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THE JUDICIAL POWER UNDER IRISH CONSTITUTIONAL LAW

By

J. P. CASEY *

> The Constitution of Ireland is founded on the doctrine of the tripartite division of the powers of government—legislative, executive and judicial—as appears from an examination of Articles 6, 15, 28 and 34.
>
> Ó Dálaigh C.J. in *Re Haughey* [1971] I.R. 217, 250.

I

IT is no doubt true that, as the above quotation indicates, the Irish Constitution enshrines the notion of *division* of powers; but it does not stipulate a rigorous *separation* of powers—save in one field. The text of the Constitution distinguishes the three classical powers and makes provision for the exercise of each of them, but except as regards the judicial power this classification is purely conceptual and has no practical consequences. Thus, there is no formal separation of the executive from the legislature—indeed the whole tenor of the constitutional provisions in this area makes it clear that a government-in-parliament on the Westminster model was intended. And while Article 15 vests the sole and exclusive power to make laws for the State in the Oireachtas, the fact is that in modern Ireland legislating is just as much an executive function as it is in the United Kingdom.[1] The vast majority of Acts passed by the Oireachtas start out as Government measures.

That development can, of course, be squared with the concept of the division of powers since in form it is the Oireachtas which enacts the legislation. And respect for the traditional division is shown by the fact that while the Constitution allows the Government to legislate through the Oireachtas, it concedes the executive no other law-making powers. There is no Irish counterpart to Article 37 of the French Constitution, nor is there in Irish law any concept of an

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[1] *Cf.* S. A. Walkland, *The Legislative Process in Great Britain*, London 1968. p. 20: "Legislation is now an almost exclusively executive function, modified, sometimes heavily, by practices of group and Parliamentary consultation." In Britain this is, in part, the result of the financial initiative of the Crown: see Gordon Reid, *The Politics of Financial Control*, London 1966, pp. 35–45. The Irish Constitution contains an equivalent provision: Art. 17.2.

inherent *pouvoir réglementaire*.[2] Indeed, the terms of Article 15.2.1 might even at first sight appear to rule out the statutory delegation of law-making powers, but the courts have happily been able to validate this essential activity.[3]

We cannot say, then, that the Irish Constitution separates executive and legislative power in the manner of the American or French Constitutions. To that extent it rejects the doctrine of the separation of powers. But one authority has noted that the essential function of that doctrine is to emphasise the independence of the judiciary [4]—and in that regard the Irish Constitution goes beyond the approach traditionally found in the common-law world. Not only does it provide the usual guarantees as to tenure and remuneration; it also maps out a sphere of operations for the judiciary and guards against its invasion by the other branches of government. The boundaries of this sphere are of necessity vague, and this poses problems for both courts and legislature; but the value of a constitutional statement of principle that there is a judicial field into which others may not stray appears clearly from the Irish cases. The point is neatly made by *Murphy* v. *Dublin Corporation*,[5] in which the Supreme Court did not merely reject *Duncan* v. *Cammell Laird* [6] and travel beyond *Conway* v. *Rimmer*.[7] By holding that a decision as to the production of evidential material could be taken only by those who exercised the judicial power of the State, the court placed the power to order discovery in such cases on a foundation which cannot be shaken by any future statute.

II

The constitutional provisions bearing most closely upon the judicial power are Articles 34.1 and 37. The former lays down the general principle that the function of administering justice is one for judges appointed under the Constitution [8]—and for them alone. The latter adds an important qualification: statutes may authorise the exercise

[2] See Brown and Garner, *French Administrative Law* (2nd ed.), London 1973, Chap. 2.

[3] *Pigs Marketing Board* v. *Donnelly (Dublin) Ltd.* [1939] I.R. 413, a decision of the High Court (Hanna J.). It should be noted, however, that the functions of the Board were in essence rather limited—to make orders fixing the price of pigs, such price to be that which in their opinion would be the proper one under normal conditions. To do this, said Hanna J., required knowledge not possessed by the legislature, which could properly therefore give this function to the Board.

[4] J. D. B. Mitchell, *Constitutional Law* (2nd ed.), Edinburgh 1968, p. 47.

[5] [1972] I.R. 215.

[6] [1942] A.C. 624.

[7] [1968] A.C. 910.

[8] " Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution. . . ."

of " limited functions and powers of a judicial nature " by persons other than judges—but only in non-criminal cases.[9]

These two provisions produce a complex concept of the judicial power. It is clear, for example, that the doctrine embodied in the Irish Constitution is quite different from that found in the Commonwealth Constitution of Australia. For example, in *Waterside Workers' Federation* v. *Alexander*[10] Griffith C.J. said that under the Australian Constitution " . . . any attempt to vest any part of the judicial power . . . in any body other than a court is entirely ineffective." The terms of Article 37 show that no similar statement could be made by an Irish judge. Again, in *Att.-Gen. for Australia* v. *The Queen and the Boilermakers' Society*[11] the mixture of judicial and arbitral powers conferred by various statutes on the Commonwealth Court of Conciliation and Arbitration was condemned as violating the Australian Constitution. It is clear that a similar development would not be open to objection in Ireland. In a leading case—*McDonald* v. *Bord na gCon*[12]—Kenny J. observed that new powers and jurisdictions could validly be conferred on the courts even though the exercise of those powers might not constitute an administration of justice. Again, in the *Boilermakers* case the Judicial Committee took the view that giving rulings as to the validity of laws, on a reference by the Governor, was not a judicial function. Article 26 of the Irish Constitution seems to proceed upon a different view.[13] It follows from this that the guidance Irish courts can obtain from overseas precedents may be limited.

The difficulties of Articles 34.1 and 37 can scarcely be over-emphasised. What precisely constitutes an " administration of justice "? When may " matters " be said to be " criminal "? How does one determine whether " functions and powers of a judicial nature " are " limited," so that they may properly be conferred on bodies other than courts? These are among the issues with which the Irish courts have been forced to grapple.

[9] " Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court established or appointed as such under this Constitution."

[10] (1918) 25 C.L.R. 434, 442.

[11] [1957] A.C. 288.

[12] [1965] I.R. 217.

[13] Art. 26 provides for the reference of Bills to the Supreme Court by the President, in order that their constitutionality may be determined. In *McDonald's* case (see n. 12 *supra*) Kenny J., referring to this procedure, said (at p. 230): " . . . it seems to me that the Supreme Court when deciding the matter is not administering justice, but giving an advisory opinion."

III

Criminal matters

Articles 34.1 and 37, read together, clearly forbid the trial of " criminal matters " by persons other than judges. Not surprisingly, this expression is nowhere defined in the constitutional text; but guidance as to its import may be found in the Supreme Court's decision in *Melling* v. *Ó Mathghamhna.*[14] There the court had to consider Article 38.5, which provides that, subject to defined exceptions, no person shall be tried *on any criminal charge* without a jury. The fullest analysis of the italicised words is found in the judgment of Kingsmill Moore J. He observed that a comprehensive definition of " crime " was almost impossible to frame, and he did not attempt to provide one. Rather, he sought for certain indicia, the primary one being the sanction. If this is punitive—not merely a matter of fiscal reparation—then the conduct in respect of which it is imposed is criminal. The learned judge quoted the words of Lord Wright in *Amand* v. *Home Secretary* [15]:

> . . . if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a criminal cause or matter.

It would seem, then, that any conduct attracting a fine or imprisonment would give rise to a " criminal matter " in terms of Articles 34–37. It follows that imposing sanctions in respect of such conduct would be a function reserved to the judges. No other persons could constitutionally be given this power. A board or tribunal involved in labour arbitration could not be empowered to fine those who failed to observe its rulings. Nor can the Oireachtas, or a committee thereof, try, convict or sentence persons for contempt.[16]

Modern Irish legislation is naturally framed with these restrictions in mind, and few attempts have been made to vest the function of dealing with criminal offences in bodies other than the courts. The Restrictive Practices Commission, for example, has no power to try those who violate its rulings; they must be brought before the regular courts.[17] Similarly, in the limited areas where breaches of Labour Court orders attract sanctions [18] these can only be imposed by the

[14] [1962] I.R. 1.
[15] [1943] A.C. 147, 162.
[16] *In Re Haughey* [1971] I.R. 217.
[17] The Commission, established under the Restrictive Practices Act 1972 is empowered to inquire into unfair trading practices and to recommend to the Minister for Industry and Commerce the making of an order to prohibit any such practice. The order is effective only when confirmed by statute, s. 8 (3). Contravention of its provisions is an offence, but is triable only in the regular courts.
[18] The Labour Court, established under the Industrial Relations Acts 1946–68, is no more a court than was the former Industrial Court (later Industrial Arbitration Board) in Britain. Its main function is to investigate disputes and to issue recommendations

ordinary courts. On three occasions, however, the Oireachtas has been found to have overstepped the constitutional limits. In *State (Burke)* v. *Lennon* [19] Gavan Duffy J. held that the Minister for Justice, when exercising that power to order the internment of persons conferred on him by the Offences against the State Act 1939, was administering criminal justice. But since only a judge could do this, and the Minister was obviously not a judge, the statute was unconstitutional.[20] In *Re Paraic Haughey* [21] the issue was as to the validity of section 3 (4) of the Committee of Public Accounts of Dail Eireann (Privilege and Procedure) Act 1970. This statute had been passed to enable the Public Accounts Committee to carry out its mandate to inquire into the expenditure of a Grant-in-aid for Northern Ireland relief. Section 3 (4) provided (*inter alia*) that if a witness before the Committee refused to answer any question to which the Committee could legally require an answer, the Committee could " . . . certify the offence of that person . . . to the High Court and the High Court may, after such inquiry as it thinks proper to make, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the High Court." Haughey had refused to answer the questions put to him, reading out instead a prepared statement. The Committee duly issued a certificate under section 3 (4), and the High Court, rejecting Haughey's contention that section 3 (4) was unconstitutional, sentenced him to six months' imprisonment. On appeal, the Supreme Court held section 3 (4) invalid. Delivering the judgment of the court [22] Ó Dálaigh C.J. said [23]:

> It has been urged on behalf of Mr. Haughey that the Act of 1970 intended to authorise the Committee to try and to convict and, thereupon, to send

for settlement. It does, however, have power to order an employer to comply with the terms of a registered employment agreement, or to order a union to stop financing a strike which is in breach of such an agreement (Industrial Relations Act 1946, s. 32). Failure to observe such an order is an offence, but that offence may be tried only in the ordinary courts.

[19] [1940] I.R. 136.

[20] The offending Act was repealed, and a Bill to re-enact it with minor amendments was referred to the Supreme Court by the President under Art. 26. When the argument which had succeeded before Gavan Duffy J. was advanced against this Bill, the Supreme Court took the view that in the context of the amendments it was " wholly unsustainable ": *Re Article* 26 and *The Offences against the State (Amendment) Bill 1940* [1940] I.R. 470, 479. The court also said of the order for detention that it was not in the nature of punishment, but a precautionary measure taken for the purpose of preserving public order and the security of the State. As the cases discussed below illustrate, the Irish courts today are far more likely to accept the Gavan Duffy view of what constitues an administration of criminal justice.

[21] [1971] I.R. 217.

[22] Ó Dálaigh C.J., Walsh, Budd, FitzGerald and McLoughlin JJ. Art. 34.4.5° stipulates that in cases involving the validity of a law there shall be only one judgment.

[23] [1971] I.R. 217, 249–250. By applying the presumption of constitutionality so as to arrive at a more benevolent construction of the 1970 Act, the court was able to avoid striking it down on this ground. It was, nonetheless, held unconstitutional, for reasons not germane to the subject of this paper.

> the offender forward to the High Court for punishment. It may be noted that the Committee itself appears to have thought that this was the correct construction. . . . If one examines the impugned sub-section in the light of the ordinary canons of construction, the Committee's view . . . has much to support it. . . . If that view is the correct view, then the sub-section has authorised the Committee to try and to convict a witness of a criminal offence. But the trial of a criminal offence is an exercise of judicial power and is a function of the Courts, not of a Committee of the Legislature. Article 34 of the Constitution provides that justice shall be administered in courts established by law by judges appointed in the manner prescribed by the Constitution. The Committee of Public Accounts is not a court and its members are not judges. . . . Moreover, under the Constitution the Courts cannot be used as appendages or auxiliaries to enforce the purported convictions of other tribunals. The Constitution vests the judicial power of government solely in the Courts and reserves exclusively to the Courts the power to try persons on criminal charges. Trial, conviction and sentence are indivisible parts of the exercise of this power. . . .

The third and most recent case is *Maher* v. *Att.-Gen.*,[24] which involved section 44 (2) of the Road Traffic Act 1968. This provided that in prosecutions for " driving under the influence " an analyst's certificate as to the concentration of alcohol in a blood or urine specimen should be conclusive evidence as to the concentration of alcohol in the blood of the person from whom the specimen was taken. The subsection was assailed as an invalid legislative infringement on the judicial power. The Supreme Court [25] held that it was. In entrusting the administration of criminal justice exclusively to the courts, the Constitution necessarily reserved to them the power to determine whether all the essential ingredients of an offence had been proved against an accused person. Since it made the analyst's certificate *conclusive* evidence, section 44 (2) purported to remove the determination of one essential ingredient from the courts. Hence, it was *pro tanto* unconstitutional.[26]

Since pre-independence statutes were not framed in the light of these limitations, the likelihood of finding constitutional infirmity there is much greater. And as the next section of this paper shows, many such statutes have in fact been held invalid, at least in part. The general principle is illustrated by *Cowan* v. *Att.-Gen.*[27] Here Haugh J. had to consider the validity of Acts of 1882 and 1884 which confided the trial of municipal election petitions to barristers

[24] [1973] I.R. 140.

[25] FitzGerald C.J., Walsh, Budd, Henchy and Griffin JJ. For the reason given in n. 22 *supra* there was only one judgment.

[26] The vice lay in the word " conclusive "; had it been omitted the section would have been valid. But after an exhaustive analysis, both of the Act and its legislative history, the Supreme Court held that it could not simply strike out that word. To do this would produce a result entirely at variance with the clear intention of the Oireachtas and would mean that the court was exceeding its functions.

[27] [1961] I.R. 411.

appointed by the High Court. The learned judge held this unconstitutional on two grounds, the second being that this election court had power to try offences arising out of elections, and to fine and imprison those it convicted. Haugh J. felt that the statutory scheme intended the court to be ready at all times to exercise its powers in these criminal matters. No severance of these offending provisions was possible; to cut them away would do violence to the intentions of the legislature.[28] The whole system of trying these petitions thus fell to be condemned.

No executive intervention

The courts have repeatedly stressed that since the Constitution reserves judicial functions in the criminal sphere solely to the judges, any executive intervention in that area is unconstitutional. Thus in *Deaton* v. *Att.-Gen.*[29] the Supreme Court struck down part of section 186 of the Customs Consolidation Act 1876. This empowered the Revenue Commissioners to elect which penalty—a fine of £100 or three times the value of the goods—should be imposed on a person convicted of an offence under the section. The court observed that in the administration of criminal justice the judicial function traditionally was threefold—(a) determining innocence or guilt, (b) selecting the sentence, and (c) imposing that sentence. Under section 186 the Revenue Commissioners could select the sentence and thus discharge a judicial function, despite the fact that they were not judges. The Constitution did not permit this.[30]

In *State* (*Sheerin*) v. *Kennedy*[31] section 7 of the Prevention of Crime Act 1908 was found wanting. This section, as adapted by later statutes, empowered the Minister for Justice to transfer incorrigible Borstal detainees to prison, *with or without hard labour,* for the remainder of their term of detention. The Supreme Court found the power to impose hard labour inconsistent with the Constitution, as an administration of criminal justice by a person who was not a judge.

[28] The point thus taken by Haugh J. was re-emphasised by the Supreme Court in *Maher's* case, where it was stressed that just as the legislature could not usurp judicial functions, so the judges must respect the functions of the legislature. " If . . . the Court were to sever part of a statutory provision as unconstitutional and seek to give validity to what is left so as to produce an effect at variance with legislative policy, the Court would be invading a domain exclusive to the legislature and thus exceeding the Court's competency. In other words, it would be seeking to correct one form of unconstitutionality by engaging in another. . . . The right to choose and formulate legislative policy is vested exclusively by the Constitution in the national parliament " ([1973] I.R. 140, 147–148, *per* FitzGerald C.J.).

[29] [1963] I.R. 170.

[30] Clearly, *Deaton's* case does not deny the Oireachtas power to fix *mandatory* sentences. It does however establish that where the precise sentence is a matter of discretion, only a judge may make the choice. See Walsh J. in *State* (*O.*) v. *O'Brien* [1973] I.R. 50, 67.

[31] [1966] I.R. 379.

Since the court found it possible to sever the unconstitutional phrase, section 7 still stands, with the offending words excised.[32]

The provision impugned in *State* (*C.*) v. *Minister for Justice* [33] was section 13 of the Lunatic Asylum (Ireland) Act 1875. This (as adapted and amended) empowered the Minister for Justice to direct that where a prisoner on remand was certified to be of unsound mind, he should be confined in a mental hospital until such time as he was certified to have recovered. The Minister could then direct that he be once again brought before the court which had remanded him. The Supreme Court found this power inconsistent with the Constitution. Ó Dálaigh C.J. remarked that in 1875 an omnipotent Parliament could enact this provision, with no problems about the separation of powers. But it was otherwise now. Section 13 would permit the court's remand to be set at naught and could be operated so as to effect an adjournment *sine die* of the preliminary investigation. This was " . . . about as large an intrusion upon a court proceeding as one could imagine." [34] Here again the court was able to cut away the offending words, so that section 13 remains in force. Thus the Minister may still issue his directive; but when the original remand period ends the accused must be brought back before the District Court for trial, preliminary examination or further remand, as the court may direct.

State (*Woods*) v. *Att.-Gen.*,[35] an application for habeas corpus, did not involve the validity of any statute. The situation there, as expounded to the High Court, was that Butler J. had sentenced Woods to seven years' imprisonment, with a proviso that when he had completed three years the rest of the sentence should be suspended, provided he had obeyed prison discipline. It was argued that this sentence was unconstitutional because the question whether or not Woods had obeyed prison discipline would naturally be decided by the Governor. Thus, it was contended, the precise length of Woods' term in prison would be determined by someone who was not a judge. Henchy J. saw this case as falling within the principle of *Deaton* v. *Att.-Gen.*—that the executive could not constitutionally be given the power to select punishments—and held the sentence unconstitutional. When the case went on appeal before the Supreme Court it was discovered that, in pronouncing sentence, Butler J. had in fact

[32] It was also contended that the power to transfer was itself unconstitutional, but the court held that Borstal detention was for this purpose equivalent to imprisonment, so that the transfer could validly be ordered. It would seem to follow from this that an administrative transfer from one kind of detention to another not equivalent thereto would be unconstitutional.

[33] [1967] I.R. 106.

[34] At 116.

[35] [1969] I.R. 385.

reserved to himself the determination of the question whether Woods had obeyed prison discipline. There was, accordingly, no constitutional flaw in the sentence. However, it seems to be implicit in the Supreme Court's judgment that had the facts been as Henchy J. saw them, the sentence would have been invalid.

Article 13.6 of the Constitution vests the power to " commute or remit " punishment in the President, and it also authorises the conferring by law of that power on " other authorities." The Oireachtas has made provision accordingly.[36] Article 13.6 must also be the modern constitutional foundation for sections 1 and 2 of the Prisons (Ireland) Act 1907, which authorise the remission of prison sentences for good behaviour. In view of all this, the propositions laid down in *Woods'* case might appear difficult to defend. Had the true situation there been that the precise length of Woods' prison term would be decided by the Governor, on the basis of obedience to prison discipline, how would this differ from the practice—authorised by law—of granting remission for good conduct? In either case a sentence imposed by a judge would have been modified by the decision of a person who was not a judge. Presumably the answer is that the law has authorised remission for good conduct, but not the kind of action thought to have been taken in *Woods'* case. For it may be argued that a judge charged with the exercise of the judicial power of sentencing cannot, in imposing sentence, make an *ad hoc* transfer of that power to someone who is not a judge.

State (O.) v. *O'Brien* [37] raised the question of the exact dividing line between judicial power and executive power. The applicant had been found guilty of murder in 1956, when he was sixteen years old. At that time the sentence for murder was death; but in the case of a " young person " under the Children Act 1908—a category into which O fell—there was substituted instead by section 103 a sentence of detention during His Majesty's pleasure. When passing sentence on O, Teevan J. said that he should be " detained until the pleasure of the Government be made known concerning him." This was done on the basis that all powers exercisable by the monarch were necessarily executive powers, and hence had been inherited by the Government. But on O's application for habeas corpus, the majority of the Supreme Court [38] rejected this view. The flexibility of the British Constitution, it was pointed out, meant that judicial power could be conferred upon the monarch, even though he was in theory the head

[36] The Criminal Justice Act 1951 (No. 2), s. 23, provides that the Government may commute or remit punishments, forfeitures or disqualifications, and may delegate power in this regard to the Minister for Justice.

[37] [1973] I.R. 50.

[38] Ó Dálaigh C.J., Walsh, Budd and FitzGerald JJ.; McLoughlin J. dissenting.

of the executive. It could not therefore be said that the Irish Government had *necessarily* inherited all powers vested in the monarch; whether or not it had inherited any given power must depend upon an examination of the true nature of the power in question. That conferred by the Act of 1908 was a judicial power and was now vested in the courts, not in the Government. It must now be understood as giving the trial court power to order detention for an indefinite period, a sentence which could at any time be terminated by the court, or which could be remitted by virtue of Article 13.6.

Implications of these decisions

The constitutional restrictions outlined above, and the decisions expounding them, show that the legislature has little scope for experiment in the field of criminal justice. Some have claimed that the Constitution is much too rigid in this regard and that it acts as a barrier to desirable reforms—for example, in the area of juvenile justice. Many persons and groups are campaigning for Ireland to adopt a system of juvenile justice broadly patterned on that in Scotland, where persons under the age of sixteen are not prosecuted for offences [39] but instead have their cases referred to a Children's Panel. This body, composed of part-time members, considers the question whether the child is in need of " compulsory measures of care." [40] One situation (though not the only one [41]) where this may obtain is where he has committed an offence.[42] The Panel is empowered, in appropriate cases, to require the child to live in a " residential establishment." [43]

It must be doubted whether this system, as it stands, could be adopted by the Oireachtas.[44] The Scottish Act, in reserving the possibility of prosecution in respect of conduct which would otherwise come within the jurisdiction of the panels, seems to imply that such conduct is criminal, in the sense of attracting punishment rather than requiring treatment. An Irish court, faced with an Act couched in similar terms, might well be forced to conclude that the

[39] Save on the instructions of the Lord Advocate or at his instance: Social Work (Scotland) Act 1968, s. 31.

[40] Social Work (Scotland) Act 1968, ss. 39 (3) and 44.

[41] Other examples are: being beyond the control of his parent, or failing to attend school without reasonable excuse. The complete list is in s. 32 of the Act.

[42] s. 32 (2) (*g*).

[43] s. 44 (1) (*b*). For a general discussion of the system see J. P. Grant, " Juvenile Justice: Part III of the Social Work (Scotland) Act 1968 " (1971) *Juridical Review* 149, to which the writer is much indebted.

[44] Save in one respect: in Scotland, when a child is prosecuted and found guilty, the court may seek the advice of a children's hearing as to treatment (s. 56 (1) (*b*)). This would be perfectly constitutional in Ireland. But s. 56 (1) (*a*)—whereby the court can, in effect, remit the decision as to treatment to the hearing—would not.

panels' remit necessarily included decisions as to the disposal of offenders, which would be unconstitutional.[45]

If reform on similar lines is to be brought about in Ireland, an adaptation of the Scottish system would be necessary. This could be done in either of two ways. Firstly, the age of criminal responsibility might be raised from its present level to, say, fifteen—with a total bar on the prosecution of persons below that age. A panel system could then be introduced, so that qualified lay people could decide whether a young person was in need of care. Among the grounds for such a decision would be that the young person had done something which, if done by an adult, would constitute an offence. (There would have to be a provision that if the grounds were not admitted they must be proved before a judge.) If it were made clear (possibly by means of recitals) that the object of the Act was treatment rather than punishment, and that its sole concern was the welfare of the child, constitutional difficulties *might* be avoided. The courts might conclude that there was an analogy between this new system and the Mental Treatment Acts, which have already been upheld as constitutional.[46]

The second mode of adaptation is based upon the fact that the Irish Constitution does not lay down any formal qualifications for judges, beyond providing that no judge may hold " any other office or position of emolument " (Article 35.3). It would therefore seem open to the Oireachtas to legislate for the appointment of non-lawyers whose qualifications and experience would fit them for dispensing juvenile justice. If such persons were appointed to the lower courts (the District and Circuit Courts) to sit with the " ordinary " judges, they could be validly appointed for one-year terms, since the Oireachtas has a free hand in fixing the terms of appointment of judges of these courts (Article 36.ii). Thus, for example, doctors and social workers on a year's secondment from their normal employment could be appointed as judges for that year. Two advantages would be secured in this way: (i) the people thus appointed would not be mere assessors, but would have a voice in the

[45] It is true that the Scottish panels do not determine innocence or guilt: the latter must either be admitted, or proven before the Sheriff (s. 42 (6)). But this means only that they have no authority to *try* offences. In Ireland, as has been shown above, the concept of judicial power in criminal cases embraces more than the power of trial.

[46] In *Re Philip Clarke* [1950] I.R. 235 the Supreme Court upheld s. 165 (1) of the Mental Treatment Act 1945, under which a Garda could take a person believed to be of unsound mind into custody and then apply to a doctor for his committal to a mental hospital. The court said it did not consider that the Constitution required a judicial inquiry or determination before such a person could be placed or detained in a mental hospital. The impunged legislation was described as being " of a paternal character." (It should be noted, however, that the relevance of Articles 34.1 and 37 was apparently not argued.)

decision of the court (ii) the limited tenure [47] of such persons would mean that the expertise and experience they would bring to the courts be *recent* expertise and experience, whereas if they were appointed until retiring age they might lose touch with developments in their fields.

Shanahan's case

One decision of the Supreme Court is out of line with developments since *Deaton's* case. It is *State* (*Shanahan*) v. *Att.-Gen.*[48] and it concerned the validity of section 62 of the Courts of Justice Act 1936. This remarkable provision lays it down that where a district justice refuses to send an accused forward for trial on indictment, the Attorney-General may himself order a return for trial. The proceedings on indictment will then go forward as though the accused had been returned for trial by a competent court. Since a district justice will refuse informations only where he is satisfied that no prima facie case has been made out, this executive review of his decision seems curious, and constitutionally doubtful. In the High Court, Davitt P. held that section 62 was invalid, on the ground that in refusing informations the district justice was exercising the judicial power of administering criminal justice. His decision was therefore a judicial decision, and no statute could authorise the Attorney-General —a member of the executive—to reverse it.

On appeal, the Supreme Court rejected this conclusion and upheld section 62 on two distinct grounds. The first was that the Oireachtas could validly have provided that there should be no preliminary investigation of indictable offences at all—that people should simply be put on trial on indictments preferred directly to the court of trial by the Attorney-General. If the Attorney could be given that wide power, he could be given the more restricted one whereby, as a condition precedent to the exercise of the power, there had to be a refusal of informations by a district justice. Secondly, section 62 would be an unconstitutional intrusion into the judicial sphere only if it gave the Attorney-General power to *change or modify* the district justice's order. But, said the Supreme Court, it had no such effect. The Attorney-General's direction was not an intervention in the controversy, but the initiation of a different one, *viz.*, the trial on

[47] " Limited " in the sense that the persons appointed would demit office after one year: during that year, however, they might be made irremovable save by resolution of both Houses. (Under Art. 35.4.1 only Supreme Court and High Court judges are *constitutionally* protected against removal in any other manner; Circuit Court judges and justices of the District Court are dependent on statute for their protection.)

[48] [1964] I.R. 239.

indictment where, unlike the preliminary investigation, the object was to determine the accused's guilt or innocence.

In *Shanahan's* case the Supreme Court did not decide whether in conducting preliminary examinations the district justice was exercising the judicial power of the State; that question was left for future decision. In *State (C.)* v. *Minister for Justice* [49] the court answered it in the affirmative, Ó Dálaigh C.J. saying [50]:

> The preliminary investigation of indictable offences is a stage in the administration of justice. There cannot be any question as to which side of the tripartite line of division of powers it falls; the preliminary investigation of indictable offences is in the judicial domain.

This conclusion would appear to destroy the first ground of decision in *Shanahan's* case. If a district justice who refuses informations is exercising the judicial power, it is difficult to see how the Attorney-General could constitutionally be authorised to set his decision at naught. The Minister for Justice may not frustrate the justice's order *remanding* an accused [51]; how then could the Attorney-General be authorised to frustrate the justice's decision *discharging* an accused? What the Oireachtas *might* have done becomes quite irrelevant; so long as preliminary examinations [52] remain part of the District Court's functions they must surely benefit from the constitutional protection accorded to judicial activities.

If that is correct, the decision in *Shanahan's* case must now rest on the second ground there advanced. But examination reveals that foundation (justly described by Kelly as sophistry [53]) to be suspect. Given that the object of the trial on indictment is to establish guilt or innocence, how can this be a justiciable controversy different from that in the preliminary examination, in which the object is to determine whether or not the accused should undergo that very trial on indictment? In both instances the parties and the charge are identical. It is therefore very different to accept the sharp distinction between the two proceedings drawn by the Supreme Court, and it is to be hoped that the court may be given an opportunity to consider section 62 again.

IV

Civil matters

> Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person of body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such

[49] [1967] I.R. 106. [50] At 114.

[51] See *State (C.)* v. *Minister for Justice, supra.*

[52] J. M. Kelly, *Fundamental Rights in the Irish Law and Constitution* (2nd ed.), Dublin 1967, p. 286.

[53] As they are now called: Criminal Procedure Act 1967.

> person or body of persons is not a judge or a court appointed or established as such under this Constitution.

Thus Article 37, once called by Gavan Duffy J. "a necessary, precautionary declaration."[54] The necessity for it springs from the absolute terms of Article 34.1. Had no exception been grafted on to the principle there laid down—that justice should be administered by judges—grave difficulties might have arisen. The corresponding Article 64 of the 1922 Constitution had been cast in quite rigid terms and had given rise to problems over the powers of the Master of the High Court.[55] In the light of this, Article 37 may well be described as precautionary.

The Article clearly contemplates the transfer of certain areas of jurisdictions from the courts to other bodies. It would thus validate, for example, section 29 of the Charities Act 1961, which allows the Board of Charitable Donations and Bequests to order the *cy-près* application of a certain class of charitable gifts as well as to revoke a scheme ordered by a court and to substitute a new one therefor. Article 37, however, does not authorise legislative or executive intervention in pending proceedings, nor legislation of a wholly particularistic character. These points emerge clearly from the remarkable case of *Buckley* v. *Att.-Gen.*[56] There an action was pending to determine the ownership of the funds of the Sinn Fein organisation. The pleadings had been closed and the case was ready for hearing as soon as a judge was available. The Oireachtas then passed the Sinn Fein Funds Act 1947, section 10 of which provided (a) that all further proceedings in the action should be stayed, (b) that on an application by the Attorney-General the High Court should dismiss the action. Gavan Duffy P. denounced this measure as unconstitutional and on appeal his opinion was affirmed by the Supreme Court. O'Byrne J. said[57]:

> In bringing these proceedings the plaintiffs were exercising a constitutional right and they were and are entitled to have the matter in dispute determined by the judicial organ of the State. The substantial effect of the Act is that the dispute is determined by the Oireachtas . . . this is clearly repugnant to the Constitution.

The broad purpose of Article 37 was to avoid the excessive rigidity of the 1922 Constitution; but to say that does not carry one very far. There remains the problem of deciding whether it validates any given Act of the Oireachtas. Two possible approaches exist. The

[54] *O'Doherty* v. *Att.-Gen. and O'Donnell* [1941] I.R. 569, 581.

[55] See *Roe* v. *McMullan* [1929] I.R. 9, and the evidence given in 1930 to a Joint Committee of the Oireachtas by the then Master (*Report of the Joint Committee on the Courts of Justice Act 1924*, T. 69, Stationery Office, Dublin, 1930.)

[56] [1950] I.R. 67.

[57] At 84.

first is to consider the statute in the light of an attempted definition of the key words " judicial " and " limited." The second is to try to discover, and to state with some degree of precision, the objects for which the Article was inserted. For convenience the first may be called the " literal," and the second the " purposive," approach.

Kenny J. may be said to have adopted the literal approach in his judgment in *McDonald* v. *Bord na gCon*.[58] The learned judge thought certain features were characteristic of the administration of justice and suggested that their presence or absence might be used to test whether a given power was judicial in nature. These features were: (a) a dispute as to the existence of legal rights or a violation of the law, (b) the determination of the rights of the parties or the imposition of liabilities or the infliction of a penalty, (c) subject to the possibility of appeal, the determination must be final, (d) the court must be in a position to enforce its order or to call in the executive power of the State to do so, (e) the order made must be one " which as a matter of history is an order characteristic of courts in this country." [59]

The test provided by these criteria is far from infallible [60]; in particular, history may mislead. Many orders traditionally made by the Irish courts do not result from the exercise of judicial power in the strictest sense. This was recognised by Kenny J., who instanced the jurisdiction over wards of court, which he described as the exercise of a semi-parental function.[61] There are other examples. The licensing of publicans and auctioneers has long been a function of the courts; but to argue that such licensing is therefore of necessity a judicial function would be to ignore the fact that this jurisdiction was originally given to the courts for reasons simply of convenience. No one, presumably, would wish to freeze historical accident into constitutional dogma. The problem is crystallised by considering disputed parliamentary elections. It was only in 1868 that the courts acquired jurisdiction over these [62]; before that they were dealt with by parliamentary committees. Could the Oireachtas now legislate for a return to the pre-1868 position, or are election petitions now properly the concern of the

[58] [1965] I.R. 217.

[59] At 231.

[60] Para. 96 of the *Report of the Committee on the Price of Building Land*, after setting out the features listed in *McDonald's* case, concludes: " A decision may be an administration of justice though all the features we have mentioned are not present."

[61] Kenny J. based this view on certain observations in *Scott* v. *Scott* [1913] A.C. 417. But the House of Lords was there considering the principle that justice should be administered in public: it was not deciding whether this jurisdiction could be exercised by someone other than a judge.

[62] Parliamentary Elections Act 1868.

courts alone? In his dissenting judgment in *McMahon* v. *Att.-Gen.*[63] McLoughlin J. took the view that they were so emphatically the province of the judiciary that a statutory provision allowing the Dail to order the inspection of ballot papers was unconstitutional.[64]

The issue is further complicated by the fact that a power may be in essence judicial even though it has never been vested in the courts. The *Report of the Committee on the Price of Building Land*[65] (chaired by Mr. Justice Kenny) affords a recent example. It was there suggested that a new jurisdiction should be conferred on the High Court, under which it could declare certain lands to be "designated areas." (These would be lands which, in the court's opinion, would be used for future development *and* whose market price had been increased by works carried out by a local authority.) Once lands were designated in this way the local authority would have power to acquire them at existing use value plus 25 per cent. The Committee believed the courts would hold that a decision whether lands should be included in a designated area was an administration of justice, and that authority to make such decisions could be entrusted only to the courts.[66]

As Geoffrey Marshall has observed,[67] "Belief in the importance of protecting the judicial power from encroachment by the legislature or executive must at least invoke the idea that there is an appropriate area for its operation." The Irish Constitution clearly enshrines that belief and leaves it for the courts to say what is the appropriate area for its operation. This can, it is submitted, best be done by asking, in words once used by the Judicial Committee[68] ". . . whether the subject-matter of the assumed justiciable controversy makes it desirable that the judges should have the same qualifications as those which distinguish the judges of superior or other courts."

This purposive approach seeems implicit in the Supreme Court's decision in *Re Solicitors Act 1954*.[69] The court here had to consider the validity of this Act, which transferred the power to strike solicitors off the roll from the Chief Justice to the Disciplinary Committee of the Incorporated Law Society. It was held that the Act was unconstitutional in that it purported to vest a judicial power in the Committee. Moreover, since that power was not limited, the Act was not validated by Article 37.

[63] [1972] I.R. 69. [64] At 117.
[65] Pr. 3632.
[66] Paras. 94–101.
[67] *Constitutional Theory* (1971) p. 120.
[68] *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* [1949] A.C. 134, P.C.
[69] [1960] I.R. 239.

The reasoning which led the court to this conclusion may be summarised as follows. The Committee's power to strike off was a power to inflict a severe penalty and [70] " . . . would seem to demand from those who impose it the qualities of impartiality, independence and experience which are required for the holder of a judicial office who, under the criminal law, imposes a fine or a short sentence of imprisonment." The Committee also had power to order restitution in cases of misconduct: but misconduct would include fraud or negligence.

> Damages awarded by a Court for fraud or negligence are primarily an attempt to produce "*restitutio in integrum*" and the Court is unable to distinguish the power given to the Committee from that given to a Court. . . . The questions which can arise before the Committee are as contentious, as difficult, and as important as the questions which would arise before a Court trying a common law action for negligence or fraud. In the opinion of the Court a tribunal which may make such an order is properly described as administering justice and such a tribunal unless composed of judges is unconstitutional.[71]

Finally, the discipline of solicitors was necessarily a matter of concern to the courts.

> Historically the act of striking solicitors off the roll has always been reserved to judges. It is necessary for the proper administration of justice that the Courts should be served by legal practitioners of high integrity and professional competence and that the judges should have the power not only of removing those who in their opinion fail to meet the requirements of the office but of retaining those who do.[72]

The Disciplinary Committee was consequently exercising a judicial power. Since that power was not " limited," the Act was not saved by Article 37. The limitation posited by that Article was not in regard to persons, subject-matter or number of powers.

> . . . it is the powers and functions which are in their own nature to be limited. A tribunal having but a few powers and functions but those of far-reaching effect and importance could not properly be regarded as exercising " limited " powers and functions. . . . The test as to whether a power is or is not " limited " . . . lies in the effect of the assigned power when exercised. If the exercise of the assigned powers and functions is calculated to affect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as " limited." [73]

This exegesis of the word " limited " is one of the crucial aspects of the case, yet no real reasons are offered in support of it. One might think it possible to hold that the context suggests a different meaning, *viz.* " restricted in number or as to subject-matter." This construction would give the Oireachtas wider scope for experiment.

[70] *Ibid.*, at 275.
[71] *Ibid.*, at 274.
[72] *Ibid.*, at 275.
[73] *Ibid.*, at 263–264.

It would mean that the legislature could not create, say, a Social Affairs Tribunal and vest in it the entire jurisdiction of the High Court; but there would be no bar to the transfer of certain specified jurisdictions (*e.g.* over negligence actions) to that Tribunal. This flexibility might prove valuable since, in certain areas, the suitability of adjudication by courts as traditionally composed is increasingly being questioned. But the Supreme Court rejects this interpretation in three sentences: [74]

> What is the meaning to be given to the word "limited"? It is not a question of limited jurisdiction, whether the limitation be in regard to persons or subject-matter. Limited jurisdictions are specially dealt with in Article 34.3.4°.

Article 34.3.4° provides: "The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law." This is the constitutional foundation for the District and Circuit Courts. It follows upon an earlier declaration that the High Court is a court of first instance, and is "invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal" (Article 34.3.1°). Clearly Article 34.3.4° contemplates courts whose jurisdiction is restricted in two ways. Firstly, it must be confined to a definite geographical area ("local"): secondly, it cannot be equivalent to that of the High Court ("limited"). The second condition may mean that these courts cannot be given all the powers of the High Court—*i.e.* that there must be withheld from them the power to determine certain classes of cases. Alternatively, it may mean that these inferior courts may be given all the powers of the High Court, but only over cases coming within certain financial limits. The precise meaning of "limited" in this context has not yet been settled by judicial decision. Consequently, the Supreme Court's assertion that "limited jurisdiction" necessarily means something quite different from "limited functions and powers" is difficult to accept.

In the *Solicitors Act* case the Supreme Court adopted a purposive interpretation of the Constitution; but the judges did not carry this approach to its logical conclusion. If the Articles in question reserve certain kinds of disputes to the courts, the reason for doing so is surely the belief that judges are the best persons to deal with such cases. But the judgment offers little help in identifying these cases. Fraud and negligence seem to be regarded as matters entirely for the judges: yet in the Irish High Court the vast majority of such actions are tried with juries. And while no one would question the

[74] [1960] I.R. 239.

impartiality, independence and experience of the judges, one might hesitate to say that the Disciplinary Committee of the Law Society was lacking in these attributes. It is submitted that, for two reasons, the judgment would have been more satisfactory had it been rested on the historical ground alone. Firstly, because the natural interest of the judiciary in the proper administration of justice affords a rational basis for their claim to control admission to, and removal from, the roll of solicitors. Secondly, because the position regarding other professions' disciplinary bodies would then have been clear—as it currently is not.

The whole question of the scope of Article 37 needs a fuller consideration than was given to it in *Re Solicitors Act*. The Supreme Court is at liberty to re-examine that decision and to depart from it, at any rate if there are compelling reasons for so doing.[75] This course would be perfectly justified if, as may well be the case, that decision has proved unduly restrictive of the legislature's powers. Since 1958, when that judgment was delivered, Irish society and Irish attitudes have undergone a considerable change, and as Walsh J. pointed out in *McGee* v. *Att.-Gen. and Revenue Commissioners*[76] " . . . no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

The proper application of Articles 34.1 and 37 requires a more thoroughgoing appraisal of judicial limitations than the Supreme Court undertook in the *Solicitors Act* case. To do this involves the courts asking, in the given context, a difficult and delicate question: What characteristics and qualifications do judges possess which would make them the only proper arbiters of such disputes? The answer would have to take account of one highly important fact: no statute transferring a branch of civil business from the courts to a tribunal may exclude the supervisory jurisdiction of the High Court.[77] It follows that here need be no sacrifice of constitutional fundamentals in any such scheme.[78]

[75] *State (Quinn)* v. *Ryan* [1965] I.R. 70.

[76] Not yet reported: judgment of the Supreme Court delivered December 19, 1973. (Compare the remark of Lord Atkin in *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada* [1947] A.C. 127, 154 (a case involving the power of the Dominion Parliament to abolish Canadian appeals to the Privy Council): " It is . . . irrelevant that the question is one that might have seemed unreal at the date of the British North America Act. To such an organic statute the flexible interpretation must be given which changing circumstances require. . . ."

[77] This would seem to follow from the fact that the Constitution gives the High Court " . . . full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal " (Article 34.1.1°). In *Murren* v. *Brennan* [1942] I.R. 466, 476 Gavan Duffy J. said: " . . . the phrase ' whose decision shall be final ' . . . cannot exclude the constitutional jurisdiction of the

[78] For footnote, see p. 324.

Nowadays it is widely felt that certain powers traditionally vested in the courts might be better exercised by bodies comprising both lawyers and laymen with relevant experience. The granting of injunctions in labour disputes—a source of much litigation, and some friction, in Ireland—is an example of one such field. If the Oireachtas empowered a tribunal to grant such orders, the statute would enjoy a presumption of constitutionality [79]; if the approach suggested above were adopted, that presumption would be difficult to rebut. Unless the Irish legal system is to be frozen in the pattern of 1937 the acceptance of this revised approach seems inevitable. Future developments will show in what sense the courts will fulfil the prediction of Kennedy C.J.[80]: "The judicial power of the State deposited with us and the other constitutional courts will be the subject of our special watchfulness even to the point of jealousy."

High Court in a case deemed by that Court to call for interference." This view may have been *obiter*, but, it is submitted, was nonetheless correct. That submission is fortified by the decision of Kenny J. in *Macauley* v. *Minister for Posts and Telegraphs* [1966] I.R. 345 that the citizen has an implicit constitutional right (derived from Article 34.4.1°) of access to the High Court.

[78] An example is the Anti-Discrimination (Pay) Act 1974, which empowers the Labour Court to issue binding orders (including orders for payment of compensation to dismissed employees) in equal pay cases. This involves that court in determining questions both of common law and of statutory construction, and the court is clearly given an important jurisdiction in contract. However, s. 8 (3) expressly preserves judicial control by providing for an appeal to the High Court on points of law.

[79] *See, East Donegal Co-op Ltd.* v. *Att.-Gen.* [1970] I.R. 317.

[80] *Lynham* v. *Butler* [1933] I.R. 79, 97.