AN CHÚIRT UACHTARACH

THE SUPREME COURT

[2023] IESC 34

Dunne J.
Charleton J.
O'Malley J.
Baker J.
Hogan J.
Murray J.
Collins J.

IN THE MATTER OF ARTICLE 26 OF THE CONSTITUTION

AND

IN THE MATTER OF THE JUDICIAL APPOINTMENTS COMMISSION BILL 2022

DECISION of the Court pursuant to Article 26.2.1° of the Constitution delivered by Ms. Justice Elizabeth Dunne on the 8th day of December 2023

Part I - Introduction

1. This is the decision of the Court on the reference to it by the President of certain sections of the Judicial Appointments Commission Bill 2022 referred pursuant to Article 26.2.1° of the Constitution.

The Reference

2. By order given under his hand and seal on the 13th October, 2023 His Excellency President Michael D. Higgins referred a number of provisions of the Bill to the Court for a decision as to whether the said sections were repugnant to the Constitution or any provisions thereof. The sections of the Bill referred to the Court are as follows ss. 9, 10, 39, 40(2), 42, 43, 45, 46, 47, 51, 57 and 58.

Proceedings on the Reference

3. In accordance with the provisions for the determination of a reference contained in Article 26.2.1° of the Constitution, and the practice and procedures hitherto adopted by this Court in such matters, counsel and solicitor were assigned by the Court to argue that the provisions of the Bill referred by the President were repugnant to the Constitution. Submissions in writing by and on behalf of the Attorney General were presented to the Court, arguing that none of these provisions were repugnant to the Constitution. The oral hearing then took place before the Court on the 15th and 16th November, 2023.

4. It should be borne in mind that the hearing and consideration of a reference pursuant to Article 26 of the Constitution is somewhat unusual. Article 26.2.1° provides as follows:

"The Supreme Court shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference."

5. It will be observed that in the first instance, Article 26.2.1° sets out who shall be heard in the course of such a hearing, namely, the Attorney General and/or counsel on his or her behalf and counsel assigned by the Court. Secondly, there is a fixed time frame for the hearing of the arguments and the giving of the decision, that is, not later than sixty days after the making of the reference. Thirdly, it should be noted that the Court is asked to deal only with the questions referred by the President. In previous references, this has involved on occasion the whole of a Bill being referred and on occasion, as in this case, specific sections of the Bill being raised to determine their potential repugnancy to the Constitution. It is important to bear in mind that the Court is being asked about a specific Bill and the questions raised in that regard and nothing else. There is therefore an inbuilt limit on the issues that can come before the Court on such a reference. A hearing on a reference is unlike any other form of proceedings in that there is no evidence and consequently no factual matrix underpinning the arguments. It is, in that sense, *a sui generis* form of procedure to which particular considerations apply.

6. Finally, it is notable that Article 26.2.2° provides that the decision of the majority shall be the decision of the Court and no other opinion, whether assenting or dissenting, shall be pronounced. There is no scope for individual voices on individual issues to be expressed. The Court speaks with one voice. Having regard to all these features of the process, the Court considers that it would not be appropriate to attempt to give direction

on broader issues of law beyond those required to resolve the question as to whether the referred sections are consistent with the provisions of the Constitution.

7. As a separate consideration, the analysis of the Bill must proceed on the basis of the presumption of constitutionality. This Court has consistently held that the presumption of constitutionality applies with full force to a Bill referred by the President under Article 26 of the Constitution: *In Re Article 26 of the Constitution and the Offences Against the State (Amendment) Bill 1940* [1940] 1 IR 470, 478; *In Re Article 26 and The Criminal Law (Jurisdiction) Bill 1975* [1977] 1 IR 129, 144; *In Re Article 26 and the Emergency Powers Bill 1976* [1977] 1 IR 159, 174; *In Re Article 26 and the Electoral (Amendment) Bill 1983* [1984] IR 268, 273; *In Re Article 26 and The Adoption (No. 2) Bill 1987* [1989] 1 IR 656**,** 660-661; *In Re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 IR 305, 315-316; *In Re Article 26 and the Regulation of Information (Services out-side the State for Termination of Pregnancies) Bill, 1995* [1995] IESC 9, [1995] 1 IR 1, 51; *In Re Article 26 and the Employment Equality Bill 1996* [1997] IESC 6, [1997] 2 IR 321, 334-335; *In Re Article 26 and the Planning and Development Bill 1999* [2000] IESC 20, [2000] 2 IR 321, 346; *In Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] IESC 19, [2000] 2 IR 360, 368-370 and *In Re Article 26 and the Health (Amendment) (No. 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105, 161..

8. In *Matrimonial Home Bill 1993* and *Illegal Immigrants (Trafficking) Bill 1999*, the Court was expressly invited to depart from its previous decisions on this issue but declined to do so.

9. It follows that, as the Court explained in *Re Article 26 and The Adoption (No. 2) Bill 1987* [1989] 1 IR 656, at 661:

"*(1) … it must be presumed that all proceedings, procedures, discretions and adjudications permitted or prescribed by the Bill are intended to be conducted in accordance with the principles of constitutional justice, and*

(2) That as between two or more reasonable constructions of the terms of the bill the construction that is in accordance with the provisions of the Constitution would prevail over any construction that is not in accordance with such provisions."

10. The presumption of constitutionality also means that "*where any particular law is not expressly prohibited and it is sought to establish that it is repugnant to the Constitution by reason of some implied prohibition or repugnancy … such repugnancy must be clearly established*" (*Employment Equality Bill 1996* at p. 334, citing *Offences Against the State (Amendment) Bill 1940*). None of the referred provisions are expressly prohibited by the Constitution (and no argument to that effect was made by counsel against the Bill.) Rather, the provisions are said to be repugnant "*by reason of some implied prohibition or repugnancy*". Accordingly, such alleged repugnancy must be "*clearly established*".

The Rule of Law

11. The entire structure of the Constitution presupposes the existence of a state and a legal system governed by the rule of law. Article 5 describes the State as a democracy, yet without the appropriate rule of law guarantees, the essential democratic character of the State could not be assured. As was observed in *Costello v. Ireland* [2022] IESC 44, this constitutional commitment to the democratic order is perhaps the most defining feature of the State's own constitutional identity. All of this means the Constitution has created a society governed by the rule of law, because it is principally through the enactment of legislation duly passed by a majority in a democratically elected Oireachtas that law

is made for the State in accordance with Article 15.2.1°. This in turns means that citizens are entitled to regulate their affairs by reference to legislation enacted by the Oireachtas and, where applicable, by the corpus of common law and pre-1937 legislation carried over by Article 50.

12. This principle also finds expression in a range of other constitutional provisions and, for that matter, standard common law rules and presumptions, such as, for example, the presumption against unclear changes in the law: see, *e.g., Minister for Industry and Commerce v. Hales* [1967] IR 50 at 76 - 77, *per* Henchy J.

13. Amongst other matters, Article 15.5.1° prohibits the creation of retrospective criminal offences or legislation providing for retrospective liability in the field of civil law such as, *e.g.*, in the area of tort law. Article 25 provides for the publication of all laws signed by the President. In this vein the courts have deplored the reliance by administrators on non-statutory rules known by "*a handful of officials and specialists*" which are not "*readily available to the public*": see *McCann v. Minister for Education* [1997] 1 ILRM 1 at 5, *per* Costello P. So far as access to the courts is concerned, this Court observed in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 at 385 that:

> "*It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights…*"

14. This also holds true so far as effective remedies are concerned, since "*in a society based on the rule of law it would certainly be a major gap in its fabric if persons who had*

been wronged…were to be left without remedy": *CK v. JK* [2004] IESC 21, [2004] 1 IR 224 at 250, *per* Denham J.

15. Continuing this general theme, Article 38.1 guarantees the trial of every person "*in due course of law*". Article 40.4.1° provides that persons may only be deprived of their liberty "*save in accordance with law*." Article 40.4.2° provides that the High Court must order the release of any person who claims that they are unlawfully detained unless it is satisfied that such detention is "*in accordance with the law*."

16. The Constitution, moreover, is replete with examples of where certain matters may and, in other instances, must, be regulated by law. Article 28A.2 dealing with the powers of local authorities is an example of the former, while Article 36, dealing with the organisation and constitution of the courts, is an example of the latter. All of this – and these examples could easily be much extended – simply underscores that at every level the Constitution contemplates and creates a democratic State grounded on the operation of the rule of law; primarily laws enacted by the Oireachtas pursuant to Article 15.2.1°.

17. The principles underpinning the rule of law are rooted in the constitutional traditions of European Union (EU) Member States. One of the fundamental principles of the rule of law is judicial independence. That principle is expressly recognised in Article 35.2 of the Constitution. Its importance is underscored by provisions such as Article 47 of the Charter of Fundamental Rights of the European Union ("the Charter"). It is recognised as a fundamental element of the rule of law in the EU legal order, not least because of its value in maintaining mutual trust among the Member States and their courts.

Part II – Broad Overview of the Bill

Broad Overview

18. By way of very broad overview, the Bill now under consideration provides for a new body, the Judicial Appointments Commission ("the Commission"). It is intended that the Commission will draw up mandatory procedures for the assessment of applicants for judicial positions and, having regard to certain matters identified in the Bill, set the criteria in respect of appointment to any judicial office within the State and in respect of nominations to certain international courts. It is to operate such procedures and apply such criteria to any persons who seek appointment to judicial office, for the purpose of making recommendations to the Government regarding applicants who meet the criteria. The Government will, in most but not necessarily all circumstances, be given a list of recommended persons from which to choose a person to nominate to the President for appointment, but can in no circumstances choose a person who is not recommended by the Commission.

19. Counsel assigned by the Court have argued that the referred measures interfere with the provision made by the Constitution in respect of all three branches of government, and thus infringe the principle of the separation of powers. They make the case that the Bill, in effect, impermissibly divests the executive of its constitutional role in appointing judges, that the vagueness and breadth of the powers conferred on the Commission are such as to amount to an unconstitutional delegation of the legislative functions of the Oireachtas, and that the measures infringe the constitutional principle of the independence of the judiciary. They also argue that the measures may bring about unjustified, and therefore unlawful, discrimination between individual applicants and may also interfere with their personal constitutional right to privacy. A further submission is that the Bill fails to respect the constitutional principle of the rule of law.

20. The Attorney General contends that the Bill respects the constitutional powers of the Government to nominate persons for appointment as judges by the President, while

enhancing the democratic legitimacy of the process leading to such nominations. He says that the measures will strengthen and safeguard judicial independence and the rule of law and will ensure consistency with the State's obligations under European Union and international law.

21. The scheme of the Bill does not readily lend itself to constitutional analysis on a section-by-section basis. It is proposed to commence with an overview of the entirety of the legislative scheme, beginning with its objectives as set out in the Long Title. We will then set out the referred provisions, and then describe some of the key constitutional provisions relating to the appointment of judges. Before the judgment sets out the fundamental constitutional principles relevant to the discussion of the issues, some material relating to the reports of the international bodies mentioned in the Long Title of the Bill and some of the jurisprudence of the Court of Justice of the European Union ('CJEU') and the European Court of Human Rights ('ECtHR') will be examined. The submissions of the parties will be considered in that context.

22. The Long Title of the Bill reads as follows:

> *"An Act to establish a body to be known as An Coimisiún um Cheapacháin Bhreithiúnacha or, in the English language, the Judicial Appointments Commission; to provide for the making of applications to that Commission for recommendation for appointment, or nomination for appointment or election, to judicial office in the State or outside the State; to amend and extend the qualification and eligibility requirements for appointment to judicial office; to provide for the publication, by the Commission, of a statement of selection procedures to be applied in considering applications and a statement of requisite knowledge, skills and attributes required by applicants seeking such recommendation; to provide for the making by the Commission of*

recommendations for such appointment or nomination to be based on merit; to provide for the aforementioned matters having regard to the recommendation of the Council of Europe's Group of States against Corruption (GRECO) that the system of selection, recommendation and promotion of judges target the appointments to the most qualified and suitable candidates in a transparent way, and having regard to Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on judges: independence, efficiency and responsibilities adopted by the Committee of Ministers on 17 November 2010, under the terms of Article 15.b of the Statute of the Council of Europe; to provide for the establishment of a Judicial Appointments Commission Office; to dissolve the Judicial Appointments Advisory Board; to provide for expressions of interest in assignment to a particular district court district or circuit to be made by eligible judges to the President of the court concerned; to provide for the funding of the Commission and the Judicial Council by the Courts Service; and for those and other purposes to amend or repeal certain provisions of the Courts of Justice Act 1936, the Courts (Supplemental Provisions) Act 1961, the Courts Act 1973, the Courts Act 1977, the Courts and Court Officers Act 1995, the Standards in Public Office Act 2001 and the Judicial Council Act 2019; and to provide for related matters."

23. As noted above, the Bill proposes to establish a Commission to deal with applications for appointments to judicial office in the State, and certain judicial offices outside the State, including the ECtHR, the CJEU and the International Criminal Court. The Commission will select a number of preferred candidates and make recommendations as to the suitability for appointment of individuals to judicial office, or, in the case of

international judicial bodies, those to be elected to judicial office, to the Minister for Justice or to the Minister for Foreign Affairs, as the case may be.

24. The Bill provides, in Part 2, for the membership of the Commission at s. 9 and sets out the functions of the Commission at s. 10. It will consist of nine members of which four will be members of the judiciary and four will be lay people. In addition, the Attorney General will be a non-voting member. Apart from the selection and recommendation of persons for appointment and nomination for judicial office, the Commission must also adopt a statement of selection procedures and a statement of requisite knowledge, skills and attributes for office. Other matters are provided for in relation to the manner in which the Commission is to carry out its functions. Part 3 of the Bill sets out details as to the Commission's office and provides for the appointment of a Director of that office, together with other administrative matters. The composition of the Commission can change depending on the judicial office to be filled. Thus, the President of the High Court will replace the President of the Court of Appeal if the judicial office to be filled is that of judge of the High Court.

25. Part 4 of the Bill provides for the making of recommendations for appointment, and for nomination for appointment or election to judicial office. This includes a requirement that the Commission be satisfied that the person applying for appointment is eligible for appointment to the relevant office. It also provides at s. 39(1) that recommendations must be based on merit.

26. The Bill sets out the procedures in relation to applications for judicial office and the information to be provided by an applicant. An applicant must permit the Commission to seek information from relevant persons and bodies. Details are set out as to the procedure to be followed when an application is made by the holder of a specified office, for example, the Chief Justice, or the Attorney General, and by an applicant who

is a member of the Commission. A number of matters must be taken into account by the Commission in considering the application (see ss. 46, 47 and 48). Thereafter the provisions of Part 4 set out the details required to accompany a recommendation. An important provision is to be found in s. 51, which provides that the Government "*shall only consider for appointment*" those persons who have been recommended by the Commission.

27. Part 5 of the Bill concerns the making of the judicial selection statement, which is to be published, and which must include a statement of selection procedures and a statement of requisite knowledge, skills and attributes (s. 57(1)).

28. The Bill contains transitional arrangements which operate pending the adoption of a judicial selection statement. Finally, it makes provision for the dissolution of the Judicial Appointments Advisory Board ('JAAB'), which currently plays a somewhat similar, but materially different, role in the appointment of judges in the State.

29. The Commission is intended to be independent in its functions. That necessarily restrains its accountability in terms of its core function – the selection of candidates for recommendation to the Government. But the composition of the Commission (including the very transparent procedure for the selection of its lay members) and its statutory mandate have been determined by the most accountable branch of government, the Oireachtas. The Oireachtas has determined the procedures to be followed by the Commission.

30. Furthermore, there is a significant level of accountability built into the Bill. Section 23 provides for accountability to Oireachtas committees (other than the Public Accounts Committee). It would appear that that section would permit an Oireachtas committee to raise concerns about a judicial selection statement, and/or the diversity statement provided for in the Bill. Section 26 provides for the Commission to make an annual

report to the Minister which is to be laid before each House of the Oireachtas. Section 27 is also of importance, providing as it does that the Minister may direct the Commission to "*make a report to him or her on any matter relating to the functions of the Commission*". Presumably such a report could be laid before the Houses of the Oireachtas. The Minister is also given significant input into the judicial selection statement, given that the views of the relevant Minister have to be taken into account by the Commission in finalising a draft judicial selection statement (see ss. 57(9) and 57(10)). Provision is also made for wider consultation by the Commission, including public consultation (s. 57(6)(b)). Further, the Minister also has a role in a review of the operation of the legislation, as provided for in s. 61 of the Bill.

The Bill – Sections 9, 10, 39, 40(2), 42, 43, 45, 46, 47, 51, 57 and 58

31. The sections of the Bill referred to the Court by the President pursuant to Article 26 provide as follows:

> ***s****. 9(1) The Commission shall consist of 9 members, subject to section 45, being -*
>
> *(a) the Chief Justice,*
>
> *(b) subject to subsection (2), the President of the Court of Appeal,*
>
> *(c) 2 members of the Judicial Council nominated and appointed in accordance with section 12,*
>
> *(d) subject to subsection (3), the Attorney General, and*
>
> *(e) 4 lay members appointed under section 13.*
>
> *(2) Where the Commission is performing the function of selecting and recommending persons for appointment to judicial office in the High Court, Circuit Court or District Court, the President of the Court concerned, and not*

the President of the Court of Appeal, shall be the member for the purpose of performance of that function.

(3) The Attorney General shall not, as a member of the Commission, have a right to vote on any matter coming before the Commission for a vote.

(4) The Chief Justice shall be the chairperson of the Commission.

32. Of the three other sections mentioned in s. 9, two have not been referred to the Court and are therefore not in issue save in so far as they affect the composition of the Commission provided for in s. 9. Section 12 deals with the nomination by the Judicial Council of two judges to be members of the Commission. Section 13 provides for the selection and appointment of lay persons to be members. Section 45, which is referred, concerns the procedures to be adopted when the Commission is considering an application by a judge who is a member of the Commission.

s. *10(1) The general functions of the Commission shall be –*

(a) to select and recommend persons –

(i) to the Minister for appointment and nomination for appointment to judicial office, and

(ii) to the Minister for Foreign Affairs in so far as a nomination for election to the European Court of Human Rights and the International Criminal Court is concerned,

and

(b) for the purposes of paragraph (a), to adopt a statement of selection procedures and a statement of requisite knowledge, skills and attributes for inclusion in a judicial selection statement.

(2) The Commission shall be independent in the performance of its functions.

(3) The Commission shall have all such powers as are necessary or expedient for the performance of its functions.

***s.** 39(1) A decision by the Commission to recommend a person for appointment or for nomination for appointment or election to judicial office shall be based on merit.*

(2) Subject to subsection (1), where the function of selection and recommendation of persons for appointment to judicial office in the State falls to be performed, account shall be taken, to the extent feasible and practicable, of the objectives that the membership of the judiciary in each court should –

(a) comprise equal numbers of male and female members,

(b) reflect the diversity of the population of the State as a whole, and

(c) include a sufficient number of judges with a proficiency in the Irish language to meet the needs, identified by the Commission following consultations under section 56(4), of users of each court with respect to proceedings being conducted in the Irish language.

***s.** 40(2) For the purposes of the Commission satisfying itself, in accordance with section 46(1)(a)(i), that a person is an eligible person -*

(a) a reference in section 5(2)(a) of the Act of 1961 to immediately before such appointment shall be construed as a reference to immediately before the relevant date,

(b) a reference in section 5(2)(b) of the Act of 1961 to immediately before the appointment shall be construed as a reference to immediately before the relevant date, and (c) a reference in section 45A(1) and (3) of the Act of 1961 to immediately before such appointment shall be construed as a reference to immediately before the relevant date.

33. The "*relevant date*" means, pursuant to s. 40(3) of the Bill, the latest date on which an application may be made in respect of a particular vacancy in a judicial office.

34. The "*Act of 1961*" is the Courts (Supplemental Provisions) Act 1961. Section 5(2)(a) of that Act, as substituted by s. 4 of the Courts and Court Officers Act 2002 and amended by s. 11 of the Court of Appeal Act 2014, provides that a person shall be qualified for appointment as a judge of the Supreme Court, the Court of Appeal or the High Court if the person is for the time being a practising barrister or solicitor of not less than 12 years standing who has practised as such for a continuous period of not less than two years immediately before such appointment.

35. Section 5(2)(b) of the Act of 1961, as amended by s. 4 of the Courts and Court Officers Act 2002 and s. 11 of the Court of Appeal Act 2014, currently provides, in summary, that a person who is or was at any time during the period of two years immediately before the appointment concerned a judge of an international court or tribunal and was, before appointment to such court or tribunal, a practising barrister or solicitor, shall be qualified for appointment as a judge of the Supreme Court, the Court of Appeal or the High Court.

36. Section 45A is a new provision, intended to be inserted into the Act of 1961 by virtue of s. 63(e) of the Bill. It makes provision for the eligibility for judicial office of certain legal academics who have practised as a barrister or solicitor for a continuous period of at least four years. Section 63(e) has not been referred to the Court.

s. *42(1) The Minister may request the Commission to make recommendations for appointment or for nomination for appointment to judicial office, as the case may be, where -*

(a) a judicial office stands vacant, or

(b) he or she reasonably anticipates that there will be a vacancy in a judicial office.

(2) The Minister for Foreign Affairs may request the Commission to make recommendations for nomination for election to the judicial office of a judge of the European Court of Human Rights or a judge of the International Criminal Court, as the case may be, where -

(a) a judicial office of a judge of either of those Courts stands vacant, or

(b) he or she reasonably anticipates that there will be a vacancy in a judicial office of either of those Courts.

(3) The Commission shall issue an invitation, through means of advertisement, for the making of applications by persons who wish to be considered for selection and recommendation for appointment or for nomination for appointment or election, as the case may be, to judicial office -

(a) upon receipt of a request under subsection (1) or subsection (2), or

(b) where the Commission anticipates there will be a vacancy in a judicial office.

(4) The Commission shall, in such form and manner as it considers appropriate, provide information to potential applicants, relevant to the judicial vacancy which is the subject of the invitation under subsection (3) -

(a) relating to the judicial selection statement, or

(b) where subsection (2)(a)(ii) or (2)(b)(ii) of section 60 applies, relating to the procedures or requisite knowledge, skills and attributes, as the case may be, which are to apply in accordance with those provisions.

37. Section 60, which has not been referred to the Court, makes provision for transitional arrangements to be determined by the Commission pending its adoption of a judicial selection statement.

***s.** 43(1) Where an invitation is issued under section 42 in relation to a judicial office, a person, including a person who holds judicial office or a relevant office holder, who wishes to be considered for selection and recommendation for appointment or nomination for appointment or election, as the case may be, to that office shall make an application to the Commission in such form, and accompanied by such supporting documentation, as is specified -*

(a) in the statement of selection procedures, or

(b) where section 60(2)(a)(ii) applies, in the procedures determined by the Commission in accordance with that provision.

(2) An application for recommendation for appointment or for nomination for appointment or election to judicial office shall not be made to the Commission otherwise than pursuant to an invitation issued under section 42.

(3) In this section, "relevant office holder" means a judge or other office holder referred to in any of clauses (I) to (VII) of section 5(2)(b)(i) of the Act of 1961.

***s.** 45(1) Where the person making an application under section 43 is -*

(a) the Chief Justice,

(b) the President of the Court of Appeal,

(c) a member of the Commission referred to in section 9(1)(c), or

(d) the Attorney General,

he or she shall take no part in the performance by the Commission of the function of selection and recommendation of a person for appointment or for nomination for appointment or election, as the case may be, to the judicial office to which the application relates and, accordingly, shall not attend any meeting of the Commission held for the purpose of the performance of that function and, where the applicant is a member referred to in paragraph (a), (b) or (c), shall not cast a vote in relation to any decision falling to be made by it for that purpose.

(2) Where subsection (1) applies and the applicant is the Chief Justice or the President of the Court of Appeal, he or she shall be replaced as a member of the Commission by the person specified in subsection (3) -

(a) for the purpose of performing the function referred to in subsection (1), and

(b) which person may attend any meeting of the Commission held for the purpose of the performance of that function and cast a vote in relation to any decision to be made by it for that purpose.

(3) The person referred to in subsection (2) is the next most senior judge who -

(a) ranks first in precedence, after the President of the Court of Appeal, in accordance with paragraphs (c) to (k) of section 9 of the Courts of Justice Act 1924,

(b) is not an applicant for the judicial office concerned, and

(c) is available to serve as a member of the Commission for the performance of that function.

(4) Where subsection (1) applies and the person making the application is a member of the Commission referred to section 9(1)(c), the Board of the Judicial Council (established under section 10 of the Judicial Council Act 2019) shall, subject to subsection (5), nominate one of its members to be a member of the Commission -

(a) for the purpose of performing the function referred to in subsection (1), and

(b) which member may attend any meeting of the Commission held for the purpose of the performance of that function and cast any vote in relation to any decision to be made by it for that purpose.

(5) A member of the Board of the Judicial Council shall, where he or she is making an application in respect of the same vacancy in a judicial office -

(a) take no part in the performance by the Board of the function of nomination referred to in subsection (4), and

(b) shall not be nominated by the Board under that subsection to be a member of the Commission.

(6) The Minister shall appoint a person nominated under subsection (4) to be a member of the Commission for the purpose of performing the function referred to in subsection (1).

***s.** 46(1) Subject to section 60, the Commission shall consider applications made in respect of a particular vacancy in a judicial office in accordance with the judicial selection statement and shall not recommend an applicant to the Minister or, if appropriate, the Minister for Foreign Affairs, for appointment or for nomination for appointment or election, as the case may be, to judicial office unless -*

(a) it is satisfied that the applicant—

(i) is an eligible person,

(ii) possesses the requisite knowledge, skills and attributes set out in that statement and is of sufficient merit for such recommendation,

(iii) is suitable on grounds of health to fulfil the duties of the judicial office concerned,

(iv) has complied with the requirements of section 44(1), and

(v) has complied with the requirements of section 22 of the Act of 2001,

and

(b) the Commission has interviewed the applicant.

(2) An interview of an applicant shall, for the purposes of subsection (1)(b), be conducted by a panel of the Commission and the panel shall comprise not fewer than 3 members, selected by the Commission, at least one of whom shall be a lay member and at least one of whom shall be a member of the judiciary.

38. The "*Act of 2001*" is the Standards in Public Office Act 2001. Section 22 currently provides, in summary, that the Judicial Appointments Advisory Board may not recommend, and the Government may not advise the President to appoint, a person who has not furnished a tax clearance certificate not more than 18 months old and a statutory declaration that the person is in compliance with the obligations to make returns and pay taxes. Section 66 of the Bill amends s. 22 by way of substitution, so that it will refer to the Commission rather than the JAAB.

s. *47(1) The Commission shall, following its consideration of applications in accordance with section 46, recommend to the Minister -*

(a) where there is one judicial office in the State to be filled in a court, 3 persons for appointment to that judicial office, and

(b) where there is more than one judicial office in the State to be filled in the same court, 3 persons and 2 additional persons for each second and subsequent vacancy for appointment to those judicial offices.

(2) Where the Commission cannot, whether by reason of the number of applicants or the operation of section 46, or both, as the case may be,

recommend to the Minister the number of persons specified in subsection (1)(a) but can recommend a lesser number of persons to the Minister, it shall -

(a) recommend to the Minister that lesser number of persons, and

(b) at the same time as making that recommendation, set out in writing the reasons it is unable to recommend the number of persons specified in that subsection.

(3) Where the Commission cannot, whether by reason of the number of applicants or the operation of section 46, or both, as the case may be, recommend to the Minister the total number of persons required by the application of subsection (1)(b) but can recommend a lesser total number of persons to the Minister, it shall -

(a) recommend to the Minister that lesser total number of persons, and

(b) at the same time as making that recommendation, set out in writing the reasons it is unable to recommend the number of persons specified in that subsection.

(4) Where the Commission determines that it cannot, whether by reason of there being no applicants or the operation of section 46, recommend to the Minister any person for the vacancy in a judicial office concerned, it shall -

(a) inform the Minister of that fact, and

(b) at the same time, set out in writing the reasons it is unable to recommend any person.

(5) The Commission shall, at the same time as making a recommendation, or informing the Minister that it cannot make a recommendation, under this

section forward the name of each person who made an application in respect of the vacancy concerned.

***s.** 51(1) In advising the President in relation to the appointment of a person to a judicial office in the State, the Government shall only consider for appointment those persons who have been recommended by the Commission to the Minister under section 47.*

(2) The Government shall request the Commission to confirm, prior to advising the President in relation to the appointment of a person to a judicial office, that the person concerned is an eligible person.

***s.** 57(1) The Commission shall, in accordance with this section, publish a statement to be known as the "judicial selection (procedures and required competencies) statement" (in this Act referred to as the "judicial selection statement") which shall include -*

(a) a statement of selection procedures, and

(b) a statement of requisite knowledge, skills and attributes.

(2) The Commission shall, as soon as practicable after the coming into operation of this–section, prepare -

(a) subject to section 58, a draft statement of requisite knowledge, skills and attributes, and

(b) subject to section 59, a draft statement of selection procedures.

(3) The Commission shall, from time to time, prepare either or both of the following:

(a) subject to section 58, a revised draft statement of requisite knowledge, skills and attributes;

(b) subject to section 59, a revised draft statement of selection procedures.

(4) The Commission shall, in preparing a revised draft statement referred to in subsection (3) have regard to any recommendations made under section 61.

(5) In preparing the draft statements referred to in subsections (2) and (3), the Commission shall consult with the President of the High Court, the President of the Circuit Court or the President of the District Court in relation to a statement in so far as the statement relates to judicial offices in the court of that President.

(6) In preparing the draft statements referred to in subsections (2) and (3), the Commission may -

(a) avail itself of the advice and expertise of a consultant or adviser appointed by the Commission under section 11(1) to assist it in the performance of its functions, and

(b) engage in a public consultation or consult with such person or persons as it considers appropriate.

(7) The Commission shall provide the Minister, and the Minister for Foreign Affairs in so far as it relates to the judicial office of judge of the European Court of Human Rights or the International Criminal Court, with a draft of each statement -

(a) pursuant to subsection (2), within a period of 15 months from the date of coming into operation of this section, and

(b) pursuant to subsection (3), as soon as practicable after the draft is prepared.

(8) The Minister may extend the 15 month period referred to in subsection (7)(a) by such further period, not exceeding 6 months, as he or she determines.

(9) The Minister, and the Minister for Foreign Affairs in so far as it relates to the judicial office of judge of the European Court of Human Rights or the International Criminal Court, shall provide his or her views (if any) to the Commission on a draft statement furnished under subsection (7) within 3 months of receipt of the draft statement.

(10) The Commission shall, within the period of time specified in subsection (12) and having taken into account the views (if any) of the Minister and, if applicable, the Minister for Foreign Affairs provided under subsection (9) -

(a) adopt a statement of selection procedures and a statement of requisite knowledge, skills and attributes,

(b) include both of those statements as adopted in the judicial selection statement,

(c) publish the judicial selection statement on its website, and

(d) on each occasion on which it adopts a revised draft statement of selection procedures or a revised draft statement of requisite knowledge, skills and attributes, or both, publish an update of the judicial selection statement on its website.

(11) Where an update of the judicial selection statement is published under subsection (10) (d) it shall, on publication, replace the previous judicial selection statement.

(12) The time period referred to in subsection (10) is -

(a) where the Minister and, if applicable, the Minister for Foreign Affairs, give their views in accordance with subsection (9), as soon as practicable after receipt of those views but in any event no later than 3 months from the date of receipt of those views,

(b) where the Minister and, if applicable, the Minister for Foreign Affairs, indicate that they have no views, as soon as practicable after they so indicate but in any event no later than 3 months after those Ministers of the Government so indicate, or

(c) where the Minister and, if applicable, the Minister for Foreign Affairs, do not give any views, no later than 3 months after the expiration of the 3 month period referred to in subsection (9).

39. The "*recommendations*" referred to in s. 57(4) are recommendations which may be made by the Commission on foot of reviews of the implementation of the Act, to be carried out by it in accordance with s. 61 of the Bill. The latter provision has not been referred to the Court.

***s.** 58(1) The requisite knowledge, skills and attributes for judicial office shall be set out in a statement of requisite knowledge, skills and attributes.*

(2) Subject to subsections (3) and (8), a statement of requisite knowledge, skills and attributes may -

(a) specify different requisite knowledge, skills and attributes by reference to -

(i) different judicial offices,

(ii) in the case of the judicial offices of judge of the Court of Justice, Advocate General of the Court of Justice or judge of the General Court -

(I) the requirements of the TFEU, and

(II) the criteria used by the panel, established under Article 255 of the TFEU, to assess candidates' suitability to perform the duties of the judicial office concerned,

(iii) in the case of the judicial office of judge of the European Court of Human Rights -

(I) Article 21 of the European Convention on Human Rights, and

(II) any recommendations, resolutions, decisions or guidelines of the Committee of Ministers concerning the selection of candidates for that judicial office,

(iv) in the case of the judicial office of judge of the International Criminal Court -

(I) Article 36 of the Rome Statute, and

(II) any recommendations, resolutions, decisions or guidelines of the Assembly of State Parties or its subsidiary organs concerning the selection of candidates for that judicial office,

(v) in the case of judicial offices in the same court, different classes of business in that court that it is reasonably anticipated a particular appointee to such office would deal with, and (vi) the needs, identified by the Commission following consultations under section 56(4), of users of the courts with respect to proceedings being conducted in the Irish language,

(b) specify, for the purposes of subsection (3)(g) and having regard to the matters referred to in paragraph (a), that successful completion of a particular education or training programme or a particular standard of programme is required, and

(c) prioritise different requisite knowledge, skills and attributes by reference to the matters referred to in paragraph (a).

(3) Without prejudice to the generality of subsection (1), a statement of requisite knowledge, skills and attributes shall specify that an applicant will be required to demonstrate the following, namely that he or she:

(a) in the case of an applicant seeking -

(i) to be recommended for appointment to the office of ordinary judge of the Supreme Court, ordinary judge of the Court of Appeal or ordinary judge of the High Court, has the knowledge and experience specified in subsection (4),

(ii) to be recommended for appointment to the office of ordinary judge of the Circuit Court or to the office of judge of the District Court, has appropriate knowledge and

understanding of the functions, practice and procedure of the court to which the appointment concerned relates, and

(iii) to be recommended for nomination for appointment or election, has the knowledge and skills specified in subsection (7);

(b) in the case of a barrister or solicitor, the basis for whose claim to be qualified for appointment to the judicial office concerned is a provision of section 5, 17 or 29 of the Act of 1961, in his or her practice as a barrister or solicitor, as the case may be, has demonstrated a high degree of professionalism, competence and probity;

(c) in the case of a legal academic, the basis for whose claim to be qualified for appointment to the judicial office concerned is section 45A of the Act of 1961, in his or her role as a legal academic and also in his or her practice as a barrister or solicitor, as the case may be, has demonstrated a high degree of professionalism, competence and probity;

(d) will be able, allowing for any appropriate training that may first be required, to deal with judicial business in branches of the law that may not have fallen within his or her previous area of knowledge as a practising barrister, practising solicitor, legal academic or holder of another judicial office, as the case may be;

(e) has an appropriate awareness of the practical considerations that affect the experience of lay participants in the court system, whether as a party to proceedings, as a witness or otherwise;

(f) has an appropriate awareness of the diversity of the population of the State as a whole and of any matters arising from such diversity that may require special consideration in proceedings before a court;

(g) has -

(i) if the applicant already holds judicial office, undergone judicial training or participated in an appropriate level of continuing professional development education or training programmes as a judge or relevant to the role of a judge, or

(ii) if the applicant does not hold judicial office, participated in continuing professional development education or training programmes relevant to the role of a judge or the area of law to which the appointment concerned relates.

(4) An applicant seeking appointment to the office of ordinary judge of the Supreme Court, ordinary judge of the Court of Appeal or ordinary judge of the High Court shall be required to demonstrate that he or she has -

(a) an appropriate knowledge of the decisions of the Supreme Court, the Court of Appeal and the High Court, and

(b) an appropriate knowledge of, and subject to subsection (6), appropriate experience in, the practice and procedure of the court to which the appointment concerned relates.

(5) In determining whether the requirements of paragraphs (a) and (b) of subsection (4) are satisfied, the statement shall specify that regard shall be had, in particular, to the nature and extent of the practice of the person concerned

in so far as it relates to his or her personal conduct of proceedings in the Supreme Court, the Court of Appeal and the High Court as either or both -

(a) a person advocating in proceedings or as a solicitor instructing counsel in proceedings, or both, or

(b) a person providing legal advice to another person on the conduct of such proceedings.

(6) A person who was appointed as a judge of the High Court, the Circuit Court or the District Court before 28 October 2014 shall not be required to demonstrate that he or she has appropriate experience of the practice and procedure of the Court of Appeal.

(7) An applicant seeking nomination for appointment or election to judicial office outside the State shall be required to demonstrate that he or she possesses -

(a) an appropriate knowledge, in relation to the court to which the vacancy in the judicial office concerned relates -

(i) of the decisions of the court, and

(ii) of the practice and procedure of that court,

(b) the language skills necessary for the vacancy concerned, and

(c) the ability to work as part of a team in an international environment in which multiple legal systems are represented.

(8) A statement of requisite knowledge, skills and attributes shall require an applicant for recommendation for appointment to judicial office in the State to give an undertaking in writing to the Commission that, if appointed to judicial office in the State, he or she will take such course or courses of training or

education, or both, as may be required by the Chief Justice or the President of the court in which the vacancy in the judicial office concerned arises."

40. The consultations referred to in s. 58(2)(a)(vi) are provided for in s. 56(4) of the Bill. The Commission is obliged to consult with the Courts Service and the Presidents of the High Court, the Circuit Court, and the District Court about the needs of users of those courts in respect of proceedings being conducted in the Irish language.

41. Section 17 of the Act of 1961, as amended by s. 5 of the Courts and Courts Officers Act 2002, provides that a person who is for the time being a practising barrister or solicitor of not less than 10 years, or is a judge of the District Court, or is a county registrar who practised as a barrister or solicitor for not less than 10 years before appointment, shall be qualified for appointment as a judge of the Circuit Court. As further amended by s. 188 of the Personal Insolvency Act 2012, it also makes provision for the appointment of specialist judges of the Circuit Court.

42. Section 29 of the Act of 1961 provides that a person who is for the time being a practising barrister or solicitor of not less than 10 years standing shall be qualified for appointment as a judge of the District Court.

43. The "*TFEU*" in s. 58(1) is the Treaty on the Functioning of the European Union. Section 40(1) of the Bill, which is not referred to the Court, provides that a person will be eligible for nomination as a judge or Advocate General of the Court of Justice, or a judge of the General Court, if they are qualified for appointment in accordance with the TFEU. The TFEU does not, itself, make any provision in respect of national nomination procedures. However, Article 255 of the TFEU provides for the establishment of a panel with the function of giving opinions on the suitability of candidates proposed by Member States. The panel has developed its own criteria for the assessment of candidates, which are published in its regular Activity Reports. Of note, it is made clear

that the panel attaches significant importance to the existence of an "*open, transparent and rigorous national selection procedure led by an independent and impartial panel*" in the national nomination process. The proposing government is asked to state the reasons for choosing the candidate and for information on the national selection procedure, including whether there was a national selection committee and if so, how it was made up and what it recommended.

44. Section 40(1) further provides that a person will be eligible for nomination for election by the Parliamentary Assembly of the Council of Europe as a judge of the ECtHR if they satisfy the criteria in Article 21 of the European Convention on Human Rights (ECHR). The Committee of Ministers published guidelines on the selection of candidates for the post of judge in 2012 (CM (2012)40). These address both the requirements in respect of candidates and the national selection process. Amongst other matters, the body responsible for recommending candidates should be "*of balanced composition*". Its members should collectively have sufficient technical knowledge and "*command respect and confidence*". They should come from a variety of backgrounds, be of similar professional standing and be free from undue influence.

Part III - Previous Regulation of Judicial Appointment

Previous Regulation of Judicial Appointment

45. The Bill is in no sense the first occasion on which the legislature has intervened in the process of judicial appointment. It may properly be understood as the latest stage in the evolution of a process which began with the prescription of qualification requirements as a precondition to such appointment, the gradual extension of the categories of person so qualified, the introduction of independent vetting of candidates, and the imposition of mandatory qualification criteria now commonly required for those providing services

to the State such as tax clearance certificates and standards in public office requirements. The development of those interventions, and their relationship with prevailing constitutional norms, form an important backdrop to the arguments advanced in the course of this reference.

46. The first legislative incursion into the process of judicial appointment in the civil courts in Ireland appears to have come in the form of the Chancery Appeal Court (Ireland) Act 1856 ('the 1856 Act') (19 & 20 Vict. c. 92). Section 3 of the 1856 Act required that those nominated and appointed to be Judges of the Court of Appeal in Chancery in Ireland had either exercised the office of Lord Chancellor of Ireland or practised at the Bar for not less than fifteen years. Similar requirements were thereafter imposed on those seeking appointment as judges of the Landed Estates Court (Landed Estates Court (Ireland) Act 1858, s. 4), and the judges of the Court of Probate (Probates and Letters of Administration (Ireland) Act 1857 s. 7). The Chancery (Ireland) Act 1867 stipulated the qualification requirements of the Vice-Chancellor (ss. 4 and 5 – a barrister of fifteen years standing), and the same requirements were imposed on the Admiralty Judge (Court of Admiralty (Ireland) Act 1867 s. 7).

47. Section 12 of the Supreme Court of Judicature (Ireland) Act 1877 ('the 1877 Act') (40 & 41 Vict. c. 57) imposed a requirement for appointment to the High Court of ten years practice at the Bar and applied the qualification requirements introduced by s. 3 of the 1856 Act to all judges of the Irish Court of Appeal established by s. 10 of the 1877 Act. Section 12 also extended the qualifications for appointment as an ordinary judge of the Court of Appeal to those who were High Court judges of not less than one year's standing. Between the enactment of the Judicature Acts and independence, various miscellaneous statutes made discrete provision for qualification requirements for

particular appointments, see for example the Criminal Injuries (Ireland) Act 1920, s. 8 (additional County Court judges: practising barrister of ten years standing).

48. Insofar as the Courts of Justice Act 1924 ('the 1924 Act') imposed similar qualification requirements on all of the courts established by that statute, it was obviously assumed that the Constitution of the Irish Free State authorised the legislative prescription of qualifications for appointment to judicial office. That power might have been understood to have been rooted in Article 12 of the Free State Constitution (which vested in the Oireachtas the sole and exclusive power of making laws for *inter alia* the good government of the Irish Free State), or it may have been believed to have been located in Article 67 (which provided for *inter alia* the "*constitution*" of the courts and judges to be prescribed by law).

49. Either way, when the President of the Executive Council corresponded with the members of what was known as the Judiciary Committee constituted by the Government on 27th January 1923 to advise the Government on the establishment of courts in accordance with the Constitution, he asked that they *inter alia* address "*the numbers and grades of Judges and judicial persons and officials, and their respective qualifications for office, and manner of selection"*. The resulting report of that Committee (which included in its number Hugh Kennedy KC) recommended periods in practice as a solicitor and/or barrister as preconditions to appointment to the District Court, Circuit Court, High Court and Supreme Court.

50. Generally, the provisions of the 1924 Act closely followed the recommendations of the Judiciary Committee and the sections dealing with judicial qualification reflected those suggested by that Committee. Section 16 expressly limited qualification for appointment as a judge of the High Court or Supreme Court to those who had practised as barristers for a period of twelve years prior to their appointment or had held specific

judicial office. Section 6 of the Courts of Justice Act 1936 later clarified that a judge of the High Court was, and was deemed always to have been, qualified for appointment to the Supreme Court.

51. Section 43 of the 1924 Act imposed similar qualification requirements for Circuit Court judges (although the required period of practice was ten years), while s. 69 enabled a person to be appointed a District Justice if, at the date of his appointment, he was a barrister or solicitor of six years standing (or, again, had served in certain judicial offices). The same qualification was required of those appointed to the position of temporary Justices of the District Court (a provision thereafter repeated and elaborated upon in s. 51 of the Courts of Justice Act 1936).

52. The Courts (Establishment and Constitution) Act 1961 established the new courts envisaged by Article 34.1 of the Constitution. The Courts (Supplemental Provisions) Act 1961 ('the 1961 Act') made provision for the constitution of those courts. Sections 5(1), 17(1) and 29 of that Act addressed the first positions on those courts. The effect of these provisions was to give those persons who then occupied the equivalent positions in the courts established under the 1961 Act first call on those offices. Section 5(1)(d) provides an example which is replicated in relation to the Presidents and ordinary judges of each such court:

> "*Each of the persons who are ordinary judges of the existing High Court immediately before the operative date shall be qualified for appointment as an ordinary judge of the High Court and, if and so long as there is one or more than one of those persons who is willing to accept office and has not been appointed, no other person shall be qualified for appointment as an ordinary judge of the High Court"*

53. Obviously, these provisions were enacted in a very particular context and to deal with an unusual and quite specific situation – the establishment of a new system of courts and consequential abolition of the offices occupied by all judges who stood appointed to the District Court, Circuit Court, High Court and Supreme Court on the date of the establishment of those new courts. It is easy to see how it might have been thought that very significant questions would surround the validity of the 1961 Act if provision were not made for the automatic entitlement of the judges of the old courts to appointment to the new ones. Apart from everything else (as counsel assigned by the Court observed) the consequence absent such provision would have been to remove those judges from office other than in the circumstances envisaged by Article 35.4.1° of the Constitution.

54. Nonetheless, the effect of the Act was that only the holders of the identified judicial offices were eligible for appointment to the new offices. The Act is consistent only with a belief on the part of the Oireachtas that it was competent to so designate appointees, albeit in the very unusual circumstances that thus presented, and it might be said that any concerns around the constitutional entitlements of the judges of the 1924 Act courts could have been met by the giving of appropriate undertakings by the Government. As the Attorney General put the matter in his responses to questions raised by the Court,

> "*[w]hile the provisions of the 1961 Act were concerned with a sui generis situation, they provide a useful illustration of how the Oireachtas is entitled to regulate the exercise of the Government's judicial appointment power in order to protect and safeguard other constitutional values".*

55. Apart from the qualification of the first appointees to the new courts, the 1961 Act repeated the requirements for appointment to the Supreme Court, High Court and Circuit Court that had appeared in the 1924 Act (ss. 5(2) and 17(2)). The period of practice as barristers or solicitors required of those appointed as District Justices was

increased to ten years by s. 29(2) of that Act. Section 48(8) of the 1961 Act had the effect of similarly increasing the years of practice required of temporary Justices of the District Court.

56. The essential framework of the system for the appointment of judges in the State remained the same from the establishment of the present courts in 1961, until the enactment of the Court and Court Officers Act 1995 ('the 1995 Act'). That Act introduced four significant changes to the pre-existing qualification regime. First, s. 28 provided that service as a judge of the Court of Justice, a judge of the Court of First Instance (now the General Court) or as an Advocate General of the Court of Justice would be deemed practice at the Bar for the purposes of the qualification requirements in the 1961 Act. It also made clear that persons who had held any of those positions would, on vacating those offices, be qualified for appointment as a judge of the Supreme Court or the High Court provided he or she had been a practising barrister of not less than 12 years standing.

57. Second, s. 30 provided for the first time that solicitors could be appointed judges of the Circuit Court, if they were practising at the time of appointment for more than ten years. It also provided that a person who was a judge of the Circuit Court of four years standing was qualified for appointment as a judge of the Supreme Court, High Court, and later the Court of Appeal (s. 28).

58. Third, the 1995 Act provided for the establishment of the Judicial Appointments Advisory Board ('JAAB'). Under the Act, JAAB includes in its membership the Chief Justice, and Presidents of each of the other Courts. It has the function *inter alia* of recommending persons for appointment to judicial offices *other* than the Chief Justice or Presidents of each of the courts. The Act provides that a person who wishes to be considered for appointment to such a judicial office must so inform JAAB in writing,

providing it with such information as it may require (s. 16(1)). On request of the Minister, JAAB shall – where a judicial office stands vacant or before such a vacancy arises – submit to the Minister the name of each person who has so informed the Minister of his or her wish to be considered for appointment to that judicial office (s. 16(5)). It must (save where fewer than seven persons inform it of their wish to be appointed or where it cannot recommend that number) recommend at least seven persons for appointment to such office. The Board is precluded from recommending persons unless they meet the statutory qualification requirements and have displayed "*a degree of competence and a degree of probity appropriate to and consistent with the appointment concerned"* (s. 16(7)). It may not make such a recommendation unless, in the opinion of the Board, the person "*is suitable on grounds of character and temperament, is otherwise suitable"* and has undertaken in writing that, if appointed, they shall take such courses of training or education as may be required by the President of the court to which that person is appointed (*id.*).

59. Section 16(6) provides that in advising the President in relation to the appointment of a person to judicial office, "*the Government shall firstly consider for appointment those persons whose names have been recommended to the Minister …"* by the Board. This does not apply where the person whom the Government proposes to advise the President to appoint to judicial office is for the time being a judge of the High Court, Circuit Court or District Court (or, as the 1995 Act was subsequently amended, a judge of the Court of Appeal) (s. 17). Section 16(8) of the 1995 Act is as follows:

> "*Notice of an appointment to judicial office shall be published in the Iris Oifigiúil and the notice shall, if it be the case, include a statement that the name of the person was recommended by the Board to the Minister pursuant to this section."*

60. Fourth, the 1995 Act imposed an obligation on the Government when it proposed to advise the President on appointment to the office of Chief Justice, President of the High Court, President of the Circuit Court or President of the District Court to "*have regard first to the qualifications and suitability of persons who are serving at that time as judges …"* (s. 23). That provision now also applies to the President of the Court of Appeal.

61. Thereafter, a number of miscellaneous provisions were enacted. Section 4 of the Courts (No. 2) Act 1997 limited the term of offices of any person appointed as Chief Justice, or President of the High Court, Circuit Court or District Court, to the lesser of seven years or their retirement age. The Standards in Public Office Act 2001 (s. 22) provides that JAAB shall not recommend a person to the Minister for judicial appointment unless they have a tax clearance certificate and have completed a statutory declaration that the person was in compliance with certain provisions of that Act.

62. The Courts and Court Officers Act 2002 stipulated that a judge of the District Court would be qualified for appointment as a judge of the Circuit Court. It allowed practising solicitors of twelve years standing to be appointed to the High Court and Supreme Court. It also supplemented the list of requirements before JAAB could recommend a person for appointment to the High Court, Court of Appeal or Supreme Court, by requiring that applicants have an appropriate knowledge of the decisions and appropriate knowledge and experience of the practice and procedure of the court in question.

63. Additional amendments were introduced by the Personal Insolvency Act 2012 to enable the appointment of Specialist Circuit Court Judges, and thereafter again by the Court of Appeal Act 2014 to extend the system of qualification to judges of that Court.

64. The net effect of the foregoing is that as of the passing of the 2022 Bill by the Houses of the Oireachtas, the legislature had intervened significantly to constrain the power of the Government in advising the President to appoint persons to judicial office. The power to impose such constraints is firmly embedded, having been exercised prior to the foundation of the State and continued in 1924. It was obviously assumed by the legislature to be permissible both under the Constitution of the Irish Free State and Bunreacht na hÉireann, and was on one – albeit quite exceptional – occasion employed to specifically designate individuals for appointment to specific judicial positions.

65. In summary, as of today, the following limitations on the power of appointment arise by law:

(i) Subject to certain exceptions for those who hold specified judicial offices (including positions in Courts of the European Union, ECtHR and certain international courts) appointment as a judge of any court is open only in respect of those who (a) are qualified barristers or solicitors, (b) have practised as such for periods of ten or twelve years and (c) are practising as of the date of their appointment.

(ii) Save for persons who hold judicial office, the Government can only advise the President to appoint persons as ordinary judges of any of the courts after it has first considered for appointment those whose names have been recommended by JAAB. Notice of appointment to judicial office must be published in *Iris Oifigiúil* and it should be clear from the notice whether or not the person so appointed has or has not been recommended by JAAB.

(iii) Persons can only be recommended by JAAB if it deems them to have displayed qualities of competence, probity, and knowledge of the law, to have produced

tax clearance certification and to have completed a declaration as required by the Standards in Public Office Acts.

(iv) The Government is limited in exercising its power to advise a person for appointment as Chief Justice or as President of the Court of Appeal, High Court, Circuit Court, or District Court by the stipulation that that appointment can only be for a maximum of seven years. In appointing persons to those positions, it must have regard to the qualifications and suitability of persons who are serving at that time as judges.

66. Both sides have agreed that the Oireachtas had the authority to impose, by legislation, these various constraints on the Government's power to advise the President in connection with the filling of a judicial office.

Part IV – The International Context

The International Context

67. It has been observed that the Long Title to the Bill makes reference to the recommendation of the Council of Europe's Group of States against Corruption (GRECO). The broad objective that GRECO identifies as supportive of the independence of the judiciary and the rule of law, as mentioned in the Long Title of the Bill, is that *"the system of selection, recommendation and promotion of judges target the appointments to the most qualified and suitable candidates in a transparent way".*

68. Reference was also made to Recommendation CM/Rec (2010)12 of the Committee of Ministers to Contracting States on judges ("the 2010 Recommendation") in the Long Title.

69. It would be helpful to explain those recommendations, and to refer to a number of pronouncements on the issue of judicial appointments made by other international

bodies. Each of these illustrate the international context in which the Bill was enacted, and the assessment of the different systems of judicial appointments is a central plank in the respective reports. It is worth saying here that no specific system of appointment is regarded as essential to the preservation of the rule of law, but what is regarded as crucial is that judges be independent and free from political influence in the performance of their judicial function, and this can sometimes require a system of appointment that itself is independent of politics.

70. The Committee of Ministers is an organ of the Council of Europe. GRECO is a body established by the Council of Europe in 1999 with specific responsibility for monitoring members' compliance with the Council's anti-corruption standards. The European Commission for Democracy (more commonly referred to as the Venice Commission) was established in 1990 and operates as an advisory body to the Council of Europe in relation to constitutional issues. The Consultative Council of European Judges ('CCJE') is another Council of Europe advisory body, on issues relating to the independence, impartiality and competence of judges.

71. In addition to these bodies, the UN and UN bodies have also pronounced on the issue of judicial appointments from time to time. The Court will refer to relevant material from these bodies, which have been helpfully discussed in the judgment of the Grand Chamber of the ECtHR in *Ástráðsson v. Iceland* [2020] ECHR 844. The import of that decision will be discussed below, as will some other European case law.

72. The GRECO recommendation and the 2010 Recommendation should be seen as informing the terms of the Bill as passed by the two Houses of the Oireachtas.

The 2010 Recommendation

73. This document relates to many aspects of the role and responsibility of judges. Chapter 6 deals with the status of the judge, and under the heading of "Selection and Career", it

says that the selection of judges should be based on objective criteria preestablished by law or by the competent authorities, and should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity. It also recommends that there should be no discrimination against judges or candidates for judicial office on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, disability, birth, sexual orientation or other status. Of particular interest, it provides as follows:

> "*46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.*
>
> *47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, and independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the Judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.*
>
> *48. The membership of the independent authorities referred to in paragraph 46 and 47 should ensure the widest possible representation. Their procedures should be transparent with reasons for decisions being made available to applicants on request. An unsuccessful candidate should have the right to challenge the decision, or at least the procedure under which the decision was made."*

74. As can be seen, the Recommendations provide that an independent and competent authority should be authorised to make recommendations or to express opinions which the relevant appointing authority follows in practice. This was a view broadly similar to that expressed by the Special Rapporteur to the ECtHR, (para. 121 of the judgment in *Ástráðsson* quoting parts of the Report of the Special Rapporteur).

GRECO Material

75. GRECO carries out regular evaluations of Member States. In its Evaluation Report on Ireland following its Fourth Evaluation Round (Eval IV Rep, 3E) 2014 there is a discussion of the system for the appointment of judges.

76. Its recommendations were as follows:

> *"Consequently, GRECO recommends that the current system for selection, recruitment, promotion and transfers of judges be reviewed with a view to targeting the appointments to the most qualified and suitable candidates in a transparent way, without improper influence from the executive/political powers. The GET notes that the composition of the JAAB would appear suitable for a more profound selection procedure; however, such a task could also come under the auspices of a judicial council should such a body be established (as recommended in paragraph 124)."*

77. It will have been seen that some of the language used in this recommendation has been adopted into the Long Title of the Bill.

78. The importance of the role of the judiciary in a democratic state is self-evident but is strongly reflected in these materials. The need for the independence of the judiciary in the exercise of the functions entrusted to it could not be clearer and the manner in which judicial appointments are made is an important facet of judicial independence.

General Considerations of EU law

79. This discussion of the broader international context would not be complete without having regard to decisions of the CJEU in which the importance of judicial independence is considered, particularly, in the context of judicial appointments. This leads to a consideration of a submission on behalf of the Attorney General as to whether the provisions of the Bill under consideration are necessitated by EU law.

Part V - Whether the Bill is Necessitated by the Obligations of EU Law for the Purposes of Article 29.4.6°

Whether the Bill is Necessitated by Article 29.4.6°

80. On one view, the first question which the Court is called upon to consider is whether the Bill is "*necessitated*" by our obligations of membership of the European Union for the purposes of Article 29.4.6°. It is accepted by counsel assigned by the Court that if the Bill is so necessitated, this is the end of the constitutional inquiry. This is because the Constitution itself would have determined that the measure was itself immune from constitutional scrutiny if it were so necessitated by the obligations of Union membership.

81. Counsel for the Attorney General argued, however, that above and beyond this, the general principles of EU law could be invoked as an aid to constitutional construction even if these principles were themselves not necessitated as such within the meaning of Article 29.4.6°. It is true that by virtue of Article 29.4.4° Ireland affirms its commitment to the European Union and to promotion of "*peace, shared values and the well-being*" of the peoples of the various Member States of the Union. This means, of course, that our courts can – and will - look to decisions of the CJEU for guidance on questions such as the nature of judicial independence and the rule of law when these issues arise

within our own legal system, whether in the course of constitutional adjudication or otherwise. These legal precepts, after all, are part of the "*shared values*" of which Article 29.4.4° speaks.

82. This, however, is a quite a different matter from saying that particular aspects of the Bill are "*necessitated*" in the sense of representing obligations emanating from EU law which of necessity shield it from constitutional scrutiny. Article 29.4.6° at once safeguards the primacy of European Union law within its proper sphere of application, while at the same time upholding key aspects of Irish legislative, executive and juridical sovereignty from otherwise inappropriate encroachment. It upholds the former by providing that binding EU obligations take effect within our legal system, other provisions of the Constitution notwithstanding. It safeguards the latter by ensuring that there is no further material transfer of that sovereignty to the Union beyond that already sanctioned by the People by referendum (see the judgment of Hogan J. in *Costello v. Ireland* [2022] IESC 44 at paras. 60 and 62). This means that, generally speaking, at least, Article 29.4.6° must be read restrictively in order to give proper effect to the Constitution and to maintain its integrity and force. It is only where the legislation at issue is truly "*necessitated*" within the meaning of Article 29.4.6° that the effective disapplication of Ireland's fundamental law can be justified.

83. It follows, therefore, that the Constitution cannot as such be interpreted by reference to EU law save where such is "*necessitated*" in the sense of Article 29.4.6°. This is also of particular importance in an area such as the present one where national competence in respect of the judiciary has not been transferred from the Member States to the Union. This Court must accordingly be astute to ensure that our national sovereignty in this respect remains inviolate, absent a decision of the Irish people in some future referendum process, were indeed this ever to occur. This means in turn that this Court

must look to inquire whether there is a *binding* legal obligation deriving from EU law *requiring* this State to effect a change in the manner of the selection and appointment of judges either generally or in a particular respect. If it were only in a particular respect, then to that extent - but only to that extent – such a measure could be said to be "*necessitated*" in this sense. It is against this background that we now propose to examine some aspects of the recent jurisprudence of the CJEU.

The Recent CJEU Case-Law on Judicial Independence

84. Article 19(1) of the Treaty on European Union (TEU) provides that "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*." Article 47 of the Charter guarantees an effective judicial remedy and access to an independent and impartial tribunal. It is these two provisions which have proved to be the building blocks by which in its recent jurisprudence the CJEU has stressed that judicial independence is a vital aspect of the EU legal architecture: see, *e.g.*, *Commission v. Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531), at para. 56. It is also the mechanism whereby effective judicial remedies are guaranteed and the rule of law is upheld see, *e.g.*, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153) at para. 116.

85. While, as we have just noted, the judicial appointments process is a matter which is exclusively within the competence of the Member States so far as appointments to national courts are concerned, EU law requires that the national appointment process must nonetheless ensure that these fundamental principles – effective judicial remedies, judicial independence and the protection of the rule of law – are not thereby compromised. The issue of whether specific aspects of judicial appointment processes in different Member States complies with these general requirements of European

Union law has been the subject of consideration by the CJEU in a range of recent cases. We propose to take just two recent decisions as representative of the newly emerging jurisprudence from the CJEU on this issue.

86. In the first of these, *VQ v. Land Hessen* (C-272/19, EU:C:2020:535), a local administrative court in the State of Hesse raised the question of whether it was a "*court or tribunal*" within the meaning of Article 267 TFEU such as would entitle it to make a preliminary reference to the CJEU. It questioned whether it enjoyed a sufficient degree of independence such that it could qualify as a "*court or tribunal*" for this purpose. That court's concerns were prompted principally by the fact that the judges of the court were appointed and promoted by the (State) Minister for Justice.

87. The Court of Justice first drew attention (at para. 45) to the importance of judicial independence for the EU legal order:

> *"In that regard, it must be recalled that the independence of the judges of the Member States is of fundamental importance for the EU legal order in various respects. It is informed, first, by the principle of the rule of law, which is one of the values on which, under Article 2 TEU, the Union is founded and which are common to the Member States, and by Article 19 TEU, which gives concrete expression to that value and entrusts shared responsibility for ensuring judicial review within the EU legal order to national courts or tribunals (see, to that effect, judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 32). Second, that independence is a necessary condition if individuals are to be guaranteed, within the scope of EU law, the fundamental right to an independent and impartial tribunal laid down in Article 47 of the Charter, which is of cardinal importance as a guarantee of the protection of all the rights that individuals*

derive from EU law (see, to that effect, inter alia, judgment of 26 March 2020, Review Simpson v. Council and HG v. Commission, C-542/18 RX-II and C-543/18 RX II, EU:C:2020:232, paragraphs 70 and 71 and the case-law cited). Last, that independence is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that that mechanism may be activated only by a body responsible for applying EU law, which satisfies, inter alia, that criterion of independence (see, in particular, judgment of 21 January 2020, Banco de Santander, C-274/14, EU:C:2020:17, paragraph 56 and the case-law cited)."

88. The Court then noted (at para. 53) the existence of a judicial appointments committee which played a "*crucial role*" in such appointments. The Court then said (at para. 54):

"As regards the conditions governing the appointment of the judge sitting in the referring court, it must be recalled at the outset that the mere fact that the legislative authorities play a part in the process for appointing a judge does not give rise to a relationship of subordination to those authorities or to doubts as to the judge's impartiality, if, once appointed, he or she is not subject to any pressure and does not receive any instruction in performing the duties of his or her office (see, to that effect, judgment of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 133 and the case-law cited)."

89. The Court then went on to say (at paras. 56 and 57):

"*56. However, that fact cannot, in itself, give rise to any doubt as to the independence of the referring court. The assessment of the independence of a national court or tribunal must, including from the perspective of the conditions*

governing the appointment of its members, be made in the light of all the relevant factors.

57. It must be recalled, in that regard, that, where a national court or tribunal has submitted to the Court a number of factors which, in its view, call into question the independence of a committee involved in the appointment of judges, the Court has held that, although one or other of the factors indicated by that court or tribunal may be such as to escape criticism per se and may fall, in that case, within the competence of, and choices made by, the Member States, those factors, when taken together, in addition to the circumstances in which those choices were made, may, by contrast, throw doubt on the independence of a body involved in the procedure for the appointment of judges, despite the fact that, when those factors are taken individually, that conclusion is not inevitable (judgment of 19 November 2019, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 142). In this instance, it cannot be concluded that a committee such as that at issue in the main proceedings is not independent solely because of the factor mentioned in paragraph 55 of the present judgment."

90. The Court then went on to hold (at paras. 59-61) that the system of judicial promotions (involving a decision of the regional Minister for Justice on the recommendation of a parliamentary committee, itself consisting of a majority of politicians) was unproblematic from the standpoint of EU law.

91. The decision of the Court of Justice in *Repubblika v. Il-Prim Ministru* (C-896/19, EU:C:2021:311) involves a system of appointment which is perhaps closest to that currently pertaining in this jurisdiction prior to the enactment of this Bill. This was a

challenge taken by a Maltese public interest organisation dedicated to the protection of the rule of law to the general system of judicial appointments which obtained in Malta. The case is of particular interest given not only that Malta is at least partially a common law country, but also because the Maltese system of judicial appointments at issue in that case seems to have some similarities to that which currently obtains in Ireland by virtue of the Courts and Court Officers Act 1995. Article 96 of the Maltese Constitution provided that the judges were appointed by the Maltese President acting on the advice of the Prime Minister.

92. That advice was subject to a number of conditions. There had to be an evaluation of candidates for judicial office carried out by a Judicial Appointments Committee. The Prime Minister had to consider that evaluation. If he decided "*not to comply with the result of the evaluation*" as he was entitled to do under Article 96, he had to announce that he had taken the decision not to comply and give "*reasons which led to the said decision*", which reasons were then published in the Maltese Official Gazette.

93. Following a reference of this issue to the CJEU, the Court considered (at para. 47) that the essential question was whether the second subparagraph of Article 19(1) TEU "*must be interpreted as precluding national provisions which confer on the Prime Minister of the Member State concerned a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of a body responsible for, inter alia, assessing candidates for judicial office and providing an opinion to that Prime Minister*." The Court also noted (at para. 53) that these rules must be sufficient so as to dispel "*any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it*."

94. The Court first noted (at para. 48):

"*In that connection, it should be borne in mind that, although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law. That may be the case, in particular, as regards national rules relating to the adoption of decisions appointing members of the judiciary (see, to that effect, judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraph 68 and the case-law cited, and paragraph 79).*"

95. Having noted the general obligation found in Article 19(1) TEU to ensure effective judicial protection and judicial independence and impartiality, the Court then continued (at paras. 56-57):

"*56. As regards, in particular, the circumstances in which decisions to appoint members of the judiciary are made, the Court has already had occasion to state that the mere fact that the judges concerned are appointed by the President of a Member State does not give rise to a relationship of subordination of those judges to the latter or to doubts as to the judges' impartiality, if, once appointed, they are free from influence or pressure when carrying out their role (judgments of 19 November 2019, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 133, and of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraph 122).*

57. However, the Court has also stated that it is still necessary to ensure that the substantive conditions and procedural rules governing the adoption of

those appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once they have been appointed as judges, and that it is important, inter alia, in that perspective, that those conditions and procedural rules should be drafted in a way which meets the requirements set out in paragraph 55 above (judgments of 19 November 2019, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 134 and 135, and of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraph 123)."

96. The CJEU then directly addressed the principal concern of the referring court, namely, the fact that the Maltese Prime Minister exercised "*a decisive power*" in judicial appointments. Noting that the position from Maltese independence in 1964 and through its accession to the EU in 2004 was that the Prime Minister's "*power was limited only by the requirement that candidates for judicial office satisfy the conditions laid down by the Constitution in order to be eligible for such office*", the new changes only took effect in 2016 with the amendment of the Maltese Constitution. The Court then continued (at paras. 61-69) that the existence of the Judicial Appointments Committee simply enhanced – rather than diminished – the rule of law:

"*61. Article 49, which provides for the possibility for any European State to apply to become a member of the European Union, states that the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them.*

62. In particular, it follows from Article 2 TEU that the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in that article (see, to that effect, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 168, and judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, paragraph 30).

63. It follows that compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU (see, to that effect, judgment of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraph 108).

64. The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary …

65. In that context, the Court has already held, in essence, that the second subparagraph of Article 19(1) TEU must be interpreted as precluding national provisions relating to the organisation of justice which are such as to constitute

a reduction, in the Member State concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence (see, to that effect, judgments of 19 November 2019, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, and of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153).

66. By contrast, the involvement, in the context of a process for appointing members of the judiciary, of a body such as the Judicial Appointments Committee established, when the Constitution was reformed in 2016, by Article 96A of the Constitution may, in principle, be such as to contribute to rendering that process more objective, by circumscribing the leeway available to the Prime Minister in the exercise of the power conferred on him or her in that regard. It is also necessary that such a body should itself be sufficiently independent of the legislature, the executive and the authority to which it is required to submit an opinion on the assessment of candidates for a judicial post (see, by analogy, judgments of 19 November 2019, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraphs 137 and 138, and of 2 March 2021, A.B. and Others (Appointment of judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153, paragraphs 124 and 125).

67. In the present case, a series of rules mentioned by the referring court appear to be such as to guarantee the independence of the Judicial Appointments Committee vis-à-vis the legislature and the executive. The same applies to the rules, contained in Article 96A(1) to (3) of the Constitution, relating to the

composition of that committee and the prohibition on politicians sitting in that committee, the obligation imposed on members of that committee by Article 96A(4) of the Constitution to act on their individual judgment and not to be subject to direction or control by any person or authority, and the obligation for that committee to publish, with the consent of the Minister responsible for justice, the criteria which it has drawn up, and also its assessments, something which was, moreover, done, as the Advocate General observes in point 91 of his Opinion.

68. Furthermore, the referring court has not, in the present case, expressed any doubts as to the conditions under which the members of the Judicial Appointments Committee established by Article 96A of the Constitution were appointed or as to how that body actually performs its role. It is thus apparent that the introduction of the Judicial Appointments Committee by Article 96A of the Constitution serves to reinforce the guarantee of judicial independence."

97. The Court of Justice then concluded (at paras. 70 to 74):

"70. In the second place, it should be noted that, as pointed out, in particular, by the Commission, although the Prime Minister has, in accordance with the national provisions at issue in the main proceedings, a certain power in the appointment of members of the judiciary, the fact remains that the exercise of that power is circumscribed by the requirements of professional experience which must be satisfied by candidates for judicial office, which requirements are laid down in Article 96(2) and Article 100(2) of the Constitution.

71. Furthermore, while it is true that the Prime Minister may decide to submit to the President of the Republic the appointment of a candidate not put forward by the Judicial Appointments Committee established by Article 96A of the

Constitution, he or she is nevertheless required, in such a situation, under Article 96(4) and Article 100(6) of the Constitution, to communicate his or her reasons to the House of Representatives and, except as regards the appointment of the Chief Justice, by means of a declaration published in the Gazette. Inasmuch as the Prime Minister exercises that power only in quite exceptional circumstances and adheres to strict and effective compliance with that obligation to state reasons, that power is not such as to give rise to legitimate doubts concerning the independence of the candidates selected.

72. In the light of all of those factors, it does not appear that the national provisions at issue in the main proceedings relating to judicial appointments are, per se, such as to give rise to legitimate doubts, in the minds of individuals, as to the imperviousness of appointed members of the judiciary to external factors – in particular, to direct or indirect influence from the legislature or the executive – and as to their neutrality vis-à-vis the interests before them, and thus lead to those members of the judiciary not being regarded as independent or impartial, the consequence of which would be to undermine the trust which justice in a democratic society governed by the rule of law must inspire in individuals.

73. In the light of all of the foregoing considerations, the answer to the second question is that the second subparagraph of Article 19(1) TEU must be interpreted as not precluding national provisions which confer on the Prime Minister of the Member State concerned a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body responsible for, inter alia, assessing candidates for judicial office and giving an opinion to that Prime Minister."

Application of these EU Principles to the Bill

98. It is clear, therefore, from this summary of the recent case law (to which a range of other recent CJEU decisions could also have been added) that the rules regarding the appointment of judges must be such as that they, in the words of the Court in *Repubblika, "…dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it*." Since as this case and other decisions such as *Land Hessen* make clear that there is no particular system of judicial appointment which is required *ex ante* by EU law, and that the involvement of the other branches of government – be they executive or legislative – in the judicial appointment process is not *in itself* an infringement of EU law, we consider that compliance with the *Repubblika* test is in essence a fact-based assessment based on the law- and practice-specific to each of the Member States of the Union.

99. So far as the State is concerned, no one has ever suggested that Article 35.2 of the Constitution does not fully guarantee judicial independence or that our courts have not safeguarded that independence with particular care. These principles were long established in our own constitutional order well before the CJEU came in recent times to pronounce upon these questions. Commencing perhaps with *Buckley v. Attorney General* [1950] IR 67, our law reports are replete with examples of where legislation which was found to trench upon or compromise that independence has been found to be unconstitutional.

100. Nor can it be said that our law does not require judicial neutrality or that such is not guaranteed in practice. It is unnecessary here to rehearse the extensive and ever-growing case-law on the rules on fair procedures, pre-judgment and bias in any detail, in respect of which this Court's judgment in *Goode Concrete v. CRH Plc* [2015] IESC

70, [2015] 3 IR 493 isa prominent recent example. In any event, judicial impartiality is of the essence of the administration of justice in Article 34.1. As Ó Dálaigh J. observed in *The People (Attorney General) v. Singer* [1975] IR 408 at 414, the criminal trial process (and, we would add, the civil trial process as well) presupposes "*third-party judgment, judgment by indifferent persons*."

101. A final requirement of EU law is that the court system, reflecting the wording of Article 6(1) ECHR, must be established by law "*such that the organisation of the judicial system does not depend on the discretion of the executive, but that it is regulated by law emanating from the legislature*": see, *e.g.*, *BN v. Getin Noble Bank* (Case C-132/20, EU:C:2022:235) at para. 121. This is also clearly satisfied by various provisions of the Constitution, not least the requirement of Article 34.1 which speaks of the establishment of courts "*by law*", i.e., a statute enacted by the Oireachtas. The jurisdiction of the courts derives entirely from the Constitution and the statute law which gives effect to these provisions. Furthermore, once established, the courts contemplated by the Constitution cannot be disestablished: see, *e.g.*, the comments of Walsh J. to this effect in *The State (Browne) v. Feran* [1967] IR 147 at 157. In any event, as we have noted elsewhere in this judgment, Article 36(iii) provides that the constitution and organisation of the courts and the distribution of jurisdiction, business and procedure shall all be regulated by law.

102. It cannot be said, therefore, that our *existing* system of judicial appointment does not comply with the requirements of EU law. The 1995 Act cannot realistically be said to cast doubt on the independence of the judiciary who have been so appointed or the neutrality of judges once appointed. The establishment of courts by law – and not simply at the pleasure of the executive – is in any event expressly provided for by the Constitution.

103. This is not to say that the present system of judicial appointment could not be improved. It is rather simply to say that counsel for the Attorney General have not identified any feature of the Bill which could be said to be "*necessitated*" by the requirements of EU law in the sense of imposing a mandatory legal obligation to effect a particular change in respect of the existing judicial appointment process. We accordingly consider that the Bill represents an autonomous, autochthonous exercise of legislative sovereignty by the Oireachtas of a kind not necessitated by the requirements of EU law for the purposes of Article 29.4.6°. The Bill is, accordingly, open to constitutional challenge in the ordinary way.

The decision of the ECtHR in *Ástráðsson v. Iceland*

104. We have already made reference to the decision of the ECtHR in *Ástráðsson v. Iceland* [2020] ECHR 844 but it might be helpful to refer to it now in a little more detail. This case arose from the applicant's contention that he had been denied the right to a fair trial before an independent tribunal established by law, as provided for in Article 6 ECHR. The basis for his complaint was that, in nominating for appointment one of the judges who had sat in the Icelandic Court of Appeal for his case, the Minister for Justice had not complied with the requirements of the statutory procedure for the appointment of judges. The judge, along with three other successful candidates, had not been recommended by the statutory expert evaluation committee. The parliament, which had the role of approving each of the nominees, proceeded with a vote that split on party political lines.

105. Two candidates who had been approved by the committee, but whose names were not put forward by the Minister, took legal proceedings which culminated in a finding by the Supreme Court that the appointment process had been procedurally flawed. While the Minister had been authorised by law to depart from the committee's proposals and

propose another person not on the list, she had disregarded a fundamental procedural rule that obliged her to base her decision to do so on sufficient investigation and assessment to at least the equivalent level of that of the committee. The claimants were awarded damages, but the Supreme Court held that the flaws in the procedure did not mean that the appointments were invalid.

106. After the Court of Appeal upheld the applicant's conviction and sentence, he appealed to the Supreme Court. Again, that Court held that there were flaws in the procedure but that that did not mean that the appointments were legal nullities. It took the view that there was insufficient reason to doubt that Mr Ástráðsson had been given a fair trial before independent and impartial judges. He then took his case to the ECtHR, which found that the domestic law had manifestly been breached, that the breaches were "*grave irregularities*" that went to the essence of the right to a tribunal established by law, and that it was not clear why the Icelandic Supreme Court had not found them to be of a nature that compromised the lawfulness of the appointment. The Court also found that the Minister's behaviour, and the uncertainty as to her motives, raised serious doubts of irregular interference.

107. For the purposes of this Reference, it is relevant to emphasise certain statements in the Grand Chamber judgment. The Court noted that it was not called upon to review the Icelandic judicial appointments system and that there was a variety of different systems in Europe. It observed that, while the concept of the separation of powers between the political organs of government and the judiciary was assuming growing importance in the case law of the Court, appointment of judges by the executive or the legislature was permissible under the ECHR. Further, it considered that a certain interaction between the three branches of government was not only inevitable but necessary.

108. The Court identified certain features it saw as intrinsic to the concept of a "*tribunal established by law*". For our purposes, the most significant are as follows.

109. The reason why a court or tribunal must be "*established by law*" is to ensure that the judicial organisation of a democratic society does not depend on the discretion of the executive. A tribunal not established in accordance with legislation will necessarily lack the legitimacy required in a democratic society. A tribunal must be independent, meaning that, in particular, it must be independent of the executive.

110. It is inherent in the very notion of a "*tribunal*" that it be composed of judges selected on the basis of merit – that is, that it be composed of judges who fulfil the requirements of technical competence and moral integrity to perform the judicial functions required of it in a State governed by the rule of law. The Court emphasised the "*paramount importance*" of a rigorous process for the appointment of ordinary judges to ensure that the most qualified candidates – in terms of both technical competence and moral integrity – are appointed. The higher the tribunal is placed in the judicial hierarchy, the more demanding the selection criteria should be. The process of appointment may be open to undue interference from the executive, the legislature or from within the judiciary, and therefore calls for strict scrutiny.

Part VI - Relevant Constitutional Provisions

Relevant Provisions of the Constitution

111. The starting point for the analysis of the constitutionality of the referred provisions is Article 5 of the Constitution which defines the nature of the State as "*a sovereign, independent, democratic State*". Article 6 of the Constitution is of considerable importance and, therefore, it is appropriate to set it out in full:

"6(1) All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

(2) These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."

112. It will be noted that the powers of government as so described, namely, legislative, executive and judicial, are tripartite in character. An issue for the consideration of the Court in this reference will be the nature of the powers exercised by different branches of government in the context of judicial appointments.

113. Article 13 of the Constitution sets out a number of powers and functions of the President, including at Article 13.1 the appointment of the Taoiseach and the other members of the Government. In the first instance, a Taoiseach is appointed by the President on the nomination of Dáil Éireann. Other members of the Government are appointed on the nomination of the Taoiseach, with the approval of Dáil Éireann. Article 13.9 is an important provision which states:

"The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body."

114. Article 13.11 goes on to provide:

"No power or function conferred on the President by law shall be exercisable or performable by him save only on the advice of the Government."

115. One of the powers and functions of the President is the appointment of judges. Thus, Article 35.1 provides as follows:

> *"The judges of the Supreme Court, the Court of Appeal, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President."*

116. Article 28 sets out a number of provisions in relation to the Government. Thus, Article 28.1 provides that the Government "*shall be appointed by the President in accordance with the provisions of this Constitution*", and it has been seen that Article 13.1 sets out the relevant provisions in that regard. Also of note is Article 28.2, and it would be helpful to set that out in full. It provides:

> *"The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government."*

117. It should also be noted that Article 28.4.1° provides that the Government shall be responsible to Dáil Éireann.

118. Another provision of the Constitution providing for the President to make appointments is that to be found in Article 33.2 which relates to the Comptroller and Auditor General. Article 33.2 provides that the Comptroller and Auditor General "*shall be appointed by the President on the nomination of Dáil Éireann*".

119. Finally, Article 30.2 provides for the appointment of the Attorney General and, in this instance, the President appoints the Attorney General "*on the nomination of the Taoiseach*".

120. In certain instances, appointments are made by the President on the nomination of either the Dáil or the Taoiseach. Article 35.1 does not make express reference to the appointment of judges being subject to nomination by any other person or body. It is clear, however, that the power of the President to appoint a judge under Article 35.1 is

subject to the constraint recognised in Article 13.9 – that it is "*exercisable and performable by him only on the advice of the Government*".

121. Given the focus in these proceedings on the powers and functions of the President, it would also be helpful to look at the Irish text of the Constitution, specifically Article 13.9:

> *"Taobh amuigh de chás dá socraítear leis an mBunreacht seo go ngníomhóidh an tUachtarán as a chomhairle féin, nó tar éis comhairle a ghlacadh leis an gComhairle Stáit, nó go ngníomhóidh sé i dtaobh ní a bhaineas leis an gComhairle Stáit, nó ar chomhairle nó ainmniú aon duine nó aon dreama eile, nó ar aon scéala eile a fháil ó aon duine nó aon dream eile, is ar chomhairle an Rialtais amháin is cead don Uachtarán na cumhachtaí agus na feidhmeanna a bheirtear dó leis an mBunreacht seo a oibriú is a chomhlíonadh."*

122. Professor Ó Cearúill in the definitive work *Bunreacht na hÉireann: a study of the Irish text* (Dublin, 1999) translates Article 13.9 as follows:

> *"Apart from a case where it is provided by this Constitution that the President will act from his own counsel, or after taking counsel with the Council of State, or that he will act upon something relating to the Council of State, or on the advice or nomination of any other group or person, or upon receipt of any other news from any other group or person, it is only on the advice of the government (that) <u>the President is permitted</u> to operate and fulfil the powers and the functions that are given to him by this Constitution".*

123. Ó Cearúill states, at p. 204, that:

> *"... "Is cead" is prohibitive in tone and focuses the section on what the President "is permitted" to do, whereas the English text focuses on when the*

powers and functions of the President are "exercisable and performable" by him."

124. Finally, reference should also be made to the provisions of Article 36 of the Constitution, which relates directly to the regulation of the courts. It is considered in detail below and for that reason will not be referred to here.

Part VII - The State (Walshe) v. Murphy

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

125. It is important, having regard to these various constitutional provisions, to repeat that both parties to this reference agreed that the Oireachtas had the authority to impose, by legislation, the various constraints on the Government's power to advise the President in connection with the filling of a judicial office we have summarised above. Two possible sources of that authority were suggested. The Attorney General argued that the authority derived from Article 15.2 of the Constitution vests in the Oireachtas the "*sole and exclusive power of making laws for the State".* By way of an alternative position, the Attorney General submitted that the power resided in Article 36(iii), this being the provision which counsel assigned by the Court contended provided the sole authority for these provisions.

126. Article 36 has been referred to above and provides as follows (emphasis added):

> *"Subject to the foregoing provisions of this Constitution relating to the Courts, the following matters shall be regulated in accordance with law, that is to say:*
>
> *i. the number of judges of the Supreme Court, of the Court of Appeal, and of the High Court, the remuneration, age of retirement and pensions of such judges,*

ii. the number of the judges of all other Courts, ***and their terms of appointment****, and*

iii. the ***constitution*** *and organization of the said Courts, the distribution of jurisdiction and business among the said Courts and judges, and all matters of procedure.*'

127. As their argument developed, this provision assumed some importance in the case made by counsel assigned by the Court. They argued that the provisions of Articles 34-37 of the Constitution presented a self-contained scheme governing the regulation of the courts. The power to impose the various qualifications and eligibility requirements to which we have referred above were, they argued, within the scope of the function granted by Article 36 to legislate in respect of '*the constitution'* of the courts. It stands to reason, they argued, that that provision, rather than Article 15 governing general legislation, would be the governing provision here. In circumstances where, they said, the Oireachtas can stipulate (and has stipulated) eligibility requirements in accordance with Article 36(iii), it is not evident why it would be necessary or appropriate to do so under Article 15.2.

128. However, they said, this did not extend to measures such as those in the Bill. Here, they stressed that Article 36 states that it is "*[s]ubject to the foregoing provisions of the Constitution relating to the Courts"*. The "*provisions … relating to the Courts"* were, they said, Articles 34-37. Because Article 35.1 (on their construction) had the effect of investing in the Government a power to identify or select nominees, the provisions of Article 36(iii) were subordinated to that power. The end point of this argument was that while Article 36(iii) enabled the field of choice to be narrowed by qualification requirements, it could not be predetermined or limited in the manner or to the extent enabled by the Bill.

129. The judgment of a Divisional Court (Finlay P., Gannon and Hamilton JJ.) in *The State (Walshe) v. Murphy* [1981] IR 275 is the only decision of the courts in this jurisdiction addressing the validity of legislation prescribing qualifications for judges. It is also the only case in which the issue has arisen as to whether, and if so when and why, it is possible for the Oireachtas to enact laws limiting and conditioning the discretion of the Government in advising the President in the exercise of the function to make a judicial appointment as provided for in Article 13.9.

130. That issue arose in an unusual and indirect way. The prosecutor had been convicted of an offence under s. 49 of the Road Traffic Act 1961. The case had been heard and the conviction imposed by the respondent, a Temporary District Judge appointed pursuant to the provisions of s. 51(1) of the Courts of Justice Act 1936 as applied and amended by s. 48 of the Courts (Supplemental Provisions) Act 1961. The effect of these provisions was that qualification for appointment to the position of Temporary District Judge was limited to "*persons who are practising barristers or solicitors of ten years standing at least at the date of appointment"*.

131. One of the objections raised by the prosecutor was directed to whether the respondent had at the time of his appointment met this requirement. The issue revolved around whether service by a qualified barrister as a legal assistant in the office of the Attorney General and as an examiner in the Land Commission qualified for this purpose. The prosecutor said that such service did not render a person a "*practising barrister"*; that in consequence, the respondent was not qualified for appointment as a Temporary District Judge, his appointment was thus invalid and, accordingly, the conviction purportedly imposed by him should be quashed.

132. The respondent contended in response *inter alia* that the requirement for qualification for appointment as a Temporary District Judge imposed by s. 51(1) was invalid having

regard to the provisions of the Constitution. The Attorney General was joined to the proceedings to defend the validity of that provision.

133. One of the important questions to emerge from the claim was whether the High Court had any entitlement to review the appointment of the respondent. The respondent contended that because that appointment had been made by the President, and because the President was – consequent upon the provisions of Article 13.8 of the Constitution – not "*answerable"* to *inter alia* any court for the exercise and performance of his powers and functions, it followed that a judicial appointment, made by the President pursuant to Article 35.1 of the Constitution, could not itself be reviewed in a court.

134. The argument was shortly disposed of. The President acted in this regard on the advice of the Government, and the proposition that illegality or unconstitutionality on its part in providing that advice could never be reviewed by a court was "*alarming"* and "*unsound*" as a matter of constitutional law. In the course of his judgment, Finlay P. delivered what is now regarded as an authoritative account of the function of the President when acting on the advice of the Government ([1981] IR 275 at 283):

> *"The President has a very great number of powers and functions which he performs on the advice of the Government, without any discretion on his part. In respect of these matters, apparently, he can not refuse to accede to that advice within the Constitution. Whilst, therefore, such acts require his intervention for their effectiveness in law, in fact they are the decision and act of the Executive. If the submission made on behalf of this respondent were correct, it would mean that the Executive would be in a position to act under the Constitution in respect of a number of matters contrary to the law and even contrary to the Constitution; and that, if such act required for its effectiveness*

the exercise of a function by the President, such illegal or unconstitutional conduct could not be reviewed by any court."

135. Once satisfied that the appointment could be reviewed, the High Court turned to whether the Oireachtas was entitled to impose by way of condition on judicial appointment, particular qualification requirements. The respondent contended that the express authority conferred by Article 36(ii) to legislate for "*terms of appointment"* did not include a power to legislate for *qualification* requirements. This was accepted by Finlay P. It followed, the respondent said, that the Oireachtas was confined to legislate for the matters expressly enumerated in that provision, and because these did not include in their number the power to legislate for preconditions to appointment, the Oireachtas did not have that power.

136. Finlay P. rejected that contention for two reasons. First, he concluded that the argument of the respondent that the power of the Oireachtas to legislate in this area went no further than the express terms of Article 36 was based upon a misconception of the extent of the legislative power provided for under Article 15.2.1°, which vests the sole and exclusive power of making laws for the State in the Oireachtas. *Prima facie*, he said, such power of legislation is "*absolute and all embracing, subject to the qualifications imposed upon it by the Constitution."* He analysed that power, and those qualifications, by reference to five propositions:

(i) Article 15.4 qualified the law-making power of the Oireachtas by positing that it could not "*enact any law which is in any respect repugnant to"* the Constitution.

(ii) There were various specific prohibitions in the Constitution against the enactment of laws having particular effects (*e.g.* Article 15.5).

(iii) There was a category of prohibition arising from specific rights or inhibitions contained in the Constitution (*e.g.*, Article 35.5).

(iv) There were several instances in the Constitution where the Oireachtas is actively obliged to regulate certain matters by law (*e.g.*, Article 36(i), or Article 30.6).

(v) There was then a final category, which he defined as follows ([1981] IR 275 at 286):

> "*all other areas or topics or matters in respect of which legislation might be enacted and in which, subject to the overall obligation not to enact a statute repugnant to the Constitution and subject to the other specific prohibitions against the enactment of laws having a particular effect or consequence, the Oireachtas may enact legislation."*

137. Finlay P. concluded that "*the enactment of legislation to provide the qualifications for persons to be appointed as justices of the District Court falls, at least, within this category"*. He explained at p. 286:

> "*I am quite satisfied that there are no grounds for concluding that the existence of a mandatory obligation, contained in the Constitution and imposed upon the Oireachtas, to prescribe certain matters in connection with the number and the terms of appointment of judges of one of the courts established under the Constitution could be construed as some sort of implied restriction on the general right of the Oireachtas, subject to the qualifications which I have attempted to outline, to enact legislation for other matters concerning the same topic."*

138. Thus, the second reason for Finlay P.'s conclusion arose from a point that was not argued by the parties. (see [1981] IR 275 at 286). As evident from the text we have

earlier quoted, Article 36(iii) requires the Oireachtas to legislate in respect of "*the constitution ... of the said Courts ...*". Finlay P. found that this power embraced the authority to legislate for judicial qualification. His reasoning was as follows (at pp. 286-287):

(i) The word "*constitution*" in Article 36(iii) had to mean something more than "*establishment*" as the word "*establishment*" was used in Article 34.1 and Article 35.1.

(ii) The equivalent word in the Irish language text was "*comhdhéan*" which means "*to make up or to constitute*", while "*comhdhéanamh*" included "*structure or composition*".

(iii) The words "*compose*" or "*constitute*" included the way in which something is made up.

(iv) He reasoned thus:

> "*... since the word "constitution" in Article 36(iii) involves the concept of appointment, formation, or making up, it would appear to follow that the determination of the qualifications of any person to be appointed a judge of any court is clearly within the provisions of Article 36(iii)*".

(v) From this, he concluded as follows:

> "*not only would a statute providing such qualifications be consistent with the provisions of Article 36 in the manner which I have already outlined but there would be an obligation on the legislature to provide for such matters by statute*".

139. To recap, while both the Attorney General and counsel assigned by the Court agreed that provisions of the kind considered above were valid, there was a debate as to the

precise basis on which they were authorised by the Constitution. The Attorney General (reflecting the principal basis for the decision in *State (Walshe) v. Murphy*) contended that the authority for these provisions was to be found in the general legislative power provided for in Article 15.2.1°, although he did not outrule the prospect that Article 36(iii) had some role in this regard. As it was put in his response to questions raised by the Court: "*while … the concept of the 'constitution and organisation' of the courts in Article 36(iii) can be understood as extending to the determination of qualifications for appointment, the power of the Oireachtas to stipulate eligibility requirements is, in truth, based on its general law-making power under Article 15.2.*" Counsel assigned by the Court, however, asserted that the power was to be found *only* in Article 36(iii), arguing that the provisions of Article 34-37 comprised a self-contained code governing the regulation of the Courts. This power was, they said, subject to *inter alia* Article 35.1, and that, in turn, meant that the Oireachtas could not pass a law which (as they contended the Bill did) emasculated the Government's power of selection which (as they argued) was a necessary aspect of its constitutional function in advising the President to appoint a person to judicial office.

140. While we agree with Finlay P. insofar as he concluded that the Constitution does not merely grant a power to the Oireachtas to legislate in respect of qualification for judicial office but imposes a positive obligation on it so to do, this does not necessarily mean that this power *has* to originate in Article 36(iii). If not located in Article 36(iii), that obligation would arise from the combined effect of Articles 5, 6, 34.1 and 35.2 of the Constitution which would, together, require the limitation of judicial office to those who have obtained appropriate qualifications and would impose an obligation on the Oireachtas to legislate to that effect.

141. Noting this, we have concluded that it is not necessary to resolve the issue of whether the power to enact legislation governing judicial qualification resides in Article 36(iii) or Article 15.2.1°. The conclusion that either (or for that matter, both) of these provisions allow such legislation, still leaves open the same question: whether that power extends to measures such as those contained in the Bill, having regard to the function of the Government in advising the President to exercise his power of judicial appointment. That depends on the proper meaning and effect of Article 13.9. Essentially, the argument against the Bill is that the power to advise the President on the appointment of judges has been expressly conferred on the Government by Article 13.9 and, therefore, that the express power of the Oireachtas to legislate in Article 15 has been implicitly or expressly limited.

Part VIII - Separation of Powers - General Considerations

Separation of Powers – General Considerations

142. The Court has referred earlier to the provisions of the Constitution in relation to the appointment of judges. The power to appoint is to be found in Article 35.1 of the Constitution. It is unambiguous in its terms and provides that judges "*shall be appointed by the President*". Both sides are agreed that the power of the President to appoint judges is subject to Article 13.9 of the Constitution. Thus, while the power to appoint a judge is vested in the President, the President can only do so on the advice of the Government.

143. As has been seen, the Bill brings about a number of changes to the manner in which judges are appointed. It will be necessary to consider the provisions referred in light of the manner in which the Constitution has provided that the structures of the State shall operate in general and *inter se*. The State is, as set out in Article 5 of the Constitution,

a sovereign, independent, democratic state, and as is made clear in Article 6, the powers of government are exercised by the legislature, the executive and the judiciary. As such, each branch of government operates in its own sphere as provided for in the Constitution, by way of what has been termed the separation of powers. It is said by counsel assigned by the Court that the effect of the provisions of the Bill, and in particular ss. 47 and 51, is such as to violate the separation of powers in respect of all three organs of government.

144. The doctrine of the separation of powers has been recognised as a fundamental aspect of our constitutional architecture, going back many, many years. For example, in *Re Haughey* [1971] IR 217 at 250 it was observed by Ó'Dálaigh C.J. that:

> *"The Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of Government"*.

145. As long ago as 1933, and prior to the People promulgating the Constitution of Ireland in 1937, it was stated in *Lynham v. Butler (No. 2)* [1933] IR 74 at 121 by Johnston J. as follows:

> *"It has been found through universal experience that this division of governmental functions cannot, as a matter of practical polity, be carried out to its logical conclusion and can only take place as an approximation. In no system of which I have any knowledge has it been found to be possible to confine the legislative, the executive and the judicial power each in what I may call its own watertight compartment; and, if such a thing were to be attempted, the result, I fear, would be so much the worse for the compartment."*

146. An important observation on the role of the judicial arm of government is to be found in the case of *Crotty v. An Taoiseach* [1987] IESC 4, [1987] IR 713, where Finlay C.J. said as follows, at 772:

"[The separation of powers] involves for each of the three constitutional organs concerned not only rights but duties also; not only areas of activity and function, but boundaries to them as well.

With regard to the Legislature, the right and duty of the Courts to intervene is clear and express.

1. Article 15.4, Article 34.3.2 and Article 34.4.4 of the Constitution vest in the High Court and, on appeal, in this Court the right and duty to examine the validity of any impugned enactment of the Oireachtas and, if it be found inconsistent with the Constitution, to condemn it in whole or in part.

2. Article 26 of the Constitution confers on this Court the duty, upon the reference to it by the President of a Bill passed or deemed to have been passed by both houses of the Oireachtas, to decide whether such Bill or any specified provision or provisions of such Bill is or are repugnant to the Constitution or to any provision thereof.

3. The Courts do not, in my opinion, have any other right to intervene in the enactment of legislation by the Oireachtas.

With regard to the Executive, the position would appear to be as follows:-

This Court has on appeal from the High Court a right and duty to interfere with the activities of the executive in order to protect or secure the constitutional rights of individual litigants where such rights have been or are being invaded by those activities or where activities of the executive threaten an invasion of such rights.

This right of intervention is expressly vested in the High Court and Supreme Court by the provisions of Article 34.3.1 and 34.4.3, and impliedly arises from the form of the judicial oath contained in Article 34.5.1."

147. It is worth reflecting also on the comments made in *Sinnott v. Minister for Education* [2001] IESC 63, [2001] 2 IR 545 by Hardiman J., where he stated at p. 702:

"[T]he constitutionally mandated separation of powers is a vital constituent of the sovereign independent republican and democratic State envisaged by the Constitution. It is not a mere administrative arrangement: it is itself a high constitutional value. It exists to prevent the accumulation of excessive power in any one of the organs of government or its members, and to allow each to check and balance the others. It is an essential part of the democratic procedures of the State, not inferior in importance to any article of the Constitution."

148. One may observe that, at its heart, the doctrine of the separation of powers reflects the constitutional balance as between the three organs of State, and the fact that each, in their own turn, operates a system of checks and balances to ensure that one branch of government does not exceed the powers granted to it under the Constitution.

149. In this context, the comments of O'Donnell J. in *Zalewski v. Adjudication Officer* [2021] IESC 24, [2022] 1 IR 421 at 480 are also relevant:

"The Irish Constitution has, since 1922, entrenched a tripartite separation of powers. However, although Montesquieu drew on what he believed to be the example provided by the British system, that system, large elements of which we inherited in 1922 and maintained thereafter, did not have a clear-cut separation between the powers of the executive, legislative, and judicial branches, and the system established under the Irish Constitution, although more rigorous, has nevertheless provided for an interaction and interdependence between the

branches. In our system, where the executive sits in parliament, the executive normally controls the legislature and has the power of appointment of the judiciary. Legislation, for its part, can alter the common law and amend or abolish causes of action or create new ones. Neither the 1937 Constitution nor its predecessor contained any definition of the judicial power (or, indeed, the executive or legislative powers) and has not been interpreted in such a way that each branch may only exercise powers defined as appropriate for that branch. Courts sometimes perform tasks which can be considered administrative, such as licensing, or wardship, or certain functions under the Companies Acts. For example, under s. 54(7) of the Fisheries Act 1980, it was possible to appeal to the High Court from an order of the Minister for the Marine designating an area as suitable for aquaculture if he considered it in the public interest to do so, which does not appear to be an intrinsically judicial task or one which gives rise to any issue of law: Courtney v. Minister for the Marine [1989] ILRM 605. On the other hand, bodies established by legislation or by the executive may be required to perform functions apparently judicial in nature, or at least be required to act judicially in certain circumstances. There are areas which move between the branches. Originally, the questions of restrictive practices and monopolies were seen as administrative functions requiring economic and policy expertise. With the passage of the Competition Act 1991, such matters have become justiciable."

150. Having referred to the decision in *Lynham v. Butler (No. 2)*, O'Donnell J. made the following observations at p. 481:

"By the same token, the fears expressed, even in Lynham v. Butler (No. 2), that the other branches would seek to remove or whittle away the courts' jurisdiction

have not been realised either. As counsel for the Attorney General pointed out, the 20th century has seen a steady expansion of the reach of the law and, accordingly, of the courts. The great expansion in the role of the State in the 20th century, and the transfer by the legislature of functions, which previously might have been considered to be matters for the executive branch alone, to newly-created statutory bodies, and the concurrent general expansion of the power of judicial review of administrative action, has meant that the boundaries of law's empire, as it were, extend much further than might have been contemplated in 1922 or 1937. Looked at functionally, therefore, rather than from the perspective of legal theory, the decisions of the courts in this field have tended to a pragmatic outcome in which the assignment of the administration of justice to the judicial branch has not operated to hinder these developments, even if that has not been achieved by reasoning which, to borrow the language of McCarthy J. in Keady v. Commissioner of An Garda Siochana [1992] 2 IR 197, is not always necessarily intellectually satisfying or elegant, although, in that regard, it must be said that the approach of the case law is firmly in line with international comparators."

151. The observations of O'Donnell J. in the passage referred to above are of some significance in the context of these proceedings. Although the Constitution recognises and reflects the separation of powers as between the executive, legislative and judicial organs of the State, it is clear that the functions carried out by those various organs of the State can change, and have indeed changed over time, as described above. Indeed, in the case of *Pringle v. Government of Ireland* [2012] IESC 47, [2013] 3 IR 1 at 110, O'Donnell J, had this to say:

"[*T]he form of separation of powers adopted in the Irish Constitution was not the hermetically sealed branches of government posited by Montesquieu, but rather involved points of intersection, interaction and occasional friction between the branches of government so established."*

152. In these proceedings, it is necessary to consider whether any measure of the Bill compromises the independence of the judiciary, whether it is permissible for the legislature to intervene in the Executive function in the appointments of judges to the extent provided for in the Bill, and whether the measures breach the constitutional principle that the sole power to legislate is vested in the Oireachtas.

Part IX - Section 58 of the Bill and Judicial Independence

Judicial Independence and Section 58

153. Counsel assigned by the Court contended that a number of the Bill's provisions were liable to interfere with judicial independence. The Court will set out and address each such argument *seriatim.*

154. First, it was said that s. 58(2)(b) of the Bill interfered not only with the "*educational self-governance*" of the judiciary but also with the perception of judges as independent. Section 58(2)(b) provides that a statement of requisite knowledge, skills and attributes *may*, for the purposes of s. 58(3)(g), specify that successful completion of a particular education or training programme or a particular standard of programme is required. In turn, s. 58(3)(g) provides that the statement *shall* specify that an application will be required to demonstrate that he or she has (if the applicant already holds judicial office) undergone judicial training or participated in appropriate professional development education or training programmes as a judge or relevant to the role of a judge (s. 58(3)(g)(i)) or (if the applicant does not hold judicial office) has participated in

continuing professional development education or training programmes relevant to the role of a judge or the area of law to which the appointment concerned relates (s. 58(3)(g)(ii)).

155. The Court is not persuaded by this argument. In the first place, judicial training is the responsibility of the judiciary and of the Judicial Council (see s. 7(1)(d) of the Judicial Council Act 2019). Nothing in the Bill alters that position in any way. Secondly, it must be presumed that the Commission's powers under s. 58(2)(b) will be exercised in accordance with the Constitution generally and with due regard to the constitutionally entrenched value of judicial independence in particular which, as explained below, encompasses institutional as well as adjudicative independence. Thirdly, and in any event, it seems wholly unobjectionable in principle that the Commission should have such a power; indeed, such a power might be said to be essential for ensuring that the most meritorious applicants are appointed (and doing so in a transparent way by the setting of objective and measurable education and training standards). Finally, it appears to the Court that counsel's argument overlooks the significant role that s. 9 of the Bill gives to the judiciary in the decision-making of the Commission. In effect, the Commission can only exercise its powers under s. 58(2)(b) with the agreement of the judicial members. In all these circumstances, the Court does not consider that s. 58(2)(b) interferes with either the actuality or the perception of judicial independence.

156. The second argument made by counsel assigned by the Court also relates to judicial education. Section 58(8) of the Bill provides that the statement of requisite knowledge, skills and attributes shall require applicants to give an undertaking in writing to the Commission that, if appointed, he or she will take such course(s) of training or education or both as may be required by the Chief Justice or the President of the court to which they may be appointed. The fact that the undertaking must be given to the

Commission could, it is said, create the impression that the judge is "*subordinated*" to the Commission and "*taking orders or instructions*" from it. Counsel cite *LM* (Case-216/18, ECLI:EU:C:2018:586), *Commission v. Poland* and *Repubblika* in this context.

157. Section 58(8) of the Bill effectively re-enacts s. 19 of the 1995 Act. That provides that a person who wishes to be considered for appointment to judicial office shall give an identical undertaking to JAAB. In each case, the undertaking is required to be given to the entity to which the application is made. That is a matter of practicality – indeed it is difficult to see who else the undertaking might be directed to. In each case, it is the Chief Justice and/or the relevant court President – not the JAAB or the Commission - that determines what courses the judge may be required to take. Section 58(8), like its statutory predecessor, is simply a practical mechanism for vesting such a power in the Chief Justice and Presidents. No reasonable observer could perceive that the subsection subordinates judges to the Commission or subjects them to orders or instructions from it.

158. The third objection taken by counsel assigned by the Court under this heading related to s. 58(3)(f), which provides that a statement of requisite knowledge, skills and attributes shall specify that an applicant for appointment (who may already hold judicial office) will be required to demonstrate that he or she has *"an appropriate awareness of the diversity of the population of the State as a whole and of any matters arising from such diversity that may require special consideration in proceedings before a court."* Counsel assigned by the Court argued that such a requirement was vague and would give rise to a perception that judges' decisions could be open to scrutiny *"on political grounds*," such as where a High Court judge in good faith made an unpopular decision affecting a particular minority. Similar objection was taken to s. 58(3)(e) of the Bill which provides that applicants shall be required to demonstrate that have "*an*

appropriate awareness of the practical considerations that affect the experience of lay participants in the court system, whether as a party to proceedings, as a witness or otherwise."

159. These provisions do not, in the Court's view, permit consideration of "*political grounds*" in the selection process. As already explained in this judgment, decisions of the Commission as to who to recommend for appointment to a given judicial vacancy are required to be based on merit. It is not, however, inconsistent with the merit principle to require applicants – whether already in judicial office or not – to demonstrate an appropriate awareness of the matters in s. 58(8)(e) and (f), which are, in principle, relevant to the capacity of applicants to satisfactorily perform their duties as a judge in the event of being appointed. The statement adopted by the Commission will, no doubt, give further guidance on the practical scope of these requirements and, again, it is to be presumed that the Commission will exercise its powers in a manner consistent with the Constitution.

160. The fourth objection made under this heading (that the "*attributes*" of prospective judges are vague and uncertain) is, has substance, been addressed elsewhere in this judgment, as is the fifth objection (relating to the requirement on applicants, including sitting judges, to provide potentially sensitive health information as part of the application process).

161. The sixth and final objection taken by counsel against the Bill is that, if the Bill is enacted, it is liable to open the whole area of judicial appointments to judicial review and administrative law challenges to a much greater degree than has been the case heretofore. That, it is said, may have consequences for public confidence in the

judiciary and thus its position and independence. In response, the Attorney General observes that the potential for judicial review is simply the corollary of legislative intervention in a State based on the rule of law.

162. In the Court's view, there is some force in the point made by counsel against the Bill. If the Bill is enacted, it *may* open the area of judicial appointments to judicial review to a greater degree than has been the case to date and that *may* in turn give rise to difficult issues as regards disclosure of information relating to the Commission's selection processes. But any such issues can – and can only – be addressed if and when they arise in concrete form. The circumstances in which and the extent to which decisions of the Commission regarding selection/recommendation may be subject to judicial review are issues which were not the subject of any debate in these proceedings and the Court expresses no view on those issues. What is clear as far as the Court is concerned is that the mere fact that the Commission may be subject to judicial review is not a basis for finding the referred provisions or any of them to be repugnant to the Constitution.

163. The Court readily accepts that judicial independence is a foundational constitutional requirement, "*the lynchpin of the constitutional order*" as it was characterised by O' Donnell J (as he then was) in *Zalewski v Adjudication Officer* [2021] IESC 24, [2022] 1 IR 421 at para. 37. The Court also agrees that judicial independence encompasses and protects the independence of judges and courts from external interference – what is sometimes referred to as external independence - as it does internal independence (judicial impartiality) (for a discussion of the external/internal distinction see *e.g.* Case C-126 *LM* EU:C:2018:586 §§63-65, which was cited by counsel against the Bill). A core element of external independence is that judges should be free to make decisions in individual cases without being subject to actual or perceived external pressures or influence (adjudicative independence). But the principle of judicial independence is

broader in scope. As the Supreme Court of Canada explained in *Valente v The Queen* [1985] 2 SCR 673, it also encompasses "*a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees*" (p. 685) and involves "*the institutional independence of the court or tribunal over which [a judge] presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government"* (page 687)*,* an *"essential condition*" of which is "*the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function*" (page 708).

164. However, in the Court's view, the features of the Bill just addressed, whether individually or in combination, do not interfere with judicial independence, as so understood. In particular, nothing in the Bill has the effect of subordinating judges or courts to the Commission or gives the Commission any power to give orders or instructions to judges or courts or do anything that could impair the institutional autonomy or independent judgment of judges and courts under the Constitution. So far from undermining either the substance or perception of judicial independence, the *raison d'être* of the Bill is, as the Attorney observed in his written submissions, to safeguard and strengthen judicial independence and, by extension, the rule of law.

165. These grounds of objection therefore fail.

166. In the Court's view, it has not been established that ss. 58(3)(e) or 58(3)(f) are repugnant to the Constitution.

Part X - Separation of Legislative and Executive Powers

Separation of the Executive and Legislative powers

Interpretation of Sections 47 to 51 of the Bill

167. The argument that the Bill would violate the separation of powers as between the executive and the legislature turns in part on the interpretation of these sections of the Bill.

168. It is clear that the Bill if enacted will not permit the Government to nominate any person to the President who has not been recommended by the Commission. The question that needs to be addressed is whether the Bill permits the Government to refuse to accept a recommendation by the Commission or whether it must, regardless of its own wishes, nominate a recommended person.

169. Section 47 provides for the recommendation by the Commission to the Minister of those persons who have been through the selection process for judicial office. As has been mentioned previously, there is an upper limit on the numbers (three) who can be recommended for any one vacancy. Provision is also made for the possibility that the Commission is not in a position to recommend as many as three persons, and therefore it can recommend to the Minister a lesser number of persons. In doing so, it is required to set out in writing the reasons why it is unable to recommend the number of persons specified in the legislation. If it cannot recommend any person for a vacancy in a judicial office, it is obliged to inform the Minister of that fact and again set out in writing the reasons why it is unable to recommend any person. Further, in making a recommendation or indeed if it cannot make a recommendation, the Commission is required to forward the name of each person who made an application in respect of the vacancy concerned to the Minister. The argument of counsel opposing the Bill has focused on the operation of s. 47 in combination with the provisions of s. 51 of the Bill. In essence, it is contended that those two sections remove any choice from the Government in advising the President and gives the choice to the Commission of selecting those who will be appointed to judicial office.

170. As noted earlier, there are a number of provisions of the Bill that can be traced back to provisions in the 1995 Act and the origin, similarities, and differences, are of some potential assistance in construing two provisions of the Bill relevant to this Reference.

171. The first is s. 51 of the Bill, which falls to be considered alongside s. 16(6) of the 1995 Act. The latter provides as follows (emphasis added):

> "*In advising the President in relation to the appointment of a person to a judicial office the Government shall* ***firstly*** *consider for appointment those persons whose* ***names*** *have been recommended to the Minister pursuant to this section".*

172. Section 51(1) of the Bill says this (emphasis also added):

> ''*In advising the President in relation to the appointment of a person to a judicial office* ***in the State*** *the Government shall* ***only*** *consider for appointment those persons who have been recommended* ***by the Commission*** *to the Minister* ***under section 47.'***

173. The words in bold define the distinctions between the sections, the only important one being the replacement in s. 51 of the word "*firstly"* with "*only"*. What in our view follows is simple and obvious. Section 16(6) of the 1995 Act was presumably the model for and source of s. 51(1). Section 16 operated in a context in which the Government was not under an obligation to appoint from the JAAB list, let alone to appoint anyone at all. Had it been intended to effect the fundamental change to the appointment process contended for by counsel assigned by the Court (*viz.* an obligation to only appoint from the list *and* an obligation to actually appoint) the changes would have had to have been far more extensive and, representing a fundamental change to the practices in this State since its foundation, clearly and unequivocally expressed.

174. Second, under the 1995 Act when the Board recommended persons for appointment to judicial office it had to not merely forward the names, qualifications and experience etc of the persons so recommended, but also "*the name of each person who has informed the Board of his or her wish to be considered for appointment to that judicial"* (s. 16(2)). This applied whether or not the Board was in a position to recommend seven persons (s.16(4)).

175. It is hard to see any reason for this other than that the Minister was, under the 1995 Act, not required to appoint a person recommended by the Board, and thus has an interest in knowing who else had applied for the position.

176. It is therefore of relevance that s. 47(5) of the Bill contains a very similar provision, suggesting that, while the Government under the Bill can clearly only advise appointment from the list submitted by the Commission, it may still have a need to know if there were other candidates and, if so, who they were. It is hard to discern why the Minister could have any need for this information if it were not to be used to decide *not* to proceed with an appointment on the basis of the list forwarded by the Commission. The section provides:

> "*The Commission shall, at the same time as making a recommendation, or informing the Minister that it cannot make a recommendation, under this section forward the name of each person who made an application in respect of the vacancy concerned."*

177. Section 51 provides that the Government "*shall only consider for appointment those persons who have been recommended by the Commission to the Minister*". Thus, the choice of the Government has been confined to those who are recommended by the Commission. The fact that the choice has been reduced (by comparison to the position in respect of JAAB) is not in doubt, but that in itself cannot mean that s. 51 is

unconstitutional. In the course of argument, some discussion took place as to what might happen if, for example, only one name could be recommended by the Commission, and the person so recommended withdrew their name from the process before the Government had a chance to consider the name or give advice to the President to nominate the person so named. It was accepted by counsel assigned by the Court that the process would have to be recommenced. It is also relevant to note the provisions of s. 51(2) which require the Government to request the Commission to confirm "*prior to advising the President in relation to the appointment of a person to a judicial office, that the person concerned is an eligible person*". It must be the case that, if having requested the Commission to confirm that the person concerned is eligible (as the Government must do) prior to advising the President, that, if the Commission were not in a position to confirm that the person is eligible, the Government could not advise the President to appoint that person.

178. Again, it must follow that the process would have to be restarted if that was the only person whose name had been recommended. Therefore, where someone withdraws their name, or is subsequently not confirmed by the Commission as being an eligible person, the Government is not required by s. 51 to advise the President to appoint that person.

179. If the Government is so clearly not obliged to advise the President to appoint in some specific circumstances, there is nothing in s. 51 that could be understood as compelling the Government to appoint a person simply by reason of the fact that the person concerned was nominated by the Commission. Two aspects of s. 51(1) are of assistance in coming to that conclusion. First, assuming for the sake of argument that more than one name has been provided by the Commission to the Government, the Government has to exercise a choice and must, in the language of the section "*consider for*

appointment" the persons so nominated. By any definition, that is the exercise of a choice. One might ask what if only one name has been recommended by the Commission? In those circumstances, it still follows that the Government has to "*consider for appointment*" that person. If the Government is to carry out its function meaningfully, it must consider whether it is satisfied to advise the President to appoint the person so recommended. If it is not so satisfied, having considered the name or names of the persons recommended, there is nothing in s. 51 which requires that the Government must advise the President to appoint a person who has been nominated by the Commission. Just as there is nothing expressly stated in s. 51 to that effect, it is difficult to read into s. 51 any requirement that the Government must nominate a person for appointment once that person's name has been supplied to it by the Commission. Indeed, as pointed out already, the terms of s. 51(2) would contradict any such implicit requirement.

180. The other point to note is that the function of the Government in this regard is to advise the President. In carrying out the function of advising the President to nominate a person for judicial office, the choice must be made by Government, having considered the names recommended by the Commission. Before advising the President, the Government has to exercise a choice as to whether or not to give that advice to the President. There is nothing express or implicit in s. 51 which requires the Government to nominate a person recommended by the Commission for appointment by the President. It has a choice to advise the President in accordance with the recommendation of the Commission, and even where only one person is recommended, the Government is still exercising a choice, the choice being whether or not to advise the President to appoint that person.

181. Therefore, the Court is satisfied that s. 51, on any interpretation, involves the exercise of a choice by the Government as to whether or not to nominate a person or persons recommended by the Commission for appointment by the President. That is a meaningful choice and is in accordance with the Government's role, as set out in Article 13.9, and having regard to the provisions of Article 35.1 of the Constitution. It follows that, if the Government is not satisfied to exercise the power to advise the President, then the process will have to start again.

The Constitutional Effect of these Measures

182. As we have seen, the Constitution requires the Oireachtas to legislate in respect of the eligibility for appointment of persons as members of the judiciary. We have earlier set out, the manner in which this has been done to date, from well before independence through to the era of the modern court structure provided for in the Constitution. It has, however, been the case to date that in making the ultimate choice of persons to nominate for appointment, the Government has generally been left with a large measure of discretion. The 1995 Act reduced that discretion to a certain extent, but it remains the situation that the Government may nominate a person who has not gone through the JAAB process (provided that it publishes formal notice in Iris Oifigiúil where it does so).

183. Counsel assigned by the Court stress that the Bill goes far beyond merely empowering the Commission to determine whether individuals have met eligibility criteria such that they are suitable for appointment. In so doing, it is argued, the Bill impermissibly interferes with the constitutional power of the Government by obliging it to act only on the recommendations of the Commission.

184. This argument is in part based on the contention that s. 51 leaves the Government with no option but to accept a recommendation, an interpretation which we have rejected.

However, it is also submitted that even if the Government does have the power to refuse to accept a recommendation, it has still in effect been divested of a constitutionally conferred power of selection. A narrow choice, it is said, is not a real choice. *Attorney General v. Hamilton* [1993] 2 IR 250 is cited as authority for the proposition that, since the Oireachtas cannot take upon itself the functions of the Government, it is not "*constitutionally permissible for the Oireachtas to direct the Government as to the manner in which it conducts its business*" (*per* Hederman J. at p. 275). *Crotty* and *Pringle* are referred to as emphasising the importance of the freedom of the executive in the sphere of foreign relations. Reference is also made to the judgment of Hardiman J. in *Sinnott v. Minister for Education* [2001] IESC 63, [2001] 2 IR 545 at 702:

> *"[T]he constitutionally mandated separation of powers is a vital constituent of the sovereign independent republican and democratic State envisaged by the Constitution. It is not a mere administrative arrangement: it is itself a high constitutional value. It exists to prevent the accumulation of excessive power in any one of the organs of government or its members, and to allow each to check and balance the others. It is an essential part of the democratic procedures of the State, not inferior in importance to any article of the Constitution."*

185. Counsel have also referred to a number of decisions of the courts in other jurisdictions. However, we have concluded that the concept of the separation of powers, and the manner in which it is implemented, can differ so widely in various jurisdictions that authorities from other jurisdictions addressing distinct (and often fundamentally different) constitutional arrangements are of little assistance to us in addressing this particular issue. In particular, the constitutional structures of the federal government of the United States of America, and the place and powers of the executive in the constitution of the United States, are markedly different to those pertaining here. In our

system the members of the Government must be members of the legislature, and the Government is directly answerable to a House of the legislature. In that context, one cannot easily draw comparisons with a system where the President and Cabinet are entirely separate from the legislature, and where there is a wide and sophisticated jurisprudence relating to executive powers. Nor can one easily seek guidance from other common law jurisdictions (although this Court frequently does so in relation to other matters), since in at least some of them the law relating to the appointment of judges and the powers of the executive may retain some remaining elements of the royal prerogative.

186. As far as those Irish authorities that address the separation of powers are concerned, it is clear that most of the jurisprudence is directed towards the resolution of potential conflicts or tensions between the legislature and the courts, or between the executive and the courts. Cases involving a determination of the role of the executive *vis-à-vis* the legislature have to date been concerned with questions as to whether, for example, a particular decision or action taken by the executive is or is not *ultra vires* the relevant legislation, or is such as would require to be authorised by legislation and/or amounts to an impermissible delegation or exercise of the exclusive law-making power vested in the Oireachtas.

187. None of these cases directly concerned or substantively addressed the particular issues that arise where an argument based on the separation of powers is deployed to preclude the legislature from trenching on areas said to be within the exclusive authority of the executive power. The potential discordance of an absolute rule, the effect of which would be to preclude the legislature from absorbing executive functions, with a constitutional system where the executive sits in the legislature and is responsible to it and where, in practice, legislative business is controlled by the executive, is self-

evident. There has not been a single instance where legislative encroachment into an area of executive power has been found in this jurisdiction to be impermissible on separation of powers grounds.

188. It follows that it is far from obvious that the approach adopted in the various authorities referred to by counsel assigned by the Court is transferable to the issue with which the Court is concerned here. That is the question of whether the Bill, if enacted, would impermissibly invade a constitutionally protected zone reserved by the Constitution to the executive. Thus, for example, *Attorney General v. Hamilton* [1993] 2 IR 250 was concerned with the principle of Cabinet confidentiality and whether or not questions could be asked in the Beef Tribunal about what transpired at a Cabinet meeting. The Tribunal was, as described by Finlay C.J. at pp. 270 – 271,

> *"…essentially, an exercise of the legislative power originated by the Executive as members of the Legislature and implemented, or put into effect, by an order of the Executive pursuant to the resolution of both Houses of Parliament."*

189. That description, in itself, demonstrates how the roles of government and legislature can sometimes be entwined. The statement quoted from the judgment of Hederman J. at para. 179 above was made in a context where he was stressing that the Government was answerable to the Dáil for the decisions that it made and not for the way that it made them. It does not resolve the question that arises here, where the issue is not whether the legislature is directing the executive in the conduct of the latter's business, but whether the Oireachtas can appropriate to itself, or otherwise legislate to regulate, aspects of a function previously exercised by the Government.

190. As for the specific passage from *Sinnott* cited, there are a number of points to be made. The separation of powers issue in *Sinnott* that Hardiman J. was addressing arose between the judiciary on the one hand and the political branches on the other – the High

Court had, in the absence of any legislative authority, made a decision of a sort that was *"normally a matter for the legislative and executive arms of government"* (at p. 699, emphasis added). That the fault line identified concerned the judicial *versus* the political branches is reinforced by his extended citation from and reliance on the High Court's decision in *O' Reilly v. Limerick Corporation* [1989] ILRM 181, where again, the issue was whether the courts had a role in supervising decisions of the organs of government responsible for determining policy around expenditure of public monies and the allocation of resources.

191. It cannot be assumed that the statement that the separation of powers "*is itself a high constitutional value*" in the context of the separation of powers between the courts and the legislature and/or the executive should be read as applying in the same way to the separation between executive and legislature. Nor can it be relied upon for the proposition that there was or is the identical or similar "*high constitutional value"* that protects executive functions against legislative regulation.

192. Other considerations that could come into play in a debate about the demarcation between the executive and legislature could include the fact, to which we have earlier referred, that the executive is drawn from the ranks of the legislature and is answerable to it. There is also the fact that, as a matter of history, the executive in this State usually (although by no means always) has a degree of dominance over the legislature. A division of function which ultimately has its justification in the institutional independence of different organs of government does not, necessarily, encompass the imposition of a sharp line of separation between an executive arm and legislative body where the former is functionally dependant on, and constitutionally responsible to, the latter.

193. Accordingly, these are largely uncharted waters, although many of these issues were helpfully anticipated by Casey, 'Under-Explored Corners: Inherent Executive Power in the Irish Constitutional Order' (2017) 40(1) *Dublin University Law Journal* 1. In keeping with the approach to the Reference that we outlined above, we do not propose to attempt in this decision to sketch a general scheme of the distinctive roles of the executive and legislature, or to delineate the precise boundaries between them. Therefore, while we note that there may be a debate to be had in other circumstances as to whether or not there is a constitutionally irreducible core of decisions or activities that may not be interfered with by the legislature, we confine ourselves here to determining whether the Bill breaches any limitations that are contended to be applicable.

194. In so doing, the importance of the principle of the independence of the judiciary as a core constitutional value must be stressed. The judiciary must be independent from both the Government and the Oireachtas, given that the role of the courts is, in accordance with the doctrine of separation of powers, *inter alia*, to act as a meaningful "check and balance" and constraint in respect of the activities of those branches of government.

195. The Oireachtas has a very significant role in relation to the courts, by reason of its obligation from the combined effect of Articles 5, 6, 34.1 and 35.2 of the Constitution, encompassing, *inter alia,* their establishment (Article 34.1), the removal of judges (a power vested in the two Houses under Article 35.4) and the broad legislative competence (and duty) arising under Article 36. On any view, it is the Oireachtas, rather than the Government, that is the principal constitutional actor in this area.

196. In this context, the Oireachtas – including the Dáil, the organ to which the Government is responsible under Article 28.4 – is entitled to adopt the position that the Government's general accountability to date in respect of judicial appointments does

not provide sufficient protection against inappropriate appointments, and/or does not sufficiently protect the judiciary from the perception that they may not be truly independent of the political branches.

197. If, as we have found, the Oireachtas is constitutionally obliged to legislate in respect of eligibility requirements, the question then arises as to whether it can legislate more generally in relation to judicial appointments. As matters stand, and subject to eligibility requirements, it is clear that to date the view has been that the Government had a very large measure of discretion in its approach to the appointment of judges. That view, however, must be seen to have developed in a context where the Oireachtas did not (apart from the exceptional circumstances surrounding the appointment of the first judges of the new Courts established in 1961) legislate beyond matters of basic eligibility until 1995. The combined effect of Article 35.1 and Article 13.9 was understood as being that the decision of the President to appoint a judge on the advice of the Government was a purely executive action taken by the Government, that action being necessarily preceded by a decision of some kind by the Government.

198. This accordingly raises the question as to whether this function of the Government can be regulated by legislation enacted by the Oireachtas. It is clear from the text of the Constitution that there is certainly no *ex ante* bar to the enactment of legislation of this general kind or on the involvement of one or other House of the Oireachtas in the exercise of executive powers. Thus, for example, even though the grant of citizenship is plainly an executive function, Article 9.1.2° envisages that "*such shall be determined in accordance with law*." The power to pardon is equally an executive power, but Article 13.6 envisages that the power "*of commutation or remission may also be conferred by law on other authorities*." The fact that Article 13.6 expressly provides that the power of remission can be conferred by law on other authorities also "*tacitly*

implies that the exercise of this power can be regulated by law": see *O'Farrell v. Governor of Portlaoise Prison* [2014] IEHC 392, per Hogan J.

199. While Article 29.4.1° vests the foreign affairs power in the Government, aspects of that power may be regulated by law in accordance with Article 29.4.2°. The Government may exercise a discretionary power to agree to certain decisions of the European Union (such as authorising the Council of the European Union to act other than by unanimity), but Article 29.4.8° provides that "*the agreement to any such decision, regulation or act [of the European Union] shall be subject to the prior approval of both Houses of the Oireachtas*." In the same vein, Article 29.5.2° provides that the State shall not be bound by an international agreement involving "*a charge upon public funds unless the terms of the agreement have been approved by Dáil Éireann*." Article 29.6 states that no international agreement agreed to by the Government "*shall be part of the domestic law of the State save as may be determined by the Oireachtas*." Article 49.2 clearly envisages that certain executive powers formerly exercised by the Government of Saorstát Éireann prior to the 11th December, 1936 (i.e., the date on which Constitution of the Irish Free State was amended to delete all references to the Crown and Governor General) will fall to be exercised by the Government "*save to the extent…[which] may hereafter be made by law for the exercise of any such power, function, right or prerogative by any of the organs established by this Constitution*" (emphasis added).

200. Over and above these special instances, there is the very practical reality that a great deal of contemporary legislation is devoted to regulating the exercise, in one form or another, of the Government's Article 28.2 executive powers. This has been recognised in one shape or another in the sphere of immigration by previous decisions of this Court in cases such *Laurentiu v. Minister for Justice* [1999] IESC 47, [1999] 4 IR 26 and *NHV v. Minister for Justice* [2017] IESC 35, [2018] 1 IR 246. To that extent, it can be said

that neither organ of government "*is totally free of influence by the other and that this fusion is mandated by the Constitution. Consequently, it is an acceptable dilution of the pure milk of the separation of powers*" (Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell, Dublin, 1997) at p. 279).

201. It may be that to some extent the express executive powers vested in the Government (and, by extension, the Taoiseach) by the Constitution to "*advise*" the President may stand in a slightly different category from the "*ordinary*" executive powers envisaged by Article 28.2. After all, many of these Article 13.9 advice powers were, in some form or another, among the "*powers, functions, rights and prerogatives*" exercisable by the former Executive Council (i.e., Government) "*in or in respect of Saorstát Éireann immediately before the 11th day of December 1936…by the authority in which the executive power of Saorstát Éireann was then vested*" for the purposes of Article 49.1. It is common case that the power to appoint judges fell into this category, having regard to the terms of Article 68 of the Constitution of the Irish Free State as it stood prior to 11th December 1936: see *The State (Killian) v. Minister for Justice* [1954] IR 207 at 212-213, *per* Murnaghan J. Article 49.2 governs the exercise of these Article 49.1 rights. Article 49.2 makes it clear that the general legislative power of the Oireachtas to regulate these particular rights and powers is "*save to the extent to which provision is made by this Constitution...for the exercise of any such power, function, right or prerogative by any of the organs established by this Convention…*" (emphasis added). At the same time, it can be said that insofar as the power of selection of persons for judicial appointment might be said to be an executive power, the effect of Article 49.2 is that the Oireachtas can legislate in that zone except where provision has otherwise been made within the Constitution.

202. Of course, the Constitution does make provision for the appointment of judges through the combination of Article 35.1 read in conjunction with Article 13.9. Certainly, it would not be possible for the Oireachtas to confer the power to *appoint* on some person or body, other than the President, or to oblige the President to act on the advice of some person or body other than the Government. However, the Oireachtas has in fact always legislated for eligibility requirements (which are not expressly provided for in the Constitution) and, as we have said, it has always been constitutionally obligated to make such provision. Put simply, it is a constitutional imperative that there should be rules as to who can or cannot be made a judge. The new model of the courts created in 1924, and carried over in 1937, envisaged the abolition of lay magistrates and justices of the peace and the creation of courts in which justice would be administered by full-time, professionally qualified judges. That obviously required, and continues to require, the making of rules as to what qualifications are needed in order to be eligible for appointment. Equally, that was and is a task for the Oireachtas and not a matter for the untrammelled discretion of the Government. As we have earlier noted, the challenge to the power of the Oireachtas to enact such legislation was firmly rejected in *State (Walshe) v. Murphy.*

203. It is not apparent therefore, that the fact that the power of appointment of judges is structured as it is in the Constitution impliedly limits the general capacity of the Oireachtas to legislate on this topic. In addition to the five categories of legislative powers helpfully enumerated by Finlay P. in *The State (Walshe) v. Murphy,* it can be observed that this Court has on several occasions noted the existence of implied limitations on the exercise of legislative power where those limitations are a necessary consequence of the express constitutional text: see, *e.g., Re Solicitors Act* [1960] IR 239 at 263 *per* Kingsmill Moore J. (the corollary of Article 34.1 is that justice is not to

be administered by persons who are not judges appointed under the Constitution, save in the special case permitted by Article 37.1) and *Re Article 26 and the Electoral (Amendment) Bill 1983* [1984] IR 268 at 274-275, *per* O'Higgins C.J. (the original version of Article 16 impliedly excluded the enactment of legislation which purported to extend the franchise to non-citizens). As Henchy J. said in *Tormey v. Ireland* [1985] IR 289 at 294, "*it is implicit in Article 26 that no court other than the Supreme Court shall have jurisdiction to rule on the constitutionality of a Bill referred by the President under that Article*", so that, for example, the Oireachtas is not at liberty to create its own version of the Article 26 procedure and vest that jurisdiction in the High Court.

204. There is, however, no universal rule in this regard and the mere fact that a power or function comes within the scope of Article 13.9 does not in itself render it inviolate and beyond the scope of appropriate legislative regulation. Each power must be construed and assessed separately, on its own terms and having regard to the specific constitutional interests in play and with regard to how the power in question fits into the wider constitutional structure. In the particular context of the process of judicial appointment, the independence of the judiciary that is so forcefully reflected in Article 35.2 is obviously a vitally important interest.

205. There may, of course, be instances where the context, wording, text and manifest purpose of the constitutional provision in issue would suggest that the exercise of the power in question is set out exclusively in the Constitution and is thus beyond the scope of legislative regulation: the power of the President to summon and to dissolve Dáil Éireann on the advice of the Taoiseach in accordance with Article 13.2.1° is almost certainly one such power. We do not consider, however, that Article 35.1 quite falls into this category given that, for example, the Oireachtas clearly has both the power and the duty to prescribe eligibility conditions for judges, thereby, on any view,

significantly constraining the scope of the Government's freedom of action in this context. The Government is, after all, not free, for example, to appoint barristers or solicitors of just five years standing to the High Court having regard to the twelve years eligibility requirement set out in the Courts (Supplemental Provisions) Act 1961.

206. While eligibility conditions are admittedly somewhat different from the power of appointment as such (though arguably located on the same spectrum), it nevertheless cannot be said that the context, wording, text and purpose of Article 35.1 (read, as necessary, with Article 13.9) is such that it can be said to exclude by implication *all* possible legislative regulation of the appointment procedure. In particular, it cannot be said to exclude the possibility of legislation that goes beyond prescription of minimum eligibility levels and further narrows down the pool of candidates to be considered by the Government.

207. In this decision, as already stated, it is not necessary to delineate in some conclusive fashion the limitations on that legislative power. The issue arising here is not abstract or theoretical. Rather, it is concrete and specific: whether it is within the legislative competence of the Oireachtas to enact *this particular* Bill. What seems to us to be clear is that if and insofar as there are any limitations necessarily implicit in the combined effect of Article 35.1 and Article 13.9, those limitations would fall to be defined by a requirement that the Oireachtas must respect all relevant constitutional considerations. In this context, one such highly relevant consideration, the status and importance of which cannot be disputed, is the necessity to protect and enhance the independence of the judiciary. By enhancing judicial independence, the Bill seeks to reinforce the most critically important aspect of the constitutional separation of powers, namely the separation between the judicial branch on the one hand and the political branches on the other. It would not be open to the Oireachtas to create a process or procedure which

compromised or undermined the principle and reality of judicial independence. On the assumption - since, as explained, we do not consider it necessary to decide the issue - that the ultimate authority of the Government to make the final decision as to who to appoint as a judge must also be preserved, the question is whether this measure is such an extension of the acknowledged right and duty to legislate for eligibility as to constitute an impermissible constraint on the Government's freedom of choice. In our view it is not, in that it preserves for the Government a real and meaningful choice as to the acceptance or rejection of a list, the freedom not to nominate a person when it so wishes, and choice within the list. Whatever the applicable boundary, therefore, the Bill does not, in the Court's view, transgress it.

208. We accordingly do not consider that it has been established that the Bill breaches the separation of powers in this respect.

Part XI - Article 15 and the Selection Criteria

Article 15 and the Selection Criteria

209. Counsel assigned by the Court have raised an issue as to its compatibility with Article 15.2 of the Constitution, which vests the sole and exclusive power of making laws for the State in the Oireachtas. The case made here is that, while the Article permits some level of delegation to subordinate bodies, the Bill grants the Commission excessive power to frame the selection criteria for judges and does not provide sufficient legislative guidance for the purpose.

210. In this context, the word "*merit*" assumes central importance. Section 39(1) provides that recommendations to the Minister must be based on merit, without defining the word. Section 39(2) provides that, subject to subs. (1), it shall be an objective that the membership of the judiciary in each court should "*comprise equal numbers of male and*

female members", "reflect the diversity of the population of the State as a whole", and "*include a sufficient number of judges with proficiency in the Irish language to meet the needs…of users of each court with respect to proceedings being conducted in the Irish language"*.

211. The Attorney General has argued that the meaning of the word "*merit*" is self-evident, while counsel assigned by the Court have argued that it is "*wholly vague and incapable of clear and consistent application*". They refer in particular to Kenny 'Merit, diversity and interpretative communities: the (non-party) politics of judicial appointments and constitutional adjudication' in Cahillane, et al., *Judges, Politics and the Irish Constitution* (Manchester University Press, Manchester, 2017) p. 136, where it is suggested that the term *"merit"* in this context is a disputed concept. Professor Kenny describes the "*merit principle*" as "*'an empty vessel for substantive norms'"* (citing Alexander (1993)) that is "*filled with content that is invariably political*".

212. Professor Kenny's essay is in part an analysis of the submission made by the Judicial Appointments Review Committee, in the public consultation process on the appointment of judges organised by the Department of Justice and Equality in January 2014. Among other matters, the Committee emphasised that political allegiance should have no bearing on appointments to judicial office. It recommended that the "*merit principle*" should be established in legislation. In this regard it gave as examples the various statutory measures governing appointments in each of the four jurisdictions in the United Kingdom, all of which stipulate that selection must be solely on merit. Reference was made to the development by the Judicial Appointments Commission for England and Wales of a set of merit criteria, and to the fact that in all other European states there were written, publicly available criteria for the appointments of judges.

213. Reference was also made to a number of broader international statements such as the *Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct* adopted in Lusaka in 2010), the *United Nations Basic Principles on the Independence of the Judiciary* (endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985), Recommendation No. R(94) 12 of the Council of Europe's Committee of Ministers on the *Independence, Efficiency and Role of Judges*, *Opinion No. 1* of the Consultative Council of European Judges and the *Report on the Independence of the Judicial System Part 1: The Independence of Judges* issued by the Venice Commission in 2010. The Committee accordingly considered that international best practice strongly suggested that appointments should be on the merits, based on objective criteria.

214. At paragraph 150 of the submission, the Committee stated that practical experience in the conduct of litigation and advocacy was an essential element of merit to which particular weight should be given. Other examples of the constituent elements of the concept of merit were identified as being ability, work ethic, education, legal writing, decision-making capabilities, leadership, professional development and personal characteristics.

215. While acknowledging the importance of the various international bodies cited in the Committee's submission, Professor Kenny takes issue with the use of the merit principle and the definition of its content. In particular, he sees the emphasis on practical experience as in effect serving to perpetuate a particular, narrow form of legal interpretative community, whose members hold to particular beliefs and practices. The values thus embodied are political rather than neutral, and it would be better to have the debate on what makes a good judge conducted on political grounds.

216. This is certainly an interesting and valuable contribution to the debate about judicial appointments. However, it does not provide an answer to the question before the Court on this aspect of the reference – whether the term "*merit*", as deployed in the Bill, is so vague as to permit the Commission *carte blanche* in effectively determining the criteria for appointments by importing its views on what constitutes "*merit*" into the selection process. To answer this question, it is necessary to consider s. 39 in the context of the Bill as a whole, paying close regard to the obligations imposed on the Commission.

217. Under s. 46 of the Bill, applications are to be considered by the Commission in accordance with the judicial selection statement. That statement must, under s. 57, include a statement of "*requisite knowledge, skills and attributes*" to be drawn up after consultation, where relevant, with the Presidents of the High Court, Circuit Court and District Court. The Minister is to be provided with a draft of the statement and may give his or her views on it, and the Commission must take those views into account before adopting the statement.

218. If s. 39 is to be complied with, the content of that statement of requisite knowledge, skills and attributes must be such as to indicate the "*merits*" being sought.

219. Under s. 58, the Commission has discretion to specify and prioritise different requisite knowledge, skills and attributes in respect of different judicial offices in or outside the State. However, it must at a minimum specify that an applicant will be required to demonstrate:

(i) in the case of an application for ordinary judge of the Supreme Court, Court of Appeal or High Court, an appropriate knowledge of the decisions of those courts and an appropriate knowledge and experience of the practice and procedure of the court to which the appointment relates. The statement must also specify that regard shall be had in particular to the nature and extent of

the practice of the person concerned in so far as it relates to his or her personal conduct of proceedings in those courts,

(ii) in the case of an application for ordinary judge of the Circuit or District Court, an appropriate knowledge of the functions, practice and procedure of the court concerned,

(iii) in all cases, a high degree of professionalism, competence and probity in their practice, or role as an academic,

(iv) the ability**,** allowing for any training that may be required, to deal with judicial business in branches of the law that were not within his or her previous area of knowledge,

(v) appropriate awareness of the practical considerations that affect the experience of lay participants in the court system,

(vi) appropriate awareness of the diversity of the population,

(vii) participation in appropriate training courses or continuing professional development relevant to the role of a judge or to the area of law concerned.

220. The selection statement may, therefore, include other considerations. However, it manifestly could not either omit any of these statutory minima or include anything that would conflict with them.

221. Section 46(1)(a)(ii) requires the Commission to be satisfied that the person being recommended possesses the requisite knowledge, skills and attributes set out in the statement "*and is of sufficient merit*" for a recommendation. There is, therefore, a threshold level of merit.

222. Section 50 provides that the Commission must furnish to the Minister, in respect of any recommended applicant, particulars of the person's education, professional

qualifications, experience, character and, where relevant, proficiency in the Irish language. It must also provide the results of the interview and the results of any other selection process conducted in considering the application. All of this information must seen as relevant to the requirement that recommendations be based on merit, and as enabling the Minister to see that the requirement has been fulfilled in respect of each nominated person.

223. The model of merit envisaged by the Bill is one that lays great emphasis on qualifications, experience, professionalism, competence, probity and ability, as well as awareness of the needs of court users and the effect of court decisions in a diverse nation. It may or may not be open to analysis as perpetuating and strengthening a perceived closed nature of the legal interpretative community. But that particular philosophical, or even ideological, debate does not lead to a conclusion on the question of constitutionality. In our view, the significant point is that the Bill sets out a sufficiently clear view of what constitutes merit in a judge and obliges the Commission to implement that view in its selection criteria. It does not leave the Commission with either a content-free concept or a broad power to create its own vision, although it is open to it to supplement the vision already presented.

224. The Bill does not, therefore, fall foul of the principles established in the jurisprudence on Article 15.2.1°. The Oireachtas has not abdicated its power or function, but has conferred a degree of discretion in a sufficiently narrow area of operation. Any additional requirements created by the Commission could not be required to be "*merely mechanical*" since they must relate to the statutory concept of merit, and might well for that reason reflect policy considerations. However, that does not, of itself, mean that additions to the statutory model are necessarily a matter for the Oireachtas alone (see the discussion in *Director of Public Prosecutions v. District Judge Elizabeth McGrath*

[2021] IESC 66, [2021] 3 IR 785). What is required is that any policy reflected in such additions must be consonant with and governed by the legislative policy set out in the measure. They would, of course, be open to judicial review on grounds of *vires* as well as rationality and fairness.

225. In those circumstances, we do not see that a breach of Article 15 is established.

Part XII - Section 39(2) and Equality

Section 39(2) of the Bill and Equality

226. Section 39(2) of the Bill was challenged by counsel assigned by the Court as being incompatible with Article 40.1 of the Constitution.

227. As set out above, s. 39(1) of the Bill provides that a decision by the Commission to recommend for appointment, nomination or election to judicial office "*shall be based on merit*". Subsection (2) then provides:

> *"(2) Subject to subsection (1), where the function of selection and recommendation of persons for appointment to judicial office in the State falls to be performed, account shall be taken, to the extent feasible and practicable, of the objectives that the membership of the judiciary in each court should—*
>
> *(a) comprise equal numbers of male and female members,*
>
> *(b) reflect the diversity of the population of the State as a whole, and*
>
> *(c) include a sufficient number of judges with a proficiency in the Irish language to meet the needs, identified by the Commission following consultations under section 56(4), of users of each court with respect to proceedings being conducted in the Irish language."*

228. No issue was taken with s. 39(2)(c). As for s. 39(2)(a) and (b), it was said by counsel assigned by the Court that these provisions conferred on the Commission a "*general*

licence" to engage in "*wholesale discrimination*" between classes of persons by reference to their inherent and intrinsic characteristics. Such classifications, based on "*matters that can be said to be intrinsic to the human sense of self*", warrant particularly close scrutiny in accordance with the decision of this Court in *Donnelly v. Minister for Social Protection* [2022] IESC 31, [2022] 2 ILRM 185. According to counsel, neither subs. 2(a) nor (b) withstands such scrutiny.

229. Citing a number of decisions of the CJEU, as well as a recent decision of the United States Supreme Court, counsel assigned by the Court argued that any scheme of positive action such as that mandated by s. 39(2) is permissible only when accompanied by strict safeguards. There could be no automatic preference for any class or category of applicant, the objective of the measure had to be clearly identified and there had to be individual objective assessment of the specific personal situation of all applicants (*Kalanke v. Freie Hansestadt Bremen* (Case C-450/93)[1995] ECR I-03051 and *Badek and others* (Case C-158/97) [2000] ECR 2000 I-01875). There had to be a clear linkage between the reason for providing accommodation or preference and the measure adopted for that purpose (*WA v. Instituto Nacional de la Seguridad Social* (Case C-450/18, ECLI:EU:C:2019:1075)). The measure should not operate in a mechanical or numerical manner (*Students for Fair Admissions Inc v. President and Fellows of Harvard College* 600 US 181 (2023)). Any measure had to be time-limited and/or subject to periodic review and revision (a requirement, counsel assigned by the Court said, that is common to EU and US jurisprudence). Finally, the decision of the High Court (Barrington J.) in *Brennan v. Ireland* [1983] ILRM 449 was cited as authority for the principle that Article 40.1 requires that each class must be treated fairly. The presence (or absence) of such safeguards were, it was submitted, relevant to considering the rationality of s. 39(2), in light of this Court's decision in *Donnelly*.

230. According to counsel assigned by the Court, none of these safeguards are found in s. 39(2). It is not subject to any form of sunset clause. Section 39(2)(a) is not subject to any sort of review and imposes a "*permanent entrenched obligation*" on the Commission. Furthermore, the policy objective underlying s. 39(2)(a) was, it was said, unclear. It was not sufficient to identify the promotion of gender equality as the objective, as the Attorney General had. The specific rationale underpinning the measure ought to have been clearly identified. As to s. 39(2)(b), it was said that the concept of diversity was so inherently uncertain that it could never be the subject of any meaningful scrutiny. The publication of a diversity statement in accordance with s. 28 of the Bill might bring clarity but the Commission had up to two years following the enactment of the Bill to adopt such a statement, and there could therefore be two years of judicial appointments without the benefit of such a statement. Again, it was said that the rationale underpinning s. 39(2)(b) had not been sufficiently identified. As regards both s. 39(2)(a) and (b), it was said that these permit a scheme of automatic preference: provided only that an applicant had sufficient merit to qualify for recommendation – merit being no more than a "*threshold*" condition – the requirements of s. 39(1) would be satisfied and the Commission could "*move to section 39(2)*" and, by reference to the gender or other attributes of that applicant, recommend them to the exclusion of a better qualified or more meritorious applicant. Section 39(2) did not make it clear that gender or diversity could only be a tie-breaker where, after an individualised assessment, applicants were considered to be of equal merit.

231. The Attorney General disputed that construction of s. 39. In his submission, s. 39(1) required the Commission to recommend the most meritorious applicants and s. 39(2) did not permit the Commission to recommend a less meritorious applicant on the basis of their gender or other attributes such as ethnicity or disability. It was, he said, "*an all*

things being equal type of provision", identifying considerations which could be taken into account in a tie-break situation. The Attorney General also emphasised the language used in s. 39(2). It is expressly stated to be "*subject to subsection (1)";* it stipulates only that "*account shall be taken ... of the objectives"* in paras. (a) and (b) and even that obligation is significantly qualified by the words "*to the extent feasible and practicable*".

232. As explained earlier in this judgment, the Bill enjoys a presumption of constitutionality. A fundamental aspect of that presumption is that it is to be presumed that the provisions of the Bill will not be administered or applied in a way which will infringe constitutional rights: see, for example, *McMahon v. Leahy* [1984] IR 525, *per* Henchy J at 541. That presumption encompasses "*all proceedings, procedures, discretions and adjudications permitted or prescribed by the bill",* including the functions of the Commission in making recommendations to the Minister under s. 47 and, in that context, applying the provisions of s. 39. It may be that, as the authors of *Kelly: The Irish Constitution* (5th ed, Bloomsbury Professional, Dublin, 2018) suggest at para 6.2.289, no such presumption would arise where it appeared that a power or discretion conferred by law was incapable of being exercised in a constitutional manner. But that is not this case. What is said here is that the operation of s. 39(2) – and in particular s. 39(2)(b) - *could* give rise to an unconstitutionality in certain circumstances, not that it *would* inevitably do so in all circumstances.

233. That, counsel assigned by the Court submitted, is enough to rebut the presumption and establish the repugnancy of s. 39(2). That, they said, was the approach taken by this Court in *Employment Equality Bill 1996*to the provisions of that Bill dealing with disability. The Court had there hypothesised that those provisions (which essentially required employers to provide reasonable accommodation for persons with disability

unless the cost involved would give rise to "*undue hardship*") could have a burdensome impact on some employers, particularly small businesses, and on that basis concluded that they were repugnant to Article 40.3 of the Constitution.

234. Counsel assigned by the Court said that this is a lower test than that which is applied by the UK Supreme Court where a question is referred to it as to whether devolved legislation is outside the legislative competence of the devolved assembly because it disproportionately interferes with rights protected by the ECHR. In such references, the Court asks whether the relevant legislative provision is capable of being operated in a manner compatible with Convention rights in that it will not give rise to an unjustified interference with such rights "*in all or almost all cases*". If, so, the legislation itself will not be incompatible with Convention rights: see, for instance, the discussion in *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, [2023] AC 505, paras. 12-19.

235. There are many differences between such references and a reference under Article 26 of the Constitution. One fundamental difference is that, in the event that the UK Supreme Court concludes that a referred legislative provision is not incompatible with Convention rights (and therefore is within the legislative competence of the devolved assembly), that legislative provision is not thereby immunised from subsequent challenge. Any person adversely affected in that jurisdiction by the operation of that provision is free to bring proceedings under the Human Rights Act 1998 in the courts of the relevant jurisdiction and, ultimately, may pursue a complaint to the ECtHR. In contrast, Article 34.3.3° explicitly excludes any subsequent questioning of the constitutional validity of a law, or any provision of a law, referred to this Court under Article 26. If this Court concludes that the referred provisions of the Bill, including s.

39, are not repugnant to the Constitution, those provisions are permanently immunised from further constitutional challenge.

236. It follows, in the Court's view, that the test applicable on an Article 26 reference cannot be the test applicable in references of devolved legislation to the UK Supreme Court. In the particular context of Article 26, the application of such a test would not appropriately discharge this Court's fundamental duty to scrutinise the referred provisions before advising the President as to whether or not those provisions or any of them are repugnant to the Constitution. Nevertheless, having regard to the presumption of constitutionality that the referred provisions enjoy, repugnancy "*must be clearly established*": *Employment Equality Bill 1996* [1997] 2 IR 321, 334. That requires significantly more than a showing that a provision such as s. 39 *could*, in some hypothetical scenario(s), apply in a manner inconsistent with Article 40.1. As already noted, in assessing the constitutional validity of s. 39, it is to be presumed that those tasked with its implementation will *not* apply it in an unconstitutional manner. If, in an individual case, s. 39(2) was to operate in a manner potentially giving rise to an unconstitutionality, that might well engage the supervisory jurisdiction of the High Court but it would not provide an adequate basis for finding the subsection repugnant to the Constitution.

237. In this context, it is clear from the decision in *Employment Equality Bill 1996* that this Court did not invalidate the disability provisions on the basis of a *hypothesis* as to the *possible* impact of those provisions. The Court clearly took the view that those provisions were objectionable because they "*sought to transfer the cost of solving one of society's problems on to a particular group*" by requiring employers "*to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work*". That obligation applied to all employers, including small firms and firms

with only a limited number of employees. While that obligation was not unqualified, the Court clearly took the view that it would, in practice, imposing uncertain but significant financial burden on employers. It was that general obligation that the Court considered to be constitutionally problematic. The Court also attached significance to the fact that, in order to establish "*undue hardship*", and thus mitigate the burden of providing reasonable accommodation, an employer might be compelled to make disclosure of his financial circumstances ([1997] 2 IR 321, 367-368). On that analysis, it seems clear that the Court considered that the disability provisions *would* inevitably have an unconstitutional impact and it was on that basis that the Court concluded that the repugnancy of those provisions had been "*clearly established*".

238. In all recent instances where Bills referred under Article 26 were held by this Court to be repugnant to the Constitution, it is clear that the Court was satisfied that one or more provisions of the referred Bill would, if enacted, infringe one or more provisions of the Constitution in a concrete and foreseeable manner. None involved a finding of repugnancy that rested on mere hypothesis or possibility. Thus, s. 9 of the Housing (Private Rented Dwellings) Bill 1981 "*clearly constitute[d] an unjust attack*" on the constitutionally guaranteed property rights of landlords because they "*would receive an amount which will be substantially less than the just and proper rent payable in respect of their property*" (*Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181, 191). Similarly, s. 2 of the Electoral (Amendment) Bill 1983 was plainly repugnant to Article 16 of the Constitution because it purported to extend the right to vote in Dáil elections to non-citizens whereas the original version of Article 16 reserved that right only to citizens (*Electoral (Amendment) Bill 1983* [1984] IR 268, 275-276). The operative provisions of the Matrimonial Homes Bill 1993 were repugnant because they would give rise to "*the potentially indiscriminate alteration of what must be many joint*

decisions validly made within the authority of the family concerning the question of the ownership of the family home" in violation of Article 41 (*Matrimonial Homes Bill 1993* [1994] 1 IR 305, 326-327). Finally, s. 1(b) of the Health (Amendment) (No 2) Bill 2004 was repugnant to the Constitution because the effect of the amendments it proposed to make to s. 53 of the Health Act 1970 would be to abrogate the property rights of nursing home residents who had been subjected to unlawful charges (*Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105, paras 137-141).

239. The Court is satisfied that it has not been "*clearly established*" that s. 39 is repugnant to Article 40.1.

240. The starting point of our discussion is to consider how s. 39 is to be construed and applied. In the Court's view, s. 39(1), read in conjunction with ss. 46 and 47, requires the Commission to recommend the most meritorious applicants for any given judicial vacancy. "*Sufficient merit*" is indeed a threshold condition for recommendation under s. 46(1)(a)(ii). But merit is more than a threshold condition; merit is the criterion that determines who is to be recommended. Recommendation decisions made by the Commission must, by virtue of s. 39(1), be "*based on merit*". That necessarily requires the Commission to select the most meritorious applicants for recommendation (subject to the requirements of s. 46(1) being satisfied). Otherwise, its recommendations would not truly be "*based on merit*". (The Court has already considered, in the context of addressing the arguments advanced by reference to Article 15.2, what the concept of "*merit*" involves and rejected the contention that it is meaningless or inherently uncertain.)

241. The merit principle in s. 39(1) is not qualified by s. 39(2). That is made clear by the opening words of subs. 2 ("*Subject to subsection (1)*"). Nothing in subs. (2) authorises - still less requires - the Commission to depart from the merit principle or permits it to

recommend a less meritorious applicant to the exclusion of a more meritorious one on account of gender or factors such as race, ethnicity, social background or disability. Such an approach would be impermissible having regard to s. 39(1).

242. Such factors are, at most, considerations to which the Commission may have regard if it becomes necessary to separate applicants of equal merit. But even in that situation, it cannot be said that s. 39(2) would necessarily have any decisive effect. All that s. 39(2) obliges is that the Commission take into account "*to the extent feasible and practicable*" the general objectives set out in (a) – (c). It may not be feasible or practicable to take account of those objectives. Even where it is, the objectives may point in different directions. Furthermore, there may be other considerations outside the scope of s. 39(2) that the Commission can and/or should take into account when faced with making a selection from two equally meritorious applicants. For example, if there was a pressing need for a judge with expertise in a particular area of law, an applicant with such expertise could be preferred to another equally meritorious applicant who did not have the same expertise in that area.

243. Furthermore, there are other steps that the Commission may undertake to achieve the objectives set out in s. 39(2). That is clear from s. 28 which, in the context of the diversity statement to be published by the Commission, refers to procedures to improve "*the diversity of applicants*", including "*procedures in place to assist in removing barriers faced by persons within the population as a whole that are under-represented in judicial office*". Such procedures could include measures to encourage and support applications for appointment from under-represented groups which in turn is likely to lead to more appointments being made from such groups. It would also appear to be open to the Commission to take measures to encourage more women (or men) to apply for judicial office. By increasing the pool of applicants, such measures would facilitate

meeting the objectives set out in s. 39(2)(a) and (b), without undermining the role of merit in selection.

244. The Court is not persuaded that the s. 39(2) mandates the Commission to adopt a strong form of positive action as counsel assigned by the Court contended. The subsection does not provide for any form of "automatic preference" for applicants of a particular gender (s. 39(2)(a) does not in fact enshrine any preference for men or women) or applicants from a particular background and/or who have particular characteristics. There is no question of the Commission being permitted to set quotas or exclude eligible candidates by reference to s. 39(2) or decide that a particular judicial vacancy should be limited to applicants of a particular gender or background. Section 39(2) does not operate in "*a mechanical or numerical manner*" and, so far from excluding individual and objective assessment of applicants, such is in fact the core task of the Commission under the Bill.

245. There is, in the Court's view, no meaningful parallel between s. 39(2) and the legislative provisions considered by the CJEU in *Kalanke*, *Badeck* and *WA*. In *Kalenke* the statutory scheme guaranteed women "*absolute and unconditional priority for appointment and promotion*" in areas of employment where women were represented and established what the national court characterised as a "quota system". Unsurprisingly, the Court concluded that the scheme went beyond what was permissible under Article 2(4) of Council Directive 76/207/EEC (Judgment, para. 22 and 23). In *Badeck,* the impugned legislation was upheld, even though it included provision for a binding plan that effectively imposed a quota. Critically, the scheme did not exclude "*objective assessment which takes account of the specific personal situations of all candidates*" and was also time limited. *WA* involved a pension supplement that was payable to women with biological or adopted children but not to

fathers of such children. It was argued that the different treatment was justified by the fact that women, but not men, would have suffered disadvantage in their careers as a result of being absent on maternity leave. However, the Court was not satisfied that there was a link between the award of the pension supplement and absence from work (para. 57 and following). That was the holding relied on by counsel assigned by the Court but the context in which it was made differs radically from the position with which the Court is concerned. Section 39(2) does not concern the giving or withholding of a benefit on the basis of gender or other status or characteristics.

246. Counsel assigned by the Court also relied on the recent decision of the US Supreme Court in Students for *Fair Admissions Inc v. President and Fellows of Harvard College* 600 US 181 (2023). The issue there was whether it is permissible for universities to take account of race as a factor in determining admission. The Supreme Court, by a majority, held that the Equal Protection Clause of the Fourteenth Amendment excluded consideration of race in the admission process, subject to what was said in Part VI of the Opinion of the Court (page 230). Lengthy and forceful dissents were delivered by the minority.

247. The language of Article 40.1 differs in some respects from that used in the Equal Protection Clause of the Fourteenth Amendment (not least by reason of the inclusion in Article 40.1 of the so-called "*proviso*", which has no equivalent in the text of the Fourteenth Amendment) and the approach of our courts to issues of equality and discrimination under Article 40.1 has largely developed independently of developments in the United States. In fairness, counsel assigned by the Court readily acknowledged these differences. The Court notes again that the Bill does not provide for any form of automatic preference, whether on grounds of gender, race or otherwise. Section 39(2) does not operate in a mechanical or numerical manner. The objectives referred to in s.

39(2) are subject to the merit principle in s. 39(2) and these provisions are, in the Court's view, targeted, nuanced and proportionate. In these circumstances, the Court is of the view that the decision in *Students for Fair Admissions Inc.* does not assist the arguments advanced by counsel against the Bill.

248. The critique of counsel assigned by the Court of s. 39(2) was critically dependent on her analysis of the latitude it afforded to the Commission to depart from the merit principle and to select candidates on the basis of the considerations set out in s. 39(2). On its proper construction, s. 39(2) does not afford any such latitude to the Commission. It must carry out an objective and individualised assessment of every applicant and its fundamental statutory duty is to identify and recommend for appointment the most meritorious applicants. That being so, the Court is not persuaded that s. 39(2) is contrary to Article 40.1 – or, indeed, that Article 40.1 is engaged in the circumstances here - by reason of the absence of the various "*safeguards*" identified by counsel assigned by the Court in submission.

249. It may indeed be the case that, if the objectives set out in s. 39(2) were expressed in more prescriptive terms, the position would be different. But, as the Attorney General emphasised in argument, the objectives set out in that subsection are expressed at a high level and in general and conditional terms. A general objective that membership of the judiciary in each court should comprise equal numbers of male and female members is wholly unobjectionable in the Court's view. Far from giving rise to any Article 40.1 issue, such an objective is compatible with, and supported by, the principle of equality reflected in Article 40.1. Similarly, the general objective that the judiciary should reflect the diversity of the population appears to the Court to be constitutionally unproblematic. Diversity in this context is not inherently uncertain or meaningless: the term is, for instance, used in the context of judicial appointment, and without further definition, in

ss. 63 and 64 of the Constitutional Reform Act 2005 in the United Kingdom. In any event, s. 28 provides for further guidance in this area.

250. One other issue raised by counsel assigned by the Court needs to be addressed. They criticised s. 39(2)(a) for its exclusion of non-binary applicants for judicial appointment. However, that criticism was founded on a misreading of s. 39. As explained, it provides for the recommendation by the Commission of the most meritorious applicants. A non-binary applicant will be recommended for appointment if they are amongst the top three applicants. Section 39(2)(a) or (b) will not affect that position. Insofar as it was suggested that such an applicant would be excluded from a protection or preference under s. 39(2)(a), that is not in the Court's view a correct characterisation of the effect of that provision. It also ignores the fact that such an applicant would in principle appear to come within the scope of s. 39(2)(b).

251. For these reasons, it has not been established that s. 39 of the Bill is repugnant to Article 40.1 of the Constitution in any respect.

Part XIII - Privacy

Privacy

252. Counsel assigned by the Court argue that the Bill breaches the Constitution insofar as it fails to respect sufficiently the privacy of sensitive, personal and health information in respect of a candidate for judicial office. Counsel argues that an applicant for judicial office may find that the Commission has engaged in a wide-ranging assessment of his or her health.

253. Counsel further argues that its provisions requiring the Commission to be satisfied that an applicant is "*suitable on the grounds of health*" permits the Commission to engage in a wide-ranging assessment of the health of individual applicants. Added to this is the

fact that the Commission may, for the purpose of establishing that an applicant is so suitable on the grounds of health to fulfil the duties of judicial office, require an applicant to provide supporting documentation to establish suitability, and require applicants to undergo an independent medical examination for the purpose of establishing such suitability.

254. The information and documentation provided by a candidate, or from a report obtained from an independent medical examination (should one be sought), will undoubtedly be personal, and sometimes sensitive, data, and its disclosure will invoke in principle at least constitutional privacy rights.

255. The regulations which may be made under the statutory powers contained in s. 33 of the Bill may provide for a form of consent by candidates to the processing of personal data. Where the data involved relates to the health of an applicant for judicial office "additional measures" may be prescribed to afford additional safeguards for such data. The processing is an inevitable consequence of the assessment of suitability by the Commission of an applicant under its powers contained in s. 46(1)(a)(iii).

256. The Attorney General argues that the constitutional right to privacy is not absolute, and "*may be restricted by the constitutional rights of others, by the requirements of the common good*": see the judgment of Hamilton P. in *Kennedy v. Ireland* [1987] IR 587 at 592. The requirement that an applicant for judicial office should be required to provide information as to their health and in the light of the express provision in Article 35.4.1° for the removal of a judge on account of "*incapacity*", the provision of information regarding health is agreed to serve a rational and legitimate purpose of ensuring that those recommended for appointment are suitable and "*capable*" on the grounds of health to perform the judicial function.

257. The Court considers that the Constitution does import an obligation on the Commission to respect the constitutional privacy rights of an applicant for judicial office but does not preclude it from obtaining information of a personal or sensitive nature to which the right to privacy may attach. Certain protections and restrictions in the Bill support this.

258. First, it is true that the Director is by reason of s. 23(2) of the Bill obliged at the request in writing of a Committee of the Oireachtas (as defined in s. 23(1)) to account for the general administration of the Commission. The saver at s. 23(3)(b) is, however, of importance in that it precludes a request that account be given *inter alia* where "*the giving of such account would involve disclosure of proceedings, communications or matter contrary to section 30"*.

259. Second, the Bill provides a procedure by which the Director of the Commission may inform the Committee of his opinion that the requirement to give an account in respect of a precluded matter is contrary to the legislation. It then provides a mechanism by which the Director may apply to the High Court in a summary matter for the determination of the question of whether he was required to give an account on such matter. Section 23(6) of the Bill further provides for a stay on any request that the Director attend before the Committee to give an account for the matter of the subject of such application to the High Court.

260. Third, s. 29 of the Bill prohibits the disclosure, save insofar as this is permitted by law or duly authorised by the Commission, of confidential information obtained by him or her in the performance of the statutory function as a member of the Commission or of a committee, or by the Director, a member of the staff of the Office, a consultant, advisor or other person engaged under contract or other arrangements by the Commission.

261. Fourth, this protection is supplemented by s. 30 which contains a prohibition on disclosure in relation to an applicant for judicial office, and any application made by him or her, by those persons or bodies of all "*proceedings of the Commission*" or of any committee of the Commission, communications between them, and communications between either the Commission and a committee, or a committee and the Minister for Foreign Affairs. Both ss. 29 and 30 make such disclosure a criminal offence and makes provision on conviction for the imposition of a fine or imprisonment or both.

262. Fifth, whilst under s. 31 the Commission is obliged to keep a record of applications made to it, and of deliberations and recommendations of the Commission relating to appointments or nominations for appointment or election to judicial office, it contains an express provision that insofar as any personal data or any special categories of personal data is comprised in such record, the processing is to be done in accordance with the Data Protection Regulations and the Data Protection Act 2018. Section 33 further provides for the consent of the Minister to make regulations for the purposes of data protection. Section 32 also provides that, subject to such regulations, if any are made certain provisions of the data protection regime are restricted but only to the extent "*necessary and proportionate to enable the person or body to perform his, her or its functions under Part 4*". Provision may be made for the period of time during which personal data of an applicant may be processed.

263. Sixth, the Freedom of Information Act 2014 does not apply to a record relating to:

> *"(a) The process of selecting and recommending persons for appointment or for nomination for appointment or election to judicial office under Part 4, or*
>
> *(b) A consultation under s. 56(1) or s. 57(5)."*

Records relating to the general administration of the Commission are excluded from this restriction.

264. Seventh, it must be observed that, in the process currently conducted by JAAB, applicants are required to sign a declaration that they will, if requested, provide a medical certificate and a letter of good standing from his or her professional body or other body for the time being exercising disciplinary jurisdiction over barristers. That declaration provides that the declarant understands that further enquiries may be undertaken for security and medical checks and undertakes to "*cooperate fully with these enquiries, including attendance at a medical examination by the State's Chief Medical Officer, if required*". No argument is made regarding that current arrangement, and indeed the Court heard no evidence of a complaint being made by an applicant for judicial office under the current regime or any refusal to cooperate with security or medical checks or to undertake a medical examination if required.

265. Finally, the personal data would, insofar as it came to be disclosed at a meeting of the Cabinet, be subject to cabinet confidentiality as provided for by Article 28.4.3° of the Constitution.

266. For these reasons, the Court does not accept that the Bill does not contain sufficient safeguards for the privacy rights of an applicant. The safeguards are contained in the confidential requirements imposed upon the Commission and its committees and other persons who might have accessed confidential or sensitive information in the course of Commission business. Further, the Bill expressly makes reference to data protection rights under the relevant domestic legislation which in turn must be seen as respecting and implementing the data protection rights contained in Article 8 of the Charter and the General Data Protection Regulation.

267. It is common case that the right to privacy may be engaged in the disclosure of his or her medical records by an applicant for judicial office. The leading case on the broad principles of privacy remains that of the High Court in *Kennedy v. Ireland* [1987] IR 587, [1988] ILRM 472, where Hamilton P. held that legislative encroachments upon the right to privacy can sometimes be justified by the exigencies of the common good. The constitutionality of the Bill is tested in that context, and thus an encroachment upon the right may be permissible if it is proportionate and done in furtherance of a legitimate object that supports other constitutional norms.

268. There was some, albeit brief, discussion of the right to privacy in *Employment Equality Bill 1996*, where this Court indicated that an objectionable feature of the Bill was that in order to avoid having to pay the costs of providing special treatment or facilities for persons with disabilities, an employer would have to show that it would cause him or her undue hardship which would in turn require the employer to disclose financial circumstances or other business problems to an outside party and where no sufficient controls on disclosure were available.

269. The right to privacy was considered in *O'T v. B* [1998] 2 IR 321 where a majority of this Court held that the right to privacy of a mother had to be balanced against the right of her child to know her identity and that certain circumstances including the ages of the mother and child, the present circumstances of both mother and child, the attitude of the mother to disclosure of the information and the reasons for that attitude, and equally the reasons of the child to know the identity of her mother and to meet her.

270. In *Herrity v. Associated Newspapers* [2008] IEHC 249, [2009] 1 IR 316 at 337 Dunne J. summarised the case law in this area and defined the scope of the right to privacy as follows:

> *"(1) there is a constitutional right to privacy;*

(2) the right to privacy is not an unqualified right;

(3) the right to privacy may have to be balanced against other competing rights or interests;

(4) the right to privacy may be derived from the nature of the information at issue - that is, matters which are entirely private to an individual and which it may be validly contended that there is no proper basis for the disclosure either to third parties or to the public generally;

(5) there may be circumstances in which an individual may not be able to maintain that the information concerned must always be kept private, having regard to the competing interests which may be involved but may make complaint in relation to the manner in which the information was obtained;

(6) the right to sue for damages for breach of the constitutional right to privacy is not confined to actions against the State or State bodies or institutions."

271. The principles are illustrated in *White v. Morris* [2007] IEHC 107, [2007] 4 IR 445 which concerned the proceedings of a tribunal of inquiry. Here the Court held that the conduct of that inquiry outweighed the applicant's interest in keeping confidential particulars of his medical condition.

272. A relatively recent judgment of this Court in an entirely different context is instructive. In *McGrory v. Electricity Supply Board* [2003] IESC 45, [2003] 3 IR 407 this Court rejected the contention that the examination of a plaintiff in personal injuries proceedings by a doctor on behalf of the defendant violated a constitutional right to privacy. Keane C.J. observed as follows ([2003] 3 IR 407 at 414):

"The plaintiff who sues for damages for personal injuries by implication necessarily waves the right of privacy which he would otherwise enjoy in

relation to his medical condition. The law must be in a position to ensure that he does not unfairly and unreasonably impede the defendant in the preparation of his defence by refusing to consent to a medical examination. Similarly, the Court must be able to ensure that the defendant has access to any relevant medical records and to obtain from the treating doctors any information they may have relevant to the plaintiff's medical condition, although the plaintiff cannot be required to disclose medical reports in respect of which he is entitled to claim legal professional privilege."

There, the balance was to be achieved between the respective rights of the defendant to defend the action, and the personal right of privacy and protection of his medical condition by the plaintiff.

273. By analogy, any applicant for judicial office cannot be said to have an absolute entitlement to the privacy, protection or confidentiality of medical information if such is required by the Commission for the assessment of an application for office. The right of the Commission to seek an independent medical report from an independent doctor is proportionate and respects the privacy rights of an applicant in the light of the robust statutory provisions regarding the use, processing and control of such information. It will also be protective of the privacy rights of an applicant should the candidate's own doctor not be aware of the applicant's interest in being appointed a judge. The independent doctor will be briefed simply to assess "*capacity*" for judicial office and must be seen as being confined to making an inquiry as to the heath factors that weigh in such assessment of capacity for that role.

274. In the course of argument, counsel assigned by the Court made a further argument concerning the risks to an applicant's privacy rights in the process. The argument is that the privacy of the individual applicant could be impacted if that applicant, mindful of

the general "*diversity*" provisions in s. 39(2) were to choose, or feel himself or herself constrained to choose, to disclose some personal matters to give themselves an advantage in the competition. Examples given include a person who would not otherwise identify as either male or female, but who might not disclose that information in a truly voluntary way unless there was perceived to be a degree of compulsion necessary to give themselves the best advantage in the competition. A person in that situation might prefer not to disclose such information but do so nonetheless.

275. An element of choice must be seen as intrinsic to the decision of a person to apply for judicial office. The opponents to the Bill rely on the case of *M.M. v. The United Kingdom* [2012] ECHR 1906 where the applicant's complaint arose from a withdrawal of an offer of employment after she had disclosed and the UK Criminal Records Office had verified, the existence of a caution for child abduction. The complaint was that the policy of retaining caution data meant that it would be retained for life, and this would have a negative impact on her employment prospects. The focus of the judgment of the ECtHR was on the fact that the applicant had no effective data protection remedies and, moreover, that the caution was retained on file indefinitely.

276. The circumstances of an applicant who makes an application for appointment as a judge is wholly different. The data is protected and any disclosure or failure to delete could be successfully challenged either by judicial review or under domestic data protection legislation. The judgment of the ECtHR in *M.M.* can also be distinguished because the applicant in that case had argued that the option to conceal the fact of the caution was not an option available to her when she applied for the job as a healthcare and family support worker and, as that job was subject to a vetting process, a process in which disclosure was unavoidable.

277. In contrast, in the present challenge, an applicant for judicial office may elect to disclose additional sensitive personal data outside the heath information for which express provision is made. The choice to do so in anticipation of adding weight to an application is one that would be freely made, and no compulsion such as was intrinsic to the vetting process in *M.M.* is apparent.

Part XIV - Reasonable Accommodation for Disability

Reasonable Accommodation for Disability

278. The requirement that an applicant for judicial office be suitable on health grounds for the purposes of s. 46(1)(a)(iii), is said to be discriminatory insofar as no positive provision is contained to support and provide equal opportunities for appointment to judicial office to those with a disability. The Bill admittedly contains no express provision to indicate how a person with a disability can meet the health requirements for appointment to judicial office. Counsel assigned by the Court argued that it was not possible to imply that the assessment of health would be made on a presumption that "*reasonable accommodation*" would be made for persons who, whilst they might have a disability, could readily be capable of performing the functions of judicial office with the benefit of suitable support measures.

279. The phrase "*reasonable accommodation*" entered the legal lexicon as shorthand for the making of provision by an employer who makes changes to the job or to the place or environment in which a job is performed to allow an employee with a disability to do the job in question, and to facilitate equal employment opportunities to those with such disability. The Employment Equality Act 1998 ("the 1998 Act") provides a legal obligation on an employer to make such reasonable accommodation and requires the

employer to take "*appropriate measures to meet the needs of persons with disabilities in their work force*".

280. The 1998 Act (as amended by the Equality Act 2004) provides in s. 16(3) for the treatment of a person with a disability as fully competent to undertake and fully capable of undertaking any duties "*if the person would be so fully competent and capable on reasonable accommodation*" being provided by the person's employer. The legislation requires an employer to take "*appropriate measures*" to enable a person who has a disability to have access to employment, to participate or advance in employment, and to undergo training. These obligations exist unless the measures would impose a disproportionate burden on the employer.

281. "*Appropriate measures*" are defined in s. 16(4) as meaning "*effective and practical measures*" to adapt a workplace or equipment to the disability concerned, to adapt patterns of working time, distribution of tasks, the provision of training or integration resources.

282. Judges are not "employees" and thus, the 1998 Act has no direct application here. As the Court of Appeal observed in *White v. Bar Council of Ireland* [2016] IECA 363, [2017] 1 IR 249, a judge is, of course, a constitutional officer and not an employee as such, albeit that certain indicia of the employment arrangements of a sitting judge are akin to those of persons employed by the State. The question of reasonable accommodation would in the first instance be a matter for the Courts Service which already has significant statutory responsibilities under Part 3 of the Disability Act 2005 so far as access to public buildings (including courthouses) is concerned. Even in the absence of any express statutory obligation to do so, it seems inconceivable that the Courts Service would not be prepared to provide reasonable accommodation for persons appointed as judges.

283. It appears to the Court that, in the assessment of the capacity of an applicant to work as a judge, the Commission would test capacity against a backdrop of the current approach in the public service generally for the provision of a system in the form of workplace modification or such arrangements as may be reasonable. The qualification requirements in the Bill require *inter alia* that an applicant for judicial office have practised as a barrister or solicitor for 10 years, or four years in the case of a person whose legal work has been in the academic sphere. Where an applicant can show that he or she has, notwithstanding a disability, conducted the practice of law with the aid of equipment or modifications to the workplace, the knowledge, skills and experience of the individual applicant will be apparent, and those abilities will be tested irrespective of any accommodation or facilities that have supported the person in his or her career to date. To that extent and in these respects the Bill fully respects and takes account of the particular needs of candidates with a disability who aspire to judicial office. Furthermore, the Court considers that there is an important distinction between health (as that term is used in s. 46(1)(a)(iii) of the Bill) and disability in this context. Where a person with a disability can, with reasonable accommodation, *"fulfil the duties of the judicial office",* that person will satisfy the requirements of s. 46(1)(a)(iii). Any other construction would not be warranted by that provision and would be inconsistent with s. 39 of the Bill, both by potentially excluding the most meritorious applicants from appointment/nomination for appointment and because it would conflict with the objective in s. 39(2)(b).

Part XV - Conclusions

Conclusions

284. The Court is satisfied that the Bill has not been shown to be unconstitutional. In the first place, the Court concluded that the Bill was not "necessitated" by the obligations of

European law, for the purposes of Article 29.4.6°. Having reached that conclusion, the Court proceeded to examine the constitutionality of the Bill, and the sections thereof referred to the Court by the President under Article 26. In coming to the conclusion that the relevant sections of the Bill are not unconstitutional, the Court has examined the provisions of the Bill and, in particular, ss. 47 and 51. The Court concluded that there is nothing express or implicit in s. 51 which requires the Government to nominate a person recommended by the Commission for appointment by the President. It has a choice to advise the President in accordance with the recommendation of the Commission. Even where only one person is recommended, the Government is still exercising a choice as to whether or not to advise the President to appoint that person. Accordingly, the Court is satisfied that s. 51 involves the exercise of a choice by the Government as to whether or not to nominate a person or persons recommended by the Commission for appointment by the President and, if not so satisfied, the process will have to start afresh.

285. Further, the Court is satisfied that the Oireachtas is constitutionally obliged to legislate in respect of judicial eligibility. The establishment and constitution of the courts by legislation is provided for in Articles 34 and36. In these circumstances, we have concluded that the Oireachtas is entitled by law to regulate the circumstances in which the Article 13.9 advice may be tendered by the Government to the President.

286. The Court also considered a number of other issues, including challenges to the Bill on the grounds of equality, privacy, and questions as to the interpretation of merit, amongst others. We have rejected the arguments advanced regarding the constitutionality of the Bill on these issues for the reasons set out in this judgment.

287. The President will accordingly be advised that this Court has upheld the constitutionality of the Bill, and that he may now proceed to sign the Bill in the manner provided by Article 26.5.3° of the Constitution.