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Superior Courts of Ireland: Judicial restraint in a stable political environment

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1 Introduction

Constitutional litigation in Ireland is characterised by remarkably high levels of judicial restraint and deference to the legislature compared to judicial decision-making in other European jurisdictions. Moreover, the Irish courts' approach to constitutional remedies where legislation is found to be unconstitutional is relatively uniform and lacking in diversity, although there have been some notable exceptions of judicial creativity in recent years. Overall, the strength and diversity of judicial decisions are among the very lowest across all jurisdictions investigated as part of the JUDICON project.

Broadly speaking, these trends can be explained by three primary factors: first, the text of the Irish Constitution imposes rules that restrict the relationship and interactions between the judicial and legislative branches; second, the Irish judiciary has adopted and self-imposed principles of deference and restraint since the Constitution was adopted in 1937, and third, Irish politics is characteristically stable, with power moving back and forth between two parties that are "relatively undifferentiated in terms of policy or programme"(Carty 1981, 1), thereby creating the conditions for a demonstrable lack of political partisanship in judicial decision-making (Elgie, McAuley, and O'Malley 2018). By way of background, Ireland does not have a standalone constitutional court. Rather, Irish constitutional law cases are heard by the three highest courts in the Irish court system's hierarchy: the High Court, the Court of Appeal and the Supreme Court. Constitutional law cases are heard before the High Court in the first instance, which has full jurisdiction to

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determine all matters on civil or criminal questions, including reviewing the constitutionality of legislation.

The current court system was established by the Irish Constitution of 1937 (or, in the Irish language, *Bunreacht na hÉireann*). However, that structure has its origins in the 1922 Constitution which established courts in Ireland to take over from the British administration following the establishment of the Irish Free State. The High Court generally sits with one judge presiding, the Court of Appeal sits with three judges, and the Supreme Court sits with a minimum of three judges and a maximum of seven judges depending on the nature of the case. On 28 October 2014, a new court, the Court of Appeal, was established following a constitutional referendum in 2013. In the current court system, the recently-established Court of Appeal slots between the High Court and the Supreme Court (the apex court). One of the underlying reasons for the creation of a Court of Appeal, according to former Chief Justice Frank Clarke, was the growth in both the quantity and complexity of litigation before the High Court (Clarke 2018a, 89).

Since 28 October 2014, appeals from a decision of the High Court are heard before the Court of Appeal. The same constitutional referendum in 2013 also led to constitutional amendments to the Supreme Court's role and jurisdiction. Since then, the Supreme Court has had discretionary jurisdiction, capable of determining its own docket on the basis that it will hear an appeal from a decision of the Court of Appeal if it is satisfied that the decision involves a matter of general public importance, or if it is necessary in the interests of justice that there be an appeal to the Supreme Court. Furthermore, the Supreme Court may also hear so-called 'leapfrog appeals' from a decision of the High Court, pursuant to Article 34.5.4° if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it. A precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors: that the decision involves a matter of general public importance; or the interests of justice. Notably, before the Court of Appeal was established, the Supreme Court did not enjoy discretionary jurisdiction to determine which appeals to hear: appeals from decisions of the High Court could be made directly to the Supreme Court which was, generally speaking, obliged to hear such appeals regardless of their substantive merit.

As such, there has been a "fundamental recalibration" in the role and jurisdiction of the Supreme Court as the highest court in Ireland during the period of analysis under consideration here, 1990–2020, from one of *mandatory* jurisdiction up until 27 October 2014 to *discretionary* jurisdiction from 28 October 2014 onwards (Irish Supreme Court 2019). Its case load has dropped as a consequence of this development, and – for present purposes – it is fair to suggest that the nature of constitutional litigation heard before the Supreme Court since 28 October 2014 may possess different characteristics, given that the Supreme Court will only allow such litigation into its courtroom if it is in the interests of justice or if it involves a matter of general public importance. However, the full effects in terms of case load and throughput are perhaps only becoming apparent since about 2019 or so, given the transitionary period for the court system from 2014 onwards (Clarke 2018a; Irish Supreme Court 2019).

2 GENERAL IMPRESSIONS

Some jurisdiction-specific features must be set out to contextualise the analysis of the data in keeping with the JUDICON project's data collection and evaluation methodology. First, and most significantly, in contrast to the analysis of constitutional courts' decisions in other jurisdictions for the JUDICON project, the researchers determined that because there is no designated constitutional court in Ireland and rather, that three courts hear constitutional law matters in Ireland, (e.g. the High Court, the Court of Appeal since October 2014 and the Supreme Court), decisions from *all three* courts should be included in the dataset. However, to avoid duplication of analysing the same rulings in the same set of legal proceedings, only the *final* ruling on each discrete challenge as to the constitutionality of each provision of legislation in the same set of legal proceedings is included in the data. So, for example, if the High Court decided on the constitutionality of a particular section of legislation, and the Court of Appeal then, on appeal, made a subsequent decision on that same section in the same legal proceedings, only the Court of Appeal's decision will be included in the dataset, rather than both the High Court *and* the Court of Appeal's decision.

Also, as regards trends in dissenting opinions, it is important to note that until 31 October 2013, there was a 'one-judgment' or 'single-judgment' rule in the 1937 Constitution prohibiting the Supreme Court from issuing dissenting (and concurring) opinions in cases where the constitutional validity of laws enacted after the establishment of the 1937 Constitution was challenged.[2] Since 1 November 2013, the Supreme Court (and the Court of Appeal since its establishment in28 October 2014) have had the power to issue dissenting (and concurring) judgments.[3] The impact of this rule and its removal is explored below in Section 4.

It is necessary to briefly set out how constitutional judicial review works in Ireland, and the nature of judicial power *vis-à-vis* its role in supervising or overseeing the exercise of legislative power as set out in the Constitution. The sole and exclusive power to make laws is vested in the national parliament of Ireland, the *Oireachtas*, which comprises two Houses, a lower House of Representatives called *Dáil Éireann* and an upper house Senate called *Seanad Éireann*.[4] The Constitution further provides that the *Oireachtas* cannot make unconstitutional law: it "shall not enact any law which is any respect repugnant to the Constitution" or any of its provisions.[5]

As for the judiciary's role, constitutional judicial review by the High Court and, by extension, the courts above it, is explicitly provided for in the Constitution: "the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution."[6] In this context, a "law" refers not only to an Act of the *Oireachtas* so

[2] Article 34.4.5° provided "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."

[3] One caveat to this is that a judge on the Court of Appeal cannot deliver a dissenting judgment in a criminal law appeal, section 7A(7) of the Courts of Appeal Act 2014.

[4] Article 15.2.1° of the Irish Constitution provides "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

[5] Article 15.4.1° of the Irish Constitution reads, in full, "The Oireachtas shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof."

[6] Article 34.3.2° of the Irish Constitution provides: "Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this

established after the 1937 Constitution, but also to laws that were in force in the Irish Free State immediately prior to the date of the coming into operation of the 1937 Constitution[7] and to laws established by common law precedent. If the courts so declare a law to be unconstitutional in exercising their power, such a law "shall … be invalid … but to the extent only of such repugnancy."[8] This provision, Article 15.4.2°, as we shall come to see, is particularly important in understanding judicial-legislative relations in Ireland. It prescribes that a declaration of unconstitutionality has *ex tunc* temporal effect. Generally speaking, as the courts have necessarily had to interpret it, where a law is declared unconstitutional, it is "null and void from the moment of its purported enactment," or "void *ab initio*."[9] This is very much the mainstay remedy where a court finds a legislative provision unconstitutional because the Constitution prescribes such. However, as will be analysed later in this chapter, in recent years, the courts have granted an alternative remedy – *suspended declarations of invalidity* – in very exceptional circumstances. These are declarations of unconstitutionality that only come into effect at a date in the future, to give the *Oireachtas*, as legislature, time to address the unconstitutionality revealed by the case.

To briefly preface the main findings of the analysis to follow, the Irish courts' approach to deciding cases concerning the constitutionality of legislation is relatively uniform and lacks diversity, and, overall, the average strength of rulings is low. The lack of diversity is largely accounted for by the aforementioned provision, Article 15.4.2°, that prescribes one default remedy where a court finds a law to be repugnant to the Constitution – i.e. that a law so-declared "shall … be invalid," and therefore the ruling has *ex tunc* effect. This remedy is

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Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court, the Court of Appeal or the Supreme Court."

[7] See further, on the transfer of laws in force prior to the 1937 Constitution, Article 50.1: "Subject to this Constitution and to the extent to which they are not inconsistent therewith, the laws in force in Saorstát Éireann immediately prior to the date of the coming into operation of this Constitution shall continue to be of full force and effect until the same or any of them shall have been repealed or amended by enactment of the Oireachtas."

[8] Article 15.4.2° of the Irish Constitution reads, in full, "Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid."

[9] For judicial analysis, see *Murphy v Attorney General* [1082] IR 241, at 309—310, per Henchy J.

recognised as "overwhelmingly, the most common remedy for a constitutional flaw in legislation" (Kenny 2017). Consequently, the courts recognise that they are operating in a relatively constrained environment insofar as remedies are concerned. Although there are no rules explicitly prohibiting Irish courts from issuing other types of remedies, or from varying the temporal effect of its rulings, or prescribing how the legislature ought to rectify an unconstitutionality, the experience of Irish courts, and their interpretation of the Constitution, is such that their role is not to engage in creative remedies. The exception to this are the handful of cases since 2017 where judges have issued the aforementioned *suspended declarations of invalidity*.[10] However, owing to the default remedy prescribed by the Constitution under Article 15.4.2°, the courts have cautioned against this becoming a mainstream tool.

In terms of the *strength* of decision-making, the Irish courts' treatment and use of their jurisdiction of constitutional judicial review is broadly characterised by very high levels of restraint and deference to the legislative branch. An analysis of the data that measures the strength of rulings by the Irish judiciary, and its behaviour *vis-à-vis* the *Oireachtas* in its role as legislature, reveals that far more often than not, the judiciary is reluctant to interfere with the Oireachtas' law-making function power. The vast majority of the time, legislation challenged as being unconstitutional is found by the courts to be constitutional.

A combination of factors may explain the relatively narrow role that the judiciary fulfils in this context: the text of the Constitution (most prominently Article 15.4.2°), the courts' development of judicial principles of self-restraint, and political factors. These are further explored in the next section.

3 Trends in majority decisions

The courts' caseload of constitutional judicial review cases is relatively small, and the busyness of the courts has remained remarkably consistent over the three decades analysed. A total of 250 rulings within 216 decisions were issued by the courts over the

[10] For analysis, see (Carolan 2017b).

period 1990–2020. Breaking this period down into each of the three decades under investigation indicates that the throughput of decisions in this area of law has remained relatively stable. 81 rulings were issued in 63 decisions between 1990 and 1999, 81 rulings were issued in 69 decisions between 2000 and 2009 and 89 rulings were issued in 84 decisions between 2010 and 2020 (or, excluding the calendar year 2020 for a truer comparison across three ten-year periods, the courts made 80 rulings in 76 decisions between 2010 and 2019). This reveals that the courts, overall, have maintained the same level of busyness in constitutional judicial review cases over the period analysed.[11]

This goes against the overall trend of high levels of general growth in litigation in Irish courts over the same period. Although official statistics do not date back to the 1990's, a review of the number of judgments delivered by the superior courts (the High Court, the Supreme Court and, since28 October 2014, the Court of Appeal) on vLex Justis, one of the main online legal databases used in Ireland, over the period 1990–2020 reflects this trend of growth in litigation over the 1990's, the 2000's and the 2010's. Between 1 January 1990 and 31 December 1999 the superior courts issued 4.008 judgments; between 1 January 2000 and 31 December 2009 these courts issued 5.983 judgments; between 1 January 2010 and 31 December 2019 these courts issued 10.907 judgments. Finally, to complete the analysis, between 1 January 2020 and 31 December 2020 these courts issued 1.211 judgments. Speculating on the reasons for the general increase in litigation in Irish courts, former Chief Justice Frank Clarke observed in 2020 that because society is more complex, this "tends to generate more litigation" and that "some of the litigation is, of itself, more complex and, therefore, will take longer" (Hallissey 2020).

It is also worth considering the courts' busyness in constitutional litigation before and after the watershed date for Irish constitutional litigation across the period 1990–2020,28 October 2014, when the Court of Appeal was established and the Supreme Court acquired powers to determine its own docket. The Supreme Court's discretionary jurisdiction did not lead to a reduction in the average number of decisions that the Court has had to make in this area of law per year. Between 1 January 1990 and 27 October 2014, the Court made on

[11] Readers are referred to data available in the annual reports of the Irish Courts Service, available from www.courts.ie/annual-report

average 2.4 decisions per year, whereas between28 October 2014 and 31 December 2020, the Court made 2.72 decisions per year. However, these numbers are very low to begin with, and the period of analysis after the watershed date is still relatively short – just six-and-a-quarter years. As such, perhaps not too much can be read into this apparent continuation of the Court's busyness before and after these important institutional reforms.

Overall, the court that issued the most rulings and the most decisions was the High Court with 137 rulings in 124 decisions, the Supreme Court made 107 rulings in 86 decisions and the Court of Appeal, 6 rulings in 6 decisions. As can be deduced from the total tally of rulings and decisions (250 rulings within 216 decisions), the courts issued just one ruling in each decision the vast majority of time, as visually represented in Figure 1.

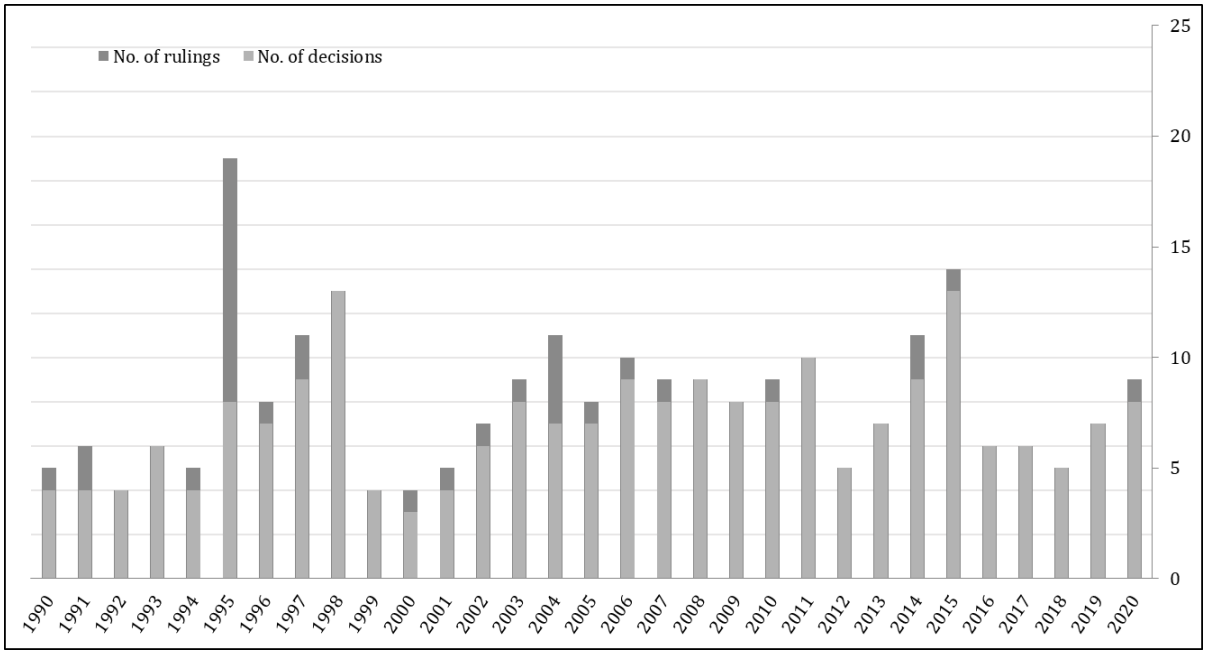

Figure 1 Number of rulings

3.1 Strength of rulings

Of 250 rulings, the courts have ruled that impugned legislative provisions are constitutional 206 times. Just 44 rulings have restrained the legislature, the vast majority of which declared a legislative provision substantively unconstitutional. Unsurprisingly perhaps, given the nature of the judicial hierarchy and the doctrine of precedent, the Supreme Court, as the apex court, was the least deferential court, issuing the highest number of restraining

rulings compared to the other two courts, both in absolute terms and as a proportionate ratio of all rulings issued by each respective court. The Supreme Court issued a total of 25 restraining rulings, a proportion of 23.4% of its total of 107 rulings, the Court of Appeal issued one restraining ruling, a proportion of 16.7% of its total of six rulings, while the High Court issued a total of 18 restraining rulings, a proportion of 13.1% of its total of 137 rulings. Correspondingly, the average strength of rulings as between the courts was highest in the Supreme Court (1.59), lower in the Court of Appeal (1.08) and lowest in the High Court (0.85).

The average strength figure is relatively meaningless as regards the Court of Appeal given the very low total number of rulings issued (six). However, the difference in average strength between the two busiest courts, the Supreme Court and the High Court presents an interesting contrast. The average strength of decisions in the Supreme Court is almost double that of the High Court, albeit from a relatively low base figure to begin with.

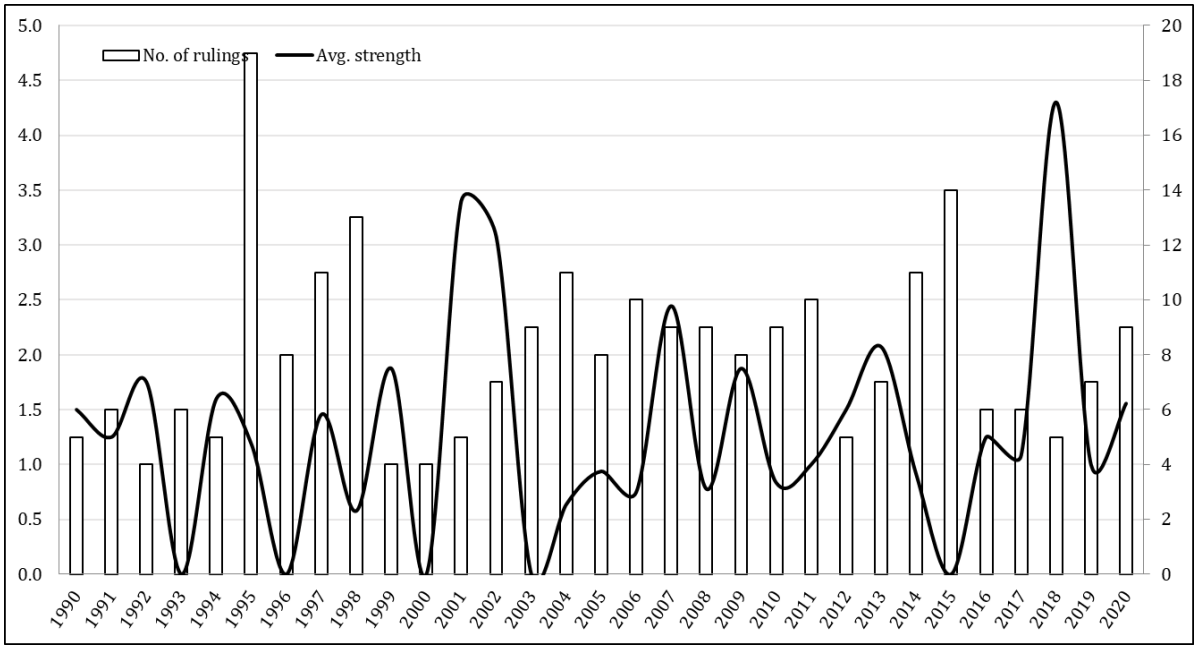

Figure 2 Average strength of rulings

Chronologically, the data suggests that the average overall strength across all courts over the three decades has gradually increased somewhat: the average strength between 1990 and 1999 was 0.74, the average strength between 2000 and 2009 was 0.81 and the average

strength between 2010 and 2020 was 1.05.[12] However, the differences between the decades are small, and these figures perhaps indicate that the average strength of rulings has remained consistently low, and, by extension, that the entire period is marked by the judiciary's considerable deference to the legislature. As Figure 2 demonstrates, three years stand out as having higher levels of average strength – 2001, 2002 and 2018, with average strength ratings of 3.40, 3.07 and 4.30 respectively. However, it is perhaps imprudent to read any significance into these figures, as the averages are based on very low total numbers of rulings in each year (five, seven and five rulings respectively).

Next, it is worth focusing on the Supreme Court's role as the apex court, and more specifically, to isolate and compare trends on that court under the tenure of different chief justices. Over the period analysed, there were six chief justices: Chief Justice Thomas Finlay (1985 - March 1994), Chief Justice Liam Hamilton (March 1994 - June 2000), Chief Justice Ronan Keane (June 2000-July 2004), Chief Justice John Murray (July 2004 - July 2011), Chief Justice Susan Denham (July 2011 – July 2017) and Chief Justice Frank Clarke (July 2017 - October 2021). Isolating the rulings of the Supreme Court made during each chief justice's tenure reveals that the Supreme Courts under Chief Justice Keane and Chief Justice Clarke were the courts with the highest ratio of restraining rulings – one in three (33.3%). Measured by the average strength of rulings, the Supreme Court under Chief Justice Clarke (up to the cut-off point of analysis of 31 December 2020) had the highest average strength rating (2.5), followed by the Supreme Court under Chief Justice Murray (2.31), and then followed by the Supreme Court under Chief Justice Keane (2.03). The Supreme Court with the lowest average strength rating was that of Chief Justice Hamilton CJ (1.01).

The relatively high levels of fluctuation on the Supreme Court during the tenure of different chief justices is noteable. The Supreme Court under Chief Justice Clarke, for instance, with an average strength rating of 2.5, is considerably higher than the overall average for the Supreme Court over the entire period of analysis (1.59). However, once again, the numbers of cases during each chief justice's tenure are low and it is not possible to establish a definitive causative link between the average strength of decision-making during a

[12] Note that data from the calendar year 2020 is included here in the final, third 'decade' for a complete picture over the entire period of analysis, 1990–2020.

particular chief justice's tenure and the influence of each their leadership on the Court. Other variables may be at play, not least the variability in the cases that present themselves to the Supreme Court in the first place.

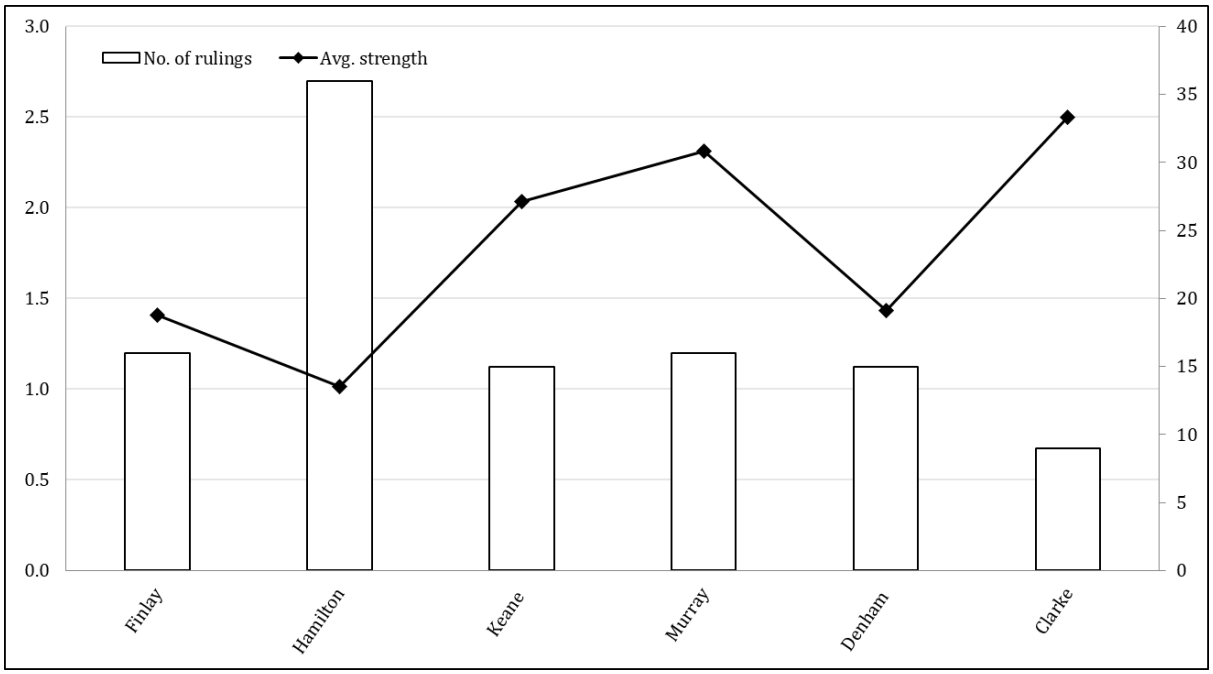

Figure 3 Number and average strength of rulings on the Supreme Court during different chief justices' tenures

Overall, and to reflect on the level of strength displayed by the courts as a whole, the data indicates remarkable levels of judicial restraint. One mark of this is that some 34 of the 75 judges in the dataset *always* issued rulings rejecting the challenge to the constitutionality of legislation (although only seven of these 34 judges presided over more than three cases each).

3.2 Diversity of rulings

As for the diversity in rulings, Figure 4 paints a picture of a relatively homogenous, non-diverse approach to remedies taken by the courts. Rulings were almost exclusively either rejections or findings of substantive unconstitutionality.

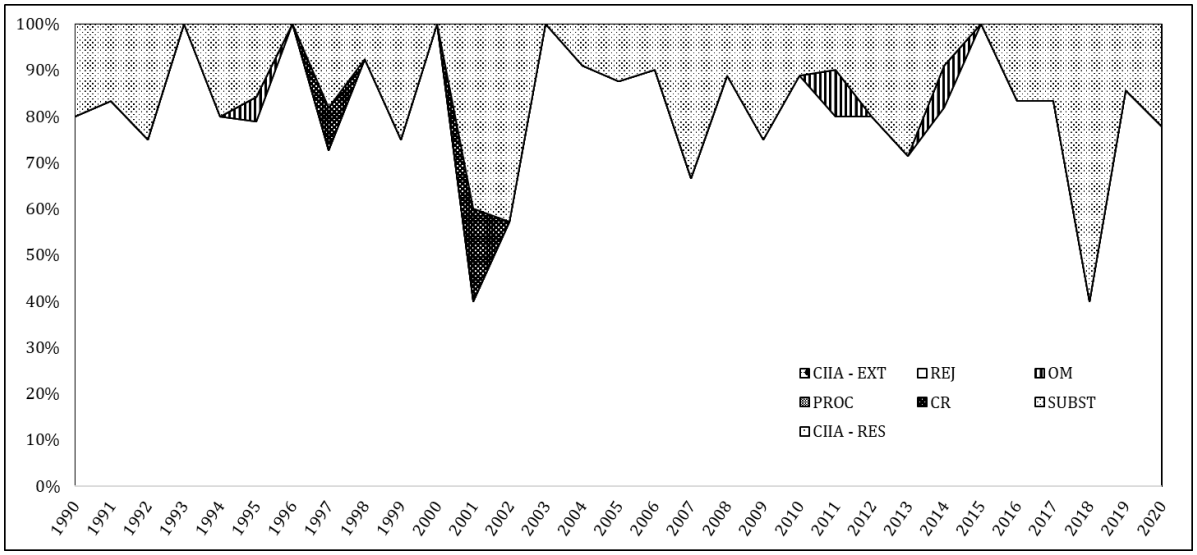

Figure 4 Ruling types

On two occasions, the courts have issued a constitutional requirement in their ruling – both rulings dictated that the impugned legislation ought to have prospective effect only, rather than have retrospective effect.[13] On three other occasions, the courts ruled that there had been an unconstitutional legislative omission – one, a legislative failure to carve out exceptions for small businesses to facilitate persons with disabilities in circumstances where such amounted to an infringement of business owners' right to earn a livelihood, the second a lacuna in criminal legislation that infringed accused persons with mental illness' criminal trial right and the third, the absence in legislation of a statutorily conferred right of appeal against a court's powers to re-activate a criminal sentence.[14] This amounts to the sum total of rulings that diverge from the ordinary, largely binary approach of the courts when substantively addressing the constitutionality of legislation: either the challenge is rejected because the law is constitutional, or a substantive unconstitutionality is declared.

Nevertheless, the apparent willingness of the courts to diverge *at all* from the default remedy set out in the text of the Constitution (that is, to declare legislation substantively

[13] See *Quinlivan v Governor of Portlaoise Prison* [1998] 2 IR 113 and *Grealis & Corbett v DPP and Attorney General* [2001] 3 IR 144.

[14] See *Re Article 26 and the Employment Equality Bill, 1996* [1997] 2 IR 321, *B.G. v Judge Murphy* [2011] 3 IR 748 and *McCabe v Ireland and others* [2014] IEHC 435 respectively.

unconstitutional with *ex tunc* effect) in this small handful of cases is, in and of itself, undoubtedly significant. In these cases, the courts adopted, seemingly without hesitation, a more creative approach to constitutional remedies, going beyond the boundaries of what the text of the Constitution prescribes. The courts, therefore, do not view the *ex tunc* rule set out in the Constitution as absolute, but rather, simply as a default rule to which there may be exceptions. This opens up a range of opportunities in the future. Moreover, and also worth noting, there appears to have been no criticism, either from the academic community or from the wider public, of this apparent self-conferral of increased powers so far as constitutional remedies are concerned.

3.3 Analysis of trends

At this juncture, it is worth reflecting on the factors that may explain the overall trends of high levels of deference to the legislative branch and the relative uniformity and lack of diversity in the courts' approach to remedies. First, the fact that the text of the Constitution prescribes such a strong default remedy – that laws declared unconstitutional are deemed void *ab initio* (a "judicial death certificate" as one judge put it) – this may explain, in some part, the characteristically deferential approach of the courts, as well as the absence of diversity in the courts' approach to ruling on the constitutional validity of legislation.[15]

Because *ex tunc* rulings are the default prescribed by the Constitution in the event of a declaration of unconstitutionality, and because, by their nature, they can result in legally complex consequences – most pertinently, thorny questions of what happens to others who have been negatively affected in the past by a law now deemed never to have existed – this may partially explain why the courts more often than not are reticent to resort to this sometimes drastic remedy.[16] Gerard Hogan (then a Court of Appeal judge) and colleagues, in an interesting anthology study on declarations of unconstitutionality, observed that "the very strength of the declaration of unconstitutionality procedure paradoxically creates its own weaknesses, as some judges may be reluctant to invoke this remedy given its far-reaching effects" (Hogan, Kenny, and Walsh 2015, 19). What is perhaps remarkable,

[15] *Murphy v Attorney General* [1082] IR 241, 307.

[16] For analysis and examples, see (Doyle and Hickey 2019, 259–67) (Reynolds 2018, 408–10).

therefore, is that judges have not diverged from this procedure *more often*, other than in the handful of cases where they have adopted constitutional requirements or legislative omissions as described above.

Aside from the text of the Constitution prescribing this default remedy of an *ex tunc* ruling, a further factor is the series of influential judicial principles that gained traction both before and during the period of analysis. Perhaps the most influential judicial principle in this regard is one that has its origins in the immediate aftermath of the establishment of the 1937 Constitution, the *presumption of constitutionality*, which dictates that the courts ought to presume that laws enacted by the Oireachtas are constitutional by default.[17] The doctrine has its roots in one of the earliest decisions of the High Court just after the introduction of the Irish Constitution 1937, *Pigs Marketing Board v Donnelly (Dublin) Ltd* [1939] IR 413. Justice Hanna made the following oft-cited statement, at 417 of his judgment:

> *"[w]hen the Court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established."*

The impact and pervasiveness of the *presumption of constitutionality* doctrine are critical to explaining the deferential trend in the Irish judiciary's approach where legislation is challenged as being unconstitutional. Justice Hanna's statement remains one of the most important, influential statements in Irish constitutional law. Writing extra-judicially, Justice Fennelly noted that the presumption of constitutionality had been applied "very consistently" and considered the reasons why it has become so prominent: courts, he suggested, may be "[c]onscious of the potentially drastic implications" of the exercise of their power of constitutional judicial review, and ultimately, law-making is a parliamentary prerogative, the *Oireachtas* being "the body elected by the people and the exclusive law-making body under the Constitution" (Fennelly 2018, 51).

In a similar vein, Irish constitutional law scholars Oran Doyle and Tom Hickey evaluated the presumption of constitutionality as follows:

[17] For analysis, see (Foley 2008).

> *"[a]t its narrowest, the presumption of constitutionality is merely a rule of court procedure: the party of asserting unconstitutionality should prove its case. However, the values that underlie the presumption have broader relevance … they inform an attitude of deference [on the part of the courts] to legislative judgment in the constitutional review of legislation"* (Doyle and Hickey 2019, 247).

They further observe:

> *"[T]he courts' belief in their limited role in the constitutional order has led them to adopt self-denying ordinances that limit the sorts of cases they will consider and the effect of their ultimate judgments. Whether because of the democratic credentials of the Oireachtas or the respect that one organ of government owes to another, the courts self-consciously limit their own role"* (Doyle and Hickey 2019, 274).

Other principles guiding the courts' jurisdiction over constitutional judicial review that have developed over the years further facilitate judicial restraint. For instance, the *double construction rule* – in effect, an extension of the *presumption of constitutionality* – dictates that if "two or more constructions of a legislative provision are reasonably open, one of which is constitutional and the other or others are unconstitutional, it would be presumed that the Oireachtas intended only the constitutional construction" (per the judgment of Denham CJ in *Damache v DPP & Others* [2012] IR 266, 267 – 268). This rule allows courts to avoid the drastic consequences of declaring laws unconstitutional *ex tunc*. However, the double construction rule is highly limited in application, as one constitutional law expert noted, "[t]he courts' role is to invalidate constitutionally repugnant laws, not to fix laws or replace them" (Kenny 2017, 86).

Finally, from the mid-1990's onwards, the courts adopted and have increasingly relied on the doctrine of proportionality.[18] Although an analysis of this doctrine and its impact are beyond the parameters of this chapter, in its simplest terms, the doctrine requires that laws that restrict constitutional rights must pass a proportionality test. Commentators have suggested that the manner in which some courts have applied the test – in some instances, by little more than formulaically reciting such tests, rather than truly applying them in a

[18] The doctrine of proportionality was first adopted by Costello J in *Heaney v Ireland* [1994] 3 IR 593, citing a test from Canadian case law, *Chaulk v R* [1990] 3 SCR 1303, at 1335—1336.

scrutinous fashion – has further facilitated courts' generally deferential approach to the *Oireachtas*.[19]

These judicial principles and tests that guide constitutional judicial review of the validity of legislation reflect a broader trend of Irish courts' general deference to other branches of government within the separation of powers.[20] Aside from deference to the legislative branch, the Irish courts are also perceived by commentators to be generally deferential to the executive branch of government; for example, where the courts are asked to consider the constitutionality of the executive branch's decisions in foreign-affairs matters,[21] or where a litigant claims that the executive acted or failed to act in such a way as to attack or not protect personal rights.[22]

Finally, the political climate in Ireland may account, to some degree, for Irish judges' generally deferential approach to the legislature. Correlating political parties' influence over judicial appointments to trends in their appointees' decision-making is an important barometer of judicial-political relations in constitutional democracies.[23] To explain the Irish context, Irish judges are formally appointed by the President, but such appointments are only "on the advice of the Government," thereby rendering the executive branch the true power broker in judicial appointments.[24] Since the establishment of the 1937 Constitution

[19] For analysis, see (Hogan 1997; Doyle and Hickey 2019, chap. 12).

[20] Fennelly J, writing extra-judicially notes, for instance, "the reticence of the courts to trespass on the ground of the other organs of State," (Fennelly 2018, 57).

[21] See, in particular, Chief Justice Fitzgerald's influential judgment in *Boland v An Taoiseach* [1974] IR 338 where he stated that "the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred on it by the Constitution," 362.

[22] In a series of important judgments, the courts have asserted that they are not in the business of delivering distributive, as distinct from commutative justice. See further, *O'Reilly v Limerick Corporation* [1989] ILRM 181, *Sinnott v Minister for Education* [2001] 2 IR 545 and *TD v Minister for Education* [2001] 4 IR 259. The significant judgment of Justice Hardiman in *TD v Minister for Education*, in particular, typifies the rigid interpretation of the separation of powers as between the judicial and other branches of government: the separation of powers is non-porous, [2001] 4 IR 259, 367.

[23] For analysis, see (Barry 2021, chap. 4.5).

[24] Article 13.9 of the Constitution.

to the present day, one of two parties – *Fianna Fáil* and *Fine Gael* – have held majority power in both the *Oireachtas* and in Government. The two parties are "relatively undifferentiated in terms of policy," subject to some exceptions (Carty 1981)(Elgie, McAuley, and O'Malley 2018). As a consequence, this relatively benign political landscape since 1937 has perhaps had a bearing on the development of Irish constitutional law in the courts and facilitated rather stable relations between the judiciary and legislature.

One study investigated the effects of political affiliation on judicial decision-making on the Irish Supreme Court. Elgie and his colleagues employed the attitudinal model to investigate whether there was any correlation between judges' decision-making and the political party that appointed them to the bench (Elgie, McAuley, and O'Malley 2018).[25] The study found no evidence of political partisanship in judicial decision-making – judges did not have a propensity to decide in line with the political party that appointed them. This, the authors of the study point out, is to be expected given the "non-ideological nature of Irish politics" and that "Irish political parties often agree on many issues" (Elgie, McAuley, and O'Malley 2018, 100, 105). Although the study was not confined to an analysis of only constitutional law cases, their findings nevertheless provide important context for, and reflections on, the relatively non-confrontational nature of judicial-legislative relations in Ireland.

4 Trends in dissenting opinions

There are only three dissenting rulings across the entire dataset of cases from 1990 to 2020. While this is a remarkable statistic in its own right, dissenting opinions are extremely rare in the dataset for one main reason: until 31 October 2013, there was a 'one-judgment' rule in the Irish Constitution of 1937 prohibiting the Supreme Court from issuing dissenting (and concurring) opinions in cases where the constitutional validity of laws enacted after the establishment of the 1937 Constitution was challenged.[26] This rule was abolished by the

[25] Politicians are centrally, and rather opaquely involved in judicial appointments to the Supreme Court and other courts in Ireland. See generally (Carroll MacNeill 2016). Reforms on how judges are appointed in Ireland appear to be imminent, see the General Scheme of the Judicial Appointments Commission Bill 2020.

[26] Article 34.4.5° provided "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

Thirty-third Amendment of the Constitution (Court of Appeal) Act 2013 which amended the Constitution following a successful referendum – the same referendum that led to the establishment of the Court of Appeal. As such, the capacity for Irish judges to issue dissenting rulings in cases concerning the constitutional validity of law is limited to cases decided by the Supreme Court after 1 November 2013 and the Court of Appeal after it was established on28 October 2014.

Recall that in contradistinction to other jurisdictions analysed for this project, the rulings of three courts are included in the analysis of Irish case law: while the Court of Appeal and Supreme Court are panel courts and, therefore, dissenting rulings are a possibility, the High Court – the court that issued the most rulings in the period analysed – sits with one judge presiding, and so, there is no possibility of dissenting judgments on that court in any event.[27]

All three dissenting opinions across the dataset were dissents made by judges of the Supreme Court, one in 2018 and two in the same case in 2019. In *PC v Minister for Social Protection* [2018] IESC 57, a case about legislation that disqualified a prisoner from receiving a state pension, Justice McMenamin dissented on the question of *when* the relevant legislative provision, section 249 of the State Welfare (Consolidation) Act 2005, was to be deemed invalid, preferring to issue a suspended declaration of invalidity. As such, this was a disagreement as much about procedure as it was about the substance of the legislative provision.

In *P v Judges of the Circuit Court* [2019] IESC 26, Justice O'Malley and Chief Justice Clarke gave dissenting judgments in a case about the constitutionality of legislation which criminalised "gross indecency" between males arising out of a historical allegation that a teacher, aged between 34 and 35 years of age at the time of the alleged offence, had had sexual relations with a male pupil between 1978 and mid-1980 when the student was

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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."

The "one-judgment" rule still applies when the Supreme Court considers the constitutionality of a Bill, rather than an Act of the Oireachtas, the Supreme Court must issue a single opinion, per Art.26.2.2° of the Constitution.

[27] Very exceptionally, the President of the High Court can decide that a particular case ought to be heard by a three-judge panel known as a Divisional Court.

between fifteen and seventeen and a half years of age. Justice O'Malley and Chief Justice Clarke dissented from the majority's ruling that cleared the way for the prosecution's case to proceed. Dissenting, Justice O'Malley decided that the prosecution of the defendant ought to be prohibited because he had standing to challenge the constitutionality of the relevant legislative provision on the grounds that it criminalised all sexual activity between men, regardless of age or consent. Also dissenting, Chief Justice Clarke decided that the defendant's prosecution ought to be prohibited on the basis that the complainant was, at the time of the alleged offences, of an age which was generally considered to be one at which a male could consent to sexual activity. This is the sum total of dissenting rulings in this area of law over the period analysed, and of course, as a consequence, there is no evidence to suggest any judicial coalitions forming on the courts.

It is worth reflecting on why the 'one-judgment' (or 'single-judgment') rule was introduced in the first place, and what precipitated its demise. First, some historical context is important. The 1937 Constitution did not originally include a 'one-judgment' rule. Rather, it was introduced by the Second Amendment of the Constitution Act, 1941 – omnibus legislation that amended various provisions in the Constitution, including the introduction of Article 34.4.5°. The introduction of this amendment was a purely legislative exercise, without recourse to the people by way of referendum. This was permitted during a transitionary phase between 1938 and 1941 after the introduction of the 1937 Constitution.[28] The main architect of the 1937 Constitution, *Taoiseach* (Irish prime minister) Eamon De Valera, offered his rationale for the introduction of the 'one-judgment' rule during a parliamentary debate on the amending legislation in 1941 as follows: "from the point of view of the public interest it is better to have a single judgment pronounced and no indication given that the other judges held a different view… the one thing I am looking for, and which I think we ought all to look for here, is that there should be a definite decision; that it should not be bandied about from mouth to mouth".[29]

[28] Article 34.4.5° provided "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."

[29] 8*2 Dáil Debates Col.1858-1859,* April 2, 1941.

Many academic commentators and judges alike had criticised the 'one-judgment' rule. One of Ireland's most well-regarded Supreme Court judges, Brian Walsh, wrote extra-judicially that the requirement "seriously hampers the development of our Constitutional jurisprudence" (Walsh 1987). Leading Irish constitutional law scholar, Gerry Whyte argued that the 'one-judgment' rule led to judgments with "lowest common denominator" results, compromising fully-fledged reasoning and producing weak precedent (Whyte 1983). In a similar vein, Ní Loinsigh argued that the "marketplace of ideas" afforded by dissenting opinions (as US Supreme Court Justice William Brennan once coined it) "was effectively shut down in significant constitutional cases, and this has been to the overall detriment of our understanding of the reasons for and against the final decisions reached" (Ní Loinsigh 2014). A review group tasked with reviewing the provisions of the Constitution recommended in 1996 removing the rule contained in Article 34.4.5°, paving the way for a proposal to remove it through a referendum (Constitution Review Group 1996, 67–78). This proposal was included as one aspect of a larger, binary choice that the public faced on wholesale changes to the judicial system, most prominently, whether or not to introduce the new Court of Appeal in the 2013 referendum. As such, whether to do away with the 'one-judgment' rule was not the subject of extensive public debate in the run-up to the referendum (Ní Loinsigh 2014, 140), nor was it met with any political resistance during parliamentary debates. The Minister for Justice at the time, Alan Shatter TD, argued that the rule was "extraordinarily artificial"[30] and removing it would allow judges "to assert their independence" ('Shatter: One Judgment Rule Change Will Allow Judges to Assert Their Independence' 2013). In any event, the decision to remove the 'one-judgment' rule by way of referendum passed without much fanfare.

It remains to be seen quite how significant the deletion of Article 34.4.5° will prove to be. Although Ní Lionsigh, writing in 2014, hoped that "the role of judicial dissent in Ireland will continue to grow and flourish and that this will be to the benefit of the development of Irish Constitutional jurisprudence," the sum total of three dissenting rulings since its deletion to the end of 2020 suggests that there is some way to go before judicial dissent becomes a rich tradition in Irish constitutional law (Ní Loinsigh 2014, 129). That said, the characteristics of

[30] 225 *Seanad Éireann Debates,* July 24, 2013.

each chief justice's tenure, and group dynamics, may also have something to do with judges' propensity (or lack thereof) to dissent against their colleagues. For example, one year into his tenure, in 2018, Chief Justice Clarke remarked that the Supreme Court was a "happy court" suggesting collegiality and good working relationships among the judges on it, perhaps indicative of a court more inclined to work collaboratively and less inclined to draw bright ideological lines through dissenting rulings (Clarke 2018b).

It is also worth reiterating Elgie and his colleagues' findings in their empirical study on rulings of the Supreme Court that there was no evidence of political partisanship or ideologically-charged decision-making on the Court, perhaps a by-product of a political system that is relatively unpolarised and where parties have tended to agree with each other on major issues – hardly conditions for judicial dissent to flourish (Elgie, McAuley, and O'Malley 2018).

All of this is not to say that judicial dissent has not played something of an important role in other areas of Irish law. Although dissent is not commonplace, in other areas of Irish law beyond constitutional judicial review there are numerous important examples of influential judicial dissents over the decades, some of them in recent years.[31]

5 Suspended declarations of invalidity: a new dialogue in judicial-legislative relations?

Despite institutional constraints and judicial self-restraint, it is worth reflecting on animportant recent development in constitutional remedies that may yet have considerable influence on Irish judicial-legislative relations in the future: the emergence of suspended (or deferred) declarations of unconstitutionality. The first such declaration was made by the Supreme Court in *NVH v Minister for Justice and Equality* [2017] IESC 35, which found that legislation that absolutely prohibited asylum seekers from working in Ireland was a breach of the constitutionally-protected right to work. In a follow-up hearing as part of the same

[31] For analysis, see (Ní Loinsigh 2014, 140–46) Note also, *inter alia*, Justice Hardiman's significant dissenting ruling in deciding to uphold the constitutionality of a strict common law rule on the admissibility of evidence in criminal trials in *DPP v JC* [2015] IESC 31 and the dissenting judgments of Justice Charleton and Justice MacMenamin in *Zalewski v The Workplace Relations Commission* [2021] IESC 24, a case that post-dates the period of analysis for this project about the constitutionality of state-provided workplace dispute resolution machinery.

legal proceedings, Chief Justice Clarke commented that suspended declarations of invalidity ought to be used only sparingly, noting that "it must be made clear that the circumstances in which it would be appropriate for the Court not to follow the general rule must necessarily be exceptional" *NHV v Minister for Justice & Equality* [2017] IESC 82, at 83. Justice MacMenamin also proposed a suspended (or deferred) declaration of invalidity as an alternative to declaring legislation void *ab initio* in his ruling in *PC v Minister for Social Protection* [2017] IESC 63.

Commentators note the potential advantages of issuing suspended declarations of invalidity. They help to avoid problems associated with declaring laws unconstitutional retrospectively, not least that invalidating a law may endanger the public or threaten the rule of law. They allow courts to decline making an immediate ruling of unconstitutionality and instead to defer them to give the legislature time to respond (Carolan 2017a). This facilitates what commentators havedescribed as "a more harmonious conception of the doctrine of the separation of powers" (Reynolds 2018), a sort of "collaborative constitutionalism" (Carolan 2011), and a "dialogue-oriented departure in constitutional remedies" (Carolan 2017a). It remains to be seen quite how exceptional and influential this new remedy will be in future case law.

6 Conclusions

Litigants have successfully challenged the constitutional validity of legislation only 44 times in 41 cases in the 31 years analysed – a 'success' rate of about one in four. The three courts tasked with dealing with challenges to the constitutional validity of legislation are both constrained, and exercise self-restraint. The courts are constrained in the sense that a default remedy is prescribed by the text of the Constitution where a law is declared unconstitutional – Article 15.4.2° providing that such a law shall be invalid, and therefore such a ruling has *ex tunc* effect. While this primarily affects the courts' diversity of decision-making, it also appears to have had a knock-on effect on the courts' propensity to exercise restraint given the consequences of *ex tunc* rulings. This constitutional provision has engendered a restrained approach by the judiciary, which has habitually exercised caution when asked to declare legislation unconstitutional. A further institutional constraint was the

'one-judgment' rule preventing Supreme Court judges from issuing dissenting rulings until 1 November 2013. It remains for future projects to analyse trends as they emerge on judicial dissent in cases concerning the constitutional validity of legislation.

Aside from constraints prescribed in the Constitution itself, the data suggests the effects of the courts exercising self-restraint in this area of law and in the field of judicial-legislative relations more generally through their adoption of a series of judicial principles; most potently the presumption of constitutionality, but also through the double construction rule and through deferential applications of the proportionality test.

Whatever of the discrete constitutional constraints and principles that may guide judges in this domain, or indeed the potential for a change of approach with the possible emergence of suspended declarations of invalidity, the results of this analysis should be considered in light of a broader trend of considerable judicial self-restraint that pervades Irish constitutional law. Judges have often espoused (and many commentators have noted) their deference to the work of the legislature and the executive, adopting a rather rigid interpretation of the separation of powers and keenly emphasising the discrete role of each of the organs of government. One judge of the High Court, Justice Costello, perhaps captured the essence of the courts' general approach in his influential judgment from 1987 in *O'Reilly v Limerick Corporation* [1989] ILRM 181, when he pithily remarked at p. 195 of his judgment that where the separation of powers arises, many cases "should, to comply with the Constitution, be advanced in Leinster House [government buildings] rather than in the Four Courts [the main court building in Ireland]."

However, it will be interesting to review equivalent data in 2030, given there appears to have been some recent innovation in judicial remedies – specifically, the Supreme Court's use of suspended declarations of invalidity as an alternative to declaring laws unconstitutional with *ex tunc* effect. One commentator has gone so far as to suggest that it "feels as if we are at a crossroads" that "could be the start of something more far reaching"(Kenny 2017, 85). That remains to be seen, but certainly, for the first time in a very long time, new ideas are emerging in the higher ranks of the Irish judiciary in constitutional litigation.

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