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[History and Use of Article 26]

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The History and Use of Article 26

Hilary Hogan[*]

Introduction

On 11 October 2023, the President convened a meeting of the Council of State to discuss the constitutionality of the Judicial Appointments Commission Bill. The Judicial Appointments Commission Bill proposes to make significant changes to the judicial appointment system, including the establishment of a Judicial Appointments Commission to recommend candidates for judicial vacancies to the Minister for Justice. Two days later, on 13 October, the President had announced that he intended to refer the Bill to the Supreme Court to assess its constitutionality. This is the first time that the Article 26 procedure has been used since December 2004, and the first time that the current President has made use of the reference procedure. President Michael D. Higgins is sometimes considered to have stretched the constitutional norms of the Presidency.[1] Yet it is notable that after twelve years in office, this is the first time he has made use of one of the President's major discretionary powers; the reference procedure included in Article 26 of the Constitution. In this paper, I first outline the primary institutional actors at play in Article 26 references, namely the President and the Council of State. Second, I outline how the Courts have approached the evaluation of Bills that have been referred by the President throughout the fifteen cases that have involved the use of Article 26. Finally, I consider why the Article 26 mechanism – an increasingly rare occurrence - may have been employed on this occasion.

The President and the Council of State

The President

Once a Bill has been passed by both Houses of the Oireachtas, it falls to the President to sign the Bill, and it duly becomes law.[2] The President thus completes the legislative process, as the office of President is constitutionally designated as the third constitutive branch of the

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[1] John Coakley, 'The Politics of the Presidency' in Farrell and Hardiman (eds) *The Oxford Handbook of Irish Politics* (OUP 2021) 366.

[2] Article 25.1. Although, of course, the legislation may not be commenced. See,

Oireachtas.[3] The President is required to sign the Bill no earlier than five days after the Bill has been presented to them, but no longer than seven days.[4] There are two exceptions, outlined under Articles 26 and 27 of the Constitution. Under Article 27, a majority of the Seanad and a third of Dáil Éireann can petition the President to refer a Bill to the public for a referendum, or back to a newly constituted Dáil Éireann. This provision has never been employed, which is likely a result of the fused legislative-executive system that characterises the interaction between the executive and legislative branches in this jurisdiction. It is difficult to envisage the kind of circumstances that would give rise to a revolt against a Government Bill from a rather unlikely coalition of a majority in the Seanad and a third of Dáil Éireann.[5]

Article 26 is the other exception, and it allows the President, after conferring with the Council of State, to refer a Bill to the Supreme Court to assess its constitutionality before it is signed into law. Money Bills, Bills that purport to amend the Constitution and Bills commenced under the shortened emergency procedure outlined in Article 24 are exempt from referral to the Supreme Court. The process of referring a Bill in the abstract allows a court to consider the constitutionality of legislation or proposed legislation in the absence of a plaintiff or defendant, often referred to as "abstract review".[6] Dedicated constitutional courts with the power to conduct abstract review of legislation exist in many major continental systems, including Germany and Spain. Ireland has a hybrid model of judicial review, as it allows litigants to challenge the constitutionality of legislation if they can show they have been affected by its operation, as well as providing for a model of abstract review in Article 26.[7]

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[3] Article 15.2 of the Constitution provides: "The Oireachtas shall consist of the President and two houses, viz.: a house of representatives to be called Dáil Éireann and a senate to be called Seanad Éireann."

[4] Article 25.2.1. A shortened procedure is provided for in Article 25.2.2 and Article 25.2.3.

[5] The authors of *Kelly: The Irish Constitution* note that this is likely thanks to "the political realities which almost always ensure that a Government majority in the Dáil will be reflected in a government majority in the Seanad (so that the hypothesis of the Article – an anti-Government majority in the Seanad allied with an anti-Government minority in the Dáil – is virtually never in practice realised." See, *J.M. Kelly: The Irish Constitution* (5th ed., Bloomsbury, 2018) 495-496.

[6] Alec Stone Sweet, 'Why Europe rejected American judicial review – and why it may not matter' (2003) 101 *Michigan Law Review* 2744, 2771-2780.

[7] Hilary Hogan, 'The Decline of Article 26: Reforming Abstract Constitutional Review in Ireland' (2022) 67 *The Irish Jurist* 123, 125-126.

The referral procedure in Article 26 provide a mechanism that provides a swift and final answer to the Oireachtas on whether a proposed Bill was unconstitutional, without taking the onerous and expensive step of amending the Constitution. As the Government was confronted with questions regarding the constitutionality of the re-enacted Offences Against the State Bill 1940, after Part IV of the Offences Against the State Act 1939 had been held to be unconstitutional, it was urged to amend the Constitution.[8] Speaking in the Seanad, the-then Taoiseach Éamon De Valera T.D. expressed his view that the President was likely to refer the 1940 Bill to the Supreme Court to provide finality on the matter, and argued that "[w]e ought not to change the Constitution, in any case, before a change has been proved necessary."[9] However, Ireland's system of abstract is unusual insofar as the power to refer a bill to the Supreme Court does not rest with the Government or houses of parliament, or a group of politicians, but rather with the independent head of state.[10] In fact, the original draft Article 26 envisaged that the President would refer the Bill to the Supreme Court if two-fifths of the Dáil or a majority of the Seanad petitioned him to do so.[11] The impetus for the referral of the Bill would then explicitly have come from a group of members of the Oireachtas. By February 1937, the drafters had vested the discretion to refer a Bill to the President, following consultation with the Council of State. A perceived benefit of this revision was that Article 26 would shield the President from being compelled to sign a Bill which he or she suspected was constitutionally dubious. John Hearne wrote that the appeal of the procedure was that it "protects the President from having to sign a Bill automatically on the advice of a Government who have used their parliamentary majority to drive an invalid measure through both Houses."[12]

There are several unusual features associated with Article 26 procedure. First, if even one provision of the Bill is found to be unconstitutional, the Bill in its entirety will fall –

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[8] *State (Burke) v Lennon* [1940] IR 136.
[9] De Valera took the view that: "A plebiscite is a costly affair; it means a campaign to educate the people regarding what they are being asked to decide, and it means a certain amount of disturbance. It is not a thing to be lightly undertaken. From these points of view we, the Government, came to the conclusion that the change ought to be effected without, if possible, a change in the Constitution." 24 *Seanad Debates* Cols. 510-516 (4 January 1940).
[10] See, Article 13.8.1 and Article 12.6.3 of the Irish Constitution.
[11] The same draft envisaged that an advisory opinion would be issued by the Supreme Court seven days later. Gerard Hogan, *Origins of the Irish Constitution,* (Royal Irish Academy, 2012) 342.
[12] Quoted in Gerard Hogan, *Origins of the Irish Constitution,* (Royal Irish Academy, 2012) 702.

something that is unique to Article 26 references.[13] Second, under Article 34.3.3, Bills that are upheld by the Supreme Court under an Article 26 reference are immune from any further constitutional challenge. Article 34.3.3 was not contained in the original text of the Constitution and was subsequently added, along with a number of other amendments, pursuant to the Second Amendment of the Constitution Act, 1941, which allowed the text of the Constitution to be amended by ordinary legislation until 1941. The provision for immunity from challenge was later added to the draft of the Constitution, for fear that decisions in Article 26 cases would be downgraded to *de facto* advisory opinions rather than binding judgments.[14]

The 1967 Committee on the Constitution proposed that the immunity from legal challenge in Article 34.3.3° be amended to allow legal challenges after seven years. The 1996 Constitution Review Group, considering whether a Bill should remain immune from any further scrutiny, considered that Article 34.3.3 should be abolished entirely, and that such an eventuality would only "impact only marginally upon legal certainty."[15] One might add that the Supreme Court has always had the power to revisit earlier judgments, and while it is a rare step for the Court to take, the Supreme Court's power to revise its earlier precedent is an important means of ensuring that mistakes are corrected, and the Court's jurisprudence is not locked into decisions and interpretations that are widely accepted to be unjust. Ordinary Supreme Court judgments are not considered to be 'advisory opinions' because they might someday be overruled. It is not clear why Bills referred to under the Article 26 mechanism would be any different. While Article 34.3.3 may have been added to bolster the legitimacy of the Article 26 process, the immunity provision under Article 34.3.3 may have had the unintentional effect of discouraging the use of the Article 26 procedure in its entirety.[16]

The Council of State

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[13] *Re the Housing (Private Rented Dwellings) Bill, 1981* [1983] IR 181, 186.
[14] Gerard Hogan, *Origins of the Irish Constitution 1928-1941,* (Royal Irish Academy, 2012) 701-705.
[15] Constitution Review Group 1996, 73. *Cf* Jaconelli who suggested that without Article 34.3.3 the Supreme Court's decision risked being "relegated to the level of an opinion." Joseph Jaconelli, 'Reference of Bills to the Supreme Court – A Comparative Perspective' (1983) 18 *Irish Jurist* 322, 327.
[16] Hilary Hogan, 'The Decline of Article 26: Reforming Abstract Constitutional Review in Ireland' (2022) 67 *The Irish Jurist* 123.

Article 31 of the Constitution outlines the composition of the group known as the Council of State, whose role is to “aid and counsel the President” in relation to the exercise of their discretionary powers, with one exception.[17] The President may not refer a Bill to the Supreme Court without first convening the Council of State, “and the members present at such meeting shall have been heard by him.”[18] The workings of the Council of State an entirely confidential, and no public records are kept of the Council’s deliberations.[19] Both the Taoiseach and Tánaiste sit on the Council of State, as well the Ceann Comhairle, the chairman of the Dáil, and the Cathaoirleach of the Seanad, who both tend to come from the majority party in Government, given Ireland’s fused executive-legislature system. Seven members are appointed at the discretion of the President if they so wish.[20] In addition, the Council of State includes former Presidents, Taoisigh and Chief Justices who are willing and able to serve on the Council of State.[21] The Attorney General, Chief Justice, and the Presidents of the Court of Appeal and the High Court are also in attendance. The Attorney General of the day straddles the political-legal classification, as a legal expert that has been appointed by the Taoiseach.[22]

The Council of State has been convened on a number of occasions to advise the President on a potential Article 26 reference, and it does not always lead to a referral of a Bill to the Supreme Court.[23] President Patrick Hillery convened the Council to deliberate and consider the Criminal Justice Bill 1984, before ultimately signing it into law. President Robinson and President McAleese both convened markedly more meetings of the Council of State and the number of referrals increased during their respective presidencies.[24] President Mary

[17] The President is not obliged to consult the Council of State before he refuses a dissolution of the Dáil to the Taoiseach under Article 13.2.2.
[18] Article 32 of the Constitution.
[19] Michael Gallagher, ‘The Political Role of the President of Ireland’ (2012) 27(4) *Irish Political Studies* 522, 530-531.
[20] Cara Augustenborg, Sinéad Burke, Dr Sindy Joyce, Maurice Malone, Johnston McMaster, Mary Murphy and Seán Ó Cuirreáin are the President’s appointees to the Council of State.
[21] Those present at the meeting on 11 October 2023 included former President Mary Robinson, former Chief Justice Frank Clarke and former Chief Justice Susan Denham, and former Taoiseach Brian Cowen.
[22] See, for example, Conleth Bradley, ‘The Political Role of the Attorney General?’ (2001) 6(8) *The Bar Review* 486.
[23] The Council of State was convened by President Seán T. O’Kelly to consider the Health Bill 1947, and nearly twenty years later by President Éamon de Valera to consider the Income Tax (Consolidation) Bill 1966. The Oireachtas passed the Income Tax (Amendment) Bill 1967 before the President came to a decision on the original Bill.
[24] Michael Gallagher, ‘The Political Role of the President of Ireland’ (2012) 27(4) *Irish Political Studies* 522, 530.

Robinson convened the Council of State on eight occasions,[25]and under President Mary McAleese, the Council of State was convened on seven occasions to consider whether a Bill should be convened to the Supreme Court.[26] Presidents Robinson and McAleese ultimately referred a total of four and three Bills respectively to the Supreme Court. President Michael D. Higgins previously convened the Council of State to consider the Protection of Life During Pregnancy Bill 2013 and the International Protection Bill 2015.

A few observations are worth making at this juncture. First, it is worth noting the degree of political representation, in particular from those in Government, at the Council of State. The Government is well placed to encourage or discourage the President to take a certain course of action. Of course, there is no guarantee that the President will comply if the Government urges him or her not to refer the Bill, and on at least one notable occasion, the President received considerable political ire for opting to refer a Bill to the Supreme Court.[27] Yet there are indicators to suggest that if the Government of the day makes it clear that it wants the Bill to be referred to the Supreme Court, the President may be slow to decline. The-then Minister of State at the Department of Environment Ruairí Quinn T.D. wrote in his memoirs on the events surrounding the lead up to the reference of the Electoral (Amendment) Bill 1983 that:

> While not allowed to request the President to directly refer a bill that has been passed by the Dáil and Seanad, a minister's open acceptance of a legitimate doubt is the code to achieve the same outcome. Accordingly, suitably briefed by my civil servants, I gave the appropriate responses on the floor of the Dáil and the Seanad in response to questions …President Hillery did refer the Bill to the Supreme Court.[28]

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[25] President Robinson convened the Council of State on eight occasions, including to consider the Fisheries (Amendment) Bill 1991 and the Criminal Justice (Public Order) Bill 1993; the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill 1995; Matrimonial Home Bill, 1993; Employment Equality Bill, 1996; and the Equal Status Bill 1997.

[26] President McAleese convened the Council of State to consider the Housing (Miscellaneous Provisions) Bill 2002, Criminal Justice Bill 2007, the Defamation Bill 2006, Criminal Justice (Amendment) Bill 2009, and the Credit Institutions (Stabilisation) Bill 2010, as well as the Bills that were ultimately referred to the Supreme Court: the Illegal Immigrants (Trafficking) Bill 1999, the Health (Amendment) (No.2) Bill 2004 and the Planning and Development Bill 1999.

[27] See the events surrounding the referral of the Emergency Powers Bill by President Patrick Hillery. David Gwynn Morgan, 'The Emergency Powers Bill Reference – I' (1978) 13(1) *The Irish Jurist* 67. Michael Gallagher, 'The Political Role of the President of Ireland' (2012) 27(4) *Irish Political Studies* 522, 531-532.

[28] Ruairí Quinn, *Straight Left: A Journey in Politics* (Hodder, 2005) 204.

This suggests that there was, at least at one stage, a political practice of signalling to the President that a Bill ought to be referred to the Supreme Court. The 1996 Constitution Review Group went so far as to consider that the President would be bound to refer a Bill to the Supreme Court if the Government so requested, noting that:

> If the Government asked for a referral and the President refused, a crisis could ensue in which the President's independence or impartiality might be impugned, to the detriment of the office.[29]

This might be something of an overstatement: given that the proceedings of the Council of State are confidential, it is hard to see how a crisis could unfold in such circumstances unless the Government took steps to make the matter public knowledge. In any event, it is clear that the Government is well represented in the proceedings leading up to the referral of a Bill to the Supreme Court, and is not lacking in opportunities to make its position clear to the President, and to exercise its soft power in encouraging a particular course of action.[30] The Attorney General, moreover, often plays a central role in the Council of State proceedings. In some recorded instances, the Attorney General has been tasked with briefing the Council of State on the provisions of the Bill and discussing its ramifications to the assembled Council of State. The Attorney, as the Government's legal advisor, will normally have had a central responsibility in advising the Government from the outset whether a particular Bill has constitutional dimensions, and advising on the drafting of the legislation.

Second, the Council of State represents an exception from the usual expectation that sitting judges cannot offer their opinions on live legal issues. Given that the Constitution explicitly envisages that the members present at the Council "shall have been heard" by the President, it clearly allows for judges to offer their views on the constitutionality of a Bill, and the merits of referring the Bill to the Supreme Court. The presence of the Chief Justice is even stranger in this regard, given that the Chief Justice leads the Court that will ultimately determine whether the Bill is constitutional, and as O'Dell has pointed out, the Chief Justice of the day has invariably delivered the final judgment on the Bill.[31] Given the centrality of

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[29] Constitution Review Group 1996, 69.

[30] Hilary Hogan, 'The Decline of Article 26: Reforming Abstract Constitutional Review in Ireland' (2022) 67 *The Irish Jurist* 123, 130.

[31] Although O'Dell notes that the Chief Justice has always authored the judgment given in Article 26 references, the application of the one judgment rule means that the authorship of the judgment cannot be conclusively

the separation of powers to our constitutional settlement more broadly, it is curious that the Constitution should explicitly provide not only that the Chief Justice is to be present, but expected to offer their opinion and advise the President on whether the Bill should be referred to the Court. It would be unthinkable in any other scenario that the Chief Justice, or any sitting judge, would be expected to offer their views on the constitutionality of legislation in advance of anticipated litigation. On this occasion, the Chief Justice has recused himself from the panel, which will mark the first occasion that a Chief Justice has not sat on an Article 26 reference.

Third, the President does not have the benefit of any independent legal counsel to advise him. The President must hear the views of the members of the Council of State, which includes a number of current and former prominent members of the judiciary, who naturally have considerable legal expertise. Previously, the President has chosen to appoint a former Supreme Court judge to the Council of State.[32] But that is distinct from the benefit of assigned legal counsel who is tasked with providing specific legal advice to the President. While the sitting and former members of the judiciary on the Council of State are entitled to offer their frank views on the constitutionality of the Bill to the President, although they are operating under time constraints, as every member of the Council of the State must be granted an opportunity to speak. Notably, during the presidency of Mary Robinson, it was accepted by the Government of the day that the President should be allowed to take professional legal advice, and she sought legal advice on two occasions from the-then Chairman of the Bar Council, Frank Clarke S.C. Professor Gwynn Morgan noted that, crucially, it was accepted that “the President is not expected to go to the Attorney General (the Government's legal advisor, who drafts all bills) for advice.”[33] There is nothing to indicate, however, that any similar advice was sought by any subsequent President. Of those present at the Council of State, the Government representatives are the only ones present who will

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determined. The variation in writing style throughout Article 26 judgment suggests that the judgment is to some degree a collaborative effort. See Eoin O’Dell, ‘The Council of State and the recusal of judges’ cearta.ie 9 January 2012, available: <http://www.cearta.ie/2012/01/the-council-of-state-and-the-recusal-of-judges/comment-page-1/>

[32] President Michael D. Higgins appointed Ms Justice Catherine McGuinness, former judge of the Supreme Court, to the Council of State in his first term of office.

[33] David Gwynn Morgan, ‘Mary Robinson’s Presidency: Relations with the Government’ (1999) 34 *Irish Jurist* 256, 259 fn 19.

have certainly received legal advice from their own legal advisor, the Attorney General, who in turn has the expertise of the office of the Attorney General and any other counsel whose advice is sought. In other words, not every member of the Council of State attends the meeting equally situated and informed.

Article 26

What type of power is Article 26?

It is rare that Article 26 is considered outside of this small selection of cases determined pursuant to an actual Article 26 reference. That opportunity did arise however, in the recent case of *Right to Know CLG v Commissioner for Environmental Information*.[34] In this case the appellants had sought to access documents relating to speeches given by President Michael D. Higgins and as well as memoranda, briefing notes and other information relied on by the Council of State in their deliberations on the Planning and Development Bill 1999, and s. 24 of the Housing (Miscellaneous Provisions) (No. 2) Bill 2001. The appellants had sought to rely on the Access to Information on the Environment Directive (Directive 2003/4/EC), which had been implemented in Irish law under the AIE Regulations.[35] This is one of two Directives that implements the Aarhus Convention, which is designed to improve public access to information on the environment, and to encourage public participation in environmental decision-making. The AIE Regulations had been amended to expressly exclude the President, the Council of State, and the office of the Secretary to the President from the definition of 'public authority.'[36]

In the High Court, Barr J concluded that while the AIE Directive allowed Member States to exclude bodies that were constitutionally immune from review, Ireland had not opted to expressly exclude the President when implementing the Directive.[37] The Council of State was excluded from Article 3(2) of the AIE Regulations as he found that the Council of State was assisting the President in exercising his legislative function under Art. 26 of the Constitution. On appeal, the Supreme Court disagreed with Barr J's assessment that the reference

[34] [2023] 1 I.L.R.M. 122.
[35] European Communities (Access to Information on the Environment) Regulations 2007-2014.
[36] The European Communities (Access to Information on the Environment) (Amendment) Regulations 2018 (S.I. No. 309 of the 2018).
[37] [2021] IEHC 273, para. 39.

procedure under Article 26 constituted a "legislative function."[38] In choosing to make an Article 26 reference, the President did not "exercise political or legislative power".[39] Rather, when the President opted to exercise the power to refer a Bill to the Supreme Court, he or she "performs a role which is protective of the legislation and the Constitution" but that did not amount to a legislative power.[40]

Counsel and Court Procedure

The Supreme Court panel to hear the Bill must be composed of at least five judges. The current panel is composed of seven judges. [41] The current Chief Justice is not sitting on the panel, nor is Mr Justice Seamus Woulfe, who was Attorney General when an earlier version of the Bill was considered by the Government. The one judgment rule applies, and the Supreme Court should pronounce its decision no later than sixty days after the reference by the President to the Supreme Court. [42] Given that the present Bill was referred on 13 October 2023, a judgment should be delivered by the Supreme Court in the second week in December at the latest. Counsel is assigned by the Supreme Court to argue against the constitutionality of the Bill, and the counsel briefed by the Attorney General defends the Bill. The tradition has been that counsel assigned to argue against the Bill's constitutionality goes first, followed by the arguments from the Attorney General's team in defence of the Bill.[43] In the first two Article 26 references, counsel for the State spoke first, followed by counsel appointed by the Court, but this practice has been discontinued in favour of the traditional format that exists for constitutional challenges, on the basis that the earlier approach sat rather uneasily with the presumption of constitutionality.[44]

On occasion, the Supreme Court has assigned counsel to argue multiple perspectives. In *Re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995,* two teams of counsel were tasked with arguing that the Bill was

[38] [2023] 1 I.L.R.M. 122, 139.
[39] [2023] 1 I.L.R.M. 122, 139.
[40] [2023] 1 I.L.R.M. 122, 140.
[41] Ms Justice Dunne, Mr Justice Charleton, Ms Justice O'Malley, Ms Justice Baker, Mr Justice Hogan, Mr Justice Murray and Mr Justice Collins.
[42] Article 26.2.2.
[43] *Kelly: The Irish Constitution* (5th ed., Bloomsbury, 2018) para. 4.5.110.
[44] Gerard Hogan, *Origins of the Irish Constitution 1928-1941,* (Royal Irish Academy, 2012), 344.

unconstitutional, one from the perspective of the right to life of the woman, and the right to life of the unborn.[45] It might be supposed that, given the magnitude of proceedings, the Attorney General would invariably appear in person to defend the Bill. In practice, however, the Attorney General of the day has only appeared in about half of Article 26 references, and alternative counsel are regularly briefed. To take the most recent examples, the-then Attorney General Rory Brady SC did not argue *Re Article 26 and the Health (Amendment) (No 2) Bill 2004,* nor did Attorney General Dermot Gleeson SC appear in the Employment Equality Bill or the Equal Status Bill references. Attorney Michael McDowell SC did not appear in *Re Art 26 and the Illegal Immigrants (Trafficking) Bill 1999,* although this was presumably due to the fact that he was due to appear as counsel in *Re Planning and Development Bill 1999,* which took place at the end of July 2000, directly after the hearings in the former Article 26 case had concluded. In relation to the Judicial Appointments Commission Bill reference, Attorney General Rossa Fanning SC argued the case personally, alongside Michael Collins SC, who has previously appeared as counsel in an Article 26 reference, namely *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999.* Of the Supreme Court bench, four of them have themselves previously appeared as counsel in Article 26 reference cases.[46]

The President can choose to refer any individual provision, or provisions of the Bill, or the Bill in its entirety can be referred to the Supreme Court.[47] Yet regardless of what the President opts to do, if any aspect of the referred Bill is found to be unconstitutional, then the Bill as a whole fails. Unlike standard constitutional challenges to legislation, the procedure set down in Article 26 is that an unconstitutional provision cannot be severed from the rest of the Bill. One might imagine then that there is little incentive to refer only particular sections of the Bill to the Supreme Court. If the remainder of a Bill cannot be saved from a finding of unconstitutionality, even if only a specific section has been found to be unconstitutional, why not refer the Bill in its entirety? It has been suggested that it might prove to difficult to isolate specific provisions of the Bill for review by the Supreme Court, particularly if, given

[45] *Re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 IR 1, 20.
[46] Current members of the Supreme Court appeared in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Re Article 26 and the Planning and Development Bill 1999; Re Article 26 and the Equal Status Bill* [1997] 2 IR 387*; Re Article 26 and the Employment Equality Bill* [1997] 2 IR and *Re Article 26 and Regulation of Information (Services Outside the State For Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.
[47] Article 26.1.1.

the manner in which a Bill is drafted, they form part of a heavily inter-dependent legislative scheme.[48]

In three of the sixteen Article 26 references that have taken place to date, it has proved possible for the President to isolate specific provisions within a Bill to be evaluated by the Supreme Court. In *Re Article 26 and the in the Matter of the School Attendance Bill 1942,* s. 4 of the School Attendance Bill 1942 was referred to the Supreme Court. Section 4 provided that a child who was being educated outside of a standard school setting – such as in the home - would not be considered to be in receipt of suitable education unless the Minister had certified it as such.[49] The Minister was entitled to certify both the education and the manner in which the child received the education. Article 42.3.1 of the Constitution provides that the State shall require children to "receive a certain minimum education." The Court considered that while it was for the Oireachtas to determine what that constituted in practice, Article 42.3.1 suggested "a minimum standard of elementary education of general application."[50] The Supreme Court considered that s. 4 might plausibly be interpreted to insist children receive a higher standard of education than the State was entitled to prescribe in the Constitution, and moreover, the Court considered that the Minister could not oversee the 'manner' in which education was being provided, which was considered to be an unconstitutional violation of parental rights. Consequently the Bill was held to be an unconstitutional violation of Article 42.

In *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999,* for instance, the Supreme Court was asked to determine whether ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999 were unconstitutional.[51] Section 5 established a fourteen-day time limit to initiate judicial review proceedings of decisions or orders made under a number of immigration and asylum acts. Section 10 of the Bill empowered the Minister to make deportation orders in respect of non-nationals, including those who application for asylum had been rejected. Section 10 also provided members of An Garda Síochána with a wide ranging power of arrest

[48] Gerard Hogan, *Origins of the Irish Constitution 1928-1941,* (Royal Irish Academy, 2012), 348.
[49] [1943] IR 334.
[50] [1943] IR 334, 345.
[51] [2000] 2 IR 360.

without warrant individuals whom they suspected, *inter alia*: of having failed to comply with a provision of a deportation order; of being in possession of forged identity documentations or intends to evade removal from the State. In *Re Article 26 and Part V of the Planning and Development Bill,* the President referred the entirety of Part V of the Planning and Development Bill, required developers to make up to 20% of a development, available to the local authority at "existing use value" for the purposes of social and affordable housing. One rationale for the President specifying the provisions that the Supreme Court ought to examine is that it may be very clear that there is only one specific aspect of the Bill that is raising constitutional concerns, and in the interests of efficient administration of justice, and efficient use of the Court's time, to narrow the inquiry from the outset. This is particularly the case where the Supreme Court may be faced with assessing the constitutionality of a very complex and lengthy Bill, with an extremely short time frame in which to make its assessment, as the Court strongly hinted in *Re Article 26 and the Employment Equality Bill.*[52]

On this occasion, the President has referred sections 9, 10, 39, 40(2), 42, 43, 45, 46, 47, 51, 57 and 58 of the the Judicial Appointments Commission Bill to the Supreme Court, although media reports suggest that the focus of the Council of State's deliberations were on s. 47 and s. 51 of the Bill.[53] Section 47(1) states that where there is one judicial vacancy to be filled, the Commission shall recommend 3 persons for the position, and there is more than one vacancy, three people and 2 additional people for each additional vacancy. Under s. 47(2) and s. 47(3) the Commission cannot recommend to the Minister the number of persons, it can recommend a lesser number of persons, and set out its reasons in writing why it cannot recommend the requisite number of persons. Where the Commission considers that it cannot make a recommendation for any person for a judicial vacancy, it should set out its reasons in writing to the Minister and forward the names of each person who applied in respect of the vacancy.[54] Section 51(1) states that "the Government shall only consider for

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[52] [1997] 2 IR 321, 331. Hamilton CJ noted that "When one considers that the Bill consists of 74 sections and either amends or refers to 33 other statutes one can see that the task confronting the Court is formidable one. The task is not made lighter by the fact that the Court is constitutionally obliged to give its decision on the Bill within 60 days of the date on which the Bill was referred to the Court by the President. Within this time the Court must assign counsel, given them time to prepare their written submissions, hold an oral hearing at which the issues are debated in open court, make its decision and deliver its judgment."

[53] Harry McGee, 'How the Council of State advised President at meeting on judicial appointments Bill' *The Irish Times* 13 October 2023.

[54] S. 47(4) and s. 47(5).

appointment those persons who have been recommended by the Commission to the Minister" under the procedure established by s. 47 of the Bill. While these are the two provisions that have attracted the most public criticism and attention to date, the reference by the President allows for the Court to grapple with much of the broader changes introduced by the Bill.

Development of Article 26

Other doctrinal developments have emerged throughout the caselaw on Article 26. One issue that the Supreme Court has grappled with is whether a Bill referred under the Article 26 procedure should be analysed in its entirety. As we have seen, the President has the discretion to refer a specific portion of a Bill, or the whole Bill, to the Supreme Court. The question is whether, once the Supreme Court has found that even a single section is unconstitutional, the Bill should simply be struck down there and then, or whether the Supreme Court should carry on and evaluate *all* the referred aspects of the Bill. The former approach has found favour for much of the case law on Article 26. The Court would evaluate the Bill's constitutionality, and if a specific section was found to be constitutionally suspect, the Bill would be struck down, and the Court would not proceed to examine the remainder of the Bill. In *Re Article 26 and The Housing (Private Rented Dwellings) Bill 1981,* the Court noted that it was not the task of the Court "to impress any part of a referred bill with a stamp of constitutionality."[55] The rationale was that once a particular section of the Bill was found to be unconstitutional, the Bill was bound to fail and the Court considered that its constitutional obligations had been fulfilled. It was not tasked with evaluating each section of Bill if an earlier provision had already been held to be unconstitutional. As a result, there could be substantial portions of a Bill that were left unexamined by the Supreme Court. As O'Higgins noted in *Re Article 26 and The Housing (Private Rented Dwellings) Bill 1981* there "may be areas of a referred bill or of referred provisions of a bill which may be left untouched by the Court's decision."[56] This was affirmed in *Re Article 26 and the Matrimonial Home Bill 1993.*[57]

[55] [1983] I.R. 181, 186.
[56] [1983] IR 181*,* 186.
[57] [1994] 1 I.R. 305.

The Supreme Court adopted a different approach, however, in an unusual set of circumstances whereby both the Employment Equality Bill 1996 and the Equal Status Bill 1997 were referred to the Supreme Court within a matter of weeks. Both Bills contained a number of identical provisions, and they were referred by President Mary Robinson in quick succession.[58] The hearings on the Employment Equality Bill took place in late April and early May 1997, followed by the Equal Status Bill hearings in early June of the same year. In the first set of hearings on the Employment Equality Bill 1996, the Court considered at the outset of its judgment that a change of approach was warranted in this particular case. The Court had been asked to assess a lengthy piece of Bill that proposed to amend a number of other pieces of legislation, which was due to be followed by another Article 26 reference on a Bill in very similar terms. If the Court ended its inquiry after a finding that one provision of the Employment Equality Bill was unconstitutional, there could be other problematic provisions that would remain intact when the Oireachtas came to amend the Bill. This could plausibly result in multiple Article 26 references. In light of this, the Court considered that the best course of action would be for it to review the Employment Equality Bill in its entirety, and in particular the sections of the Bill that had been challenged by counsel assigned to argue against its constitutionality.[59] The Supreme Court found that the provisions of the Bill that obliged employers to make reasonable adaptations to their workplaces to facilitate the employment of disabled persons unless it would cause 'undue hardship to the employer' were an unconstitutional violation of private property rights.[60] The imposition of vicarious liability for the criminal acts of their employees in s. 15, as well as the provision for evidence to be admitted via a certificate certified by a company director in s. 63(3) were also held to be unconstitutional.

The hearings for the Equal Status Bill took place shortly afterwards, in early June 1997, with the same legal team in place for both sides. Several provisions of the Equal Status Bill were now rendered inoperable by virtue of the decision in *Re Art 26 and the Employment Equality Bill 1996,* as they were contingent on the enactment of the Employment Equality Bill, which

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[58] President Mary Robinson referred the Employment Equality Bill 1996 on 3 April 1997, followed by the Equal Status Bill on 7 May 1997.
[59] *Re Art 26 and the Employment Equality Bill 1996* [1997] 2 IR 321, 333.
[60] S. 16 and s. 35 of the Employment Equality Bill.

could now not be enacted. The Court accepted that this did not, in and of itself, render the Equal Status Bill unconstitutional. The more pressing issue was that both s. 15 and s. 63(3) of the Employment Equality Bill had counterparts in s. 40(3) and s. 71 of the Equal Status Bill. Counsel for the Attorney General, the Supreme Court noted in its judgment, "properly and unavoidably acknowledged" that they could not now defend the constitutionality of the provisions of the Equal Status Bill as two of the provisions were, to all intents and purposes, identical to those of the Employment Equality Bill.[61] Regardless, counsel for the Attorney General asked the Court to evaluate the Bill as a whole.

Unusually, the Supreme Court declined to do so. First, the Court distinguished the practice that it had adopted just a month beforehand in its decision in *Re Employment Equality Bill.* The Court had engaged in an extensive review of the Bill, it explained, only to avoid the prospect of multiple Article 26 references. Second, the Court pointed out that it was aware that two provisions of the Bill were 'indisputably' unconstitutional, the Bill could not enjoy a presumption of constitutionality.[62] There was, the Court considered, "no presumption" for counsel to rebut, and "no justiciable issue for the Court to try." For the same reasons that the identical substantive provisions had been found unconstitutional a month beforehand, so too were s. 40(3) and s. 71 of the Equal Status Bill 1997. The Court considered that its task, in that case, was complete. One might add that a similar but related question arises where the President has opted to refer a specific section of a Bill for determination by the Supreme Court: is the Court then confined to examining only this particular provision? The same problem arises. If the Supreme Court examines only the referred section and concludes that it is compatible with the Constitution, and concludes its analysis at that point, the circumstances could easily arise whereby the Oireachtas amends the Bill in light of the guidance provided by the Supreme Court, only for the Bill to be referred once again.

Presumption of Constitutionality

A Bill referred to the Supreme Court under the Article 26 mechanism enjoys the same presumption of constitutionality as ordinary legislation.[63] This was established in the first

[61] *Re Art 26 and Equal Status Bill 1997* [1997] 2 IR 387, 399.
[62] *Re Art 26 and Equal Status Bill 1997* [1997] 2 IR 387, 402.
[63] *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, 367-370.

Article 26 reference that came before the Supreme Court,[64] where the Court noted that any alleged unconstitutionality must be "clearly established."[65] The Supreme Court later adopted this position explicitly in *Re Article 26 and in the matter of the Criminal Law (Jurisdiction) Bill 1975.*[66] Thus, the normal canons of constitutional interpretation, including those set down in *East Donegal Co-operative Livestock Mart Ltd v Attorney General,* apply.[67] Where there are two plausible interpretations of a Bill or provisions contained within it, the Court will opt to adopt the construction that is compatible with the Constitution.[68] The argument that the presumption of constitutionality should not apply rests on the basis that the law-making process has not been completed, as the President has not signed the Bill into law. The approach of the Supreme Court is that the President plays no meaningful role in the 'purely legislative function of the Oireachtas.'[69] The fact that the President has referred the Bill should not, in the eyes of the Court, question its constitutionality from the outset.[70] While the Supreme Court has been urged to reconsider the presumption, it has reaffirmed its position on Article 26 references on a number of occasions.[71]

In the ordinary course of litigation, counsel for the Applicant is tasked with demonstrating that a piece of impugned legislation is unconstitutional. The Oireachtas has long enjoyed a presumption of constitutionality, and it is for the Applicant challenging the law to displace that presumption. This default position applies even in the application of the proportionality test: the burden of proof rests entirely with the Applicant.[72] To challenge the constitutionality of a law, a plaintiff must demonstrate that their interests have been adversely affected by the operation of the law in question.[73] As a matter of course, the case revolves around the specific facts of the individual's circumstances, to demonstrate that not

[64] *Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470, 478.
[65] *Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470.
[66] [1977] I.R. 129.
[67] *The Adoption (No. 2) Bill 1987* [1989] IR 656, 661.
[68] 25. See also *Information (Termination of Pregnancies) Bill 1995* [1995] 1 IR 1.
[69] *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 at 369.
[70] *Kelly: The Irish Constitution* (5th ed., Bloomsbury, 2018) para. 4.5.104.
[71] *Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305, 315-317; *Re Housing (Private Rented Dwellings) Bill 1981* [1983] I.L.R.M. 246, 249; *Re Art 26 of the Constitution and in the Matter of Adoption (No 2) Bill 1987* 660; *Re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 IR 1, 25.
[72] David Kenny, 'Proportionality, the Burden of Proof and some signs of reconsideration' (2014) 52(2) *The Irish Jurist* 141.
[73] *Cahill v Sutton* [1980] IR 269, 282-284.

only do they have clear standing to challenge the law, but often evidence is adduced to buffer the Plaintiff's case that the legislation has had a particularly egregious impact on them. As O'Donnell CJ. noted in *O'Doherty v Minister for Health,* if a Court is to invalidate a piece of legislation passed by the Oireachtas at the behest of a single individual, it is important to hear and test their evidence to establish whether their rights have, in fact, been violated to such a degree that would warrant the invalidation of the Act in question.[74]

Article 26 references are distinctive in that there is no identifiable plaintiff. Counsel assigned by the Court tasked with arguing against the Bill's constitutionality must argue the case entirely in the abstract and invite the Court to speculate on potential unfairness that could arise. In some respects, it is a more straightforward task for counsel; rather than being tied to the specific facts presented by an individual plaintiff, counsel can invite the Court to envisage or imagine circumstances where the Bill could cause give rise to considerable unfairness. The Supreme Court does not tend to hear evidence in Article 26 hearings. As there is no litigant who is attempting to demonstrate that an Act of the Oireachtas has had a particular impact on them, the usual justification for which evidence would be adduced is absent. In *Re Housing (Private Rented Dwellings) Bill 1981,* the Supreme Court noted that, to date, no evidence had been heard in any Article 26 reference. O'Higgins CJ pointed out the difficulty the Court would find itself in, with at least five judges tasked with producing a unanimous judgment faced with conflicting evidence.[75] The question of whether evidence should be admitted was reserved in *Private Rented Dwellings Bill,* and subsequently in *Re Article 26 and the Regulation of Information (Services Outside the State for Termination (Pregnancies) Bill 1995* the Court took this a step further and pronounced that "no evidence is received when the Court is considering a Bill."[76] This is not as unusual as it may appear. Evidence may buffer a constitutional challenge in highlighting the effects on individual litigant, but as the Supreme Court recently affirmed in *O'Doherty v Minister for Health,* it is

[74] See the comments of O'Donnell CJ in *O'Doherty v Minister for Health* [2022] IESC 32, para. 37; [2022] 1 I.L.R.M. 421, 442 – 443.
[75] *Re Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181 248.
[76] *Re Article 26 and the Regulation of Information (Services Outside the State for Termination (Pregnancies) Bill 1995* [1995] 1 IR 1.

by no means necessary for a successful constitutional challenge. Legislation can be challenged and defended "solely on the basis of argument, analysis, inference, and logic."[77]

In *Re Article26 and the Health (Amendment) (No.2) Bill*, patients in public nursing homes had been subject to fees for several decades which lacked any legal basis. The Oireachtas sought to retrospectively legalise the imposition of the fees via the Health (Amendment) (No. 2) Bill, as well as to extinguish the rights of the affected patients to recover for the illegal payments. The Supreme Court noted that it did not have actual evidence before it on the personal circumstances of the many individuals who had been subject to unlawful charges levied by the Health Boards. Nonetheless, the Court considered that it was reasonable to infer, both from the Bill's legislative history and the widespread common understanding that those who availed of Health Boards were drawn from the poorer sectors of society, and given the timescale which these events took place, they would now be elderly. Thus, the Court focused on the impact that the failure to repay the out-patient charges would have on a social group who were likely to be elderly, impoverished and potentially suffering from a mental disability or otherwise vulnerable.[78]

In cases such as *Re Article 26 and the Employment Equality Bill* and *Re Article 26 and the Matrimonial Homes Bill*, the Supreme Court envisaged hypothetical scenarios where the Bills would cause particular unfairness. In the former case, the Court concluded that the Bill would potentially impact severely on employers of small businesses.[79] In *Re Matrimonial Homes Bill,* the Court considered that converting home ownership into joint co-ownership between spouses could potentially interfere with the wishes of married couples, it could amount to an unconstitutional interference with Article 41. In other words, the Court is tasked with trying to imagine in what possible factual circumstance the Bill would plausibly be considered to be unconstitutional. The drawback with this line of case law is that it seems to produce slightly artificial results, as the Supreme Court seems to feel itself bound to

[77] *O'Doherty v Minister for Health* [2022] IESC 32, para. 45.
[78] *Re Article 26 and the Health (Amendment) (No. 2) Bill 2004* [2005] 1 I.R. 205.
[79] Such a scenario did seem to be contemplated by the Employment Equality Bill, given that the Bill explicitly made provision for employers to be excluded from making reasonable accommodation for disabled employees where it would cause 'undue financial hardship.' See Hilary Hogan and Finn Keyes, 'The Housing Crisis and the Constitution' (2021) 65(1) *The Irish Jurist* 87, 94. See also, Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press, 2021) 144-145.

consider whether the Bill would be constitutional in every conceivable factual scenario. A Bill involving a complex areas of social policy, for example, might plausibly cause hardship or unfairness that meets the threshold for unconstitutionality in an extreme set of factual circumstances. As a result, some Bills have been found to be unconstitutional on the basis of imagined factual scenarios which, it has been pointed out, may never have arisen by way of ordinary constitutional challenge.[80]

It has, however, previously been suggested that the Article 26 reference procedure is particularly well-suited for cases involving clearly defined constitutional questions where the constitutional analysis provided by the Supreme Court would largely be consistent even in the face of shifting fact patterns. In other words, the Supreme Court's analysis – and its answer – would likely be the same, regardless of the identity of the challenger to the legislation. The Judicial Appointments Commission Bill seems to fall rather neatly into that category. Rather than diverse questions that can be posed in areas of social policy, the constitutionality of the Bill does not depend on the question of the hypothetical factual circumstances of an imagined litigant.

Why has Article 26 been revived?

If Article 26 was included in the Constitution to provide certainty on the constitutionality of proposed Bills, it cannot be said to have been successful at this task. This is only the sixteenth such reference since the foundation of the State, and the first time since late 2004. There have been no shortages of controversies and contested pieces of legislation where the constitutionality of a proposed course of action has been publicly contested by politicians, lawyers and academics. The decline in the use of Article 26 can be contributed to a number of factors. It has been suggested that Article 26 was, at least at one stage, unpopular with the judiciary: Casey wrote in 2001 that judges were "hostile to Article 26, in private."[81] This may stem from some of the more rigid aspects of the procedure, not least the tight frames, the imposition of the one judgment rule, and the discomfort that may arise when the judiciary are called upon to depart from standard procedure and consider the

[80] *Kelly: The Irish Constitution* (5th ed., Bloomsbury, 2018) para. 4.5.124.
[81] James Casey, *Constitutional Law in Ireland* (Roundhall, 2001) 216.

constitutionality of the Bill in the abstract. Another major source of criticism is the requirement that if a Bill survives constitutional challenge in an Article 26 reference, it enjoys a permanent seal of constitutionality.[82] This might, ironically, make the President slower to exercise his discretion under Article 26, for fear of copper fastening a potentially problematic Bill. In one interview to a national newspaper, President Michael D. Higgins stated that:

> I have to, as President, operate with a certain amount of prudence in relation to how I interpret my powers under Article 26. It's a deep process, because I know that if I refer a piece of legislation to the Supreme Court, I am closing off the opportunity for other citizens, for citizens to challenge it later on. So what I have to bear in mind is this: if something strikes me in the legislation as raising a constitutional issue, is this best tested by my Article 26 exercise of power? Is this better tested by a factual statement of a case?[83]

In 2020, a statement released in the wake of President Higgins's decision to sign the controversial Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Records Bill into law hinted at a similar sentiment.[84]

If the immunity provided for in the Bill leaves the President slow to exercise his discretion under Article 26, the Government also has further incentives not to encourage the use of Article 26. The fused nature of the executive-legislative branch means that the government of the day dominates the legislative process. The Government will command a majority in the Oireachtas meaning that, in practice, legislation does not get passed without the assent of the Government. As the legal advisor to the Government, the Attorney General and his office advise the Government on constitutionality of bills, proposed measures and policies. In practice, it appears that Bills do not progress to the Oireachtas unless the Attorney

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[82] In *Re Private Rented Dwellings,* O'Higgins wrote that: "Whether the constitutionality of a legislative measure of that nature which has been passed or is deemed to have been passed by both Houses of the Oireachtas is better determined within a fixed and immutable period of time by means of reference under Article 26, in which case, if no repugnancy is found, the decision may never be questioned again in any court, rather than by means of an action in which specific imputations of unconstitutionality would fall to be determined primarily or proven or admitted facts, is a question on which we refrain from expressing an opinion." 248-249.

[83] Fionnan Sheahan, 'Higgins admits he's reluctant to close off legal challenges to bills by public' *Irish Independent* 12 October 2013.

[84] Relating to retention of documents gathered by the Commission of Investigation into Mother and Baby Homes

General of the day considers that the Bill is constitutional.[85] For a Government that is grappling with the question of whether a Bill strays outsides constitutional parameters, it is far more simple and straightforward to ask the Attorney General to provide their advice at an initial stage in the law-making process, rather than encouraging the President to refer a Bill to the Supreme Court after it has already passed both the Houses of the Oireachtas.[86] The latter occurs at a far later stage, where the work has already been expended on the Bill, involves far greater publicity and of course, there is no guarantee that the President will do so. It also brings with it the potential public embarrassment of a finding of unconstitutionality by the Supreme Court.

What is different about this Bill? The Article 26 reference procedure has not altered since 2004. The proposal made by then-Minister for Justice Alan Shatter T.D. in 2012 to remove the immunity of Bills that survived the Article 26 procedure was ultimately abandoned. The same difficulties remain with the procedure: the time frame, the one-judgment rule, and the subsequent immunity for the Bill. A few factors may have led to the President's decision to refer the Bill to the Supreme Court, or indeed, the encouragement of various members of the Council of State for him to do so. First, as outlined above, the Judicial Appointments Commission Bill seems to be particularly well suited to be evaluated by the Supreme Court under the Article 26 reference procedure. The constitutionality of the Bill will likely turn on the capacity of the Oireachtas to regulate the Government's discretion to fill judicial vacancies. These are issues that do not depend on complex matters of social and economic policy, or issues that the Supreme Court may prefer to hear evidence. The Supreme Court's assessment of the Bill would likely be relatively similar regardless of the particular fact pattern of the individual plaintiff. In other words, it seems likely that the Supreme Court will not have to engage in the kind of hypothetical fact scenarios that can lead to rather artificial findings of unconstitutionality. This is not to say that the appointment of judges is not a

[85] Ruairí Quinn, for example, wrote in his memoir that: 'A government cannot knowingly introduce legislation that the Attorney General deems to be unconstitutional.' See, Ruairí Quinn, *Straight Left: A Journey in Politics* (Hodder, 2005) 204.

[86] David Kenny and Conor Casey, 'A One Person Supreme Court? The Attorney General, Constitutional Advice to Government, and the Case for Transparency' (2020) 43 *Dublin University Law Journal* 89; David Kenny and Conor Casey, "Shadow Constitutional Review: The Dark Side of Pre-enactment Political Review in Ireland and Japan" (2020) 18(1) *International Journal of Constitutional Law* 51; Hilary Hogan, 'The Decline of Article 26: Reforming Abstract Constitutional Review in Ireland' (2022) 67 *The Irish Jurist* 123.

complex and important one, and in fact, it will likely touch on provisions of the Constitution that have not yet been interpreted in depth. But these factors indicate that the Judicial Appointments Commission Bill may be particularly suitable for the Supreme Court to consider it in the absence of a plaintiff.

Second, the Judicial Appointments Commission Bill is the kind of Bill that would pose serious problems if it was the subject of a finding of unconstitutionality post-enactment. If the Judicial Appointments Commission Bill had passed into law, and judicial appointments were made pursuant to the legislation, only for the Act to be subject to a successful constitutional challenge, it would raise uncomfortable questions about the legality of the previous appointments. Once an Act is found to be unconstitutional, it is ordinarily considered to be void from the date it was enacted. Of course, the courts have accepted that not every action taken pursuant to a statute later found to be unconstitutional is invalid. While it had been found in *De Búrca v Attorney General* that certain provisions of the Juries Act 1927 were unconstitutional,[87] this did not, however, mean that all jury trials that had empanelled juries under this system were unlawful.[88] The Supreme Court's relatively new practice of suspending declarations of unconstitutionality has also eased the dramatic fallout of a finding of unconstitutionality. However, there remain good reasons to believe that more serious questions would arise if the Judicial Appointments Commission Bill had been passed into law and found to be unconstitutional. While any finding of unconstitutionality brings with it some disruption, there are particular levels of complexity that would arise in a situation where judicial decisions had been handed down by judges who have been appointed pursuant to an appointments procedure which was later held to be unconstitutional. A suspended declaration of unconstitutionality would provide time to the Government to introduce new and revised legislation, but it would not satisfactorily resolve the issue of previous judicial appointments, and any corresponding court proceedings and judgments. Moreover, applicants would presumably be unwilling to apply for judicial vacancies lest their appointment would later be called into question.[89] At the very least, it would cast a shadow over the integrity of the judicial process, and would risk undermining

[87] *De Búrca v Attorney General* [1976] IR 86.
[88] *State (Byrne) v Frawley.*
[89] I am grateful to Professor Oran Doyle for this observation.

public confidence in the courts. It would, in other words, give rise to the kind of damage that would be very hard to undo. Much the same discomfort was apparently what gave rise to previous Article 26 references which have touched on questions such as the extension of the franchise to British citizens in *Re Article 26 of the Constitution and the Electoral (Amendment) Bill, 1983,*[90] and the revision of electoral constituencies in *Re Article 26 of the Constitution and the Electoral (Amendment) Bill, 1961*.[91] The status of elections that had been held pursuant to legislation later deemed unconstitutional would be legally doubtful. Finally, one might speculate that the Government may be more receptive to the Supreme Court examining the provisions of the Judicial Appointments Commission Bill, given that the impetus for the Bill is at least, in part, external, influenced as it has been by recommendations issued by Council of Europe's Group of States against Corruption (GRECO).

Conclusion

Article 26 is a relatively straightforward mechanism that allows the political branches to establish the parameters of their law-making power. However, this most reinvocation of Article 26 does not necessarily suggest a long-term change in position. There are a number of drawbacks to the use of the Article 26 procedure which may deter its use, not least the provision for immunity in Article 34.3.3. Moreover, it appears that in recent years successive Governments have preferred to rely on their own informal, functional form of *ex ante* constitutional review by ensuring that Government Bills do not proceed unless the Attorney General of the day is satisfied that they are constitutional. Of course, the Oireachtas has an obligation not to pass legislation that it knows to be unconstitutional. Unlike other jurisdictions, where other branches of government can put forward their own good-faith competing understandings of what the Constitution demands, in Ireland the courts are the only branch tasked with assessing the constitutionality of legislation, and the Supreme Court is the ultimate arbiter of constitutionality. By and large, the State closely mirrors the constitutional parameters laid down by the courts. Yet there are notable instances where the constitutional understandings advanced by political actors are arguably over-cautious and out of step with the jurisprudence of the Courts. In recent years, for example, successive Governments have argued that far-reaching action cannot be to remedy the housing crisis,

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[90] [1984] IR 268.

[91] [1961] IR 169. See, *Kelly: The Irish Constitution* (5th ed, Bloomsbury, 2018) para. 4.5.125.

citing constitutional concerns on the introduction of eviction bans, rent freezes, or removing the sale of the property as a justification for eviction. But this is not consistent across all policy areas. The Government is far more intrepid when it comes to assessing its own internal powers, such as the appointment of super-junior Ministers at Cabinet, or the regular use of the money message. Occasionally, the Government has revised its own understandings of what it is constitutionally permitted to do, often prompted by a change in the office of the Attorney General, rather than a new legal standard that has been articulated by the Courts.[92] Yet where there is legitimate doubt as to the constitutionality of a Bill, Article 26 is the mechanism that has been prescribed by the Constitution to test the boundaries of the Oireachtas's law-making power, and for that reason alone, it should be preferred to the informal and infinitely less transparent procedure of consulting the Attorney General in confidence. The immense benefit provided by the reference procedure in Article 26 is that it provides a forum for the Supreme Court to evaluate a Bill and consider whether it is constitutional before it is enacted, and to avoid embarking on the process of amending the Constitution before it is clearly established that such a step is warranted. As the mechanism that has been established by the Constitution for this very purpose, the revival of Article 26 is a positive development.

[92] Hilary Hogan, 'Executive Lawyering under de facto Political Constitutionalism' *IACL-AIDC Blog* 9 February 2023. Available: < https://blog-iacl-aidc.org/2023-posts/2023/2/9/executive-lawyering-under-de-facto-political-constitutionalism-in-ireland>.

Case	*Challenge upheld*	*President*
1. Re Article 26 and Judicial Appointments Commission Bill 2023		Michael D. Higgins
2. Re Article 26 and the Health (Amendment) (No.2) Bill 2004 [2005] 1 IR 205	Yes	Mary McAleese
3. Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 IR 360	No	Mary McAleese
4. Re Article 26 and Part V of the Planning and Development Bill 1999 [2000] 2 IR 321	No	Mary McAleese
5. Re Article 26 and the Equal Status Bill 1997 [1997] 2 IR 387.	Yes	Mary Robinson
6. Re Article 26 and the Employment Equality Bill, 1996 [1997] 2 IR 321	Yes	Mary Robinson
7. Re Article 26 and the Regulation of Information (Services Outside the State for Termination (Pregnancies) Bill 1995 [1995] 1 IR 1	No	Mary Robinson
8. Re Article 26 and the Matrimonial Home Bill 1993 [1994] 1 IR 305	No	Mary Robinson
9. Re Article 26 and the Adoption (No.2) Bill 1987 [1989] IR 656.	No	Patrick Hillery
10. In Re Article 26 of the Constitution and the Electoral (Amendment) Bill, 1983 [1984] IR 268	Yes	Patrick Hillery
11. Re Article 26 and the Housing (Private Rented Dwellings) Bill 1981 [1983] IR 181	Yes	Patrick Hillery
12. Re Article 26 of the Constitution and the Matter of the Emergency Powers Bill 1976 [1977] IR 159	No	Cearbhall Ó Dálaigh
13. Re Article 26 and in the matter of the Criminal Law (Jurisdiction) Bill 1975 [1977] IR 129	No	Cearbhall Ó Dálaigh
14. In Re Article 26 of the Constitution and the Electoral (Amendment) Bill, 1961 [1961] IR 169	No	Éamon de Valera
15. In Re Article 26 of the Constitution and the School Attendance Bill, 1942 [1943] IR 334	Yes	Douglas Hyde
16. In re Article 26 of the Constitution and in the matter of the Offences Against the State (Amendment) Bill [1940] IR 470	No	Douglas Hyde