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CURRENT DEVELOPMENTS: CASE COMMENT

Ireland's abstract review and the Judicial Appointments Commission Bill case

Laura Cahillane*

University of Limerick, Ireland
Email: laura.cahillane@ul.ie

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Introduction

The Irish Constitution contains a pre-enactment abstract review procedure under Article 26 whereby, before signing a Bill into law, the President can refer the Bill to the Supreme Court for a decision on its constitutionality. However, only 16 such references have ever been made. The reason Irish Presidents have been cautious about sending Bills to the Supreme Court for abstract review relates to the fact that if a Bill survives the Article 26 review process, it then acquires an immunity from further challenge under Article 34.3.3. This has sometimes been referred to as a 'seal of constitutionality'[1] and the absolute nature of this blanket immunity has been criticised because it means that, in practice, the review process is rarely used.[2] By its very nature, abstract review suffers from the defect that the provisions are being looked at in a vacuum, without the benefit of a concrete factual scenario and it may be that circumstances later arise which could result in an unconstitutionality that was not apparent when the Bill was initially examined. For this reason, Presidents will sometimes decide not to refer a Bill, even one which is considered controversial, for fear of closing off the Bill to potential future challenges; they may feel it is better for challenges to occur organically as situations arise rather than to prevent a situation where a future challenge is blocked by the immunity following the review process. As Hogan has put it, '[w]ithout a plaintiff, a court may fail to anticipate side-effects or unintended consequences of the law'.[3] The paucity of occurrences means that when the procedure is invoked, there is a great interest (amongst members of the legal and academic communities at least) in the process and outcome.

The procedure was invoked most recently in Autumn 2023 when, after a period of almost 20 years without any such references, President Higgins referred the legislation setting up a new process for appointing judges in Ireland. There were concerns that the legislation constituted a usurpation of executive power and the Court was requested to consider potential unconstitutionality with regard to a number of different sections in the Bill.

1. The Judicial Appointments Bill

The judicial appointments process in Ireland has long been considered in need of reform. Article 35.1 of the Constitution states: 'The judges of the Supreme Court, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President'; Article 13.9 clarifies

*Associate Professor in Law at the University of Limerick. I would like to thank the reviewer for their very helpful comments and the editor for a very smooth process.

[1]R Byrne et al *The Irish Legal System* (London: Bloomsbury, 2020) p 627.

[2]H Hogan 'The decline of Article 26: reforming abstract constitutional review in Ireland' (2022) 67 The Irish Jurist 123.

[3]Ibid, 127.

that this power, like many granted to the President, is only exercisable 'on the advice of the Government'. So judges are appointed by the Government. Until the mid-1990s, this occurred by way of the 'tap on the shoulder' approach and often the appointments were made on the basis of 'personal networks and political allegiances'.[4] In 1995 the Judicial Appointments Advisory Board (JAAB) was established to reform this process. However, the reform was only 'skin deep' and significant problems remained with the appointments process.[5] Following many reform attempts, the Judicial Appointments Commission (JAC) Bill 2022 was finally passed, which aimed to establish a new fair and transparent system for judicial appointments.[6]

However, the Bill garnered significant opposition. One concern related to membership of the Commission, given that it excluded representatives from the professions and, it was argued, gave judges a veto over appointments. But the main objection raised was that it unconstitutionally restricted the executive's discretion to appoint candidates of its choice by requiring the executive to choose from a list of three candidates recommended by the new Commission. One objector described the Bill as 'manifestly unconstitutional'[7] and a number of opposition politicians argued that it should be considered by the Supreme Court. The President decided to call together the Council of State,[8] in order to consider referring the Bill. Following that discussion, he decided to refer the Bill to the Supreme Court on 13 October 2023.

It might seem surprising that after almost 20 years without a referral, this piece of legislation was referred, when there were arguably more contentious Bills in previous years that were not referred. For example, the Protection of Life during Pregnancy Bill 2013 and the International Protection Bill 2015 both led to President Higgins calling the Council of State to discuss referrals but on both occasions he ultimately signed the Bills without a reference to the Supreme Court. In 2020 there was also some controversy when the President did not call the Council of State to consider whether or not to refer the Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Records Bill,[9] despite calls from opposition politicians to do so. Rather unusually, (because the President is not required to give any reasons for his decision to refer or not to refer a Bill), the President released a statement afterwards explaining his reasoning, in which he referred to the seal of constitutionality and the fear of closing off the Bill to something which might arise in the future.

In fact, this is the reason why the JAC Bill was such a good candidate for abstract pre-enactment review. In the examples above there was a clear reluctance to refer the Bills, lest they acquire immunity, preventing challenges which might only become apparent in the future. But for an instrument regulating how judges are appointed, the certainty that an immunity would bring would be an advantage. The Bill did not involve any social issues which might change with the passage of time and a pre-enactment decision on the validity of the Bill either way would avoid the possibility of future complicated challenges to the appointment of judges made under the legislation, and potentially to any decisions such judges might have made.

2. The Article 26 judgment

On referring the Bill, President Higgins requested that special attention be given to sections 9, 10, 39, 40(2), 42, 43, 45, 46, 47, 51, 57 and 58 of the Bill. These sections mainly related to membership and functions of the JAC, the requirements of merit and diversity, and the statement of judicial skills and attributes required by the Bill. However, the major concern related to section 51, which stated that, in advising the

[4]J Carroll MacNeill *The Politics of Judicial Selection in Ireland* (Dublin: Four Courts Press, 2016) p 59.

[5]For detail on these problems see L Cahillane and D Kenny 'The Seamus Woulfe controversy and the deficiencies in Ireland's judicial appointments process' (2023) 74 Northern Ireland Legal Quarterly Advance 22.

[6]For details on previous reform attempts see ibid.

[7]See https://www.michaelmcdowell.ie/judicial-appointments-commission-bill-is-unconstitutional.html (last accessed 23 September 2024).

[8]The President is required to consult the Council of State before making a reference but retains discretion to make the ultimate decision. See Bunreacht na hÉireann, Art 26.1.

[9]This was designed to seal records to mother and baby homes.

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President in relation to the appointment of a person to a judicial office in the state, the Government shall only consider for appointment those persons who have been recommended by the JAC.

The 1995 legislation setting up the JAAB contained a clause which functioned as a sort of constitutional safeguard whereby it was expected that Government would choose from the names recommended by JAAB – but crucially, it was not *required* to do so. However, if it departed from the recommended names it would have to publish a statement to that effect in the Government's official publication, Iris Oifigiúil. This was to ensure conformity with the constitutional principle that it is the role of the executive to appoint members of the judiciary and to ensure there was discretion in this regard. This same procedure had originally been included in the Heads of the Bill but in the press release announcing the publication of the final Bill, a change to the procedure was announced together with a statement that the Attorney General had been consulted and he was satisfied that this would not cause any problems of unconstitutionality.[10] The change meant that instead of leaving the choice of candidates as discretionary, the Government would 'only consider for appointment' those recommended by the JAC. This was clearly intended to make the new appointment body more effective and to avoid the possibility of Governments simply ignoring recommendations and appointing a candidate who was not considered by the JAC (or who may have been considered but not recommended). It is likely that this change was influenced by developments in EU law, given that both the European Court of Justice and the Commission have indicated a preference for more independence from the executive in judicial appointments decisions.[11] The European Commission Rule of Law reports had repeatedly criticised the level of executive discretion in judicial appointments in Ireland.[12] However, the difficulty is that this discretion is specifically authorised by the Irish Constitution and herein lay the dilemma. If the legislation was interpreted as removing executive discretion in all circumstances, then it was likely unconstitutional. The question was whether this was the correct interpretation of section 51.

In the case of *State (Walshe) v Murphy*, Finaly P pronounced that the appointment of a judge is something which requires 'the President's intervention for its effectiveness in law' but that in fact it is 'the decision and act of the Executive'.[13] The authors of *Kelly: The Irish Constitution* go so far as to label this a 'constitutional right of the executive'.[14] This being the case, legislation purporting to restrict that right was always going to raise questions about the dividing line between the executive and legislative power; in particular, whether and how far the Oireachtas (Parliament) can control executive power. Clearly, the section prevents the Government from advising the President to appoint a person not recommended by the Commission; but the question the Court had to consider was whether it actually requires the Government to advise the President to appoint one of the persons recommended by the Commission. In other words, once names are recommended, does the Government then have to make an appointment or could it, in theory, decide not to proceed with the appointment if it was unhappy with the names presented and begin the process anew? This rather complicated and nuanced point was crucial to the validity of the Bill since, if the Court decided that executive discretion had been extinguished by the Bill – and that it required one of the recommended candidates be appointed, then the Bill would most likely fall foul of the Constitution. Whereas, if a level of discretion remained then the Bill could be regarded as a constitutional limitation of executive discretion rather than a usurpation of it, since as Oran Doyle has demonstrated, the courts have repeatedly held (albeit obiter) that the Oireachtas is competent to control the executive power.[15]

[10]See 'Minister McEntee publishes Bill to implement biggest reform to judicial appointments in decades', 31 March 2022, available at https://www.justice.ie/en/JELR/Pages/PR22000058 (last accessed 23 September 2024).

[11]See for example, Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe, paras 46–47. See also ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18 *AK*, paras 137–138.

[12]2022 Rule of Law Report, Country Chapter on the rule of law situation in Ireland, p 2; Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe.

[13]*The State (Walshe) v Murphy* [1981] IR 275.

[14]G Hogan et al *Kelly: The Irish Constitution* (London: Bloomsbury, 5th edn, 2018) p 1186.

[15]O Doyle 'Legislative constraint of the executive power to select judges: unconstitutional usurpation or legitimate control', Trinity College Dublin Legal Studies Research Paper Series 2023.

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The judgment (which under Article 26 procedure issues as a single judgment of the whole Court, in this case of seven judges, as no concurring or dissenting opinions are permitted),[16] ran to 136 pages, but the central discussion of section 51 and its impact on executive power and the separation of powers is dealt with in just 17 pages and the main argument on the usurpation of executive discretion is answered in about three pages. In a way, this is unsurprising since, as Hogan notes, '[t]he immunity granted to a Bill that survives an Article 26 reference will make the Supreme Court particularly anxious to examine all potentially unconstitutional aspects of the Bill to the fullest degree'[17] and there were 11 other sections also mentioned in the reference. While the Court dispatched any concerns in relation to those other sections relatively easily, there are other limitations on the Court, as the judgment must issue within 60 days of the reference and the Court must balance the need to give counsel sufficient time for preparation with the need to also provide time and space amongst the seven members of the Court to agree on conclusions and write a judgment. All of this means that while it might have been more intellectually satisfying to see the Court delve deeply into the questions around legislative control of executive power, the Court had to take a utilitarian approach in simply answering the question of unconstitutionality in the limited time it had.

During the hearing, counsel appointed to oppose the Bill was subject to intense questioning by the Court on the question of whether the legislation required the Government to make an appointment; essentially everything came down to the interpretation of section 51. The Court asked what would happen if only one person was recommended and that person subsequently withdrew. A similar question was what would happen if the recommended person turned out to be ineligible.

The Court came to the conclusion that the legislation did not oblige the Government to make appointments in these circumstances.[18] It followed then that:

> If the Government is so clearly not obliged to advise the President to appoint in some specific circumstances, there is nothing in s 51 that could be understood as compelling the Government to appoint a person simply by reason of the fact that the person concerned was nominated by the Commission.[19]

The wording of the section, 'consider for appointment', was instructive in this regard. The Court observed that the constitutional power involved a choice for Government whether or not to advise the President to make an appointment and said there is nothing express or implicit in section 51 which impedes that choice:

> It has a choice to advise the President in accordance with the recommendation of the Commission, and even where only one person is recommended, the Government is still exercising a choice, the choice being whether or not to advise the President to appoint that person.[20]

In coming to this conclusion, the Court also pointed to section 47(5), which requires the Commission to forward to the Minister the names of all who had sought appointment. The Court admitted that it was 'hard to discern why the Minister could have any need for this information if it were not to be used to decide *not* to proceed with an appointment on the basis of the list forwarded by the Commission'.[21] It was also outlined by the Court that if the intended effect of the section had been to create 'an obligation to actually appoint' it would have expected to see 'far more extensive' changes, which would have to be 'unequivocally expressed' since it would represent a 'fundamental change to the practices in this State since its foundation'.[22]

[16]Art 26.2.2.
[17]Hogan, above n 2, at 128.
[18][2023] IESC 34, at 91.
[19]Ibid.
[20]Ibid, at 92.
[21]Ibid, at 90.
[22]Ibid, at 89.

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Since the Court decided that the legislation did not require the Government to make an appointment, it did not then have to answer the question of whether it would be unconstitutional to require the Government to appoint a particular candidate. As Doyle has argued, this would have forced the Court to identify a positive rationale for the Government's role in judicial appointments:

> If the Government could be compelled to advise the President to nominate a particular candidate that it considered unsuitable, the democratic accountability for judicial appointments and hence for the exercise of judicial power under the Constitution would be undermined. … while not necessarily problematic as a matter of democratic theory, [it] would subvert the particular democratic scheme established by the Irish Constitution.[23]

For this reason it is likely that had the Court been required to decide this issue, it would have found it unconstitutional and the Court did stress that the assumption is that 'the ultimate authority of the Government to make the final decision as to who to appoint as a judge must also be preserved'.[24]

The Court was content that section 51 does not infringe the separation of powers, even though there is a limitation of executive power involved. The Court stopped short of embarking on an exploration of the areas of executive power that can be controlled by the Oireachtas, but it did recognise that such control was possible in certain contexts. In fact it pointed out that 'there has not been a single instance where legislative encroachment into an area of executive power has been found in this jurisdiction to be impermissible on separation of powers grounds'.[25] The Court stressed that there may be a 'constitutionally irreducible core of decisions or activities that may not be interfered with by the legislature' but it was not possible to consider anything other than the direct issue in the Bill.[26] Despite this, it was acknowledged that 'in reality a great deal of contemporary legislation is devoted to regulating the exercise, in one form or another, of the Government's Article 28.2 executive powers'.[27] It was observed that, in fact, the Oireachtas had always legislated for eligibility requirements for judicial office and that it is constitutionally obligated to do so.[28]

More generally, the Court stated that the Oireachtas was entitled to adopt the view that the Government's accountability in respect of judicial appointments does not sufficiently protect the judiciary from the perception that they may not be truly independent of the political branches and to legislate to address this.[29] It would not, however, be open to the legislature to create a process which 'compromised or undermined the principle and reality of judicial independence'.[30] It was clear though that the Court was prepared to accord plenty of scope to the Oireachtas to control the exercise of the executive's power in this context. This may have implications for future decisions around legislative control of executive power in other areas that are not constitutionally declared to be within the exclusive competence of the executive. In *Burke v Minister for Education*,[31] the Supreme Court clarified that executive power can be limited if the effect is to encroach on constitutional rights. The Article 26 reference case has provided further clarity in relation to the possibility of control of executive power.

In a recent case the Supreme Court confirmed that the separation of powers under the Irish Constitution 'is functional rather than absolute'[32] and cited a statement from another recent case that 'the Constitution provides for "an interaction and interdependence between the branches" and

[23]O Doyle 'Executive power and judicial appointments: re Article 26 and the Judicial Appointments Commission Bill 2022' (2022–2023) 43 Dublin University Law Journal 173.
[24][2023] IESC 34, at 105.
[25]Ibid, at 96.
[26]Ibid, at 98.
[27]Ibid, at 100.
[28]Ibid, at 102.
[29]Ibid, at 99.
[30]Ibid, at 104–105.
[31][2022] IESC 1.
[32]*Delaney v Personal Injuries Assessment Board* [2024] IESC 10, at [250] per Collins J.

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"there are areas which move between the branches"'.[33] It will be interesting to see if, in future cases, the Court will develop this flexible approach further.

Conclusion

The legislation was thus upheld, was signed into law and is now immune from further constitutional challenge. Constitutional enthusiasts will have to wait for another case to receive further pronouncements from the Court on legislative limitations on executive power, but the decision has answered a question over which uncertainty lay for a long time on how far executive discretion could be limited in the context of judicial appointments. In an era of executive dominance it is interesting to see the Court confirm that extensive limitations are possible and indeed that limitations on executive power more generally can be compatible with the 'high constitutional value' of the separation of powers, particularly when it involves the Oireachtas, rather than the judiciary, and in the context of upholding other constitutional values such as judicial independence:

> A division of function which ultimately has its justification in the institutional independence of different organs of government does not, necessarily, encompass the imposition of a sharp line of separation between an executive arm and legislative body where the former is functionally dependant on, and constitutionally responsible to, the latter.[34]

The debate over the Judicial Appointments Commission Bill was a heated one and the reference brought the Court into the centre of something that was, while constitutionally-sanctioned, also very political. But the result provided much needed clarity on the central issue of the legitimacy of the legislation, allowing the reform to proceed, and without getting into much of the detail on the complicated inner workings of executive power, also provided some clarity on this issue. In the context of judicial review more generally, and despite some intricacies in the process which may need to be re-considered in future – such as the blanket immunity – in terms of providing a process which allows for controversial legislation to be tested before it can cause problems, there are some great advantages to abstract review and the Irish Article 26 procedure.

[33] *Zalewski v Adjudication Officer* [2021] IESC 24, [2022] 1 IR 421, at [90] per O' Donnell J.
[34] [2023] IESC 34, at 97.

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