AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2022:000006

[2023] IESC 18

O'Donnell C.J.

Dunne J.

Charleton J.

O'Malley J.

Baker J.

Hogan J.

Murray J.

Between/

TOMÁS HENEGHAN

Plaintiff/Appellant

-and-

THE MINISTER FOR HOUSING, PLANNING AND LOCAL GOVERNMENT, THE GOVERNMENT OF IRELAND, THE ATTORNEY GENERAL AND IRELAND

Defendants/Respondents

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 26th day of July, 2023.

1. On 31 March of this year, this Court, in a judgment of Murray J. (with whom O'Donnell C.J., Dunne, O'Malley and Baker JJ agreed; Hogan J. concurring separately; Charleton J. dissenting) concluded that s. 6 and s. 7 of the Seanad Electoral (University Members) Act, 1937 ("the 1937 Act") were inconsistent with the provisions of Article 18.4.2° of the Constitution: see *Heneghan v. Minister for Housing, Planning & Local Government & ors* [2023] IESC 7 (Unreported, Supreme Court, O'Donnell C.J., Dunne, Charleton, O'Malley, Baker, Hogan and Murray JJ., 31 March, 2023) ("*Heneghan No. 1*"). Article 18.4.2° was inserted into the Constitution by a referendum approved by the people in 1979. The inconsistency arose because the provisions of the 1937 Act limited the electorate in respect of the six university seats to graduates of the University of Dublin and the National University of Ireland. While that was consistent with the provisions of Article 18.4 up until 1979 the new sub-article inserted then, 18.4.2°, provided for the enactment of laws allowing the extension of the University franchise to institutions of higher education other than Trinity College Dublin and the National University of Ireland. While the terms of Article 18.4.2° did contemplate that the Oireachtas would have some time to implement the change to the franchise authorised by the 1979 referendum, by the time the principal judgment came to be delivered it was not necessary to identify with any precision the point at which the Oireachtas was in default. As it was put at paragraph 157 of the judgment of Murray J., *"on any version it has long since expired"*.

2. However, notwithstanding this conclusion, the Court did not proceed to make a declaration of the invalidity of s. 6 and s. 7 of the 1937 Act with immediate effect. Instead, the Court declared the invalidity of the sections, but made it clear

(at paragraph 159 of the judgment) that the effect of the declaration of invalidity must be wholly prospective. Moreover, the Court suspended the effect of that declaration until 31 July, 2023, and invited submissions from the parties as to the precise length of time for any suspension to allow the position to be remedied. The Court must now address that issue and make an appropriate order.

3. Neither party contests either the terms of any declaration or the need for a suspension of any declaration of invalidity. The main, and almost sole ground of dispute relates to the period of any such suspension. The appellant contends that the declaration should be suspended until July 2024 – that is effectively one year from now with what is described as a red line of 25 May, 2025 (approximately just over two years after the date of the delivery of the judgment) as the last possible date for the election of the next Seanad. This follows from a calculation of the last possible date for the dissolution of the current Dáil as February 2025, the Constitution requiring by Article 18.8, that a general election for Seanad Éireann shall take place not later than ninety days after the dissolution of Dáil Éireann. The contention of the Attorney General, on behalf of the State respondents, is that the declaration should be suspended until 30 July, 2027, thus extending the period of suspension by a period of four years. This period is calculated by reference to the period of time that the State parties consider to be necessary to take the appropriate steps to devise, draft, enact, and implement remedial legislation.

4. In written submissions, the Attorney General addresses the nature of the jurisdiction to suspend the declaration of invalidity, and in a footnote, reserves

his position pending further argument on the appropriateness of the remedy of suspended declarations of invalidity, either in general, or at all. I do not consider that it is possible, or if possible, desirable, to proceed in this way. It is necessary to address this issue given that it has been raised as it goes to the jurisdiction that the Court is invited to exercise, to suspend the declaration of invalidity consequent on the Court's judgment for a period of between two and four years. In any event, even if it were appropriate to proceed on the parties' acceptance that a jurisdiction does exist, an understanding of the nature of this remedial device, and its limits, are a necessary, indeed essential, backdrop to any suspension decision.

5. Both the principal judgment and the separate judgment of Hogan J. addressed the issue in some detail by reference to both Irish and international jurisprudence. In Ireland, it appears that the first occasion on which an order akin to suspended declaration was made was in *N.H.V. v. Minister for Justice and Equality* [2017] IESC 35, [2018] 1 I.R. 246 *("N.H.V."*) (although it was there treated as a deferral of a declaration). The mechanism has been employed on one further occasion by this Court before now: *P.C. v. The Minister for Social Protection and ors (No. 2)* [2018] IESC 57, (Unreported, Supreme Court, Clarke C.J., O'Donnell, McKechnie, MacMenamin and O'Malley JJ., 28 November, 2019) ("*P.C. (No. 2)*"). It has also been availed of on two occasions in the Court of Appeal: *A.B. v. The Clinical Director of St. Loman's Hospital and ors* [2018] IECA 123, [2018] 3 I.R. 710 and *Osinuga and Agha and ors v. Minister for Social Protection and ors* [2018] IECA 155, [2018] 2 I.L.R.M. 351.

6. The starting point is Article 15.4 of the Constitution, which provides that the Oireachtas shall not enact a law which is in any way repugnant to the Constitution. This provision must be read with Article 34.3.2°, which provides that the jurisdiction of the High Court "*shall extend to the question of the validity of any law having regard to the provisions of this Constitution*". It is clear, therefore, that the High Court (and on appeal, the Court of Appeal and Supreme Court) are empowered to make decisions on the question of validity of laws. These provisions, however, do not themselves determine the nature of the order to be made or the consequences of any such determination. The only guidance the Constitution provides is in Article 15.4.2° of the Constitution which states that "*[e]very law enacted by the Oireachtas, which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid".*

7. This is very similar, but not identical to the provisions of s. 52(1) of the Canadian Constitutional Act, 1982:-

> *"The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."*

8. This latter provision is the basis of the jurisprudence of the Supreme Court of Canada dealing with the jurisdiction to make suspended declarations. Insomuch as there is a difference between the two texts, it could be said that the Irish constitutional formula emphasises that the question for the Court is never one which could properly result in an entire Act being found invalid because of an inconsistency in one provision of that legislation. Instead, it emphasises that the

invalidity must be measured precisely against the inconsistency ("*but to the extent only of such repugnancy*"). Furthermore, it uses the future tense ("*shall be*") and refers to *invalidity* but does not address the effect of such invalidity or the validity of acts done pursuant to any such law while in force. These matters were left to be addressed in the jurisprudence.

9. The starting point is that, on a finding of invalidity, the impugned provision is deemed to be void from the beginning – *ab initio* – either from the date of the enactment, if post-dating the Constitution, or from the date of enactment of the Constitution, if the provision pre-dates it. This is consistent with the obligation of the Oireachtas not to enact any law repugnant to the Constitution, and the provisions of Article 50 of the Constitution, which continued the law in force in Saorstát Éireann immediately prior to the date of the coming into force of the Constitution, "*to the extent to which they are not being inconsistent therewith*". However, as Karakatsanis J. observed in *Ontario (Attorney General) v. G* [2020] SCC 38, (2021) 50 BHRC 422, ("*G*") at paragraph 87, this assumption is derived from the Blackstonian declaratory theory of law that judges never make law but merely discover it, a proposition that has not been accepted since at least the extra-judicial observations of Holmes in *The Common Law* (Little, Brown and Company 1881), and Cardozo in *The Nature of the Judicial Process* (Yale University Press 1921), not perhaps coincidentally, in a common law system with provision for judicial review, but taken as established in the wider common law world since at least Lord Reid's famous statement:-

> "*But we do not believe in fairytales anymore. So, we must accept the fact that for better or worse judges do make law and tackle the question of how they approach their task and how they should approach it."*[1]

Holmes offered his own response to this enduring question as to the proper limits of the power to make law by judicial review in *Southern Pacific Co. v. Jenson* 224 U.S. 205 (1917) at p. 221:-

> *"I recognise without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."*

It is unsurprising, therefore, that the stark proposition that the provisions of legislation found to be inconsistent with the Constitution are void *ab initio* has been qualified in subsequent jurisprudence.

10. The power granted under a modern constitution to declare an act of the legislature to be invalid, is a very far-reaching one. As Henchy J. observed in *The State (P. Woods) v. Attorney General* [1969] I.R. 385, 399, it is a powerful and potentially crude mechanism that can cause widespread collateral damage to the legal order, particularly given its potential retrospective effect under the full Blackstonian theory, something which the Constitution outlaws in the case of the criminal law (Article 15.5) and views with disfavour in the civil law. However, this power is an essential guarantee of the checks and balances in a modern constitutional system based on the rule of law and the protection of individual rights. Accordingly, case law in this and other jurisdictions has

[1] Lord Reid, 'The Judge as Lawmaker' (1972) 12(1) Journal of the Society of Public Teachers of Law, 22-29.

identified a number of principles themselves consistent with the constitution and the legal order it contemplates, which control the potentially seismic collateral effects of a finding of unconstitutionality and limit the occasions on which such a remedy must be granted to those where it is truly required. All of this is consistent not just with the obligation under Article 15.4.2° to limit any finding of constitutionality to the precise area and aspect of inconsistency, but also to the understanding of the Constitution as creating a functioning legal order. As Justice Robert H. Jackson famously put it in *Terminiello v. City of Chicago* 337 US 1 (1949):-

> "*The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrine or logic, with a little practical wisdom it will convert the constitutional Bill of Rights into a suicide pact."*

11. Among the techniques developed and regularly employed in that regard are concepts such as mootness; *locus standi*; acquiescence; estoppel; the principle of constitutional issues shall be reached last; the double construction rule; and the principle that the benefit of a finding of invalidity may be limited in time and to those who might have commenced proceedings or that a finding of invalidity of legislation will not render invalid or ineffective final determinations of courts, whether criminal or civil, made under and by virtue of the provision found invalid. These techniques, like indeed, the declaratory theory of law, are a product not of the express language of the Constitution, which, as already observed, is silent on these matters, but of the case law,

judicial decisions, and the interpretation of the Constitution and the legal order it creates.

12. One such approach developed by the courts in a number of jurisdictions is that, on rare occasions, a court may suspend the making of the formal declaration of invalidity, with the effect that the provision found to be inconsistent with the Constitution by the decision, may nevertheless remain effective and have the force of law for a specified and limited period. This approach borrows from the power of the courts in private law disputes to condition, qualify, or suspend relief, whether by way of declaration or injunction or otherwise, where the justice of the case requires a more nuanced response, than the simple and clear making or refusing of such declaration, injunction or other order. Nevertheless, the fact that the suspension or postponement of a declaration of invalidity has the effect of permitting a state of affairs to continue that the Court has found to be repugnant to the Constitution, and, in some cases, to be a breach of the constitutional rights of the citizen, means that the jurisdiction to do so has been carefully scrutinised and, in Ireland at least, employed only on rare occasions. It may be helpful to review the recent Irish jurisprudence on the area and compare it to the more developed jurisprudence and commentary in Canada, in particular.

13. The possibility of a suspended or delayed declaration of repugnancy and therefore, invalidity was first raised by Denham J. (as she then was), in *A. v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88 ("*A*"). There, she said that it was "*the duty of the courts to administer justice. The courts do not apply a cold logic in a rule-making vacuum. Rather, the courts administer*

justice to promote the common good". Later, she pointed to the Canadian jurisprudence enabling the making of suspended declarations, observing that the "*rationale for such an approach is fundamental and arises out of the constitutional exercise of the constitutional power and duty*". While the Irish Constitution and the Canadian Charter and Constitution, expressly contemplated an order of invalidity and thus that the law was void, she considered that "*to exercise such a power constitutionally the Court has inherent power to administer justice. The jurisprudence which has been developed in Canada in relation to the Charter has addressed the issue of the application of such power*".

14. The first occasion on which this Court actually refrained from an immediate declaration of invalidity was *N.H.V.*, in which the Court held that the provisions of the Refugee Act, 1996 which created an absolute ban on obtaining employment by those seeking asylum, were repugnant to the Constitution. However, the invalidity identified was caused by the interaction of two different provisions and could in theory have been cured by either limiting the period of the ban on employment or alternatively shortening the period of the asylum determination. The choice between this and indeed any other measure to comply with the judgment was a matter in the first place for the Oireachtas. Accordingly, the Court postponed the making of the formal order of the Court. However, when the issue returned to this Court, the judgment of Clarke C.J. made it clear that the circumstances in which such a course would be taken or a suspended declaration made, would be very rare, and simply determined a date upon which the relevant declaration would be made. In *P.C. v. Minister for Social Protection and ors* [2018] IESC 63, [2017] 2 I.L.R.M. 369 *("P.C. (No.*

1)"), the Court (Denham C.J., McKechnie, Clarke, MacMenamin and O'Malley JJ.) held that the provisions of s. 249(1) of the Social Welfare (Consolidation) Act, 2005 were inconsistent with the Constitution, but deferred making a declaration to that effect. Subsequently that matter, and the question of remedy, was considered in *P.C. (No. 2)* by a slightly differently composed court (Clarke C.J., O'Donnell, McKechnie, MacMenamin and O'Malley JJ.).

15. In my judgment in *P.C. (No. 2)*, I discussed these issues in some detail. It is not necessary to repeat those observations here. However, it is relevant that that case identified the particular difficulties which would arise in the field of electoral law if the simple view expounded by Field J. in *Norton v. Shelby County* 118 U.S. 425 (1886), 426 were accepted to be the law, i.e., that *"an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed"*. In the field of electoral law, for example, such a principle if applied would have the effect of invalidating all past elections, and therefore, any legislation enacted by the legislature so elected, and also and at the same time, preventing the problem from ever being cured, since on this view there would be no validly elected legislature that could enact the curative legislation. It was precisely this type of logical dead-end that led courts in jurisdictions as disparate as Germany, Australia, and New Zealand, to address the issue in different ways as discussed more fully at paragraph 32 of my judgment in *P.C. (No. 2)*.

16. The most elaborate discussion of the issue and development of the jurisprudence has occurred in Canada. The issue was first confronted in an area where the

finding of an invalidity affected the entire legal system in a province and raised a problem which at one and the same time would invalidate all or nearly all the existing code of law, and potentially preclude the possibility of legislation remedying the constitutional flaw.

17. In *Re Manitoba Language Rights* [1985] 1 SCR 721, the Supreme Court of Canada held that s. 23 of the Manitoba Act, 1870 and s. 113 of the Constitution Act, 1867 were mandatory, and required accordingly that legislation enacted from 1870 in the Province of Manitoba be enacted and published in both English and French. However, almost all legislation enacted since that date had been enacted in English only. It followed that such legislation would be immediately invalidated which would create a vacuum, which could not be filled for some time, if indeed, at all. The Supreme Court of Canada unanimously held that this conclusion did not follow and was not required. The Court referred to concepts such as *de facto* office holders, the law passed by revolutionary regimes, and the doctrine of state necessity, all of which had been discussed at different times in other common law jurisdictions and concluded that a consequential invalidity of all Manitoban legislation would itself be inconsistent with the rule of law upon which the Constitution was based concluding at paragraph 59:-

> "*In the present case, declaring the Acts of the Legislature of Manitoba invalid and of no force or effect would, without more, undermine the principle of the rule of law. The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Indeed, it is*

> *because of the supremacy of law over the government, as established in s. 23 of the Manitoba Act, 1870 and s. 52 of the Constitution Act, 1982, that this Court must find the unconstitutional laws of Manitoba to be invalid and of no force and effect.*
>
> *Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order[…] It is this second aspect of the rule of law that is of concern in the present situation".*

18. Accordingly, the Court held that it could suspend the declaration of invalidity for a period to permit the repeal of the invalid legislation, its re-enactment, (and where appropriate further repeal), consistent with the requirements of the Act of 1870.

19. Subsequently, the Supreme Court of Canada applied the technique in other areas. In *Schachter v. Canada* [1992] 2 SCR 679 (*"Schachter"*), Lamer C.J. recognised three categories of cases in which suspensions could be granted: threats to the rule of law, threats to public safety, and under-inclusive legislation, finding at paragraphs 175-176 of his judgment:-

> *"A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (R. v. Swain, supra) or otherwise threatens the rule of law (Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness*

as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.

I would emphasize that the question of whether to delay the effect of a declaration is an entirely separate question from whether reading in or nullification is the appropriate route under s. 52 of the Constitution Act, 1982. While delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the institution of the legislature under s. 52."

20. Subsequently, the suspension of declarations of invalidity became more commonplace in Canada, and the Canadian Supreme Court has recently taken the opportunity of reviewing the principles on which such an order should be made in *G*. Prior to the oral hearing of the present case, the Court drew the attention of the parties to this decision. In *G*, the majority of the court, in the judgment of Karakatsanis J. (with whom Wagner C.J., Abella, Moldaver, Martin and Kasirer JJ. agreed) sought to identify what was described as

"*principled remedial discretion*". The Court, Karakatsanis J. considered, should be guided by fundamental remedial principles as follows:-

A. *"Charter rights should be safeguarded through effective remedies.*

B. *The public has an interest in the constitutional compliance of legislation.*

C. *The public is entitled to the benefit of legislation.*

D. *Courts and legislatures play different institutional roles".*

21. A minority would have taken an even narrower approach. Rowe J. would have limited the circumstances to those identified in *Schachter*, namely circumstances giving rise to rule of law considerations, particular difficulties in the field of public safety, and the particular case of under-inclusive legislation conferring a benefit. Two other dissenting judges, Côté and Browne JJ., would have limited the suspension of a declaration of invalidity to the rule of law cases and those raising issues of public safety. They would not have contemplated a suspended declaration in cases of under-inclusivity, preferring in such circumstances to limit the declaration of invalidity to the fact that the legislation did not extend the benefit to the identified group, thus in effect, leaving in place the benefit of the legislation and achieving the same result.

22. The submissions on behalf of the Attorney General in the present case also made reference to an article (Robert Lecky, 'The Harms of Remedial Discretion' (2016) 14(3) International Journal of Constitutional Law 584) which was included in the materials supplied to the Court, and which was sceptical of the extensive use of suspended declarations. We have carefully considered all this material.

23. It is perhaps correct to say that both the theory and practice in this jurisdiction, has come closest to the views of the dissenters in *G*, but what is significant for present purposes, is that the judicial discussion and academic commentary, even that most opposed to the use of suspended declarations, accepts that there is a core of cases in which the remedy is properly applied, and most obviously, in cases which give rise to rule of law concerns, particularly in the field of electoral law.

24. All of the parties here accept that this is one such case. The reason is explained very clearly in the judgments in the principal case. At paragraph 158 of his judgment, Murray J. observed:-

> *"Until recently, the conventional understanding was that the issue of a declaration that a provision or provisions of an Act of the Oireachtas is or are unconstitutional operated from the point at which the legislation was enacted. It is well established that this does not mean that all actions undertaken on foot of that legislation are null and void, but the working assumption, traditionally, was that the declaration reached back. The critical difficulty in applying that assumption here is obvious: every Oireachtas composed since 1979 has operated on the basis of the Seanad university franchise as defined by the 1937 Act, and at any point from now on there might be an election before the Oireachtas has the opportunity to remedy the invalidity identified in this judgment".*

25. At paragraphs 67 and 68 of his judgment, Hogan J. for his part said:-

> *"67. ... The democratic character of the State as described in Article 5 is an inviolate feature of the Constitution's identity. Yet this democratic*

character would be compromised if elections (whether for the Dáil or Seanad) could not safely be held or they were otherwise conducted under the shadow of unconstitutionality with the attendant risk of invalidity.

68. It would not be practical or realistic to make that declaration immediately effective since it would effectively render our democratic system positively unworkable, as it would be all but impossible in such circumstances to conduct a general election for Seanad Eireann in the manner required by Article 18.8. Since Seanad general elections must take place "not later than ninety days after a dissolution of Dáil Éireann", such a constitutional impasse would also, inter alia*, frustrate the right of the Taoiseach to seek a dissolution of Dáil Éireann in accordance with Article 13.2.1° of the Constitution. The Oireachtas, moreover, could not be expected quickly to complete this task given the practical and other difficulties and complexities attending the extension of the University franchise, not least given the difficulties associated with the assembly of entirely new electoral registers associated with other institutes of higher education".*

26. In written submissions on behalf of the Attorney General and the State parties, the following was said at footnote 10:-

"*The question does arise as to what the actual legal consequence would be if (a) the Court did not suspend the declaration in this case, or (b) if remedial legislation is not enacted prior to the expiry of the period provided for by the suspended declaration. This issue was adverted to*

but not fully explored in argument at the substantive hearing […] At the extreme end of the spectrum of possibilities is the potential for argument that any Seanad election for the University Senators that took place after the expiry of the period of suspended declaration will be invalid, and that any Seanad with such University Senators would thus not be lawfully composed and the Oireachtas would consequently be unable to legislate at all, or to put it another way, any legislation that was purported to be enacted by an Oireachtas including such University Senators, would be a nullity. These questions do not have to be determined on this appeal, but even to articulate these possibilities points very clearly to the logic of affording the Oireachtas a significant period of time to legislate".

27. As both Murray and Hogan JJ. observe, and as the parties submit, the jurisprudence of this Court now clearly establishes that there are circumstances in which the retrospective effect of a declaration of invalidity must be qualified. The suspending of a declaration of invalidity is a recognition that this theory can be, as Murray J. put it at paragraph 167 of his judgment, "*projected forwards as well as backwards*". There is, however, a distinction which is relevant to the issue which the Court must determine. Where the law determines that the effect of a declaration of invalidity of legislation does not automatically lead to the invalidity of ineffectiveness of action taken pursuant to such provisions, the law is influenced in part by the fact that such legislation had the force of law up and until it was declared invalid, and was, moreover, a law enacted by the only body authorised by the Constitution to make such laws, and as such, commanded obedience. As Chief Justice Hughes said in *Chicot County Drainage Dist. v.*

Baxter State Bank, 308 U.S. 371 (1940) at 374: "*[t]he actual existence of a statute, prior to such a determination, is an operative fact, and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration*".

28. The actual existence of a statute, and the compliance with such legislation, has a certain constitutional value and gives rise to a constitutional duty to apply, uphold and obey such laws until the point of a declaration of invalidity. That state of law cannot or should not be ignored. However, when a suspended declaration is made, it is directed towards events after the formal (and final) determination of invalidity, and in circumstances where the provision has been decided to be inconsistent with the provisions of the Constitution, which it is the duty of the courts to uphold. As it has been put, a suspension of a declaration of invalidity means that an unconstitutional law is maintained in force solely by virtue of the court order. These considerations reinforce the caution which the State parties correctly emphasise should guide the Court's application of the jurisprudence, but also suggests that while the deferral or suspension of a declaration may be necessary to avoid constitutional chaos, it should not be extended unnecessarily. This suggests, in turn, that the Court should look to limiting the period of permitted operation of the invalid law so far as is possible and to that which is necessary for that objective; that is, the prevention of a constitutional crisis.

29. In submissions, it was suggested that the position of the State parties was one of deference to the Court and its decisions. While this may be a question of nuance, deference is perhaps not quite the correct term or concept. It perhaps

implies that the position taken was one out of respect but is not required. If it was a matter of choice, then in theory a party could choose not to defer to any particular decision. By the same token, I do not think the position of the Court is properly described as one of restraint. That term, for its part, implies the Court could go further than it has, but should not do so, perhaps only as a matter of prudence. I do not think that is a complete understanding of the separation of powers. In this difficult area of the interaction between the respective branches, the areas of responsibility for each are not a matter of choice, but rather of obligation. Indeed, it might be said that there is a particularly heavy responsibility and duty on the courts in this regard, since it is their function to identify and enforce the proper boundaries of each branch, including their own, and the only possible check on this power if erroneously exercised is a constitutional amendment. It is the corresponding duty of the Executive and Oireachtas to accept and obey those determinations. In each case, however, it is a matter of obligation rather than choice.

30. By the same token, I think it would be unwise to give excessive importance to considerations such as those adverted to by Geoghegan J. in *A*, to the effect that judges considering the constitutionality or otherwise of an enactment would be consciously or unconsciously affected by the consequences of a finding of unconstitutionality, if it was not possible to limit potentially catastrophic consequences. It would be a mistake to think that, in any human system of judging, that there are not many factors which are capable of affecting judges who cannot reach their decisions in the abstract. However, it would be an error of even greater proportions to assume that these considerations control courts' decision-making. It would be wrong to refrain from making a finding of

constitutionality because the result would be inconvenient or worse, and equally incorrect, to find something unconstitutional, which was not. In truth, courts should attempt to address all cases on their merits, and the only relevant consideration is whether the test to be adopted and applied, make that already difficult task easier, or more difficult.

31. These matters are relevant here because it is important to be precise about both the nature of the flaw found in *Heneghan (No.1)* and what is involved in any deferral or suspension of a declaration of invalidity in this case. This is not merely a case, dramatic though it would be, of an invalidity in a structural piece of legislation which could not be readily remedied readily, or at all. The legislation in question is part of the constitutional architecture of the State itself. What would be deferred or suspended is the formal declaration of invalidity of s. 6 and s. 7 of the 1937 Act alone. The judgment has been delivered, and a consequence of that judgment is that the Oireachtas has been found to have failed in its duty, imposed by Article 18.6 of the Constitution, to enact a law compliant with the Constitution to provide for election for the university seats in the Seanad. More specifically, it is also in breach of its duty to comply with the specific obligation imposed by the People by referendum in 1979 as found by this Court in *Heneghan (No.1)* to extend that franchise beyond Trinity College Dublin and the National University of Ireland. The deferral or suspension of a declaration of invalidity of the specific statutory provisions of the 1937 Act does not in any way absolve the Oireachtas of its obligation to perform that duty. That duty is ongoing, and it is a basic requirement of any system in which all branches of the State are bound by and must uphold the Constitution, that any breach by a branch of the Constitution must be remedied

by it as soon as feasible. It should be emphasised that this is a constitutional obligation which lies on the current Oireachtas, which crystallised on the delivery of the judgment in *Heneghan (No. 1)*, has applied since then and applies now with full force. That constitutional duty, to be absolutely clear, is not merely to change the law so as to align it with the constitutional obligation of the Oireachtas as it has been found by the Court, but to do so now. A demonstrable failure by the Oireachtas to take the steps necessary to put the process in train for the enactment of this legislation would thus, in itself, represent a breach of a clear constitutional duty. That duty applies now and has indeed applied since the delivery of judgment in this case on 31 March of this year, and is not relieved or qualified in any way by the suspension of the declaration of invalidity of s. 6 and s. 7 of the 1937 Act.

32. Given the complex interaction of factors in this case, the present and ongoing duty on the Oireachtas to legislate, and the limited scope of the provisions involved, this would not, in my view, be an appropriate case to simply defer the declaration. On the contrary, making a declaration of invalidity may have the beneficial effect of focusing attention on the limited scope of the provisions involved while directing attention to the present obligation of the Oireachtas to perform its constitutional duty to enact legislation.

33. Accordingly, I propose that this Court, by order of the Court, make a declaration that s. 6 and s. 7 of the Seanad Electoral (Universities' Members) Act, 1937 are inconsistent with the provisions of the Constitution.

34. Next, the Court must consider the suspension of that declaration. I accept the submissions made on behalf of both parties that it is, at least in theory, possible

to suspend the declaration for more than one period and that it is possible to set out an initial period of suspension which could be extended as appropriate. However, the circumstances in which such a procedure would be appropriate, particularly in light of the caution with which the Court should treat this remedy, must be rare. It would inevitably involve the Court supervising the procedures, and scrutinising the internal operations of another branch of the State. This would, itself be incompatible with the relationship between the branches of government posited by the Constitution, and which it is the obligation of the courts to uphold. In this case, suspension of the declaration is not necessary to permit the Oireachtas to function, either generally, or specifically in relation to its duty to legislate in respect of the university seats. It is only necessary to suspend a declaration to guard against the possibility of unanticipated events leading to a dissolution of the Dáil and a consequent obligation to elect the Seanad, at a point before it has been possible to enact new legislation. The risk of a dissolution before curative legislation could be enacted is perhaps small, but the consequences for the constitutional structure are so final and fatal, that it is appropriate to suspend the effect of any declaration of invalidity to protect against that risk. This suggests a present declaration of invalidity, and a single period of suspension is appropriate. That would provide for protection against the possibility of a dissolution of the Dáil and the next election occurring before enactment of the legislation. No more should be required. The Oireachtas would then be able to act in full knowledge of the consequences of any failure to perform its duty in this regard.

35. There remains the issue of the period of any suspension. The State parties have set out what is described as a forensic analysis of the steps which it is suggested

are necessary to be completed before it could be possible to have an effective election for Seanad university seats with an extended franchise and suggests accordingly, that the declaration should be suspended for a period of 48 months from now, ending on 31 July, 2027. It is acknowledged that this is, even for the State parties, an exercise in inspired guesswork, since, as was correctly pointed out, the respondents in these proceedings cannot completely control the process of legislation, which is in constitutional theory, a matter for the Oireachtas alone. It follows that it would be even more speculative for the Court to attempt to interrogate this assessment or provide its own assessment of the legislative administrative steps that might ensue. Furthermore, as pointed out by the State parties, it is very doubtful that it is appropriate for the Court to engage so intimately in the procedure of other branches. But in any event, and apart from these considerations, it seems to me that the approach is not one which can or should be adopted by the Court.

36. It has been acknowledged that there are multiple ways in which the invalidity identified in the principal judgments could be cured ranging from a very simple solution to a more elaborate extension of the franchise and inclusion of potential electors, and conceivably even a more comprehensive reform of the Seanad electoral system. The very wide range of options available, and latitude afforded to the Oireachtas in this regard, are clear from paragraph 129 of the first judgment. That, it must be stressed, did not mandate the extension of the franchise to any *particular* institution, or any particular form of franchise. It follows that if the Court's inquiry was simply the period necessary to allow *any* possible solution, then the backstop date would have to be measured by the most elaborate, comprehensive, and therefore, lengthy process. But if that course is

taken, and the longest potential period provided, then there can be no guarantee that such elaborate solution will, in fact, be adopted by the Oireachtas. It is clearly a function of the Oireachtas to choose the form of constitutionally compliant legislation which it enacts, or indeed the manner in which it approaches that task. It could even decide to proceed in stages. If a period is allowed to elapse which would be sufficient for the most elaborate legislative solution, but at the end of the day, the solution chosen is the simplest one which could have been, but was not, carried through in a reasonably short period, then the effectiveness of an invalid law would have been extended for much longer than was necessary.

37. More critically, the suspension for such a period of time is not *essential* or even *necessary* to permit the Oireachtas to legislate. The parties accept there is no question of any current invalidity in the composition of the current Seanad and therefore, the current Oireachtas. It follows that the purpose of the suspension is not to perform as a rough estimate of the time it may take this or any future Oireachtas to legislate. For reasons I have sought to analyse above, the purpose of the extension is to protect against the possibility of an election and consequent dissolution which might trigger an election before curative legislation had been put in place. In principle therefore, it seems that this should extend to only one electoral cycle. To be taken unawares by one election caused by events not necessarily within the control of the Oireachtas is a risk to the constitutional system, which justifies the remedy of a temporary suspension of a declaration of the invalidity that would normally necessarily follow from the decision of the Court. But that cannot extend indefinitely to subsequent elections. The continued functioning of the system established by the

Constitution requires that the Oireachtas in this case which has the constitutional function and duty of legislating, should be protected against the possibility that the invalidity of the legislation might have the effect of precluding Oireachtas from performing its constitutional duty. It has, however, no legitimate claim to be protected from the consequence of its own advertent failure to perform that duty.

38. For that reason, I accept the submission of the appellant, that a single, relatively lengthy, period of suspension is sufficient to achieve that purpose. Furthermore, we have been referred to international precedent which acknowledges that a reasonably lengthy period of suspension is necessary where the incompatibility identified related to electoral provisions and where a range of solutions are possible. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203, the Supreme Court of Canada found that certain provisions of the Indian Act, R.S.C., 1985, which provided for the voting rights of members of Indian bands in band elections infringed s. 15 of the Canadian Charter of Rights and Freedoms, and determined that a suspension of the declaration of eighteen months was appropriate. In *Speaker of the National Assembly and Another v. New Nation Movement NPC and Others* [2020] ZACC 24, the South African Constitutional Court held that provisions of the Electoral Act 73, 1998 relating to the requirement that citizens must be elected through their membership of political parties to the National Assembly and Provincial Legislatures were inconsistent with the Constitution but suspended the declaration for a period of twenty-four months. In the context of this case, I would propose that the Court should order that the effect of the declaration of invalidity made today, should be suspended up to and until the 31 May, 2025.

39. In summary, I conclude as follows:-

I. The effect of the decision of this Court of 31 March, 2023 is to find that the State, through its Executive and Legislative organs, is in breach of its constitutional duty under Article 18.6 to enact a law compliant with the Constitution to provide for election to the university seats of Seanad Éireann, and also in breach of the specific obligation imposed under Article 18.6.2° by the people in 1979 to make provision for such election on an expanded basis;

II. The obligation to perform that duty has applied since the constitutional breach of duty was established on 31 March, 2023. That duty applies now and is not in any way affected by a suspension of a declaration of unconstitutionality of specific statutory provisions;

III. It has been established that this Court has, in rare cases, a jurisdiction to defer, postpone or suspend a declaration of constitutional invalidity of any statutory provision, where to make an immediate declaration of such invalidity would imperil the rule of law, and remove the possibility of the invalidity being capable of being remedied;

IV. This is one such case. The immediate invalidity of s. 6 and s. 7 of the Seanad Electoral (University Members) Act, 1937 would give rise to a real possibility that curative legislation might not be capable of being enacted, with the consequent inability to elect an Oireachtas consistent with the Constitution and render it incapable of enacting any legislation;

V. The Court, having received submissions from the parties on the length of any period of suspension of a declaration of invalidity of the relevant sections, considers that a single, relatively lengthy period of suspension is required, and appropriate; and

VI. Accordingly, the Court will suspend a declaration of the invalidity of s. 6 and s. 7 of the Seanad Electoral (University Members) Act, 1937 until **31 May, 2025**.