September 3, 1939 - following the outbreak of the Second World War - in order to amend Article 28.3.3 by extending the definition of "time of war" and, hence, to allow for the enactment of emergency legislation

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[87] 68 *Dail Debates* at Col. 289 (June 10, 1937).
[88] 68 *Dail Debates* at Col. 285.

even though the State was neutral during that conflict. In contrast to that specific measure, the Second Amendment of the Constitution Act 1941 consisted of a series of heterogeneous changes which were the result of a systematic study of the entire Constitution. Neither of these measures was judged by the President to be of such a momentous character as to require a referendum and both measures duly passed into law in accordance with Article 51.1.

The 1940 Constitution Review Committee

As early as January 1938 the Department of the Taoiseach had established a working file[90] dealing with possible amendments to the Constitution which might be included in an omnibus amendment during the transitional period. This was further formalised by a Department of Finance circular in December 1938[91] and a subsequent letter of December 1, 1939 to all Departments setting out "the procedure to be adopted in connection with amendments to the Constitution which may come up for consideration during the three year period."[92] The replies were duly received in the first half of 1940 and in April 1940 a Committee was established by the Taoiseach to review proposed amendments to the Constitution. The new

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[89] 68 *Dail Debates* at Col. 287-8.
[90] S 10299.
[91] Circular 34/38.

Committee consisted of Dr. Maurice Moynihan (the Secretary to the Government)(Chairman); Dr. Michael Rynne (Legal adviser to the Department of Foreign Affairs); Mr. Philip O'Donoghue (Legal Assistant to the Attorney General) and Mr. William Fay (Parliamentary Draftsman's Office)[93]. The composition of the Committee had altered somewhat from its predecessor in 1934 and, of course, the key figure of the 1936-1937 drafting committee - John Hearne - was no longer available, having by this stage been made High Commissioner to Canada in 1939, largely in recognition of his work on the new Constitution. Michael McDunphy had been appointed Secretary to President Hyde. However, the presence of Moynihan and O'Donoghue provided continuity from the 1936-1937 drafting committee and, of course, O'Donoghue had been a member of the 1934 Constitution Review Committee.

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[92] Letter dated January 25, 1940 (S.10484) Secretary to the Government (Maurice Moynihan) to the Secretary to the President (Michael McDunphy).

[93] S. 10299. As it happens, the Parliamentary Draftsman, Arthur Matheson, was indisposed with a minor illness at the date of the formation of the new Committee. The Taoiseach (Mr. de Valera) wrote on April 27, 1940 to Matheson at home wishing him a speedy recovery and explaining why he had appointed Mr. Fay to the Committee:

> "I regard Fay's membership as desirable....because I understand that he takes a special interest in constitutional questions and he may be able to make valuable suggestions. I take it that the committee will have the benefit of consulting with you personally as occasion may arise."

Matheson promptly responded to thank the Taoiseach for his warm wishes and indicating that he agreed with the suggested course of action.

The Committee held its first meeting of May 1, 1940 and had 16 meetings in all before concluding its business on June 30, 1940. Just as with the 1934 Committee, the 1940 Committee discharged its business with great speed and efficiency, especially given the circumstances in which it operated and the other very considerable burdens which must have rested on the shoulders of these men during this anxious time.[94]

In addition to matters raised by members of the Committee itself, it also had to consider a large variety of possible amendments from the different Departments and certain individuals.[95] Among the various proposals were some which potentially impacted on the structure of judicial review or on aspects of judicial review practice and procedure which merit particular attention in the context of this thesis. These were: aspects of Article 26 practice; the finality of a finding under Article 26; the "one

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[94] The then US Minister to Dublin, David Gray, wrote to Roosevelt on June 19, 1940 that there was a "before the battle atmosphere" prevailing in Dublin and that a German invasion was thought to be "probable and imminent": see Bowman, *De Valera and the Ulster Question* (Oxford, 1982) at 225.

[95] The Clerk of the Seanad (Mr. Malone); the Secretary of the Department of Justice (Mr. Roche) and the High Commissioner to Canada (Mr. Hearne). Rynne cabled Hearne in Ottawa in Mid-September 1940 (S. 12506) asking for comments and suggestions, adding that:

> "In view of your very special knowledge of the Constitution the Taoiseach feels that final preparation of amending measures should not be undertaken before you have time to re-examine the substance of the Constitution in light of present world trends, recent political developments at home

judgment" rule; the right of applicants for habeas corpus to move from judge to judge and the right of appeal from decisions of the High Court in habeas corpus cases involving the constitutionality of a law. All of these proposals can trace their origin to either *The State (Burke) v. Lennon* or the *Offences against the State Bill* reference and the debate concerning each of them will be presently considered in turn.

In its main Report[96] the Committee set out its manner of operation:

> "All of these suggestions were considered by the Committee in the order in which they affected the various Articles of the Constitution. Where necessary, suggestions were re-drafted for the purpose of stating in net form the proposals for amendment contained in them. In regard to each proposal, the Committee had a proposal. All of these proposals and the recommendations thereto are set out in the First Annex to this report. This Annex is in three parts: viz., I, the proposals recommended for acceptance; II, the proposals regarded as matters of policy; III, proposals not accepted."[97]

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and your personal experience of Canadian constitutional matters."

[96] S. 10299. All unreferenced quotations in this chapter are taken from this file.

[97] There was a Second Annex to the Report which contained a memorandum from Stephen Roche which, in essence, argued against key features of the Constitution and which contended (a)

The Committee also had to consider the form which any such amending legislation might take. The minutes of the 1st meeting of May 1, 1940 record that it was agreed provisionally to recommend that:

> "all amendments of a character proper to be dealt with under Article 51 of the Constitution should be included in one Bill which would include the necessary enacting clause and a schedule or schedules setting out the particular amendments proposed to be made in the Irish and English texts."

In their final Report the Committee commented that:

> "Such amendments as appeared to be either of a purely drafting character, or such as, though containing points of substance, were thought to be unlikely to be submitted to a referendum should be included in one Bill and placed before the Oireachtas for enactment without reference to a referendum. If it was found on the passage of this Bill through the Oireachtas, that substantial opposition was offered to any proposal in the Bill, such proposal could be dropped and later submitted in a separate Bill for ultimate reference to the people...Where any proposed amendment to be made within the same period was submitted to the

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that the powers of judicial review given to the judiciary were too extensive and (b) that the constitutional safeguards with regard to

people by referendum, the amendment should be incorporated in a separate Bill. It was recognised that, despite the suggestion in Article 46.4, that more than one proposal might be contained in the same Bill, there would obviously be difficulties in submitting more than one proposal in a Bill which was to be referred to the people."

In the end, the Second Amendment of the Constitution Act 1941 took the form of 30 separate heterogeneous amendments which had no particular relationship with each other. It is here, however, proposed to examine the amendments which were inserted as a result - either directly or indirectly - of the decision in *Burke* and the Offences against the State (Amendment) Bill reference.

The time limits for Article 26 references

Article 26.1.2 originally provided that any reference of a Bill by the President to the Supreme Court would have to take place with four days after the date on which the Bill was passed or was deemed to have been passed by the Houses of the Oireachtas. The Department of Finance was noting as early as January 1938 that the time-period in question was much too short and recommending that consideration be given to an amendment of this provision.[98] Following the reference of the 1940 Bill by the President, the matter

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the administration of justice were too extensive.
[98] S 10484.

again became topical and, accordingly, the Secretary to the President (Mr. McDunphy) wrote on 19 January 1940 to the Secretary to the Government (Dr. Moynihan) about this issue. Mr. McDunphy raised two issues: first, the time ran from the date of the passage of the Bill by the Houses of the Oireachtas as opposed to the date of its presentation to the President and, secondly, the four day period was too short:

> "It rarely occurs that a Bill is received by the President from the Taoiseach before the first day after passage by the Oireachtas. In the majority of cases it is not received before the second day. In the case of a lengthy Bill in which there have been numerous amendments in the final stages, it is possible that it may not be received by the President until the four-day period prescribed by the sub-section 2 has expired, due to the fact that the Bill has to be printed after it has been passed by both Houses. Even in the most favourable circumstances the time limit of four days is far too short, as a Bill cannot be referred to the Supreme Court by the President except after consultation with the Council of State, for which purpose a meeting of that Council must be convened and held."

The Secretary concluded by requesting that Article 26 be amended accordingly within the three year transitional

period. The proposal was then formally transmitted to the Department of Finance in accordance with its 1938 circular.

The 1940 Committee agreed with the first proposal and agreed that time should run from the date of the presentation of the Bill. They disagreed, however, with the second proposal:

> "In their opinion, to allow a longer period than four days for a decision to refer a Bill to the Supreme Court would unduly encroach on the period allowed to the President for the signature of the Bill."

The Taoiseach, however, agreed with Mr. McDunphy and Article 26.1.2 was amended accordingly to provide for a seven day period in which the decision to refer might be made, such period to run from the date of presentation of the Bill.

The finality of a finding under Article 26

Article 34.3.3 now provides that:

> "No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill

for such law shall have been referred to the Supreme Court by the President under Article 26."

This provision had not been included in the Constitution as originally enacted and it was John Hearne who put forward the idea for such an absolute rule of finality to the 1940 Committee. Hearne's proposal was that Article 34.3.2:

"should be amended to provide that a Bill or provision which has been referred to the Supreme Court under Article 26 and has been pronounced valid by that Court, shall, when enacted into law, be beyond the reach of the original jurisdiction conferred on the High Court by this Article."[99]

The fact that the suggestion came from John Hearne is itself significant, since a shrewd observer might have suspected the hand of Stephen Roche, the formidable Secretary of the Department of Justice, at work here with an ingenious proposal which would have copper-fastened

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[99] S. 12506. Hearne (code named "Hibernia") cabled Rynne ("Estero") in mid-September 1940 with two suggestions for change:

"1. A Bill or provision which has been the subject of decision of the Supreme Court under Article 26 pronouncing it valid shall, when enacted into law, be beyond the reach of any jurisdiction conferred on the High Court by Article 34.3.2.

2. An amendment removing the jurisdiction conferred by Article 40.4.2 from a single judge."

the hard-won victory in the Offences against the State Bill reference by rendering it immune from any future challenge. While Hearne may also have been thinking along these lines, it seems more likely that this proposal accorded with his consistent thinking about the role of the Supreme Court as a Constitutional Court. After all, Hearne's proposal was that a decision of the Supreme Court on an Article 26 reference would be immune from challenge in the *High Court* (as opposed to future review by the *Supreme Court*) and not - as the new Article 34.3.3 was ultimately to provide - that it would be immutable from challenge under any circumstances whatsoever.

Although Hearne's formal proposal was not made until September 1940, he did set forth his thinking regarding the purpose of the Article 26 procedure in a letter to Rynne on May 4, 1940. The letter first made reference to a speech of Professor Michael J. Ryan KC where the latter had been reported as saying that the Constitution contained "elements of a conflict between the legal mind and laymen" and gave as an example the aftermath of the Supreme Court's decision in respect of the reference:

> "...the reference of a Bill to the Supreme Court before it became law was not worth the paper on which it was written. The courts were there to interpret the law and a Bill was not law until it had been passed by the Oireachtas and had received the consent of the Uachtarain. It was an interesting

question to consider whether the advice given by the Supreme Court in that case was not in the same position as advice given by the Judicial Committee of the British Privy Council to the King and was not binding therefore on the courts of this country."[100]

Ryan's views evidently caused some concern to Rynne and the fellow members of the drafting team since the appropriate newspaper cutting appears to have been sent to Hearne[101] asking for his comments. Given the novelty of the entire procedure and having regard to the fact that it was not a decision of the Court based on facts assumed or proved (the traditional starting point at common law for the doctrine of precedent) there is, perhaps, something to be said for Ryan's view that the Supreme Court decision was not binding.[102] Nevertheless, as we have already seen, Matheson had already advised de Valera in early March 1937 to change the wording of Article 26 from "advice" to "decision" in order to ensure that any such decision of the Court would be regarded as binding and not simply an advisory opinion. To that extent Ryan was incorrect to describe the Supreme Court as having given advice to the President in much the same way as the Privy Council gives

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[100] *The Irish Times,* February 29, 1940.

[101] Although neither Rynne's letter to Hearne nor the cutting appears to have been retained on file.

[102] No less an authority than Kenny J. expressed the very same view in *Ryan v. Attorney General* [1965] IR 297 regarding the precedential status "advice" given by the Supreme Court to the President following an Article 26 reference.

advice to the British Monarch: Article 26 referred to a decision which was intended to be binding.

At all events, Hearne referred to Professor Ryan's argument and continued:

> "The effect of the reference procedure under Article 26 of the Constitution, as I understand it, is as follows:
>
> It protects the President from having to sign a Bill automatically on the advice of a Government who have used their parliamentary majority [in] both Houses. If the Supreme Court holds that the Bill is contrary to the Constitution, the President must refuse to sign it and it cannot become law. The reference procedure includes the decision of the Supreme Court and should therefore be considered only in the machinery of law making.
>
> At the time of the framing of the Constitution we had many discussions as to whether a provision should not be inserted prohibiting a challenge in the courts to the validity of any statute the Bill for which had been signed by the President after a reference thereof to the Supreme Court and a decision by that Court under Article 26 of the Constitution pronouncing the Bill valid. It was decided not to insert such a provision. The reason for that decision was as follows: There is

little likelihood, it was said, of a Supreme Court which had decided on a reference to them under Article 26, that a Bill is valid holding that the same Bill when enacted into law is invalid. In order to ensure that that would be so, it was agreed to put in a provision contained in Article 26.2.1 that the Supreme Court should consist of not less than five judges for the purposes of that Article.[103]

There is nothing in the Constitution which prevents any litigant from raising in a proper court the question of the validity or otherwise of a statute the Bill for which has been decided by the Supreme Court on a reference under Article 26 to be valid in very respect. The High Court and Supreme Court have the same power over such a statute as they have over a statute which has never been referred to the Supreme Court by the President under Article 26. The provision (Article 34.3.2) which confers original jurisdiction on the High Court alone in all cases in which the validity of any law is in issue makes no exception of a law

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[103] It is interesting that this conclusion was quite independently arrived at by the Constitution Review Group in its *Report* (Pn. 2632) almost sixty years later (at 85-86):

> "The Review Group is of the view that there should be at least five judges. This ensures a large judicial input into these important decisions. Five represents more than half the total proposed Supreme Court membership and allows the Court to deliver a judgment even if a number of judges cannot sit for such reasons as illness or absence abroad. If immunity from challenge is removed [Article 34.3.3], the case for retaining the five judge minimum would be all the stronger."

the Bill for which has been declared valid under Article 26.

In my view, the High Court is not bound by the decision of the Supreme Court sitting under Article 26 and pronouncing that a Bill referred to them thereunder is valid. But, should the High Court hold that the statute is invalid, the Supreme Court on appeal would in 99 cases out of a 100 decide as they had done when the Bill was before them under Article 26. You might conceivably have a case where a sound argument against the validity of a law is adduced in the High Court which had completely escaped the attention of the Supreme Court when considering the Bill. But that is extremely unlikely. You might have again a complete change of personnel of the Supreme Court Bench who would take different views of the law and the Constitution from that held by their predecessors when the Bill was before them. And in that case it is still possible under the Constitution as it stands to have the situation in which a law would be declared invalid perhaps some years after the Bill for the law had been declared valid by the Supreme Court under Article 26."[104]

Hearne's proposal evoked a broadly sympathetic response from the Committee:

"The Committee are inclined to sympathise with this suggestion and if it is desired to give effect to it, this could be dome by a comparatively simple amendment to Article 34.3, preferably by the addition of a new sub-section 3 to that section, excluding from the jurisdiction conferred on the High Court by subsection 2 any law or any provision of a law the Bill for which had been referred to and pronounced valid by the Supreme Court under Article 26.

The Committee, however, are of opinion that it is extremely unlikely that the High Court would ever enquire into, let alone question, the validity of a law where the Bill for such law had been pronounced valid by the Supreme Court, and it is accordingly for consideration whether any amendment of the Constitution is really necessary for this purpose. "

It was not until 1950 in *Attorney General and Minister for Posts and Telegraphs v. Coras Iompair Eireann*[105] that the Supreme Court had first indicated that it was strictly bound by its own previous decisions. But even then, that dispensation did not last long, since in 1964 in *Attorney General v. Ryan's Car Hire Ltd.*[106] the Supreme Court indicated that it was no longer so strictly bound[107]. But

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[104] S 12506.

[105] (1956) 90 ILTR 139. (The case was belatedly reported).

[106] [1965] IR 642.

[107] But for the limits of that freedom to depart from earlier decisions, see, *e.g.*, *Mogul Of Ireland v. Tipperary (NR) County*

this relaxation of *stare decisis* does not, of course, mean that the High Court can question a Supreme Court decision[108] even if that decision has been given in the course of an Article 26 reference.[109]

Dr Moynihan noted in his hand-writing on the margin on October 31, 1940:

> "The Taoiseach feels that there is much force in the arguments both for and against this proposal. He desires that a draft amendment based thereon should be included provisionally in the list of amendments to be submitted to the Government."

Council [1976] IR 260; *O'Brien v. Mirror Group Newspapers Ltd.*, Supreme Court, October 25, 2000.

[108] In *Moynihan v. Greensmyth* [1977] IR 55 the Supreme Court raised the issue of whether *O'Brien v. Keogh* [1972] IR 144 had been correctly decided. In *Campbell v. Ward* [1981] ILRM 60 Carroll J. was asked to treat as valid the section of the Statute of Limitations 1957 which the Supreme Court had held to be unconstitutional in *O'Brien v. Keogh*. This she refused to do, saying that she considered herself "bound by the existing decision of the Supreme Court in that case until such time as the Supreme Court reviews its decision."

[109] In *Ryan v. Attorney General* [1965] IR 294 Kenny J. concluded that the High Court was not bound by the "advice" given by the Supreme Court to the President in an Article 26 reference "in the same way as does a decision of the Supreme Court in a case between parties." It may be noted, however, that the balance of authority lies clearly the other way. In *Director of Public Prosecutions v. Best* [2000] 2 ILRM 1 Keane J. observed (at 33) that:

> "Dicta in other cases would appear to support the view the High Court and Supreme Court are bound by the *ratio decidendi* of judgments arising from a reference under Article

The Committee then produced a draft - which corresponded exactly to the present wording of Article 34.3.3 - for their meeting on November 25, 1940. Dr. Moynihan noted on the same day that the Committee "recommended the acceptance of the proposal" and "the Taoiseach agrees."

The rule is not, however, without its own difficulties. In the case of an Act which has been the subject of an Article 26 reference is subsequently amended[110] there must presumably come a point where the cachet of Article 34.3.3 is lost:

> "Suppose, however, the amendments were of a radical variety which transformed the entire Act (including, perhaps, provisions which, although not expressly amended by the later legislation, took on a new meaning in the light of these amendments). In such circumstances, it would seem that there must come a point where, by reason of the radical character of later amendments, the Act has been transformed to such an extent that it can no longer be regarded as the Act that had been cleared on a previous Article 26 reference. This would then appear to open the door to a later constitutional challenge where the Act would, perhaps, have lost entirely the immunity it

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26: see, in particular, the observations of Henchy J. in *The State (Lynch) v. Cooney* [1982] IR 337."

[110] Thus, for example, certain provisions of Criminal Law (Jurisdiction) Act 1976 (whose constitutionality was upheld following

previously enjoyed under the rubric of Article 34.3.3."[111]

A different type of problem might also arise if Constitution were subsequently to be amended. A straight forward example of this would be if the Constitution were to be amended to prohibit detention without trial. In such circumstances the immunity conferred by Article 34.3.3 would presumably not apply or, at least, that the Act could be challenged on the basis that it conflicts with the new constitutional amendments. These types of potential difficulties simply do not appear to have been in the minds of the drafters of Article 34.3.3.

In the end it is, perhaps, scarcely surprising that the Constitution Review Group recommended the deletion of this provision. It adds little by way of legal certainty, since it may be expected that the Supreme Court would reverse its original decision only in exceptional circumstances.[112]

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an Article 26 reference) have been repealed and other provisions therein substituted by s.14(4) of the Criminal Damage Act 1991.

[111] Kelly, *The Irish Constitution* at 495.

[112] In fact the reasoning contained in Article 26 judgments seem particularly vulnerable to over-ruling. In *McGimpsey v. Ireland* [1990] 1 IR 110 the Supreme Court expressly over-ruled previous *dicta* of Kenny J. in *Re Article 26 and the Criminal Law (Jurisdiction) Bill 1976* [1977] IR 129 concerning the proper interpretation of the (former version) of Articles 2 and 3; in *Campaign to Separate Church & State Ltd. v. Minister for Education* [1998] 3 IR 321 the Supreme Court departed from one aspect of its decision in *Re Article 26 and the Employment Equality Bill 1997* [1997] 2 IR 321 on the meaning of the concept of endowment of religion in Article 44; and, finally, in *Director of Public Prosecutions v. Best* [2000] 2 ILRM 1, Keane J. took the view that aspects of *Re Article 26 and*

The rule is, moreover, an inflexible one and risks "denying justifiable redress in circumstances not envisaged in the arguments on the Article 26 reference."[113] The 1967 Committee on the Constitution canvassed the suggestion that any upholding of a Bill on an Article 26 should be immune from challenge for a seven year period[114], but the Review Group considered - correctly, it is submitted - that any such time limit "would of necessity be arbitrary."[115] In these circumstances, it does not seem that the change effected by the 1941 Act was a desirable one.

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the School Attendance Bill, 1942 [1943] IR 334 were wrongly decided.

[113] Pn. 2632 at page 78. The Committee added (at 80):

> "On balance, Article 34.3.3 should be deleted in its entirety. Such a deletion would impact only marginally upon legal certainty, inasmuch as a decision of the Supreme Court upholding the constitutionality of the Bill would still be an authoritative ruling on the Bill which would bind all the lower the courts and be difficult to dislodge. It is to be expected that the Supreme Court would not, save in exceptional circumstances, readily depart from its earlier decision to uphold the constitutionality of the Bill. Such exceptional circumstances might be found to exist where the Constitution had been later amended in a manner material to the law in question or where the operation of the law in practice had produced an injustice which had not been apparent at the time of the Article 26 reference or possibly where constitutional thinking had changed."

[114] Pr. 9817. The Committee put forward the following reasons (at para. 99) for its conclusions:

> "The best solution would be to retain the existing provisions with an amendment to the effect that the Supreme Court decision could be challenged in further legal proceedings after a period of, say, seven years. This would provide some answer to the criticism that the existing arrangements have the effect of calcifying the law for all time, and it would be in harmony with the abandonment of *stare decisis* for ordinary proceedings."

[115] Pn. 2632 at page 79.

The "one judgment" rule

The idea of a one judgment rule in certain constitutional cases seems to have originated with the 1936-1937 Drafting Committee, possibly as an aspect of earlier ideas for a Constitutional Court. By February 13, 1937 the fourth draft of the new Constitution was ready. In that draft, an Article 28.4 proposed to vest the Supreme Court with exclusive jurisdiction to determine all questions as to the validity of a law having regard to the provisions of the Constitution, but there was no provision for one judgment in ordinary constitutional cases. However, a different rule had been envisaged for Article 26 references, as that draft of Article 26.2.2 then provided that:

> "The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and dissenting opinions shall not be disclosed."

As we have already noted, shortly afterwards these drafts were forwarded to both Maguire P. and Gavan Duffy J. who were asked for their observations on these drafts. Gavan Duffy expressed himself trenchantly in relation to the one-judgment rule which the drafters had proposed for Article 26:

> "The silencing of dissenting opinions comes from the British Privy Council, where its purpose is to conceal dissent from India and African nations, and from the Court of Criminal Appeal, where the purpose is to conceal dissent from the criminal. Surely it would be most undemocratic to apply the same policy to judicial opinions on the Constitution, and the people are entitled to know what their judges think. This would give an artificial sanction to the opinion of 3 Judges against 2, and those 2 are fully entitled to be heard, especially as they may be right."[116]

In the light of these comments, the words "and dissenting opinions shall not be disclosed" were omitted when Article 26.2.2 was originally enacted.[117] The effect of this was to require the Supreme Court to deliver a collective judgment in respect of the Article 26 reference, but it did not prevent the Court revealing that this judgment was that of the majority. But this change proved to be simply a temporary reprieve.

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[116] UCD P 1082/7B. These notes are undated, but seem to date from the second half of March 1937.

[117] However, speaking in the Dail during the course of the Second Amendment of the Constitution Bill, 1941, Mr. de Valera commented (86 *Dail Debates* at Col. 1857, April 24, 1941):

> "In an early draft of the Constitution there was a provision such as this [providing for the one judgment rule] but it finally disappeared. I have not been able to find how it got out."

As we have already seen, in January 1940 President Hyde referred the Offences against the State (Amendment) Bill, 1940 to the Supreme Court under Article 26. The Supreme Court duly upheld the constitutionality of the Bill, but Sullivan C.J. commenced his judgment by announcing that the decision was that of a majority of the Court.[118] The fact that the Court revealed that the decision was a majority one was thought:

> "...to indicate a dissenting opinion which, it was felt, could greatly reduce the authority of the decision of the court and, we are informed, and it is commonly believed, led directly to the additional clauses by the Act of 1941 in both Article 26 and Article 34."[119]

De Valera was apparently indignant that the fact that the judgment was a majority one was publicly revealed and was further embarrassed when (as we have also seen) Deputy Dillon subsequently demonstrated in the Dail that three of the six judges who had heard the case considered the Bill to be unconstitutional whereas the three other judges took the contrary view.

The one judgment issue was subsequently then considered by the 1940 Constitution Revision Committee. As far as Article 26 was concerned, the Committee observed that:

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[118] [1940] IR 470.

"Where a Bill, or a provision of a Bill, is referred to the Supreme Court under Article 26 of the Constitution, it is desirable that the certainty attaching to the Court's decision should not be impaired by the pronouncement of a dissenting judgment. The amendment accordingly provides that the decision shall be pronounced by one Judge of the Supreme Court and that 'no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other be disclosed.'"

The Committee took a similar view with regard to ordinary constitutional challenges:

"Having regard to the statement contained in their recommendations [regarding Article 26] the Committee gave consideration to the question of providing that the Supreme Court should pronounce only one judgment in constitutional cases. The Committee understands after consultation with the Attorney General that the Chief Justice [Sullivan] suggested that the Supreme Court should pronounce only one judgment in all constitutional cases, whether arising under Article 26 or otherwise. Accordingly, they recommend an amendment be made for this purposes in Article 34.4."[120]

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[119] *Attorney General v. Hamilton (No.1)* [1993] 2 IR 250, 269 per Finlay C.J.

The Secretary of the Government (Dr. Maurice Moynihan) noted in handwriting on November 4, 1940 that the Attorney General (Kevin Haugh SC) was of opinion that it was "undesirable" that the one judgment rule should be extended to ordinary constitutional cases. The Attorney was also noted as having drawn attention to practical difficulties that might be encountered:

> "[Suppose that] three judges A, B and C say [the law is] valid [and] two [judges] D and E [say the law is] invalid. [Judge] B holds the other ground in favour of party pleading unconstitutionality. Then, in AG's views, case should be decided in favour of that party."

This was prescient advice, as the practical difficulties which the Attorney identified have subsequently come to pass. In practice, as the Constitution Review Group noted, the operation of the "one judgment" rule frequently obliges the Supreme Court to engage in:

> "...an often artificial division between the constitutionality of the law and the other related constitutional issues raised by a case. This point was adverted to by Blayney J. in *Meagher v. Minister for Agriculture and Food* [1994] 1 IR 329, a case where one judgment was delivered, yet several judgments were delivered on the validity of statutory instruments promulgated pursuant to that law, even though the

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[120] S. 12506.

court plainly found it difficult to separate the issues in that case. In this respect, *Meagher* is not an isolated case, as 'split' Supreme Court judgments (that is, where one judgment is given on the issue of the validity of the law, with several judgments given on the subsidiary issues arising) have been delivered in upwards of twenty cases."[121]

The Taoiseach, however, agreed with the views of the Committee and recommended that its proposals for change should be incorporated into the Second Amendment of the Constitution Bill, 1941.

The one judgment proposals excited some controversy during the course of the Dail debate. As far as the Article 26 amendment was concerned, it was proposed to add the following to Article 26.2.2:

"...and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or assenting, shall be pronounced nor shall the existence of any such other opinion be disclosed."

A similar amendment was proposed for Article 34:

"The decision of the Supreme Court on a question as to the validity of a law having regard to the provisions

[121] Pn. 2632 at page 84.

of this Constitution shall be pronounced by such one of the judges of that Court shall direct and no other opinion on such question, whether assenting or dissenting, shall be pronounced, not shall the existence of any such other opinion be disclosed."

Two leading Fine Gael opposition politicians - Deputies John A. Costello and Patrick McGilligan - not only opposed these amendments, but proposed their own amendment which took a diametrically opposite view of this issue. The Fine Gael amendment was in the following terms:

"Each of the Judges of the Supreme Court shall deliver or cause to be delivered in above Court a written judgment stating the reasons for his decision."

Both Deputies advanced slightly different reasons for the proposed amendment. Deputy Costello stressed that his amendment would have greater educational value and would also lead to better decision-making on the part of the Court:

"If each judge has to give a written judgment, you are likely to get a better judgment than you will if one man delivers the judgment. The individual who delivers the judgment will be endeavouring, in some cases at all events, to give a sort of common form to his judgment. If there is a disagreement, he will be endeavouring to deliver his own judgment and the

judgment of those colleagues who agree with him. That may be of interest, but I do suggest that it is of less interest than if the five judges gave judgments stating the reasons for the conclusions to which they came. This would lead to greater interest in the subject matter and to development of constitutional though. It would afford greater education to students of constitutional law than would one judgment which may be, on occasions, laconic and not deeply reasoned. The law students, so far as constitutional questions are concerned, will have to rely on the text of the Constitution. They would get a wider education on constitutional law and its implications if they had judicial judgments on which they could rely. These judgments would stimulate their own thought and provide them with a wider knowledge of constitutional matters than they would have from the mere reading of the text of the Constitution and bald judgments by a single judge upon it."[122]

Deputy McGilligan considered that the one judgment rule was little more than a pretence:

"There are people who think that there is some value in having the pretence that a clear decision is arrived at by the whole court. You are not going get anything more than a pretence. As against that, there is the decided advantage to be got, as any practitioner

[122] 86 *Dail Debates* at Col. 1857. (April 24, 1941).

knows, from having judges canvassing points of view and indicating the strong points that have weighed with them in coming to the final decision, whether the Bill is or is not repugnant to the Constitution."[123]

While the Taoiseach admitted that the opposition had a valid point from an educational point of view, the desirability of a definite opinion was for him the decisive consideration:

"The one thing I am looking for, and which I think we all ought to look for here, is that there should be a definite decision; that it should not be bandied about from month to month that, in fact, that decision was only come to by a mere majority of the Supreme Court. Then you would have added in, perhaps, the number of judges who dealt with the matter in the High Court before it came to the Supreme Court, as might happen in some cases. You would then have an adding up of judges and people saying: 'There were five on this side and three on the other, and therefore the law is the other way. That would be altogether undesirable. While there might be advantages on the other side, I think, on the whole, we ought to keep it here in a single judgment."[124]

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[123] *Ibid.*, at 1860.
[124] *Ibid.*, 1861.

The allusion to the adding up of judges etc. is clearly a reference to what had occurred in the aftermath of the Offences against the State Bill reference. Indeed, earlier in the debate the Taoiseach had been even more explicit in his allusions to Deputy Dillon's comments when he said:

> "The important thing is that there should be no doubt about the decision. It was suggested here on one occasion by a Deputy that because judges of the Supreme Court were divided on a certain point of view there was as much to be said for one contention as for the other and he tried to show that the position was one of uncertainty."[125]

Although the Taoiseach's views carried the day, Gavan Duffy was unrepentant on the issue of the one judgment rule. Writing as President of the High Court to Attorney General O'Dalaigh in July 1946, he once again pleaded for change:

> "Is mor, mor an truagh, dar liom, nach bhfuil cead ag gach breitheamh sa gCuirt Athcomhairc Choiriula a breith a craobhscaileadh; do bheadh gach bhreith usaideach don Rialtas, mar shampla, nuair ata dunmharu agus breith bais i gceist; coip den dli as Lunnduin 'seadh e sin. Ach ta an sceal i bhfad nios measa sa mBunreacht, san alt nua 34(4)(v), nuair ata dli an Oireachtais i gceist agus nach bhfeidir leis an gCuirt is

airde ach aon bhreith amhain a thabhairt; nach e sin dallagh-mullog a chur ar an bpopal? Fuaireas an nos aisteach sin, mar ata fhios agat, ins an "Privy Council" i Sasana, agus se seo an bun ata leis, go mba mhaith le na Sasanaigh go gcreidfeach na 'natives in India' go bhfuil gach ball den Cuirt sin ar aon intinn; agus, o's rud e go bhfuil siad ar aon intinn, is soleir go bhfuil an ceart acu! Uair ar bith a bheitheas ag smaoineadh ar athru a dheanamh sa mBunreacht no san Acht Cuirteanna Breithiunais, ta suil agam go mbeidh faill agat no botuin sin d'iniucadh. Bainim sasamh mor as an mBunreacht seo agus ba mhaith liom gan ealang a bheith air."[126]

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[125] *Ibid.*, 1858.

[126] S 10484. As it happens, the "one judgment" rule was abandoned in the case of the Privy Council in 1966 by the Judicial Committee (Dissenting Opinions) Order 1966. The passage in question may be translated as follows:

> "I am of the view that it is a great, great pity that each member of the Court of Criminal Appeal may not publish their [individual] judgments; every such judgment would be useful to the Government, where, for example, murder and the death penalty are at issue; this is a simply a copy of the law from London. But the story is far worse with the Constitution and the new Article 34.4.5 - where an Act of the Oireachtas is at issue and the highest Court may not give more than one judgment - is that not pulling the wool over the eyes of the people? As you know, this strange practice comes from the Privy Council in England and the reasons for it is this: the English want the 'natives' in India to believe that the each member of the Court is unanimous and because they are unanimous, it is clear that the decision is correct! If you are perchance contemplating an amendment to the Constitution or the Courts of Justice Acts you will have an opportunity to remedy this mistake.

The Attorney passed on the letter to the Taoiseach (Mr. de Valera), urging him to give the proposal favourable consideration:

> "Chidhtear dom fein go bhfuil cuid mhaith den cheart den meid adeir se in dtaobh ceist an Bhunreachta. Dream caomhach coimeadtach iseadh lucht an dli; agus o thaobh an phobail - agus o thaobh an Rialtais leis - den sceal bheadh bonntaisti airithe ag baint le foillsiu iol-thuairimi na mbreithiun. Beidh cuimhne agat fein ar conus mar do chuaidh tuairimi "di-aontuithe" o bhreithiuin airithe i bPriomh-Chuirt Americe i bhfeidhm diaidh ar ndiaidh a mhiniu an Bunreachta thall. Ta bfheidir baol sa choras ata in bhfus againn-ne go mbeidh an Bunreacht seo go ro-mhor fe anail na gCuirteann agus go mbeidh se deacair aon atharru a dheanamh tre Reifreann. Nior mhar sin amhthach da mba chead do bhreithiuin nar aontaigh le tuairim an fhurmhoir a mbreithiunas di-aontaithe do nochtadh."[127]

The Constitution is a source of great satisfaction to me and I would prefer if it did not have any defects."

[127] This may be translated thus:

> "I think that there is a great deal for what he says regarding the constitutional issue. The legal community are a conservative lot and from the point of view of the public - as well as from the point of view of the Government - there would be definite advantages associated with the publication of the individual judgments of the judges. You will recall how the dissenting opinion of particular judges of the US Supreme Court slowly but surely influenced constitutional interpretation over there. There is, perhaps, a danger in the system which we have that the Constitution would be too much in the grip of the courts and that it might be difficult to make any change through referendum. However,

But the Taoiseach did not change his mind. Dr. Moynihan noted in hand on the Attorney's letter that they had spoken and that the Taoiseach remained opposed to the idea that dissenting judgments should be pronounced in cases of this kind.[128]

Arguments similar to those just advanced by Gavan Duffy J. against the "one judgment" rule have been put forward by virtually every committee which has considered this matter.[129] In 1967 the Oireachtas All-Party Committee on the Constitution[130] broadly supported the one judgment rule as:

> "...it is the majority opinion which really matters and any publication of other opinions would only tend to create uncertainty in the minds of the people on

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this would not be so if the judges who did not agree with the opinions of the majority had permission to disclose their dissenting judgments."

[128] S. 10484. Dr. Moynihan noted on August 1, 1946:

> "Labhras leis an Taoiseach. Ta se [ar intinn] leis an tuairim gur fearr gan cead a bheith ann chun bhreithiunas di-aontaithe do noctadh in gcas den tsaghas de bhfuil tagairt anseo."

This may be translated thus:

> "I spoke with the Taoiseach. He agrees with the view that it is better not to allow dissenting judicial opinions to be disclosed in the type of cases in question."

[129] The 1968 Attorney General's Committee on the Constitution; the Court Practice and Procedure Committee; the Constitution Review Group and the All-Party Oireachtas Committee on the Constitution have all recommended that this rule be changed.

questions of constitutional importance. It could be contended that the object in introducing these particular clauses into the Constitution was to eliminate uncertainty of this kind and that, therefore, they should be retained in their present form"[131]

However, the 1968 Attorney General's Committee on the Constitution[132] subsequently took a different view:

"This is in part a question of constitutional policy and in part a question of the organisation of the courts. The Committee did not wish to express any view on the political argument in favour of the 'one judgment' rule. From the point of view of clarifying and developing the law, however, the 'one judgment' rule is undesirable. The present rule can give rise to serious difficulties if the judges forming the majority of the Supreme Court were agreed as to the result but disagreed as to their reasons. The argument made

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[130] Pr. 9817.

[131] Para. 100.

[132] This Committee was established by the Attorney General (Colm Condon SC) as the request of the Taoiseach (Sean Lemass TD) "to consider constitutional review in conjunction with, but separately from, the Oireachtas Committee on the Constitution. The Committee was an especially distinguished one and consisted of the following persons: Walsh J., Kenny J., John A. Costello SC, Thomas Connolly SC; Niall McCarthy SC, Anthony Hederman SC; Liam Hamilton SC; Donal Barrington, Barrister-at-Law, Gerard Buchanan, Barrister-at-Law, Professor John M. Kelly, Matthew Russell, Barrister-at-Law; Gerald Y. Goldberg, Solicitor; Patrick C. Moore, Solicitor; Kevin Mangan, Attorney General's Office; P.W. Joyce, Parliamentary Draftsman and Dr. John Temple Lang (Secretary to the Committee). The final draft of the Report was made ready for publication in August 1968, but for some reason it was never published.

by the Oireachtas Committee applies primarily to cases under Article 26 (Bills referred to the Supreme Court) rather than to Article 34 (the constitutionality of Acts passed since the coming into operation of the Constitution). If the rule that Supreme Court decisions under Article 26 is to be reversed is to be modified, as the Oireachtas Committee suggest (paragraphs 95-99), the one-judgment rule in Article 26 cases and a fortiori in Article 34 cases should be abolished. The dissenting view today may be the majority view tomorrow. When the High Court sits with three judges, given on constitutional issues, separate judgments may be given....

The 'uncertainty' resulting from public knowledge of the existence of dissenting or concurring judgments, which will be primarily of interest to lawyers, is probably unlikely to be a serious problem. In cases other than those under Article 26, uncertainty - in the sense of the theoretical possibility of the decision being reversed - will exist anyway, and little is gained by concealing it. It is anomalous that Article 34 prohibits publication of concurring and dissenting judgments when the majority judgment can be reversed, and when concurring and dissenting judgments are delivered in Supreme Court decisions on pre-1937 Acts.

Another possible argument for the rule is that public knowledge of the existence of judicial dissent might encourage political dissent. This is not something on which the Committee wishes to comment, beyond saying that in a democratic society this is not necessarily undesirable.

A single majority judgment may be a compromise and so less precise in its reasoning than an individual judgment. Concurring and dissenting judgments would help to make it clear that a similar Act might have been quite differently regarded: uncertainty on related points is increased by the rule, and later litigation is thus encouraged and prolonged. Even where dissents are given, there will usually be a large measure of agreement between the judges. Concurring and dissenting judgments will help to clarify the law for the authorities in implementing a Bill held valid under Article 26 and in drafting similar legislation, and may express a view which later on may obtain public support. Where the majority decision declares an Act or Bill invalid, separate judgments might be useful in indicating what alternative legislation would be permissible. If a strong dissent was given, the authorities might be able to avoid later difficulties by amending the law or their method of implementing it, and the chance of the Act or some action under it being declared unconstitutional would be reduced.

If the majority judges disagreed on their reasons for the decision, the majority judgment might give quite a misleading impression of the weight of authority for a particular view. The possibility of separate judgments should help to ensure clarification of the thinking of the majority who will be compelled to answer criticisms of their views more explicitly than they otherwise would. There might be a chance that a judge who knew he was a minority might fail to write a judgment which, if fully reasoned and written, would have changed his colleagues' mind. It has been the US experience that dissenting and concurring judgments contribute greatly to the law.

In conclusion, the one-judgment rule is undesirable from a legal point of view in the context of Article 34, whatever its merits when a Bill is referred to the Supreme Court by the President under Article 26."[133]

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[133] It may be noted that on a number of other occasions prominent members of the Committee separately expressed their opposition to the "one-judgment" rule. Deputy Costello had made his opposition clear during the course of the 1941 debate. Thus, for example, in *G. v. An Bord Uchtala* [1980] IR 32, 96 Kenny J. said that the comments of Walsh J. in *The State (Nicolaou) v. An Bord Uchtala* [1966] IR 567 regarding the constitutional rights of a natural mother were purely *obiter* and "does not bind the members of this Court, at least when they are free of the considerable handicap of Article 34.4.5 of the Constitution." In an essay entitled "Una voce poco fa" in O'Reilly ed. *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Dublin, 1992) McCarthy J. forcefully advanced (at 168) the case against the one-judgment rule:

> "At the centre of the common law, the genius of its dynamism, is the inter-play of judicial rationale - the multiple

A similar view was expressed by the Committee on Court Practice and Procedure in its 11th Report dealing with the Supreme Court.[134] In more recent times the Constitution Review Group[135] was strongly in favour of change, at least as far as "ordinary" constitutional cases arising under Article 34 is concerned. Having set out the arguments on either side of the argument, the Review Group concluded:

> "On the whole, Article 34.4.5 should be deleted. The rule is unsatisfactory in its operation and is apt to create anomalies. There is not, however, a consensus that Article 26.2.2 should be deleted, some members of the Review Group being of the view that the special character of the Article 26 reference procedure justifies the retention of Article 26.2.2"

These views were endorsed by the All-Party Oireachtas Committee on the Constitution in their 1st[136] and 4th[137]

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judgment system. Let it flourish. It has a proud history; it should continue to have a historical pride. It is for this reason that we write judgments - we may wish to indulge in some semantic exercise; we may wish to polish our literary style; we may wish to temper the rigor of some decision; but most of all we wish to see the interpretation and growth of the law continue."

[134] *The Jurisdiction and Practice of the Supreme Court* (Prl. 1835, 1971). The Committee concluded that while such a rule:

> "may have advantages in the political sphere, we are of the opinion that it is undesirable and injurious in the legal sphere. It inhibits the development of our constitutional case law."

[135] Pn. 2326.

[136] Pn. 3795.

Reports. In their 1st Report the Committee not only agreed that Article 34.4.5 should be deleted, but added in the case of Article 26.2.2:

> "The Committee believes that the arguments weigh overwhelmingly in favour of the deletion of Article 26.2.2. It feels that the two arguments against deletion do not carry great weight in modern conditions. The one-judgment rule seeks to give the decisions of the Supreme Court the character of an oracular utterance. However, it is not credible that people nowadays, who are habituated to the analysis of complex issues by the presentation of arguments for and against through the media, would presume that the members of the Supreme Court invariably reach a unanimous decision on the complex issues placed before them. The argument that the rule shields judges from improper influence or pressure does not take sufficient account of how easily such factors can be neutralised by the exposure of them in the media."[138]

Whyte has also persuasively criticised the operation of the "one judgment" rule:

> "...the one judgment can adversely affect the status of a judgment of a precedent in an informal sense because it compels the judges to engage in a search

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[137] Pn. 7831 at p. 47.
[138] At page 62.

for the lowest common denominator, often resulting in judgments containing very general statements. It goes without saying, of course, that a collegiate judgment of the Supreme Court is just as binding, in the formal sense, on inferior courts as any other judgment of that Court. However, where one is confronted by long recitations of facts and submissions, terse statements of the Court's decision and, in particular, the absence of reasoning by analogy, as these collegiate decisions tend to be, then one can be forgiven for feeling that such principles should not be taken at their face value but should be read *subjectam secundum materiam*. Lord Denning put this in a slightly different way when he said of the collegiate judgment that:

'it makes it exceedingly difficult to discover what is the *ratio decidendi* of a case, as distinct from *obiter dicta*....Whereas if there had been, not one, but three or four or five it would have been much easier to separate the wheat from the chaff and to discover what was really the *ratio decidendi* and therefore binding, as distinct from *obiter dicta* and not binding.'[139]

That multi-judgment decisions sometimes give rise to difficulties of application can hardly be questioned;

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[139] *Paal Wilson & Co. v. Partenreederei Hannah Blumenthal* [1982] 3 WLR 49, 56-7.

however the remedy imposed by Article 34.4.5 of the Constitution is not without its own defects...."[140]

Indeed, the entire case against the operation of the one-judgment rule in the common law context were put forcefully by Lord Wilberforce in the following extra-judicial comments:

> "In anything of any interest in the area of common law, for example, I think it is very necessary to have multiple opinions. No one judge can ever get it absolutely right. There is a great risk that what one judge says will be treated as if it were a statute and followed slavishly by the lower courts, sometimes to

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[140] Whyte, "The One Judgment Rule in Operation" (1983) 5 *D.U.L.J.* 273, 278-9. See also the comments of a former Chief Justice following his retirement in O'Higgins, *A Double Life* (Dublin, 1996)(at 282):

> "No doubt the intention behind this provision was to achieve certainty in matters affecting the Constitution. However, at times, it was worked to prevent the court's judgment being sufficiently rationalised, because agreement could not be reached as to the reasons for the particular conclusion which the single judgment was pronouncing."

Chief Justice Finlay is, perhaps, the only senior legal figure who has publicly expressed support for the "one judgment" rule. In Sturgess and Chubb, *Judging the World: Law and Politics in the World's Leading Courts* (Butterworths, 1988) Chief Justice Finlay is quoted (at p. 417) as saying:

> "I know that some of my colleagues feel, and respectfully feel due to our allegiance to the Constitution, that it was an error not to provide this in the Constitution and we would be better with dissenting judgments. I rather think not, because I think that there is a lot to be said for coming as near to

their embarrassment. Whereas, if you have multiple opinions, you can leave it to a Darwinian process of natural selection to see which is the opinion that prevails."[141]

It is clear, therefore, that the introduction of the "one judgment" rule was a retrograde step. The rule has been wholly unsatisfactory in its operation and the stifling of individual opinions has tended to impede the development of constitutional law in a significant way.

Habeas corpus procedure

There were several suggestions for change of the Article 40.4.2 procedure. All of these suggestions were prompted by aspects of what had occurred during the course of *The State (Burke) v. Lennon* where, as we have seen, to the consternation of the authorities, the applicant declined to move his application before a Divisional High Court, but instead selected his own judge - Gavan Duffy J. - to hear both the leave and substantive applications. Upon hearing

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certainty and finality as you can get in constitutional issues. I think on balance the single decision is a good one."

[141] Sturgess and Chubb, *op.cit.*, 275-276. Cf. the views of Brandeis J. of the US Supreme Court who told Professor Frankfurter (as he then was) in July 1923 that dissent had "a special function in constitutional cases." In ordinary cases there is a good deal to be said for not having dissents - you want certainty and definitiveness and its doesn't really matter terribly how you decide so long as it is settled." However, in constitutional cases "since what is done is what you call statesmanship, nothing is ever settled": see Urofsky, "The Brandeis-Frankfurter conversations" (1985) *Supreme Court Review* 299, 314.

the substantive application, Gavan Duffy J. promptly found Part VI of the 1939 Act to be unconstitutional and the Supreme Court refused to hear an appeal from that decision, the wording of Article 34.4.4 notwithstanding. The Government was then forced to release all internees, with potentially disastrous consequences.

Before considering the detail of the changes effected by the Second Amendment of the Constitution Act 1941, it is, perhaps, worth pausing to consider whether the procedure actually adopted in *The State (Burke) v. Lennon* was correct. The question of whether there existed a right to apply successively to various judges of the High Court for habeas corpus was one on which there was great deal of legal learning and rather confusing case-law.

In *Cox v. Hakes*[142] Lord Halsbury L.C. stated:

> "If release was refused, a person detained might...make a fresh application to every judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge."[143]

Lord Herschell spoke to the same effect:

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[142] (1890) 15 App.Cas. 506.
[143] *Ibid.*, 514.

> "It was always open to an applicant for it, if defeated in one Court, at once to renew his application to another. No Court was bound by the view taken by any other, or felt itself obliged to follow the law laid down by it. Each Court exercised its independent judgment upon the case, and determined for itself whether the return to the writ established that the detention of the applicant was in accordance with the law. A person detained in custody might thus proceed from court to court until he obtained his liberty."[144]

Leaving aside the fact that these comments were all entirely *obiter* - since *Cox v. Hakes* dealt with the right of appeal from an order of habeas corpus and not at all with the right to go from judge to judge - Lord Herschell's comments also betray confusion as to whether the right existed in relation to divisions of the High Court or in respect of individual judges thereof. And while it seems implicit in Lord Hailsham's comments that this distinction was irrelevant, these dicta do not seem to be supported by authority[145] and have been subsequently doubted.

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[144] *Ibid.*, 527.

[145] Thus, Lord Esher M.R. had said in *Ex parte Cox* 20 QBD 1 that it was not correct to say that under the "old [pre-Judicature Act] system there could be an application to all the judges in succession. There could be an appeal to all the Courts in succession."

This issue had also arisen in Ireland some two years earlier in *Re Sullivan.*[146] Here the Queen's Bench Division had refused to grant certiorari to quash a conviction, whereupon the prisoner applied for habeas corpus in the Exchequer Division. Palles C.B. rejected the argument that the refusal of certiorari in the Queen's Bench Division of itself precluded the Exchequer Division from dealing with the habeas corpus:

> "But the judgment of the Queen's Bench upon the application for a certiorari, so far as it can have any effect binding in law upon us, as distinct from its effect as an authority (to which, of course, we must pay great deference), cannot, in my opinion, be pushed further than it could have been, had the judgment been an application, not for a certiorari, but for a habeas corpus; and it is settled that a prisoner who has applied in one Court for a habeas corpus and has been refused, may go to another Court and make the same application; and that the second Court is bound to consider the case upon its merits and determine it upon its own view of the law and cannot shelter itself from a refusal to itself determine the question by the decision of the other Court."[147]

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[146] (1888) 22 L.R.Ir. 109
[147] *Ibid.*, 109.

Nevertheless, Palles C.B. was careful to describe the right in terms of going from Court to Court and the following passage shows that he was conscious of the effect which the unification of the divisions of the High Court might have:

> "I confine my observations entirely to the Court as now constituted in this country, in which we are still a Division distinct from the Queen's Bench and retain all the inherent jurisdiction of the former Court of Exchequer. It is unnecessary for me to consider how the case would be in England, where all the Common Law Divisions have been merged in one."[148]

Prior to *Burke's* case, the most recent example in which the issue of going from judge to judge had actually arisen had been in one of the great cases arising from the War of Independence. In *Egan v. Macready*[149] the applicant had been sentenced to death by a military court and an application was then made to O'Connor M.R. sitting in the Chancery Division. Dealing with the jurisdictional issue, O'Connor M.R. said that it was:

> "...the right of the subject under arrest to apply to any judge of the High Court for the writ of *habeas corpus*, and, if the writ is refused, to proceed from Judge to Judge; and that it is the duty of each Judge

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[148] *Ibid.*, 110.
[149] [1921] 1 IR 265.

to form his independent opinion and to act upon it."[150]

In passing, it may be added that it is not at all clear whether Egan had ever actually applied to another judge or another division of the then High Court. There is nothing in the Irish Reports to suggest that such an application had been made and in *The State (Dowling) v. Kingston*

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[150] *Ibid.*, 279. In a remarkable judgment O'Connor M.R. distinguished the earlier War of Independence cases (such as *R. v. Allen* [1921] 2 IR 241) which had upheld the jurisdiction of the military courts, and, holding that the right to use martial law was a prerogative right, he concluded that this prerogative right had merged in the relevant statute, the Restoration of Order in Ireland Act 1920. Accordingly, he concluded that the military courts ought to have followed the procedure set out in that Act. The authority of *Egan v. Macready* has been severely shaken by subsequent criticism. In Heuston, *Essays in Constitutional Law* (London, 1964) Professor Heuston points out that the better view was that martial law was not a prerogative right "but simply an extension of the ordinary common law power to meet force with force." He continues (at 159-160):

> "The decision in *Egan v. Macready* suffers from other enfeebling factors. First, it is extremely doubtful whether the court had jurisdiction to hear an application for habeas corpus as the applicant had already applied unsuccessfully to the King's Bench Division which had followed its own previous decision in *R. v. Allen*. Secondly, it is not possible to feel much confidence in a judgment on a point of Crown practice which contains the following words: "I have not lost sight of the fact that in giving judgment I do, I am acting at variance with the unanimous judgment of the King's Bench Division in *Allen's* case, reaffirmed by subsequent decisions. I hope that my action will not be construed as indicating any disrespect at my colleagues or any over-weening opinion of my own. I fully recognise that they have a wide knowledge and experience of criminal law, and that I cannot pretend to have any. My practice at the Bar and my life as a judge of the Chancery Division have left me unqualified for criminal cases; and I say unfeignedly I cannot confidently set up my opinion against the experienced and learned judges of the King's Bench Division."

(No.2) FitzGibbon J. dismissed O'Connor M.R.'s comments as entirely *obiter*.[151] On the other hand, Deputy Costello - who had been Junior Counsel for Egan - asserted during the course of the Dail Debates on the 1941 Bill[152] that an initial application for habeas corpus in the King's Bench Division had been refused.

The issue was also in view in *The State (Dowling) v. Kingston (No.2)*[153], a case where the applicant had unsuccessfully for habeas corpus before a Divisional High Court (Maguire P., Hanna and Gavan Duffy JJ.). The Court (Gavan Duffy J. dissenting) refused to grant the relief sought, whereupon the applicant immediately applied to Gavan Duffy J. "for an independent order of release, notwithstanding the decision of the court whose members were still on the bench."[154] Gavan Duffy J. then refused that application, but an appeal was taken against the first refusal on the ground that, as one member of the Divisional High Court was in favour of the grant of habeas corpus, the order of the Court should have been drawn up to reflect that view. This was a novel variant of the right to go from judge to judge theory and, as FitzGibbon J.

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[151] FitzGibbon J. said (at 745):

> ".....in any event the observation of the Master of the Rolls as to the right to go from Judge to Judge was irrelevant, because the particular applicant with whom he was concerned had not made any previous application to any other Court or Judge, and no one disputed his right to apply in the Chancery Division if he thought fit to do so."

[152] 82 *Dail Debates* at Cols. 1244-1246 (April 24, 1941).

[153] [1937] IR 699.

[154] *Ibid.*, 738, per FitzGibbon J.

candidly remarked, "it may seem incredible that such an argument could be put forward."[155] Not surprisingly, all five members of the Supreme Court rejected this contention out of hand.[156]

However, three members of the Court expressed varying opinions on the right of an applicant to go from judge to judge. The judgment of FitzGibbon J. has been much admired[157] and in it he authoritatively examined pre-Judicature Act practice. FitzGibbon J. concluded that while prior to the Judicature Acts there was a right to go from Court to Court[158], there was never a right to proceed from Judge to Judge (except, perhaps, in vacation). It seems to be implicit in this judgment that, following either the Judicature Acts or (at the very least) the fusion of the various courts into one High Court by the Courts of Justice Act 1924, the right to go from Court to Court

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[155] *Ibid.*, 737.

[156] Sullivan C.J., FitzGibbon, Murnaghan, Meredith and Geoghegan JJ. As Sullivan C.J. observed (at 750):

> "But it does not suffice for [counsel] to establish that each Judge of the High Court could have heard and determined his application and that he could apply successively to each Judge. In the present case the application to make absolute the conditional order was made to a Court constituted of three judges, it was heard and determined by that Court, and the order that was made expressed the decision of the majority of the members of that Court. The contention that the order of the Court should have been in conformity with the decision of the dissenting Judge is unsupported by any authority and is, in my opinion, quite unsustainable."

[157] Described as "a most illuminating judgment" by Lord Parker C.J. in the leading modern English decision on this topic, *Re Hastings (No.2)* [1959] 1 QB 358, 375.

[158] [1937] IR 699, 746.

simply ceased to exist.[159] FitzGibbon J. did not directly examine the implications of Article 6 of the 1922 Constitution.

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[159] In *Eleko v. Government of Nigeria* [1928] AC 459, 467 Lord Hailsham L.C., delivering the advice of the Privy Council, said that if the pre-Judicature Act right had been to go from court to court, then it followed that the effect of this legislation "must have been to deprive the subject of the right which he had previously enjoyed." He added that the Privy Council would be most reluctant to reach that conclusion "unless compelled to do so by clear words", since "it would be a startling result" if a statute "enacted primarily for the simplification of procedure should have materially cut down that protection." Lord Hailsham L.C. then concluded (at 468):

> "If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the Courts have been combined in the one High Court of Justice, each judge of that Court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding some other judge has already refused a similar application."

However, the authority of *Eleko* was generally doubted by FitzGibbon J. (at 740) in *Dowling*:

> "....the theory enunciated by Lord Hailsham that he had a right to go to each Judge of each Court during term time is unsupported by any decision and is contrary to a strong current of authority."

In what must be the only example of an English court preferring a decision of the Supreme Court to that of the Privy Council, Lord Parker C.J. observed in *Re Hastings (No. 2)* [1959] 1 QB 358, 375 that the judgment of FitzGibbon J. gave "cogent reasons for thinking that the Lord Hailsham may have gone too far in that case."

This issue was, however, examined by both Sullivan C.J. and Murnaghan J. The latter put the matter clearly when he said that when the Constitution:

> "...spoke of detention in accordance with law, it contemplated a fixed and settled law and not the varying opinions of individual judges. When the High Court has pronounced that the detention is in accordance with law, did the Constitution contemplate a succession of applications to individual Judges, any one of whom might declare to the contrary. The Constitution gave an appeal to the disappointed applicant and the decision of the Supreme Court, if not unanimous, must surely be determined by the majority of opinions. I am satisfied that the words used in Article 6 are capable of a construction which secures the liberty of the subject by a procedure that is speedy and always available and yet is consistent with the dignity of the Court. If each Judge were to hear the application as a matter personal to himself there was no necessity to refer in the Article to the Court at all. In my opinion, there is no right to apply to a Judge after the High Court has pronounced the detention to be legal. It is quite a different matter (which, however, does not arise for discussion in this appeal) to say that the refusal of a Judge to grant the first *ex parte* application prevents an application to another Judge. In such a case the detention has not been declared to be in accordance with law - it is

only a view that there is no case to inquire into at all. In my opinion the right to make an *ex parte* application after a refusal by another Judge has been confused with a hearing by the Court or Judge at which the detention has been declared to be legal."[160]

The Chief Justice took a different view:

"[By virtue of Article 6] it follows that an applicant has the right to apply successively to the Judges of that Court, as it would be quite inconsistent with what I consider to be the clear and express language of the Article to hold that a Judge could decline to exercise his jurisdiction in such a case on the ground that another Judge had refused the application."[161]

Summing up the law as it was generally understood to have been prior to the coming into force of the present Constitution, it would seem that while there was a right to apply to different judges of the High Court for an inquiry into the legality of the detention, the right of a disappointed applicant to go from judge to judge once the High Court had pronounced on the legality of the detention was much more problematic. This was in part

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[160] *Ibid.*, 751-752.

[161] *Ibid.*, 729-730. There was a hint in the concurring judgment of Meredith J. of some support for this proposition when he said (at 752) that the Court cannot treat "the addition of the words 'and any and every Judge thereof' in this important Article as being idle and of no effect." However, Meredith J. expressly declined to

because it seems that the former common law right had merely been the right to go from Court to Court and the abolition of this common law right seems to have been one unintended by-product of the establishment of a unified High Court by Article 64 of the 1922 Constitution and the Courts of Justice Act 1924.

In any event, such common law rights as existed in 1922 had been at least supplanted by the enactment of Article 6 of the 1922 Constitution which referred to applications "to the High Court and any and every judge thereof." In the only case in which these words had been judicially examined - *The State (Dowling) v. Kingston* - Sullivan C.J. and Murnaghan J. had reached opposite conclusions as to what they meant. Although precisely similar language had been used in the version of Article 40.4.2 as originally enacted in 1937, the meaning of those words "had not yet been judicially determined and about which there [was] still a great deal of confusion."[162] Against that background one could not confidently assert that the right to go from judge to judge (insofar as it existed) included the right to have a particular judge of the High Court hear the application, as happened in *The State (Burke) v. Lennon.*

It is not altogether surprising, therefore, that in the light of what had actually occurred in *Burke's* case that various

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offer a view on this point, since this issue did not directly arise on the appeal.

[162] Anon., "Habeas Corpus Procedure under the Constitution of Eire" (1940) 74 *ILTSJ* 1, 3.

Government Departments sought amendments to Article 40.4.2. The Secretary of the Department of Justice submitted a lengthy memorandum to the Committee on September 12, 1940 in which he was frankly sceptical of the value of constitutional guarantees and in which he maintained the courts had been given excessively wide powers of judicial review. The following extracts give a flavour of his forthright views:

> "The general line adopted in the Constitution in relation to the Courts of Justice and the punishment of offences in normal times is to provide, as the ordinary or permanent code, a system characterised mainly by precautions designed to prevent any possibility of injustice or undue severity. With this object, very explicit and far-reaching guarantees are given; justice is to be administered by Judges and by nobody else; in addition to the Judge there must be, except in the case of minor offences, a jury: the habeas corpus procedure is explicitly made a portion of the Constitution; a High Court Judge is given the right to declare an Act of the Oireachtas to be invalid. (This last provision was inserted, it will be remembered, after considerable hesitation, and on the assumption that it would always be open to the State to appeal to the Supreme Court, an assumption which seemed perfectly safe having regard to the words of Article 34.4.4 but which was defeated, in a very

unexpected and unfortunate way, in connection with habeas corpus procedure.)"[163]

Roche's reference here to the hesitations concerning the vesting of the power of judicial review in the High Court reflect the fact that - as we have already seen - the draft Constitution as introduced in Dail Eireann had originally proposed that the Supreme Court would enjoy exclusive original jurisdiction in constitutional matters. At Committee Stage Mr. De Valera yielded to opposition concerns[164] and restored the High Court's jurisdiction in constitutional matters, but Article 34.4.4 sought to safeguard the right of appeal against a finding of constitutionality. Roche's memorandum continued:

"We have not only adopted the old safeguards but we have also bound ourselves to them in a way which the English, who invented them, have never adopted. Habeas corpus or no habeas corpus, Bill of Rights or no Bill of Rights, the Westminster Parliament acknowledge no restraint over what it may do for the better government of Great Britain. No Court can take a new statute of that Parliament for examination and pronounce it invalid, because it is, in its view, 'contrary to the Constitution.' When habeas corpus threatens to become troublesome in England it is simply suspended. In my view - I admit being

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163 S. 11577A.

164 68 *Dail Debates* at Col. 1492-1494 (June 2, 1937).

prejudiced against a written Constitution at all - it is unwise to put much detail about the Court system and the criminal law into a statement of fundamental law."

Roche then proceeded to give four examples of where express constitutional protections gave the courts too great a role vis-à-vis the Oireachtas and the Executive. The first three were Article 34.1 (what constituted the administration of justice and must it always be held in public); Article 34.3.1 (one High Court with a full original jurisdiction); Article 38.5 (trial by jury). The fourth concerned the procedure under Article 40.4.2:

"[Article 40.4.2] is a good illustration of the danger inherent in any attempt to translate what is quite a good general principle into a flat and final statement of constitutional law. Even those who do not like 'safeguards' must admire the vigour and simplicity of the habeas-corpus procedure but it is, I think, safe to say that when this provision was inserted into the Constitution nobody anticipated the mischievous use which would actually be made of it."

Roche then proceeded to give the *The State (Burke) v. Lennon* as an example of where, to his mind, such an abuse had occurred:

"It was possible in this case for an applicant to select the most suitable Judge of the High Court, from his

point of view, to prevent other Judges from sitting with him, and to obtain from that Judge, sitting alone, a decision which proved to be erroneous, that an Act of the Oireachtas is void as being contrary to the Constitution, with very serious practical consequences. This should not be possible."

Quite independently of the Roche memorandum, proposals for change came from both Hearne and the Department of the Taoiseach. As we have already noted, Hearne had cabled from Ottawa with the suggestion that Article 40.4.2 should be amended "by removing the jurisdiction thereby conferred from a single judge of the High Court." The Department of the Taoiseach made a similar suggestion:

"It is suggested that this provision under which an applicant in a habeas corpus case can have the matter dealt with by any and every judge of the High Court should be amended. It may be necessary or desirable to take steps to ensure that persons are not released from custody on purely technical grounds or because of some trifling flaw in procedure. There is also the issue that habeas corpus proceedings are of such importance as to justify their being heard by more than one judge.

It is suggested further that where a habeas corpus application is granted on the ground that a particular statute is unconstitutional there should be an appeal

to the Supreme Court. It is undesirable that constitutional issues should in a habeas corpus case be decided by the judgment of a single member of the High Court without any appeal to the Supreme Court."

These proposals met with a mixed response from the Committee:

"The Committee are of opinion that no change should be made in the present position in regard to habeas corpus save in the direction of an appeal to the Supreme Court in cases where the applicant obtains his release on the ground that the law under which he is detained is unconstitutional. In this respect, they agree with the proposal and recommend that such provision should be made by the amendment of Article 40.4 for enabling a Court or Judge which or who is of opinion, on application under that section, that the applicant is detained in accordance with a law which is unconstitutional, to refer the question of unconstitutionality to the Supreme Court for its determination and to release the applicant under that question is determined."

The Committee then furnished an early draft of what was ultimately to be become Article 40.4.3:

"3. Where, on an inquiry by the High Court or a judge thereof into a complaint made under this section, the

Court or judge is satisfied that the person detained is being detained in accordance with a law, but that such a law is invalid having regard to the provisions of this Constitution, the Court or judge may refer the question of the validity of such law by way of case stated to the Supreme Court for its determination thereon, and in that case, shall not order the release of the person detained pending the determination of the Supreme Court."

Dr. Moynihan noted in the margins on October 16, 1940 that it had been approved "provisionally" by the Taoiseach, but that it be "very carefully considered from judge's point of view." The words "that such a law is invalid" were underlined and it seems clear from the crossed out words in the margins that alternative drafts were being considered. About a week later Dr. Moynihan noted he had discussed the matter further with the Taoiseach on October 23, 1940:

"With regard to [the] suggested draft overleaf, he now agrees that we should let the words 'that such law is invalid' stand.

He desires that we should add words to the draft indicating that where the person concerned in a [High Court] application is under sentence of death such sentence shall not be executed pending the final determination of the question whether he is lawfully

detained. This, he directs, might be effected by deleting the words 'shall not order the release of the person detained' and substituting the words 'shall order that the person detained shall be held in custody' or words to that effect.

He desires further that any other suggestions affecting habeas corpus including Hearne's suggestions should be fully examined and submitted to him."

By mid-November 1940 several drafts corresponding in broad measure to the present Article 40.4.2-5 were produced and these were approved by the Taoiseach. At this stage, however, the draft Article 40.4.2 provided that every substantive habeas corpus application (i.e., apart from the initial application for an inquiry) would have to be heard and determined by a Divisional High Court consisting of not less then three judges.

Somewhat surprisingly perhaps, it was the issue of habeas corpus procedure which proved to be the most controversial of the proposed amendments. In the course of the Second Stage debate Deputy Costello objected to the proposal whereby an applicant for *habeas corpus* would no longer have the right to go from judge to judge of the High Court to select his own judge:

"Any person who claimed that he was unlawfully detained had the right to apply to any judge of the

High Court for a writ of *habeas corpus*. He had the right, not merely to apply to any judge of the High Court, but to select the particular judge to whom to would make his application. That right, which was embodied in the original Constitution of this State, was really taken over from the law as it stood before the coming into being of this State.

It was even in the Black and Tan times the right of the subject to approach any judge of the High Court and apply for a writ of *habeas corpus* so that his detention could be inquired into and the judge would determine whether or not he was being unlawfully detained. He had the right to select his judge and, if he was refused that right, either on the original application for a conditional order of *habeas corpus*, he had the right to walk into the chambers or the private residence of any other judge of the High Court and demand, as of right, the issuing of a writ of *habeas corpus*, and that judge was entitled and bound to issue that writ irrespective, if he so pleased, of the decision of one of his colleagues.

That was a valuable right and not merely a theoretical right. There is at least one man alive today who would have been dead 18 or 19 years if that right did not exist. There was a case in which I was engaged - it was the case of *Egan v. Macready* - and it was heard in 1921, at the height of the Black and Tan regime.

> Every High Court judge had been tried up to that...There was only one man left, the late Master of the Rolls, who at one time adorned the Supreme Court of our State. He was the only judge left, and he had the courage, in spite of his upbringing and outlook, to remember that it was the old judicial tradition, even in the old days, that habeas corpus took precedence of every business. He stopped his Chancery business, his ordinary court business, when we applied to him for a conditional order...He gave the conditional order for the writ of *habeas corpus* and subsequently heard it himself and, notwithstanding that every one of his colleagues of the High Court had declined to pass judgment owing to the case of *R. v. Allen,* he gave independent judgment, with the result that there is one man alive who would not have been alive if that right was not in existence.
>
> That very valuable constitutional right was preserved and given authority in the original Constitution of this State...That right was embodied in our original Constitution and was continued in the amendment of the Constitution, but in this amendment of the Constitution it is proposed to be taken away."[165]

Deputy Costello also complained that other inroads were being made into traditional habeas corpus practice:

"We find that not merely is the citizen prevented from selecting his judge, but he is prevented from going to judge to judge. We find the President of the High Court can himself select the judge and that he can have not one judge, but three judges, if he likes, and we find that the right and initiative passes from the citizen into the President of the High Court."[166]

Deputy Costello also attacked the case-stated procedure in cases involving the constitutionality of a law, since it violated the traditional common law rule that no appeal lay against the making of an order of *habeas corpus:*

"That was the position that existed until this amendment, bringing our democratic Constitution up to date, was introduced...If [the people] read or ponder on the Constitution and on this amendment of it, they will be still more convinced that a written Constitution is no safeguard of their liberties, and that this last amendment is the greatest inroad upon the constitutional liberty of the citizen that has been made since the establishment of the State."[167]

Replying at the close of the Second Stage debate, the Taoiseach indicated that, if necessary, he would be prepared to re-insert the words "any and every judge thereof" in Article 40.4.2 to make it plain that the

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[165] 82 *Dail Debates* at Cols. 1244-1246.
[166] 82 *Dail Debates* at Col. 1247.

applicant had the right to go from judge to judge at the application for leave stage.[168] The Taoiseach, however, stoutly defended the three-judge rule:

> "If there is an important matter to be decided as to whether a certain law is constitutional or not, it is not proper that that should be dealt with in a haphazard way of finding some judge with a particular view, and allowing him to decide. You try, in other words, to choose the person whose opinion happens to be in a certain direction and then get your verdict. We would not stand for that and I think, therefore, that for the final determination, if it is regarded by the President of the High Court, who is removed from politics, as of sufficient importance to have three judges, there is no harm done to anybody."[169]

At the Committee Stage the Taoiseach moved an amendment to clarify the position regarding the right of the applicant to go from judge to judge at leave stage. The version of Article 40.4.2 contained in the 1941 Bill as originally published provided that:

> "Upon complaint being made by or on behalf of any person to the High Court or such [any][170] judge

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[167] 82 *Dail Debates* at Col. 1248-9.
[168] 82 *Dail Debates* at Col. 1265.
[169] *Ibid.*, 1206.
[170] The version as originally drafted by the 1940 Committee read "or any judge thereof." This made it clear - which the words "or

thereof alleging that such person is being unlawfully detained, the High Court or such judge thereof shall forthwith inquire into the said complaint and may order the person in whose custody such person is detained to produce the body before the High Court on a named day and to certify in writing the grounds of his detention and the High Court [consisting of not less than three judges][171] shall, upon the body of such person being produced before the Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law."

The Taoiseach moved two amendments at Committee Stage to replace the words "or such judge thereof" (which appeared twice) with in each case the words "and any and every judge thereof to whom such complaint is made."[172] The Taoiseach explained that:

"The amendment is intended to make quite clear that the complaint of a person that he is being unlawfully detained may be made in the first instance to any and every judge of the High Court and that upon refusal

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such judge thereof" did not - that the applicant had the right to apply to any judge of the High Court asking for an inquiry into the legality of an applicant's detention.

[171] The words in brackets were contained in the version drafted by the 1940 Committee.

by one or more judges the application may be renewed before the other judges or any of them. In other words, that you may make your application for a conditional order of which is usually the first step in a *habeas corpus* application to the various judges of the High Court in succession. That is to meet a point that was made by some speakers on the other side on the Second Reading."[173]

The new wording did represent an improvement, since, whatever the intention may have been, the original wording ("the High Court or such judge thereof...") of the revised Article 40.4.2 as presented to the Oireachtas did not readily lend itself to the argument that there was a right to go from judge to judge once the initial application for an inquiry has been refused.

The Taoiseach did not, however, give way on the other points raised. The opposition expressed concern that the President of the High Court would be given the power to determine whether Court hearing the substantive application for release would consist of one or three judges and would also be in a position to determine whether the judge who granted leave should sit on that Court:

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[172] *Ibid.*, 1906-7.
[173] *Ibid.*, 1907.

"Deputy McGilligan: Leaving out the question of illness, I have asked the Taoiseach whether there was ever definite power to exclude the judge who gave the conditional order from sitting in the final court.

The Taoiseach: I believe there was such a power, but that it was never exercised. As far as I know the position was this: that, in important cases, the ultimate determination was generally made by a court of three judges. I have never had heard that there was an obligation on the person constituting the court to have one judge more than another on it: that it was obligatory on him to have the judge who gave the conditional order on it, but, as a matter of practice, he did it and, as a matter of practice, I believe that it will happen in this case too. There is no need to lay that down explicitly, because I think the President of the High Court, in selecting the numbers of the courts, would advert to the importance of having the judge who heard the application in the first instance a member of the court."[174]

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[174] 82 *Dail Debates* at Cols. 1909-10. It may be noted that in *Adams v. Director of Public Prosecutions*, High Court, April 12, 2000 (a judicial review application in respect of pending criminal proceedings) Kelly J. emphatically rejected the suggestion that only the judge who granted leave to apply for judicial review could hear the motion to have that leave set aside:

> "First, [such an argument] is completely inconsistent with the established practice of the Court. Secondly, insofar as the Rules of the Superior Courts permits applications to be set aside, for example, under Order 52, r.3 or Order 12, r. 26,

On the whole, however, the changes to habeas corpus procedure effect by the 1941 Act were warranted. The common law rules had evolved in the pre-Judicature Act era in which there had been no right of appeal and had given rise to endless confusion about the extent of the right to go from judge to judge. Nor did this confusion end following the enactment of Article 6 of the 1922 Constitution and the very similar language of Article 40.4.2 as originally enacted, since - as *Dowling's* case revealed - no one could be sure what the words "and any and every Judge thereof" as they appeared in these provisions actually implied.[175] The new version of Article 40.4.2, while preserving the right to go from judge to judge in respect of the initial application for leave, made it clear that there

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> the rules do not provide that the application has to be made to the judge who made the original order."

Kelly J. then drew attention to the practical difficulties which might otherwise ensue:

> "A moment's consideration of this proposition would demonstrate the absurd results that could flow from it. What if the judge who made the order was engaged in other business of the Court which could not be interrupted, e.g., presiding over criminal business in the Central Criminal Court? What if the judge was on circuit? What if the judge had retired? What if the judge had died? In the latter two circumstances the order, on Mr. Forde's thesis, could never be set aside. In the former two it could be done (in an urgent case) only by interrupting a criminal trial or by following the judge to the country venue at which he might be presiding."

[175] It is, of course, true that similar language is used in Article 40.4.2, but the crucial difference is that the words "to whom such complaint is made" follow the words "and any and every judge thereof", making it clear that the duty to inquire rests with the individual judge to whom an initial complaint is made.

was no right to go to another judge of the High Court once that Court had pronounced that detention to be valid. Moreover, unlike the position at common law, the disappointed applicant could always exercise his constitutional right to appeal that decision to the Supreme Court. And while the case-stated provisions of Article 40.4.3 were something of a novelty in 1941, they were eminently justifiable on the ground that - unlike the position of the common law courts - the High Court had been given the enormous power of judicial review of legislation. If a prisoner was to be released from custody on the sole ground that an Act of the Oireachtas was unconstitutional - with, as in *Burke's* case, possibly enormous implications for the entire prison population - it does not seem unfair that the Supreme Court should be given the final say on an issue of such potentially far-reaching importance.

The implications of these changes contained in the Second Amendment of the Constitution Act 1941

What are we to make of these changes? On the whole, the amendments effected by the 1941 Act so far as they related to the courts and the power of judicial review can only be given a mixed welcome. While none of the amendments could be regarded as of vital importance, the one judgment rule is something more than a minor irritant, since it has impeded the ordinary organic development of constitutional law. Moreover, although Article 34.3.3 was

probably unwise, its practical effect is fairly limited.[176] However, the changes to the habeas corpus procedure represented, on the whole, an improvement on and clarification of the original version of Article 40.4.2, Article 6 of the 1922 Constitution and the earlier common law. But most of all, it is evident once again from the care and attention which was given to these matters that the drafters fully understood the important of the actual language of the Constitution and were fully cognizant of the potential impact which judicial review might have in the future.

[176] The provision may, however, have the paradoxical effect of making the Supreme Court more reluctant to uphold the constitutionality of a Bill which has been referred under Article 26, precisely because the Court is aware that if the constitutionality of the Bill is upheld, the legislation in question can never be challenged again.

CHAPTER 8

CONCLUSIONS

And so it is in the grim year of 1941 that our examination of the early development of the constitutional law of the Irish State ends. It is now sometimes forgotten that, some curiously, the 1940s were to see occasional bursts of judicial activism that were to presage the significant developments of the 1960s and later decades. In 1943 the Supreme Court held that the School Attendance Bill 1942 infringed parental rights and was unconstitutional.[1] Two recently enacted statutes of the Oireachtas were found unconstitutional in the period from 1946-1948: the Trade Union Act 1941[2] and the Sinn Fein Funds Act 1947.[3] Very shortly after the delivery of the judgment in the latter case, President O'Kelly convened a meeting of the Council of State to consider a possible reference of the Bill to the Supreme Court. The Council of State had been summoned in deference to the agitation concerning the possible unconstitutionality of what became the Health Act 1947.

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[1] *Re Article 26 and the School Attendance Bill 1943* [1943] IR 334.
[2] *National Union of Railwaymen v. Sullivan* [1947] IR 77.
[3] *Buckley v. Attorney General* [1950] IR 67. See generally, Hogan, "The Sinn Fein Funds Case Fifty Years On" (1997) 2 *Bar Review* 375.

The President only signed the Bill after advice to this effect from the Council of State, but the alleged unconstitutionality of this legislation was the subject of acute political controversy for about time thereafter.[4] Three years later the common law rule regarding paternal supremacy in the matter of child custody was found unconstitutional in the much mis-understood decision of the Supreme Court in *Re Tilson, infants.*[5] If the 1950s were a relatively fallow period, constitutional law was changed beyond recognition in the 1960s. These latter events have been chronicled elsewhere, but in 1941 they lay in the distant future and fall well beyond the subject matter examined here.

What conclusions, therefore, can we draw from the events under consideration? First, by the mid-1930s, the 1922 Constitution had been fatally undermined and there was a clear necessity for a new Constitution. Most people would argue that that Constitution was probably doomed from the start, given that it was expressly subordinated to the Treaty; that it contained too many references to the Crown (however symbolic) and that it altogether lacked the legitimacy which a popular mandate gave the 1937 Constitution. But even if this were not so, the wholescale amendments of the Constitution effected in 1929 and 1931; the Supreme Court's decision in *The State (Ryan) v.*

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[4] See McCullagh, *A Makeshift Majority* (Dublin, 1998) at 211-213; Maninng, *James Dillon, a Biography* (Dublin, 1999) at 219-200.

[5] [1951] IR 1. See generally, Hogan, "A Fresh Look at Tilson's Case" (1998) 33 *Irish Jurist* 311.

Lennon[6] upholding the validity of those amendments and the subsequent dismantling of that Constitution (and the Treaty settlement) by a series of constitutional amendments from 1933 onwards all meant that a fresh start was needed.

But what does our analysis of the drafting of the Constitution and the thinking of the drafters tell us about the Constitution itself? Outside of the confines of the legal community[7], it is probably fair to say that the Constitution of Ireland has not received a good press. Part of the reason for this, of course, is that key features of the Constitution were or are[8] seen as being confessional and highly nationalistic in character. Critics have also rightly drawn attention to the manner in which certain rights are subject to considerable qualifications and, indeed, to what appear to be internal contradictions within the Constitution itself. And yet, perhaps, it is only now with the passage of

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[6] [1935] IR 170.

[7] Thus Forde, *Constitutional Law of Ireland* (Cork, 1987) describes (at 13) the Constitution as a "model of superb drafting." See also the comments contained in the *Report of the Constitution Review Group* (Pn. 2632, 1996) discussed below.

[8] Critics point to the terms of the Preamble, Articles 2 and 3 (deleted and entirely re-cast by the 19th Amendment of the Constitution Act 1998); the "'special position" of the Catholic Church contained in Article 44.1.2 (deleted by the Fifth Amendment of the Constitution Act 1972); the divorce prohibition (deleted by the Fifteenth Amendment of the Constitution Act 1995) and the general contents of Articles 41 and 42 dealing with the family and education. For a representative analysis of these provisions by eminent historians, see Whyte, *Church and State in Modern Ireland*, 1923-1979 (Dublin, 1979) at 50-56; Lyons, *Ireland*

time and the dissipation of the passions of the politically-charged 1930s that the virtues of the Constitution have become more fully apparent.[9] This is, perhaps, especially so now that some of the highly controversial and (to many, the writer included) intrinsically objectionable features of the Constitution have been deleted by referendum - the 'special position" of the Catholic Church (1972); the ban on divorce (1995) and the complete re-casting of Articles 2 and 3 (1998).

Of course, at a political level, the Constitution had long since brought much-needed stability:

> "After nearly thirty years of incessant war, revolution and political change, the twenty-six counties had at last achieved a kind of equilibrium so profound and so firmly based that even when the final step towards the formal realisation of the republic that when it came in 1948-9, could be taken by the passing of a

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since the Famine (London, 1972) at 536-550; Lee, *Ireland, 1912-1985: Politics and Society* (Cambridge, 1989) at 201-211.

[9] Cf. the comments of Manning, *James Dillon, op.cit.*, at 133:

> "Like most others at the time, Dillon failed to appreciate the strength and depth of de Valera's Constitution. He saw it as making little change...Neither he, nor others, foresaw the extent to which the human rights element of the Constitution would develop and be developed by adventurous jurists, nor the extent to which judicial review of the Constitution would turn the Supreme Court into a major political force, striking down laws and curbing executives."

simple act of parliament and without the necessity of far-reaching constitutional amendment."[10]

At a legal level, the achievements of the Constitution are, perhaps, best summed-up by the following observations of the Constitution Review Group:

> "The provision made for the protection of fundamental rights in the Constitution were more elaborate than heretofore and the drafters had clearly learnt from the experience from the experience of the 1922 Constitution...Indeed, to an extent, the new Constitution reflected some sophisticated legal thinking (especially by the standards of the day) even if this was not widely appreciated at the time. This sophistication, coupled with skilful and elegant drafting, ensured that the Constitution was sufficiently flexible and had an in-built capacity for organic growth through judicial interpretation. Moreover, the fundamental rights provisions have, generally speaking, proved to be an effective method of safeguarding individual rights so that 'the overall impact of the courts on modern Irish life, in their handling of constitutional issues, has been beneficial, rational, progressive and fair.'"[11]

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[10] Lyons, *op.cit.*, at 549-50.

[11] *Report of the Constitution Review Group* at 213-4. The internal quotation is from Kelly, *The Irish Constitution*, Dublin, 1994, at xci.

Of course, that this is so is largely thanks to the wisdom and foresight of the drafting team and, of course, to de Valera himself who was prepared to repose such confidence in the team which he had selected. As the Report of the 1934 Constitution Review Committee plainly shows, the drafting team were clearly determined to construct a Constitution which would not suffer the vicissitudes which had undermined the 1922 Constitution. They were sufficiently broad-minded to ensure that the Constitution reflected enduring fundamental democratic values and respected the rights of minorities.[12] Given the forces that were prevailing in continental Europe and the strident demands of a strong ultra-montane element within the Roman Catholic hierarchy, these were no mean achievements. In this regard, Ireland most emphatically did not follow the Polish example (a country with, in some respects, a very similar history) where the "April Constitution" of 1935 drifted towards fascism. As Cierlik has argued:

> "This divergence of fortunes of the two States may be traced to many sources, but in no small part credit ought to go to those who resisted the temptation of 'strong government' to which so many States succumbed at the time....Antiquated and

[12] Of course, that is not to say that the Constitution could not have gone further in protecting those rights, but given the political and religious atmosphere then prevailing, the Constitution went about as far as it could go in protecting those rights while still retaining majority support.

> inappropriate as it may be in parts, it is only when de Valera's project, of which he was so proud, is viewed in the wider political circumstances prevailing at its genesis, that its contribution to Irish constitutionalism and democracy can be truly appreciated."[13]

Of course, the other notable contribution to constitutionalism on the part of the drafters was the creation of a relatively rigid Constitution, thus paving the way for circumstances in which the powers of judicial review and the protection of fundamental rights could flourish. These important checks and balances powerfully re-inforced democracy and democratic values. The 1937 Constitution succeeded against the odds in establishing a system where judicial review could flourish, even though this prospect excited considerable scepticism at the time.[14] In this regard, compared with the Constitutions of the

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[13] Cierlik, "Bunreacht na hEireann and the Polish 'April Constitution' in Murphy and Twomey eds., *Ireland's Evolving Constitution 1937-1997* (Oxford, 1998) 241, 251.

[14] *The Irish Times*, July 1, 1937, described the declarations of fundamental rights in the Constitution as "bunkum." An earlier editorial in the same paper on June 9, 1937 had described the Constitution "in its essentials as so much eye wash." O'Sullivan, an admittedly fierce if eloquent critic of de Valera, writing in 1940 commented (*op.cit.*, at 495) that:

> "Large sections of the new Constitution consist of declarations of a homelitic character concerning personal rights, the family, education, private property, religion and directive principles of social policy. Many of these are so vague that they could not possibly be impleaded in the courts."

other emerging nations of Europe, the Irish Constitution succeeded where many other attempts failed.[15] It may thus be stated that the success of the 1937 Constitution is due in no small measure to the foresight and legal acumen of those gifted team of civil servants whose work in reporting, advising and drafting during the period from 1934 to 1937 was critical to this endeavour.

Perhaps one may be permitted to conclude on a personal note. The major conclusion of this thesis is that a survey of all the available evidence, taken in its totality, suggests that the late Professor Kelly was wrong to assert that the drafters never intended a vigorous system of judicial review

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[15] In his seminal work, Professor Lee, *op.cit.*, often makes comparison between Ireland and Finland, two countries with similar past histories and population structures and who both achieved independence from neighbouring large powers within a few years of each other. But if Professor Lee is correct to make unflattering comparisons between Ireland and Finland in terms of matters of such as academic standards (*op.cit.*, at 600-601) the retention of the language and general economic performance (*op.cit.*, at 663-4), the same cannot be said in respect of their respective Constitutions. Thus, the Finnish Constitution of 1919 also contained a brief catalogue of fundamental rights, but, as one noted Finnish human rights lawyer has observed:

> "In everyday court practice, constitutional rights have never played a significant part and even today cases where constitutional provisions have been invoked by Finnish courts remain few in number."

Sheinin, "Incorporation and implementation of Human Rights in Finland", Sheinin ed., *International Human Rights Norms in the Nordic and Baltic Countries* (Martinus Nijhoff, 1996) at 261. Even now, after some major textual revisions of the Constitution in 1995 and 1999, "the institutional of judicial review....is implemented in a highly conditional manner that it likely to leave the practical value of judicial review at a low level": see Sukksi, "The Advisory Referendum in Finland" (1999) 5 *European Public Law* 535, 549.

of legislation or that the fundamental rights provisions in Articles 40 to 44 were simply to be regarded as "headlines to the legislature" and in essence largely non-justiciable in character. In what was to be his last - but highly acclaimed[16] - public lecture which dealt with the implications of the Supreme Court's decision in *Webb v. Ireland*[17] and the question of the survival of prerogative rights, Professor Kelly concluded thus:

> "It remains for me only to thank the Trinity College Law School for the great honour of its invitation to give a lecture in commemoration of the enactment of the 1937 Constitution; and to express the hope that the life and times of its predecessor, the Constitution of Saorstat Eireann, so filled not only with political tension, but also with youthful national pride and hope for the future, may attract more interest from lawyers and historians, than, up to this, it has generally received."[18]

If, therefore, I have been forced to disagree with that great master of Irish constitutional law, then let the fact that this thesis has traversed a period of our constitutional

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[16] "Hidden Treasure and the Constitution" (1988) 10 *Dublin University Law Journal* 5. In *Geoghegan v. Institute of Chartered Accountants in Ireland* [1995] 3 IR 86, 118 O'Flaherty J. observed that "doubtless in any future debate" concerning the survival of the prerogative, this essay would prove to be of "immense value."

[17] [1988] IR 353.

[18] Kelly, *loc.cit.*, 23.

history in which he had an abiding interest serve as an act of *pietas* in his memory.

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