

SHORTCOMINGS AND ANOMALIES: ASPECTS OF ARTICLE 26

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Introduction

Described by some as tantamount to a “judicial death certificate”,¹ Article 26 has long generated debate and disagreement. In the aftermath of *Re Article 26 and the Health (Amendment) (No.2) Bill 2004*,² and the surrounding controversy, it is perhaps an opportune time to revisit the oft-neglected Article 26 reference procedures. This article proposes to examine various aspects of these procedures that are in need of alteration or modification.³

Article 26 arises for consideration after a Bill has passed through both Houses of the Oireachtas and has been submitted to the President for her signature. The President may, after consultation with the Council of State,⁴ refer any Bill to which this Article applies⁵ to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.⁶ The Supreme Court, consisting of no less than five judges,⁷ must rule on the validity of the proposed Bill “not later than sixty days after the date of such reference.”⁸

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¹ Byrne and McCutcheon, *The Irish Legal System* (4th ed., Butterworths, 2001), at 554.

² Unreported, Supreme Court, 16 February 2005, Murray C.J.

³ This article does not purport to deal exhaustively with Article 26. See Hogan and Whyte, *Kelly: The Irish Constitution* (4th ed., Butterworths, 2004), at 398-413.

⁴ In the past 20 years, the President has convened the Council of State on a number of occasions without then referring a Bill to the Supreme Court. For example, this occurred in relation to the Criminal Justice Bill 1984, the Fisheries (Amendment) Bill 1991, the Criminal Justice (Public Order) Bill 1993 and the Housing (Miscellaneous Provisions) Bill 2002.

⁵ The preamble to Article 26 states:

This Article applies to any Bill passed or deemed to have been passed by both Houses of the Oireachtas other than a Money Bill, or a Bill expressed to be a Bill containing a proposal to amend the Constitution, or a Bill the time for the consideration of which by Seanad Éireann shall have been abridged under Article 24 of this Constitution.

⁶ Article 26.1.1°, *Bunreacht na hÉireann*.

⁷ Article 26.2.1°.

⁸ *Ibid.*

The Rationale Behind Article 26

The reference of Bills to the Supreme Court under Article 26 was envisaged as a mechanism for the protection of constitutional rights and the maintenance of constitutionally sound legislation. The provision lays down a procedure whereby the President may “decline to sign and promulgate a Bill that has been passed by both Houses”.⁹ As Walsh points out, “[t]he Supreme Court is the ultimate interpreter of the law. It is also the ultimate interpreter of the Constitution”.¹⁰ Article 26 can also be regarded as the finest example of the President’s role as guardian of the Constitution.¹¹ From the Legislature’s standpoint, it is particularly constructive in situations where legal opinion as to the validity of a provision or statute is divided, or where State institutions are involved.¹² Gallagher points out that the referral of Bills to the Supreme Court is usually “accepted by the Government of the day with a good grace, and on occasion has been positively welcomed”.¹³

Article 26 is “one of two ways by which the ban on unconstitutional law is implemented”.¹⁴ If Article 26 procedures did not exist, the constitutionality of a piece of legislation could, of course, be challenged at a later stage under Article 34.¹⁵ Applicants in such cases are, however, faced with potentially crippling costs, and difficulties in establishing *locus standi*.¹⁶ In addition to these difficulties, Article 34 operates solely *a propos* legislation that has already been enacted. If a statute is struck down

⁹ Forde, *Constitutional Law of Ireland* (2nd ed., First Law 2004), at 91.

¹⁰ Walsh, “The Constitution: A View from the Bench” in Farrell ed., *De Valera’s Constitution and Ours* (1988 Thomas Davis Lectures, Gill & Macmillan), at 193.

¹¹ De Valera, 437 Dáil Debates, 1937.

¹² Hamilton, “Article 26 Procedure from the Point of View of the Framers of Legislation,” in Report of the Constitution Review Group, May 1996, Appendix 9, at 544.

¹³ Gallagher, “The President, the People and the Constitution,” in Farrell ed., *op. cit.*, at 82. Such was the case, for example, with *Re Article 26 and the Electoral Amendment Bill 1983* [1984] IR 268. However, one infamous incident where the decision to refer a Bill under Article 26 was less enthusiastically greeted was with regard the 1976 Emergency Powers Bill (now known as the ‘Donegan affair’). See Gallagher, *op. cit.*, at 82-83, and Chubb, *Constitution and Constitutional Change* (4th ed., Institute of Public Administration, 1978), at 39. Incidents such as this, claims Chubb, “show that this is an important safeguard which really works”. The same might be said of the facts surrounding *Re Article 26 and the Medical (No.2) (Amendment) Bill 2004* (unreported, Supreme Court, 16 February 2005, Murray C.J). Nonetheless, Mee has commented that the President must truly be above politics to ensure that the integrity of Article 26 is maintained. See Mee, “The Changing Nature of the Irish Presidency” *ILT* 14 1997, at 30.

¹⁴ The other method is the invocation of the High Court’s power to strike down legislation in the course of litigation between parties. Morgan, *Constitutional Law of Ireland* (2nd ed., Round Hall, 1990), at 106.

¹⁵ Article 34.3.2^o provides that the High Court has full original jurisdiction in respect of constitutional challenge to the validity of legislation already in force.

¹⁶ See *Cahill v. Sutton* [1980] IR 269, *per* Henchy J., at 280-6; *Crotty v. An Taoiseach* [1987] IR 713, *per* Finlay C.J., at 766; *Iarnród Éireann v. Ireland* [1996] 3 IR 321, *per* Keane J., at 351-2; *S.P.U.C. (Ireland) Ltd. v. Coogan* [1989] IR 734, *per* Walsh J., at 743; *Todd v. Judge Murphy* [1999] 1 ILRM 261. See also Casey, *Constitutional Law in Ireland* (3rd ed., Round Hall Sweet & Maxwell, 2000), at 358-364.

as unconstitutional months or even years after its enactment, considerable uncertainty can ensue and “there may be difficulties in unscrambling what has been done under it”.¹⁷ By contrast, Article 26 allows the Supreme Court to rule on the constitutionality of a Bill before it becomes law, providing “a speedy decision on the validity of a legislative measure”.¹⁸ Jaconelli notes the drawbacks of *ex post facto* review, as compared with Article 26 anticipatory review.¹⁹ He places particular emphasis on the fact that, under the former, it is not known from the outset whether suspect legislation is consistent or inconsistent with the terms of the Constitution.²⁰ As Morgan rather colourfully puts it, the advantage of Article 26 over Article 34 is that the former “strangles unconstitutional measures before birth”.²¹

A glance at previous references made under Article 26²² indicates that the subject matter of referred Bills is often apt to be of a sensitive nature, frequently touching on such sensitive themes as property rights,²³ franchise,²⁴ human trafficking,²⁵ familial autonomy²⁶ and freedom of information.²⁷ The Constitution Review Group noted in 1996 that “[s]ome Bills concern fundamental issues on which doubt cannot be allowed”.²⁸ Hamilton observes that, without Article 26, ‘it is likely that the legislature would be very cautious about legislating in such areas – some might say unduly cautious’.²⁹ Similarly, the authors of *Kelly* appear to be of the opinion that the nature of the Article 26 reference allows the Supreme Court “to give a more dispassionate assessment of the constitutional issue, without having, as it were, to look over its shoulder to consider the potentially alarming implications of a finding of unconstitutionality”.³⁰

¹⁷ *Casey, op. cit.*, at 333. Hogan and Whyte, *op. cit.*, at 218 note the potential chaos that could have ensued if the Electoral (Amendment) Bill 1983 had passed into law and had subsequently been struck down as a result of a constitutional challenge. This Bill concerned the enfranchisement of British citizens for general elections.

¹⁸ *Casey, op. cit.*

¹⁹ Jaconelli, “Reference of Bills to the Supreme Court – A Comparative Perspective” (1983) 18 *Ir Jur (n.s.)* 322, at 325.

²⁰ *Ibid.*, at 326

²¹ Morgan, *op. cit.*, at 106

²² *See supra.*

²³ *Re Article 26 and the Medical (No.2) (Amendment) Bill 2004* (unreported, Supreme Court, 16 February 2005, Murray C.J.).

²⁴ *Re Article 26 and the Electoral (Amendment) Bill 1961* [1961] IR 169.

²⁵ *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360.

²⁶ *Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305, *Re Article 26 and the Adoption (No.2) Bill 1987* [1989] IR 656.

²⁷ *Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1

²⁸ Report of the Constitution Review Group, *op. cit.*, at 77. For a discussion of the background of the Review Group, and an appraisal of its work, *see generally* Butler and O’Connell, “A Critical Analysis of Ireland’s Constitution Review Group Report” in (1998) 33 *Ir Jur (n.s.)* 237.

²⁹ Hamilton, *op. cit.*, at 544.

³⁰ Hogan and Whyte, *op. cit.*, at 412. Note, however, that in the recent judgment in *Re Article 26 and the Medical (No.2) (Amendment) Bill 2004* (unreported, Supreme Court, 16 February 2005,

A 'Relative Innovation'

The power of the Irish President to refer bills to the Supreme Court for an advisory opinion under Article 26 is a most striking feature of the Constitution of 1937.³¹ Although generally considered exclusive to the 1937 Constitution, the types of reference procedures provided for by Article 26 have their counterparts, both in past legislation and in other jurisdictions. As such, the authors of *Kelly* note that Article 26 is but “a relative innovation”,³² and Keane too is quick to point out that:

It ... seems to have been generally overlooked by commentators on the Constitution that a model was also on hand for what is generally seen as [an] innovative feature, the power to refer bills to the Supreme Court under Article 26. This was to be found in section 51 of the Government of Ireland Act, 1920.³³

Prior to this statute, however, section 4 of the Judicial Committee Act, 1833 provided for the referral of disputed points of law to the Judicial Committee of the Privy Council. There was no comparable procedure in the 1922 Constitution, but the power to refer to the Privy Council was invoked in the late 1920s in order to settle a dispute over compensation to civil servants under the Anglo-Irish Treaty,³⁴ and Hogan and Whyte surmise that “the possible utility of such a procedure may thereby have commended itself to the [1937] Constitution’s drafters”.³⁵ Section 51 of the Government of Ireland Act, 1920³⁶ echoed the procedures provided for in the 1833 statute, and Keane stresses its “remarkably close resemblance to the Article 26 power”.³⁷ The Judicial Committee Act, 1833 is still operative in the United Kingdom, but has been utilised by the Crown only a handful of times.³⁸ The power of referral to the Privy Council has also been

Murray C.J.), the court did cast an eye to the “potentially alarming” financial consequences of a finding of repugnancy, though this did not influence their decision.

³¹ Jaconelli, *loc. cit.*, at 322.

³² Hogan and Whyte, *op. cit.*, at 399.

³³ Keane, “Fundamental Rights in Irish Law: A Note on the Historical Background” in O’Reilly ed., *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (Round Hall Press, 1992), at 25.

³⁴ *Re Compensation to Civil Servants under Article X of the Treaty* [1929] IR 44.

³⁵ Hogan and Whyte, *op. cit.*, at 399.

³⁶ Keane, *op. cit.*, at 25. This statute provided for the establishment of two parliaments, in Northern and ‘Southern’ Ireland, and provided the legal underpinnings of the Stormont parliament and government for the next 50 years. It remained in force until repealed by the Northern Ireland Constitution Act 1977.

³⁷ Keane, *op. cit.*, at 26.

³⁸ See Walker and Weaver, “The United Kingdom Bill of Rights 1998: The Modernization of Rights in the Old World” (2000) 33 *U Mich JL Reform* 497, at 555. See also Sir K. Roberts-Wray, *Commonwealth and Colonial Law* (1966, London, Stevens), at 448.

provided for in devolution schemes for Wales,³⁹ Scotland⁴⁰ and Northern Ireland.⁴¹ Jaconelli describes all of these as “rough equivalents” to Article 26.⁴²

Interestingly, the Indian Constitution, closely modelled on *Bunreacht na hÉireann*, provides in Article 111 that when a Bill has been passed by both Houses of Parliament, and has been presented to the President, “the President shall declare either that he assents to the Bill, or that he withholds his assent therefrom”. The President may then “return the bill ... to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend...” If the Parliament, having considered these recommendations, declines to implement them, and returns the Bill to the President unaltered, “the President will not withhold assent therefrom”.⁴³

For examples of procedures that more closely resemble Article 26, we must turn to our Civil Law neighbours.⁴⁴ In Germany, Articles 93(1) and 94(2) of the German Basic Law provide that the Federal Cabinet or one-third of the *Bundestag* may refer the question of the constitutionality of a statute to the Federal Constitutional Court.⁴⁵ This is the *abstraktes Normkontrollverfahren*, or ‘abstract norm-control procedure’. Similarly, Articles 61 and 62 of the French Constitution⁴⁶ of 1958 allow 60 Deputies or Senators to refer a Bill to the *Conseil Constitutionnel* before promulgation.⁴⁷ Articles 125(2) (a)-(b) and 125(6) of the Constitution of the Russian Federation make similar provision. The reference may be made by the President, the State *Duma*, one-fifth of the Federation Council, one-fifth of the Deputies of the State *Duma*, the Government, the Supreme Court, the Higher Court of Arbitration, or the organs of the legislative and executive power of the components of the Russian Federation. The decision is to be made by the Constitutional Court of the Federation.

³⁹ The Government of Wales Act 1998, section 109.

⁴⁰ The Scotland Acts 1998, section 3, and 1976, section 33.

⁴¹ The Northern Ireland Constitution Act 1973, section 18.

⁴² Jaconelli, *loc. cit.*, at 322. For a discussion of the procedures relating to Scotland and Northern Ireland, *See* Jaconelli, *loc. cit.*, at 328-330.

⁴³ This provision appears to be potentially useless as the power of the President to return the Bill to the Parliament could be entirely ineffectual in securing an amendment thereto.

⁴⁴ For a more detailed discussion on the various comparative aspects of these reference procedures, *see generally* Finer, Bogdanor and Rudden, *Comparing Constitutions* (Clarendon Press, 1995) and Jaconelli, *op. cit.*, at 328-333.

⁴⁵ *See also*, the German Federal Constitutional Court Act, section 76.

⁴⁶ *See* Sadat Wexler, “Official English Nationalism and Linguistic Terror: A French Lesson” (1996) 71 *Wash L Rev* 285, at 326-328; and Tomlinson, “Reception of Community Law in France” (1995) *Columb J Eur L* 183, at 197-209 for further discussion of the French system.

⁴⁷ This is similar to the Constitution of the Republic of South Africa, 1993, section 98(9).

In a European context, Article 300(b) EC⁴⁸ provides that the European Court of Justice, at the request of the Commission, the Council or a Member State, may pronounce upon the compatibility of an international agreement with the principles of Community Law.⁴⁹ The terms of Article 47 of the European Convention on Human Rights bear some similarity to this, providing for analogous advisory opinions, “albeit in relatively defined circumstances”.⁵⁰ Article 47(1) allows the court, at the request of the Council of Ministers, to give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto. However, such opinions shall not deal with “any question relating to the conduct or scope of the rights and freedoms defined in section 1 of the Convention and the protocols thereto”, or with “any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention”.⁵¹ Article 26 has no counterpart in the Constitution of the United States,⁵² and the US Supreme Court has tended to shy away from giving advisory opinions. Section 2 of the Third Amendment provides only for the hearing of “cases” and “controversies”, and the idea of pronouncing upon the constitutionality of laws does not sit well with this.

Thus, whilst Article 26 had no counterpart in the 1922 Constitution, nor in the Constitution of the United States, it would be inaccurate to state that the procedures therein are wholly unique. It will be seen throughout this discussion that, particularly in terms of the Civil Law mechanisms, there is something to be learned from casting an eye to other jurisdictions.

The Limitations of Article 26

If they allow villains into Government, a piece of paper will not protect them from the consequences, nor must they expect a few learned men in wigs and gowns to save the fools from the knaves they have elected.⁵³

⁴⁸ Formerly Article 288.

⁴⁹ Hogan and Whyte, *op. cit.*, at 400.

⁵⁰ For a more elaborate analysis, *See ibid.*

⁵¹ Article 47 (2) ECHR.

⁵² *See, however,* the German Federal Constitutional Court Act, section 76 and the French Constitution, 1958, Article 61. For a comparative examination of Article 26-type procedures, *See Jaconelli, op. cit.*, at 328-333.

⁵³ Kelly, *Fundamental Rights in the Irish Law and Constitution* (2nd ed., Allen Figgis & Co., 1967).

Observers⁵⁴ have commented on the relatively infrequent invocation of Article 26,⁵⁵ and some have cited this as a symptom of the many problems associated with the procedure.⁵⁶ These various disadvantages will manifest themselves to varying degrees depending on the nature of the case in question. It has also been speculated that many of the apparent advantages of Article 26⁵⁷ are, in light of the obstacles involved, illusory.⁵⁸ In general, debate on the inadequacies of the procedure has tended to focus on two issues—the single-judgment rule and the permanent immunity of the statute from constitutional challenge. Any analysis of the procedure would, however, be unjustifiably narrow in the absence of a brief consideration of the other facets of the rule that have fallen to be criticised over the years.

Time Limits

Though not afforded much by way of discussion, the “tight”⁵⁹ time limits set by Articles 26.1.2° and 26.2.2° may well be perceived as something of a nuisance. By virtue of the former, once a Bill has been presented to the President for her signature, she has but seven days in which to assemble and consult with the Council of State, reach a decision, and refer the Bill to the Supreme Court for a judgment on whether or not the Bill, or part of it, is repugnant to the Constitution.⁶⁰ It is suggested that this period may warrant some extension in order to better facilitate the convening of the Council and to allow the President more time for reflection upon the terms of the Bill and the Council’s recommendations. This would be particularly

⁵⁴ See Casey, *op. cit.*, at 89, 333 and the Report of the Constitution Review Group, *op. cit.*, at 74. The Review Group also noted the “trend of increasing, though still rare, use of the procedure,” at 75.

⁵⁵ So far, 15 Bills have been referred to the Supreme Court under Article 26: *Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470; *Re Article 26 and the School Attendance Bill 1942* [1943] IR 344; *Re Article 26 and the Electoral (Amendment) Bill 1961* [1961] IR 169; *Re Article 26 and the Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129; *Re Article 26 and the Emergency Powers Bill 1976* [1977] IR 159; *Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181; *Re Article 26 and the Electoral Amendment Bill 1983* [1984] IR 268; *Re Article 26 and the Adoption (No.2) Bill 1987* [1989] IR 656; *Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305; *Re Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995* [1995] 1 IR 1; *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321; *Re Article 26 and the Equal Status Bill 1997* [1997] 2 IR 387; *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Re Article 26 and the Planning and Development Bill 1999* [2000] 2 IR 321; [2001] 1 ILRM 81, *Re Article 26 and the Health (No.2) (Amendment) Bill 2004* (unreported, Supreme Court, 16 February 2005, Murray C.J.).

⁵⁶ For example, See Casey, *op. cit.*, at 333. Casey maintains, however, that the “relatively infrequent” use of Article 26 must be viewed in perspective, as many invalidated statutes have pre-dated the Constitution.

⁵⁷ *Infra.*

⁵⁸ Hamilton, *op. cit.*, at 545.

⁵⁹ Casey, *op. cit.*, at 90.

⁶⁰ Casey, *ibid.*, appears to be critical of this stringent time-limit. It doubtless presents considerable difficulties, particularly if the President is relatively unfamiliar with the law.

prudent where the impugned Bill is of considerable length, as was the case in *Re Article 26 and the Employment Equality Bill*.⁶¹

Hamilton C.J.,⁶² in delivering the court's judgment in that case, also complained of the 60-day time-limit imposed on Supreme Court by Article 26.2.2°. Keane has also voiced some dissatisfaction with this "remarkably short" period.⁶³ It is noteworthy that the Government of Ireland Act, 1920, which allowed for a similar reference to the Judicial Committee of the Privy Council, imposed no such time limit. In France, however, the time limit for pronouncing upon the validity of a Bill is one month, and can be reduced to eight days in special circumstances.⁶⁴ To this end, the Constitution Review Group suggested in 1996 that this be extended to 90 days.⁶⁵ The following year, this proposal garnered support from the All-Party Oireachtas Committee on the Constitution.⁶⁶

Absence of Evidence

O'Higgins C.J., in *Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981*,⁶⁷ noted that Article 26.2.1° provides for the hearing of arguments by, or on behalf of, the Attorney General, and by counsel assigned by the court.⁶⁸ The Article makes no mention of the hearing of evidence. He went on:

In this, as in all earlier references, the matters argued have had, in the absence of evidence, to be dealt with as abstract problems, to the extent that, unlike practically all other cases that come before the Court, there is an absence or shortage of concrete facts proven, admitted, or projected as a matter of probability.⁶⁹

It seems, both from his words and from their tone, that the Chief Justice was irritated, if not a little frustrated, by the abstract nature of these proceedings.⁷⁰ Speaking as he was on behalf of Walsh, Henchy, Griffin and

⁶¹ [1997] 2 IR 321.

⁶² *Ibid.*, at 331.

⁶³ Keane, *op. cit.*, at 26.

⁶⁴ French Constitution, 1958 Article 61.

⁶⁵ Report of the Constitution Review Group, *op. cit.*, at 86.

⁶⁶ First Progress Report, April 1997, at 61. The Committee consisted of nine TDs (Austin Currie Sile De Valera, Frances Fitzgerald, Brian Lenihan, Kathleen Lynch, Derek McDowell, Michael McDowell, Willie O'Dea and Jim O'Keefe) and two Senators (Ann Gallagher and Michael O'Kennedy).

⁶⁷ [1983] IR 181.

⁶⁸ *Ibid.*, at 186.

⁶⁹ *Ibid.*

⁷⁰ Casey, *op. cit.*, at 334, is of the opinion that the Chief Justice's judgment "seems to contain an implicit request to the President that no similar Bills should be sent to the Court in future".

Hederman J.J., one can only speculate as to the extent of this dissatisfaction amongst the senior judiciary.

In *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*,⁷¹ written submissions by counsel assigned by the court quoted extensively from speeches made by the relevant Minister and other Deputies and Senators during the passage of the Bill through both houses of the Oireachtas. Keane C.J. devoted some attention to the issue of whether or not this type of background information would be of any use to the court in determining whether the impugned provisions were constitutionally repugnant, before ultimately concluding that it would not.

[T]his is not a case in which the court can derive any assistance as to the constitutionality of the two sections from anything that was said concerning them in the course of the debates in the Oireachtas.⁷²

Similarly, leading academics have criticised “the necessarily abstract character of the proceedings”⁷³ and the fact that there is “no concrete dispute between the parties.”⁷⁴ However, it would seem that there is little to be done to alleviate these difficulties as the problem goes to the very root of Article 26 procedures. In addition, those who have complained have not proposed any meaningful alternative. Tellingly, neither the Constitution Review Group nor the Committee on the Constitution have attempted to address the issue, and this in itself may be an indication that there is no real solution on the horizon.⁷⁵ The problem is compounded by the stringent time limits involved. If the issue of the factual vacuum were to be remedied by the allowing of evidence, this would necessitate an extension of the 60-day limit.⁷⁶

Bill Unconstitutional in its Entirety

Once the Supreme Court makes a ruling of repugnancy, the entire Bill fails, and not just the offending provisions.⁷⁷ Considered by some commentators a drawback to Article 26,⁷⁸ it was the subject of considerable judicial commentary in the 1980s and 1990s. O’Higgins C.J., in *Re Article 26 and*

⁷¹[2000] 2 IR 360.

⁷²*Ibid.*, at 372. This does not bode well for the quality of constitutional debate in the Oireachtas.

⁷³Casey, *op. cit.*, at 333. See also Hogan and Whyte, *op. cit.*, at 417.

⁷⁴Casey, *op. cit.*, at 334.

⁷⁵Hogan examines the issue of the admissibility of evidence in these proceedings in the Report of the Constitution Review Group, *op. cit.*, Appendix 10, at 547.

⁷⁶This point is also made by Hogan and Whyte, *op. cit.*, at 406.

⁷⁷Article 26.3.1°. For example, See *Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305.

⁷⁸See Hogan and Whyte, *op. cit.*, at 409; and Casey, *op. cit.*, at 334-336. However, neither the Constitution Review Group, *op. cit.*, nor the Committee on the Constitution, *op. cit.*, proposed any change to this rule.

the Housing (Private Rented Dwellings) Bill 1981,⁷⁹ was clear on the principles:

The Court's function under Article 26 is to ascertain and declare repugnancy...It is not the function of the Court to impress any part of a referred bill with a stamp of constitutionality. If the court feels that *any* provision of a referred bill or of the referred provisions is repugnant, then the whole bill fails for the President is then debarred from signing it.⁸⁰

He mused that “[t]he authors of a bill may therefore find the Court’s decision less illuminating than they would wish it to be” but noted that it would be contrary to the doctrine of the separation of powers, so central to *Bunreacht na hÉireann*, if the Supreme Court were to do any more than declare the entire Bill void. He went on, “[t]he Constitution does not vest in the Court any advisory function to the Oireachtas or to the Houses of the Oireachtas in regard to proposed legislation”.⁸¹ Hogan and Whyte question “whether the traditional rules and practices regarding judicial review of legislation are readily applicable to this special procedure”. They continue:

Indeed, so far from adopting ordinary rules regarding standing, justiciability, the rule of avoidance and so forth, it may be thought that the Article 26 procedure enjoins the Supreme Court to give a definitive answer in the constitutional issues raised by the referred Bill.⁸²

However, the judgment of O’Higgins C.J. received approbation by Finlay C.J. in *Re Article 26 and the Matrimonial Home Bill 1993*.⁸³ Three years later, Hamilton C.J. voiced similar concerns when delivering the court’s judgment in *Re Article 26 and the Employment Equality Bill 1996*.⁸⁴

The problem remains whether the Supreme Court by deciding that one provision was repugnant to the Constitution and

⁷⁹ [1983] IR 181, at 186.

⁸⁰ *Ibid.*

⁸¹ *Ibid.* Similarly, though in an American context, Frankfurter, in “A Note on Advisory Opinions” (1923-1924) 37 *Harv L Rev* 1002 warns against shifting the burden of the legislature onto the Supreme Court. *See also* Hudson, “Advisory Opinions of National and International Courts” (1923-1924) 37 *Harv L Rev* 970.

⁸² Hogan and Whyte, *op. cit.*, at 409.

⁸³ [1994] 1 IR 305, 327-328.

⁸⁴ [1997] 2 IR 321, at 331.

remaining silent about the others, would have fulfilled its constitutional duty under Article 26.2.1^o.⁸⁵

After some deliberation, he concluded that “the Court is obliged to consider the whole Bill and all its provisions, particularly those which have been impugned by Counsel as being repugnant to the provisions of the Constitution”.⁸⁶

In the judgment in *Re Article 26 and the Health (Amendment) (No.2) Bill 2004*,⁸⁷ the Supreme Court indicated clearly those aspects of the Bill which were repugnant to the Constitution and those which were constitutionally sound. It was noted that the prospective provisions, which proposed the future levying of charges for nursing homes, were not repugnant. It went on, however, to conclude that those provisions that purported retrospectively to validate illegal charges made over 30 years were repugnant to the Constitution.⁸⁸ The Oireachtas then subsequently incorporated the prospective provisions in another piece of legislation, which was passed without comment. It would appear then, that the court has departed from the earlier practice of merely striking down the Bill in its entirety, and there has been a shift towards specifying which provisions are repugnant.

Five Judge Minimum

Article 26.2.1^o provides that the Supreme Court shall consist of no less than five judges. Until *Re Article 26 and the Health (No.2) (Amendment) Bill 2004*,⁸⁹ the five-judge minimum had never been exceeded. O’Higgins C.J., in *Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981*,⁹⁰ commented that “the difficulties that could confront a court of at least five judges in reaching a unitary decision” were “too obvious to need elaboration”.⁹¹ Although the Constitution Review Group did not propose

⁸⁵ *Ibid.* The constitutional duty Hamilton C.J. referred to is that of considering and pronouncing upon every question referred by the President – Article 26.2.1. The Chief Justice also appeared to be disgruntled at the fact that the President had referred a Bill containing 74 sections and had not specified any part of the Bill. He mentioned that in such circumstances, it was difficult for the court to know the provisions to which the President was referring. This is surprising, given the fact that the Chief Justice is, by virtue of Article 31.2, an *ex officio* member of the Council of State.

⁸⁶ At 333. This was not done, however, in *Re Article 26 and the Equal Status Bill 1997* [1997] 2 IR 387.

⁸⁷ Unreported, Supreme Court, 16 February 2005, Murray C.J.

⁸⁸ For a more detailed constitutional analysis of this judgment, See Whyte and Doyle, “The Separation of Powers and Constitutional Egalitarianism after the Health (Amendment) (No. 2) Bill Reference” in O’Dell ed., *The Older Person: Law and Policy in Modern Ireland* (Firstlaw, 2005) (forthcoming).

⁸⁹ Unreported, Supreme Court, 16 February 2005, Murray C.J. The court in this case was composed of seven judges.

⁹⁰ [1983] IR 181, at 186.

⁹¹ *Ibid.*

any change to this provision, the All-Party Oireachtas Committee on the Constitution recommended in 1997 that the Supreme Court should consist of seven judges in all cases where the validity of laws are in dispute.⁹² Such a move would not be out of step with our Continental counterparts – the French *Conseil Constitutionnel* consists of nine members.⁹³

The Single Judgment Rule

The Rule

Perhaps one of the more controversial aspects of Article 26 is section 2.2°, which reads:

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, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.⁹⁴

This subsection did not form part of the original Article 26 but was inserted, along with Article 34.4.5°,⁹⁵ by ordinary legislation⁹⁶ during the three-year transition period. Even in 1941, the value of such a provision was hotly debated.⁹⁷ De Valera sought to justify the new rule, claiming:

⁹² First Progress Report, April 1997, at 58.

⁹³ Article 56, French Constitution 1958.

⁹⁴ It should be noted that this is not a feature exclusive to Article 26. A single-judgment rule also operated in relation to the Special Criminal Court (Offences Against the State Act 1939, section 40). *See generally, The State (Littlejohn) v. the Governor of Mountjoy* [1976]; and Robinson, *The Special Criminal Court* (Dublin, 1974), at 17-18) and the Court of Criminal Appeal (section 28, Courts of Justice Act 1924). The European Court of Justice also operates in this manner, although, as the Constitution Review Group pointed out (at 81), the European Court of Human Rights does not. This difference in procedure is striking, especially when considered in light of the fact that Article 26 is designed to protect constitutional or fundamental rights.

⁹⁵ This reads as follows:

The decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed.

⁹⁶ The Second Amendment of the Constitution Act 1941.

⁹⁷ Deputy Costello, at 82 Dáil Debates, col. 1857, for example, argued:

If each judge has to give a written judgment ... 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. That would lead to greater interest in the subject matter and to development of Constitutional thought. It would afford greater education to students of Constitutional law than would one judgment which may be, on occasions, laconic and not deeply reasoned.

In response to this, the Taoiseach replied, at col 1858:

The important thing is that there should be no doubt about the decision ... it should not be bandied about from mouth to mouth that, in fact, that decision was only come to by a mere majority of the Supreme Court.⁹⁸

The impetus behind the introduction of these amendments is generally ascribed⁹⁹ to comments made by Sullivan C.J. in delivering the judgment in *Re Article 26 and the Offences Against the State (Amendment) Bill 1940*.¹⁰⁰ Dubbed one of the “first major items of litigation involving the new Constitution”,¹⁰¹ the Chief Justice in this case stated that “[t]he decision now announced is the decision of the majority of the Judges and is ... the decision of the Court”.¹⁰² This has traditionally been seen as indicating that there was dissent among the judges, which could arguably be seen as weakening the impact of the decision.

Article 26.2.2° has generated considerable debate since its inclusion. Casey, for example, is critical of both this rule and its counterpart in Article 34.4.5°, noting the disadvantages involved, and the fact that “The judges are, to say the least, not enamoured of the rule”.¹⁰³ Hogan and Whyte also question the utility of this provision.¹⁰⁴ Academic discussion, however, has tended to skirt the issue of the single judgment rule, and it often receives only the most cursory allusions.¹⁰⁵ The rule has, nevertheless, been the subject of dispute elsewhere. The focus has generally been on whether a greater degree of certainty should take precedence over other considerations.¹⁰⁶

The Committee on the Constitution¹⁰⁷ acknowledged in 1967 that “a case could be made for allowing the disclosure of opinions other than that of the majority”,¹⁰⁸ but went on to say:

While I am willing to admit the value of the other procedure from an educational point of view, I think that, from the point of view of the public interest, it is better to have a single judgment pronounced and no indication given that other judges held a different view.

It is evident that at that time, public interest considerations were to override any interest in the development of constitutional law.

⁹⁸ 82 Dáil Debates, col. 1858-1859.

⁹⁹ See, for example, Finlay C.J. in *Attorney-General v. Hamilton (No. 1)* [1993] 2 IR 268. See also de Valera’s comments made at 82 Dáil Debates, col. 1858-1859.

¹⁰⁰ [1940] IR 470.

¹⁰¹ Hogan, “The Supreme Court and the Reference of the Offences Against the State (Amendment) Bill 1940” in (1998) 33 *Ir Jur (n.s.)* 237, at 239.

¹⁰² [1940] IR 470, at 475.

¹⁰³ Casey, *op. cit.*, at 374.

¹⁰⁴ Hogan and Whyte, *op. cit.*, at 972.

¹⁰⁵ For example, See Forde, *Constitutional Law of Ireland* (Mercier Press, Cork and Dublin, 1987), at 63-64. See also Casey, *op. cit.*, at 374-375.

¹⁰⁶ See *supra*.

¹⁰⁷ Report of the Committee on the Constitution, December 1967.

¹⁰⁸ *Ibid.*, at 37.

In our view, however, 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 matters of constitutional importance.¹⁰⁹

The Constitution Review Group

In 1970, the Committee on Court Practice and Procedure recommended the abolition of the rule:

While such a rule may have advantages in the political sphere, we are of the opinion that it is undesirable and injurious to in the legal sphere. It inhibits the development of our constitutional case law ... valuable individual contributions to the interpretation of the Constitution will not be available for future study by lawyers or by members of the Oireachtas or of the Government unless they are in their entirety agreed to by the majority of the Court.¹¹⁰

The question was all but laid to rest for 30 years, until the Constitution Review Group came to re-examine the issue, both in the context of Article 26 and its counterpart in Article 34.4.5°. The Group considered arguments both for and against the deletion of Article 34.4.5° and the deletion of Article 26.2.2°.

The arguments in favour of abolishing Article 34.4.5° were extensive. First, there are numerous exceptions to the application of the rule. It does not apply to pre-1937 legislation,¹¹¹ nor where a Divisional High Court¹¹² pronounces on the validity of a post-1937 law.¹¹³ It is not applicable to statutory instruments made pursuant to a post-1937 law,¹¹⁴ nor to constitutional cases which are not concerned with the validity of laws.¹¹⁵ The Review Group also commented that “the rule 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”.¹¹⁶

Secondly, the rule can lead to “serious practical difficulties in its

¹⁰⁹ *Ibid.*

¹¹⁰ Eleventh Interim Report 1970, at 11. Members of the Committee included Brian Walsh and Mr. Justice Kenny.

¹¹¹ There is also some practical difficulty in ascertaining whether the rule applies to “mixed” legislation – that is, pre-1937 Acts which have been subsequently amended post-1937. *See State (Sheerin) v. Kennedy* [1966] IR 379, *per* Walsh J. at 388.

¹¹² Of three judges.

¹¹³ Report of the Constitution Review Group, *op. cit.*, at 82. *See also Re Haughey* [1971] IR 217.

¹¹⁴ *Ibid.*, at 82. *See also Meagher v. The Minister for Agriculture* [1994] 1 IR 239.

¹¹⁵ *Ibid.*, at 82. *See for example, Attorney-General v. X* [1992] 1 IR 1.

¹¹⁶ *Ibid.*, at 82. For an example of such a ‘split’ judgment, *See Meagher v. The Minister for Agriculture* [1994] 1 IR 239.

application”;¹¹⁷ and thirdly, the rule is “completely out of harmony with the common law tradition which has always permitted individual judgments”.¹¹⁸ As Casey points out, other common law jurisdictions, such as Australia, Canada and the United States, have not felt the need for such a rule.¹¹⁹

The fourth argument in favour of the abolition of Article 34.4.5° was that the rule adversely affects the quality of the judgment as a whole as a certain amount of compromise is needed for five judges to reach a unanimous decision. In the words of the Review Group, “dissent is artificially suppressed and the court strives for the lowest common denominator so that a majority of the court can endorse the judgment”.¹²⁰ This, it was argued, tends to inhibit the development of the law.¹²¹

The fifth argument was that the original rationale for this rule was that the authority of the court’s judgment could be impaired or undermined if the dissenting judgments were to be published. It is questionable whether this has ever been satisfactorily established, as there have been multiple judgments in almost all key constitutional cases,¹²² and this has not necessarily undermined the authority of such decisions. It was also argued that a dissent in a constitutional case is essentially an appeal to a later generation of judges and lawyers.¹²³ It is not uncommon in this jurisdiction for dissenting judgments to be later reconsidered in light of changing circumstances and for them to eventually to become good law.¹²⁴ As one commentator has noted, “one factor that may lead to the re-examination of an earlier decision is the existence of a cogent dissent”.¹²⁵

The final argument considered by the Review Group in this respect was that even if minority judgments encourage political dissent, this is not necessarily an entirely undesirable consequence.¹²⁶ It was said that:

[I]f each judge could make a judgment, the quality of judgments would tend to rise as each judge would articulate a position which must necessarily engage reasonable people.¹²⁷

¹¹⁷ At 82.

¹¹⁸ *Ibid.*

¹¹⁹ Casey, *op. cit.*, at 375.

¹²⁰ *Ibid.* In Casey’s words, “an artificial unanimity is imposed on the court”, *op. cit.*, at 374.

¹²¹ *Ibid.*

¹²² For example, *Attorney-General v. X* [1992] 1 IR 1; *A.O. & D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 IR 1; *Crotty v. An Taoiseach* [1987] IR 713; and *Re A Ward of Court* [1996] 2 ILRM 401 are but a few such cases.

¹²³ Holmes, as quoted in the Report of the Constitution Review Group, *op. cit.*, at 83.

¹²⁴ For example, the Supreme Court in *The State (Browne) v. Feran* [1967] IR 147 accepted Johnson J.’s dissenting judgment in *The State (Burke) v. Lennon* [1940] IR 136.

¹²⁵ Casey, *op. cit.*, at 374.

¹²⁶ Report of the Constitution Review Group, *op. cit.*, at 83.

¹²⁷ *Ibid.*, at 84.

The public would thus have a better appreciation of the whole process.

Against all of this, the arguments in favour of retaining article 34.4.5° were fairly unconvincing. It was said, first, that dissenting judgments merely serve to create uncertainty¹²⁸ and, secondly, that the publication of dissenting opinions tends to weaken the court's authority and impair its persuasiveness. It comes as no surprise to hear that the Review Group was not swayed by these contentions, and concluded that Article 34.4.5° ought to be deleted. It claimed that the rule was "unsatisfactory in its operation" and "apt to create anomalies".¹²⁹

The Group then turned to consider Article 26.2.2°. The arguments outlined above in favour of deleting Article 34.4.5° were said to apply with equal force here. In addition, it was said that although the Article 26 reference procedure is "unique",¹³⁰ it is in essence just another mechanism by which the Supreme Court adjudicates on the validity of a parliamentary measure, and the single-judgment rule cannot thus be justified.¹³¹ Finally, although the majority of Article 26 references have concerned issues of fundamental importance, many similarly fundamental questions have been addressed through multiple judgments.¹³²

On the other hand, it was pointed out that it could be argued that the "special character"¹³³ of Article 26 procedures does in fact justify the single-judgment rule.¹³⁴ The need for certainty on such matters is particularly pertinent in light of the fact that the judgment has a permanently binding effect.¹³⁵ In addition, it was said that because the cases involved often deal with such sensitive issues, it is prudent to shield the judges from improper or undue pressure or influence.¹³⁶

The Review Group were unable to reach a consensus regarding the deletion of Article 26.2.2°, and it appears that it faltered over whether or not the "special character" of Article 26 justified the single-judgment rule.¹³⁷

Aftermath

The arguments in favour of retaining the rule are flimsy at best, based on supposition and speculation, with little regard to fact or precedent. The counter-arguments may well prove more persuasive in the long run. Indeed, the members of the Oireachtas Committee on the Constitution seemed to

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, at 85.

¹³⁰ *Ibid.*, at 84.

¹³¹ *Ibid.*

¹³² *Ibid.* For example, *Attorney-General v. X* [1992] 1 IR 1.

¹³³ *Ibid.*, at 84.

¹³⁴ *Ibid.*, at 85.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

think so when they came to consider the recommendations of the Review Group some months later. It was stated in the First Progress Report that the Committee unanimously favoured the deletion of both Article 34.4.5° and Article 26.2.2°.¹³⁸

The single judgment rule is not exclusive to Articles 26 and 34. As noted *infra*, there are two other instances of its application in this jurisdiction. However, many of the justifications for retaining the rule in the Special Criminal Court and in the Court of Criminal Appeal¹³⁹ are simply inapplicable here. The European Court of Justice also delivers single judgments or opinions. However, it should be noted that the European Court of Human Rights, the protector and upholder of fundamental rights, eschews such an approach and favours the disclosure and publication of dissenting judgments.

The single-judgment rule also compounds some of the other complications experienced by the judiciary in deciding such cases. The sixty-day time limit adds to the difficulty in reaching such a consensus, as does the fact that such cases are to be decided by a minimum of five judges. One can only imagine the frenzied and frenetic deliberations following such proceedings. To quote one commentator:

[S]peculation will still go on. We gain nothing by a pretence of unanimity by this device. It is a complete falsification as far as reality is concerned.¹⁴⁰

In light of all this criticism levelled at the rule, Casey, for one, is hopeful that the demise of the rule “will not long be postponed”.¹⁴¹ Almost a decade since their recommended deletion, however, the two provisions still exist, and it remains to be seen whether the recommendations of the various expert groups will ever be implemented.

Permanent Immunity from Constitutional Challenge

The Rule

Article 34.3.3° reads:

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

¹³⁸ The All-Party Oireachtas Committee on the Constitution, First Progress Report, April 1997, at 62.

¹³⁹ For example, the independence, personal safety and integrity of the judiciary is aided through anonymity.

¹⁴⁰ 82 Dáil Debates, col. 1860, *per* Deputy McGilligan.

¹⁴¹ Casey, *op. cit.*, at 375.

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 the said Article 26.

This is doubtless the most controversial aspect of the Article 26 reference procedures. If the Supreme Court, on an Article 26 reference, rules that a Bill is not repugnant to the Constitution, once enacted, it can never again be challenged in the courts. The Supreme Court's ruling affords the statute a permanent immunity from legal proceedings.¹⁴² This has been cited as "the most serious disadvantage of the Article 26 procedure".¹⁴³

The Government of Ireland Act, 1920, generally cited as the inspiration for Article 26, provided that any decision by the Privy Council on a referred matter was "final and conclusive and binding upon all courts".¹⁴⁴ However, like the single judgment rule, the "permanent immunity" clause did not form part of the original *Bunreacht na hÉireann* as enacted by the people but was later inserted by ordinary legislation.

Arguments in its Favour

In defence of Article 34.3.3°, it does afford a degree of confidence in circumstances where a lack of certainty could have serious and far-reaching consequences. For example, the Adoption (No.2) Bill 1987 allowed for the adoption of children whose parents were still living, in exceptional circumstances where the parents had failed, physically or morally, in their duty towards them. On a reference under Article 26, the Supreme Court held that the Bill was not repugnant to the Constitution.¹⁴⁵ Without the safeguards of Article 34.3.3°, the result of a subsequent declaration of repugnancy could be to invalidate hundreds of adoptions, the possibility of which could discourage the Government from legislating on such issues. In support of this rule, it can also be argued that under the French Constitution, decisions of the *Conseil Constitutionnel* on the validity of referred Bills are not subject to review. They are binding on all public powers and all judicial and administrative authorities.¹⁴⁶

The Constitution Review Group acknowledged that there are numerous fundamental issues demanding a degree of certainty, whether indefinitely or for a long period.¹⁴⁷ The very object of Article 26 could arguably be undermined if a Bill which had been upheld by the Supreme Court could be open to subsequent challenge. "Once the possibility of later

¹⁴² Theoretically, the statute could however later be repealed by legislation.

¹⁴³ Casey, *op. cit.*, at 338.

¹⁴⁴ Section 53.

¹⁴⁵ *Re Article 26 and the Adoption (No.2) Bill 1987* [1989] IR 656.

¹⁴⁶ French Constitution 1958, Article 62.

¹⁴⁷ Report of the Constitution Review Group, *op. cit.*, at 77.

challenge was admitted”, the Review Group heard, “the entire fabric unravels and the object of the procedure is defeated”.¹⁴⁸

Arguments Against the Rule

As with the single judgment rule, the drawbacks far outweigh the advantages. First, the absolute nature of the rule is said to be “open to objection”.¹⁴⁹ The Review Group heard arguments in favour of relaxing the rule as well as arguments in favour of deleting it altogether. In relation to the former, it was said that:

As the number of Article 26 references increases and with on-going constitutional development, there is a real risk that this rule will operate to protect the validity of law in circumstances where, if the Supreme Court could later consider the matter afresh in the light of new circumstances, it would probably take a different view. The law should never be frozen. It should be free to flow with the needs of the people.¹⁵⁰

A glaring example of an area in need of such pliability is the law relating to immigration. Demographic fluctuations and economic requirements necessitate a public policy that is flexible and able to keep in line with changing public attitudes. The Illegal Immigrants (Trafficking) Act 2000 can never again be challenged in the courts as its Bill was upheld by the Supreme Court on an Article 26 reference.¹⁵¹ In response to the claim that the rule affords a level of certainty to delicate areas, it was argued that an affirmative decision by the Supreme Court accords a “substantial degree of certainty” without having recourse to permanent immunity.¹⁵²

An interesting point is that when Article 34.3.3° was inserted into the Constitution in 1941, it was presumed that the Supreme Court, in all cases, be strictly bound by its own decisions. However, the doctrine of *stare decisis* has been relaxed somewhat in the interim¹⁵³ and no longer supports this justification.

Earlier commentators on the rule tentatively suggested that the immunity be constrained by a fixed time-limit, such as seven years.¹⁵⁴ However, it is submitted that implementing a period wherein the validity of

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, at 78.

¹⁵¹ *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360.

¹⁵² *Ibid.*

¹⁵³ Since the 1960s, the Supreme Court has favoured a relaxed approach to *stare decisis*. See *The State (Quinn) v. Ryan* [1965] IR110; *Attorney General v. Ryan’s Car Hire Ltd.* [[1965] IR 643; and *McNamara v. Electricity Supply Board* [1975] IR 1. See also Byrne and McCutcheon, *op. cit.*, at 331-345.

¹⁵⁴ See the Report of the Committee on the Constitution, December 1967, at 36.

an Act could not be challenged would be merely arbitrary. Nor would it prevent cases being brought, as it is arguable that any person seeking redress for an infringement of their rights would be willing to wait out the seven-year period. In addition, the Review Group stated that, where the Supreme Court upholds a statute under an Article 26 reference, a subsequent challenge could probably only be brought by a person prejudicially affected in a manner envisaged at the time. It would be unreasonable to expect such a person to wait seven years for access to the courts.¹⁵⁵

The Review Group also considered whether an absolute deletion of the rule was preferable to a mere amendment.¹⁵⁶ The arguments included the fact that there is no redress if the reasoning underlying a judgment upholding the constitutionality of a law now appears defective, or if the decision would not now be supported by the Supreme Court. The inflexibility of the rule runs contrary to the idea that the Constitution ought to be malleable.

It was also pointed out that the rule is apt to create anomalies – for example, a situation could arise where the Supreme Court declares a Bill valid, but subsequently the Constitutional provisions on which the statute was based are amended by referenda. The status of the statute in such circumstances is open to debate. Similarly, an Act whose Bill was upheld in Article 26 proceedings may later be amended. Does Article 34.3.3° also apply to the amendments and, if so, does this depend on the degree of departure from the original Act? It is submitted that in both of these potential scenarios, Article 34.3.3° would probably cease to apply, but this would not necessarily be so. This seems to defeat both the purpose of this rule and the *raison d'être* of Article 26, which is to add certainty to areas of importance.¹⁵⁷ Another anomaly is the fact that the rule applies only to challenges based on domestic law; thus, if, in later years, the statute is considered to be incompatible with EU law, an applicant may not be debarred from taking the proceedings.

The absolute nature of the immunity clause “may tend to inhibit the President from invoking his or her powers under Article 26”.¹⁵⁸ Indeed, the existence of the rule may also inhibit the court from making a ruling of non-repugnancy. Judges are doubtless slow to uphold a statute which can never again be the subject of judicial scrutiny. Hamilton notes that it is difficult to avoid the conclusion that the Supreme Court seems “in practice

¹⁵⁵ Report of the Constitution Review Group, *op. cit.*, at 79.

¹⁵⁶ *Ibid.*, at 78-79.

¹⁵⁷ See Hamilton, *op. cit.*, at 544.

¹⁵⁸ Report of the Constitution Review Group, *op. cit.*, at 78. This problem would be particularly potent in the case of a President who lacks a legal background.

very ready to strike Bills down” and that this may be partly attributable to the permanent immunity rule.¹⁵⁹

Not only is Article 34.3.3° problematic of itself; it also serves to compound some of the other difficulties relating to Article 26 procedures. For example, it is likely that the single-judgment rule would not grate so severely if severed from this permanent immunity clause. The disturbing dearth of dissenting judgments might be tempered by a possibility of future revision. Similarly, Casey complains that “Article 34.3.3° compounds the difficulty created by the abstract nature of the proceedings”.¹⁶⁰ The Supreme Court, in a factual and evidentiary vacuum, can but speculate as to the likely effect the Bill will have if enacted. If they guess incorrectly, or if subsequent unforeseen events alter the effect of the Bill, there is no redress, nor any possibility of revision.¹⁶¹ Hogan and Whyte¹⁶² also appear to be mindful of the possible consequences of preventing the Supreme Court from re-opening an interpretation of a Bill whose constitutionality was determined in an evidential vacuum.

In 1923, Frankfurter warned against the assumption that “constitutionality is a fixed quantity”.¹⁶³ Jaconelli notes 50 years later that such a tacit assumption is being made by Article 34.3.3°.¹⁶⁴ He adds that “a catalogue of human rights should ideally be a flexible instrument, ever responsive to the changing needs of society”.¹⁶⁵ In light of all these shortcomings, it is difficult to disagree with the suggestion that Article 34.3.3° be deleted “in its entirety”.¹⁶⁶ There is a substantial body of opinion

¹⁵⁹ Hamilton, *op. cit.*, at 545.

¹⁶⁰ Casey, *op. cit.*, at 338. *See also* Hogan and Whyte, *op. cit.*, at 411, where it is noted that “[t]he twin combination of abstract adjudication and permanent immunity means that some Bills are clearly less suitable for the use of the reference procedure than others”; and Forde, *op. cit.*, at 59.

¹⁶¹ *See also* Keane, *op. cit.*, at 26.

¹⁶² *Op. cit.*, at 406. Hogan and Whyte also refer here to the case of *P, L & B v. Minister for Justice*, unreported, High Court, 2 January 2001, Smyth J. In this case, the applicant sought leave to challenge certain deportation orders which had been made in accordance with section 5 of the Illegal Immigrants (Trafficking) Act, 2000. A question arose as to whether they had satisfied the requirement of showing “substantial grounds”. The Supreme Court, in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, *per* Keane C.J. at 394-395, in upholding the Bill, had held that this phrase was equivalent to “reasonable grounds” and simply excluded grounds which were “trivial and tenuous”. It was held that the Bill placed no onerous burden upon the exercise of the constitutional right of access to the courts. In the subsequent *P* case, however, Smyth J. expressly invited the Supreme Court to reconsider the manner in which it had interpreted the “substantial grounds” requirement. Hogan and Whyte point out that, had section 5 been interpreted in a very restrictive manner – as Smyth J. appeared to suggest – at the date of the reference, the Supreme Court might have taken a different view on whether there was indeed a disproportionate restriction on the right of access to the courts.

¹⁶³ Frankfurter, *loc. cit.*, at 1004.

¹⁶⁴ Jaconelli, *loc. cit.*, at 327.

¹⁶⁵ *Ibid.*

¹⁶⁶ Report of the Constitution Review Group, *op. cit.*, at 80. An alternative to Article 34.3.3° was suggested by Connelly: that the court’s ruling should constitute an opinion, rather than a decision, thus it would not be binding. Connelly, “Articles 26, 34.3.3° and 34.4.5°” in Appendix

in favour of such a move. The Oireachtas Committee on the Constitution agreed wholeheartedly with the Review Group.¹⁶⁷ Hamilton recommends the removal of the rule, in the hope that Article 26 would be invoked more frequently and utilised to the fullest extent.¹⁶⁸

Conclusions

The advantages of Article 26 reference procedures are obvious. It is a useful tool for the resolution of cases presenting net points of law, and it prevents against the dire effects of a subsequent holding of unconstitutionality. Cappelletti and Cohen stress the importance of judicial review of the constitutionality of legislation,¹⁶⁹ and Irish commentators have not failed to note the advantages of Article 26. Government policy must adhere to the principles enshrined in *Bunreacht na hÉireann*, and this is but one aspect of the mechanisms available to ensure such compliance. The value of such a procedure is especially visible in light of the recent controversy regarding Government policy towards nursing home patients.¹⁷⁰ It is acknowledged that on the whole, it is a valuable provision, *prima facie* useful, but with numerous anomalies and shortcomings lurking just below the surface.

Article 26 is currently not reaching its full potential as a reference mechanism. Certainty is often sacrificed in favour speedy decision-making. The single judgment rule denies us the usual nuances of Supreme Court decisions, and the conclusiveness of a finding of constitutionality is worrying in its absolute finality. Added to this are relatively minor complaints, such as the fact that the President will often refer a whole Bill without specifying which provisions are in doubt, and the fact that the entire Bill will fail if even one term is found to be repugnant to the Constitution. The purpose of the reference procedure is to enable the Supreme Court to advise the President on the constitutionality of an impugned Bill, yet its task is made difficult by the terms of the Article itself.

Attention has been drawn to the many defects inherent in the current procedure. The Report of the Constitution Review Group has described

11, at 551-552. However, this proposal was rejected by the Group. Jaconelli, *loc. cit.*, at 327, however, seems to be of the opinion that if Article 34.3.3° was deleted, the decision of the Supreme Court would, in reality, be relegated to a mere opinion as the statute could be reconsidered in the course of *ex post facto* proceedings.

¹⁶⁷ The All-Party Oireachtas Committee on the Constitution, First Progress Report, April 1997, at 63.

¹⁶⁸ Hamilton, *op. cit.*, at 545.

¹⁶⁹ Cappelletti and Cohen, *Comparative Constitutional Law* (The Michie Co., 1979), at 73.

¹⁷⁰ *Re Article 26 and the Medical (No.2) (Amendment) Bill 2004* (unreported, Supreme Court, 16 February 2005, Murray C.J.). See Howlin *et al.*, "The Health Bill Fiasco: Thirty Years of Doublethink?" in O'Dell ed., *Older Person in Law and Policy in Modern Ireland*, *op. cit.*

constitutional judicial review as “conspicuously successful”,¹⁷¹ but it is argued that this is not necessarily so with regard to Article 26. For the time being, Article 26 is full of shortcomings and anomalies. Until a full implementation of both this Report, and that of the Oireachtas Committee, is achieved it remains a rather half-baked idea.

¹⁷¹ Byrne and McCutcheon, *op. cit.*, at 573.