JUDICIAL RESTRAINT CAN ALSO UNDERMINE CONSTITUTIONAL PRINCIPLES: AN IRISH CAUTION

MARIA CAHILL AND SEÁN Ó CONAILL*

I INTRODUCTION

The chief problem with judicial activism is that it mandates judges operating beyond the boundaries of their limited constitutional mandate, thereby undermining the constitutional order. The corollary advantage of judicial restraint should be that it corrals the judiciary within the proper scope of its constitutional function and thereby upholds the constitutional order. In fact, as the example of Ireland demonstrates, judicial restraint can also damage the constitutional order.

This article is divided into an introduction and two main parts: Part II discusses the mandate for activism, setting the scene by outlining in Part IIA the legal framework within which judicial review takes place in Ireland and charting in Part IIB the emergence, development and demise of the activist unenumerated rights doctrine which ultimately gives way to a very tempered approach to fundamental rights adjudication which is ultimately permeated by an instinct towards restraint. Part III then discusses the machinery of restraint, revealing the paradox that although the judiciary adopts an attitude of judicial restraint out of respect for democracy and the constitutional separation of powers, in fact that very attitude has significantly undermined the separation of powers, the quality of parliamentary and plebiscitary democracy and the supremacy of the Constitution. Part IIIA discusses how judicial restraint has damaged parliamentary democracy by becoming complicit in the erosion of Parliament's exclusive legislative function, while Part IIIB reveals how judicial restraint has compromised popular democracy by becoming complicit in the erosion of the reverence for the role of the people in the referendum process.

II THE MANDATE FOR ACTIVISM

The 1937 *Constitution of Ireland* established a system of government that was in many ways styled on that of her erstwhile imperial ruler, Great Britain. There is one notable discrepancy — the Constitution explicitly authorises judicial review of legislation. Article 15 declares that the Irish Parliament[1] is given the 'sole and exclusive power of making laws for the State' subject only to one limitation that it 'shall not enact any law which is in any respect repugnant to this Constitution or any provision thereof'.[2] Despite its constitutional mandate to review legislation to establish repugnancy, the judiciary has proceeded with caution, conscious always that, whatever errors Parliament may commit will not be atoned for by the judiciary transgressing the boundaries of its own function. In particular, the Supreme Court has underscored that: '[t]he usurpation by the judiciary of an exclusively legislative function is no less unconstitutional than the usurpation by the legislature of an exclusively judicial function'.[3] At the same time, the Constitution explicitly endorses the idea that the rights which inhere in the person are

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* Lecturers in Constitutional Law, School of Law, University College Cork.

1 Referred to in the Constitution as the Oireachtas, and comprising two chambers: Dáil Éireann and Seanad Éireann.

2 Articles 15.2.1 and 15.4.1.

3 *Maher v Attorney General* [1973] IR 140, 147.

'inalienable and imprescriptible …, antecedent and superior to all positive law',[4] which natural law mandate proved to be the basis for a flirtation with judicial activism through the development of the unenumerated rights doctrine between the 1960s and 1990s but which ultimately yielded to an approach characterised by deference to Parliament, even in the vindication of fundamental rights.

A *Judicial Review: The Legal Framework*

There are three constitutional mechanisms by which the judiciary may review legislation passed by Parliament to ensure that it does not contradict the Constitution. The first is the abstract review procedure, mandated by Article 26 of the Constitution, which applies to legislative bills, other than those promulgated using the expedited procedure and those concerning taxation and public expenditure, which have been passed by both Houses of Parliament and not yet signed into law by the President.[5] The President may refer such a bill to the Supreme Court for review of its constitutional validity *ex ante*, and the judges hear arguments defending the legislation from the Attorney General acting on behalf of the State and from counsel assigned to argue for repugnancy. If a piece of legislation survives a challenge under Article 26, it can never again be challenged before the courts, even if the basis for such a challenge is a point of law which had not been considered during the course of the Article 26 hearing.[6] The second is the concrete review procedure, mandated by Articles 15.4.2 and 34.3.2 of the Constitution, which, respectively, declare that laws enacted by Parliament which are repugnant to the Constitution 'shall, but to the extent only of such repugnancy, be invalid' and confirm that the jurisdiction of the superior courts includes the power to examine the question of invalidity. The third is a further concrete review procedure laid down in Article 50.1, which applies to legislation which was already in force in Ireland prior to the entry into force of the Constitution, and which the courts are to examine for consistency rather than validity.

B *Inchoate Activism*

Judicial interpretation and development of fundamental rights under the Irish Constitution have provided what is probably the most cited example of judicial activism in Ireland. The nature of fundamental rights discourse in a common law jurisdiction with a written constitution naturally lends itself to an inherent degree of judicial flexibility and innovation in order to determine the scope of rights which are superior to positive law enactments. Cases concerning rights have demonstrated two distinct lines of judicial thought: sometimes the courts are either active to a certain limited degree and at other times the courts will pause and examine the lack of legislative intervention rather than scoping the full extent of constitutional rights.

Articles 40 to 44 of the Irish Constitution are entitled 'Fundamental Rights', and the tone and language of these provisions is very much rooted in the natural law tradition, with rights described as being 'inalienable and imprescriptible …, antecedent and superior to all positive law',[7] as being 'natural and imprescriptible'[8] and as inhering in

4 Article 41.1.1.
5 Article 26. Cf. Articles 22, 24.
6 Article 34.3.3.
7 Article 41.1.1.
8 Article 42A.1.

man 'in virtue of his rational being'.[9] These provisions have been the basis for many seminal pronouncements of the Courts and the gradual evolution of rights discourse. However, Articles 40 to 44 are not the sole source of Irish Constitutional rights and many other provisions of the Constitution have been successfully invoked to ground and assert rights.[10] Moreover, the judiciary has acknowledged the existence of rights which are not expressly written in the constitutional text, through the evolution of a doctrine of unenumerated rights based initially on natural law considerations, which opened the door to a restrained form of judicial activism. The doctrine owes its existence to the wording of Article 40.3.2 which prescribes that:

> The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

The judicial inference was that the phrase 'in particular' denoted the existence of rights other than those which were written down, among which those listed in Article 40.3.2 were to be given special attention within the hierarchy of rights.

This articulation of the unenumerated rights doctrine took place in the 1963 case of *Ryan v Attorney General*,[11] in which the plaintiff, who was opposed to the fluoridation of drinking water, sought to assert an unenumerated constitutional right to bodily integrity in order to have the enabling statute declared unconstitutional. Although she succeeded in having her right to bodily integrity recognised by the court, she was ultimately unsuccessful in obtaining the relief that she sought based on the facts of the case. Based on Article 40.3.2, as noted above, the High Court, in the first instance, and the Supreme Court on appeal, held that the rights protected by the Irish Constitution included the enumerated rights prescribed in the constitutional text '*and* other personal rights of the citizen which have to be formulated and devised by the High Court'.[12] The judgment relied heavily upon natural law theory, and referenced a Papal Encyclical in an effort to justify the natural law intervention. It is noteworthy that, perhaps in an attempt to pre-empt some of the criticism which would later be directed toward the unenumerated rights doctrine, Kenny J in the High Court sounded a note of caution to his fellow judges, urging that the doctrine bestowed on the courts 'a jurisdiction to be exercised with caution'.[13] The very fact that the first manifestation of unenumerated rights doctrine, itself a product of judicial activism, was tied to an instant delimitation of that same activism out of deference to an act of the legislature speaks volumes about the particular brand of activism the Irish courts were to embrace.

The newly recognised doctrine was given a more solid footing in *McGee v Attorney General*.[14] The plaintiff, a married mother of four children, was advised that a future pregnancy could pose a serious risk to her life. The sale and importation of contraceptives were prohibited in Ireland by the *Custom Consolidation Act 1876* as amended by the *Criminal Law (Amendment) Act 1935*. The plaintiff sought to have an unenumerated constitutional right to marital privacy recognised and to have the

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9 Article 43.1.

10 For example, Articles 8 (language rights), 34.1 (right of access to the courts), 38.1 (right to fair trial, right to silence, etc.). See further, Gerry Whyte and Gerard Hogan *J M Kelly, The Irish Constitution* (Butterworths, 2003), 386.

11 *Ryan v Attorney General* [1965] IR 294.

12 Ibid 311.

13 Ibid.

14 *McGee v Attorney General* [1974] IR 284.

offending legislation deemed unconstitutional by reference to that unenumerated right. The Supreme Court ruled in her favour, holding that by virtue of her rights as a human person, she did enjoy a constitutionally protected right to martial privacy, which included a right to use contraception. The legislation in question, being pre-independence legislation, had not survived the adoption of the 1937 Constitution. (In thus resolving the dispute, of course, the Supreme Court was purporting to use a natural law argument to reach a conclusion that was contra-indicated by the teachings of the Catholic Church.) Like the *Ryan* decision, this appears *prima facie* to be an example of judicial activism, but closer analysis of the detail in the case shows that the trend of legislative deference continues even in the midst of activism. For example, Griffin J noted that:

> In my view, in any ordered society the protection of morals through the deterrence of fornication and promiscuity is a *legitimate legislative aim* and a matter not of private but of public morality. For the purpose of this action, it is only necessary to deal with the plaintiff as a married woman in the light of her particular circumstances.[15]

He thus underscored the limits of the decision and the shadow cast over attempts at judicial activism by the judiciary's instinctive deference towards the legislature.

Until very recently, it seemed clear that the doctrine of unenumerated rights had run its course, because the enthusiasm with which the Irish courts had embraced the doctrine seemed to have evaporated, especially during the 1970s and 1980s. For example, it was held by the High Court in the case of *Duffy v Clare County Council*[16] that there was no unenumerated right to clean swimming water, in a judgment that showed strong support for legislative provisions that sought to protect the environment. However, the 2017 case of *NVH v Minister for Justice and Equality*[17] seems potentially to resurrect the doctrine: the Supreme Court held that non-citizens could, in virtue of Article 40.1, 'rely on the constitutional rights, where those rights … relate to their status as human persons'.[18] The case concerned a legislative provision which absolutely prohibited asylum seekers from employment within the state, and the Supreme Court decided that there was an unenumerated 'right to work at least in the sense of a freedom to work or seek employment' which was deemed to be 'part of the human personality', with the implication that 'the Article 40.1 requirement that individuals as human persons are required to be held equal before the law means that those aspects of the right which are part of human personality cannot be withheld absolutely from non-citizens'.[19] However, the activist approach to constitutional interpretation is once again tempered by a reticence to interfere in the province of the legislature: the court strongly indicated that the legislature could seriously delimit the right to work of an asylum seeker and also put a stay on its order for six months to allow the legislature to bring forward legislation to deal with the matter. Whilst the doctrine of unenumerated rights clearly had certain benefits, its inherent ambiguity inevitably led to significant uncertainty around rights discourse particularly when the judiciary were periodically finding new personal rights to which they attached constitutional status. Furthermore, the contrast between the boldness which with the judiciary re-wrote the terms of the Constitution and the reticence with which they struck down — or refused to strike down — provisions of

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15 Ibid (emphasis added).

16 *Duffy v Clare County Council* [2013] IEHC 51.

17 *NVH v Minister for Justice and Equality* [2017] IESC 35.

18 Ibid para. 11. Article 40.1 states that 'All citizens shall, as human persons, be held equal before the law.'

19 *NVH v Minister for Justice and Equality* [2017] IESC 35, para. 17.

legislation meant that the unenumerated rights doctrine is perhaps best remembered as a form of inchoate activism.

More recently, the courts have been even more explicit in their attention and deference to the legislature in the context of fundamental rights adjudication. This is plainly apparent in the context of the (strictly limited) incorporation of the *European Convention on Human Rights* by means of the *European Convention on Human Rights Act 2003*. Since the Convention was incorporated without a constitutional amendment, its place in the legal system is entirely governed by constitutional principles. Simply stated, the Act prescribes that the organs of government and state agencies must continue to observe Irish law and should also, if it is possible, act in a manner compatible with Convention obligations. When it comes to interpreting Irish legislation, then, the judiciary should follow the usual rules of statutory interpretation but if it is possible, within those rules, also to find a Convention-compatible interpretation, they should do so.[20] The provisions of the act are unambiguous and yet a surprising number of cases have been taken by litigants arguing, for example, that the Convention is directly effective in Irish law or that the judiciary could strike down Irish legislation for incompatibility with the Convention. Decisions of the Supreme Court deny these claims and in the process re-affirm the terms of the 2003 Act, the legislative authority of the Parliament and the supremacy of the constitutional order.[21]

Moreover, in the case of *Roche v Roche*,[22] the superior courts repeatedly bemoaned the lack of legislative guidance in terms of the manner in which the term 'unborn' should be understood for the purposes of Article 40.3.3 of the Constitution, which requires the State to vindicate 'the right to life of the unborn, with due regard to the equal right to life of the mother'. Ultimately, the Supreme Court decided that the embryo did not qualify as 'unborn' for the purposes of Article 40.3.3 but would clearly have preferred to have received greater direction from the legislature. Similarly, in *Zappone v Revenue Commissioners*[23] the plaintiffs, two women, sought to have their Canadian marriage recognised in Ireland. The Court upheld the definition of marriage as being between a man and a woman and allowed itself to be guided to that conclusion by legislative enactments (which the Court took to be an indication of popular will) which defined marriage in this way. Relatedly, the courts have also shown a marked deference to Parliament when granting remedies for breaches of constitutional rights. In general, they demonstrate considerable reluctance to offer mandatory relief and a preference for declaratory relief.[24] This trend is confirmed by the recent case of *NVH v Minister for Justice and Equality* in which the Supreme Court, acknowledging that the regulation of the conditions under which asylum seekers could engage in employment was 'first and foremost a matter for executive and legislative judgement, … [adjourned] consideration of the order the Court should make for a period of six months and [invited] the parties to make submissions on the form of the order in the light of circumstances then

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20 Section 2 of the *European Convention on Human Rights Act 2003* states: 'In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions'.

21 See, for example, *J McD v PL* [2010] 2 IR 199. See generally, Maria Cahill, 'The Rule of Law or the Rule of Rights? Five ECHR Misconceptions the Courts Convincingly Refute' in Eoin Carolan (ed.) *Judicial Power in Ireland* (Institute of Public Administration, 2017, forthcoming).

22 *Roche v Roche* [2010] 2 IR 321.

23 *Zappone v Revenue Commissioners* [2008] 2 IR 417.

24 Cf. *Doherty v Government of Ireland* [2010] IEHC 369, in which the High Court granted only declaratory relief in relation to the protected failure, over a number of years, to call a by-election in order to fill vacant seats in the national parliament.

obtaining'.[25] These three final examples only confirm the general trend of inchoate judicial activism in Ireland, in which the free and creative way in which the courts interpret constitutional provisions is tempered by an instinct towards restraint which seeks to respect the position of the legislative branch of government.

III THE MACHINERY OF RESTRAINT

Although this instinct towards restraint operates in the context of fundamental rights adjudication, it is even more pronounced in other contexts. The judiciary has indeed adopted certain rules for judicial review — self-imposed limitations on the operation of the three mechanisms for review established in the Constitution by Articles 26, 34 and 50. Out of respect for the separation of powers and for the democratic mandate of elected representatives, the courts determined, while the Constitution was only a few years old, that both the abstract review and the concrete review mechanisms would entail a presumption of constitutionality, meaning that the court assumes that the legislation is valid until the claim of repugnancy is 'clearly established'.[26] This presumption, the courts note, 'springs from, and is necessitated by, that respect which one great organ of State owes to another'.[27] The corollary or 'practical effect' of this presumption was established in a later case, which holds that 'if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction … [i]t is only when there is no construction reasonably open which is not repugnant to the Constitution that the provisions should be held to be repugnant'.[28] Commonly known as the double construction test (although it admits of the possibility of multiple unconstitutional constructions), this test may save a piece of legislation that looks to be *prima facie* unconstitutional and in principle undermines the rules of statutory interpretation.[29] The second corollary of the presumption of constitutionality is that the courts also apply a rule of self-restraint, enjoining themselves to 'reach constitutional issues last'; the court should explore other grounds on which relief may be granted to the plaintiff, in order not to put legislation 'to the test unnecessarily'.[30] Finally, legislation which is reviewed under the Article 15/34 mechanism is also subject to the doctrine of severability or separability, such that 'only the offending provision will be declared invalid' while the remainder of the legislation will continue to be of full force and effect, provided that it 'may be held to stand independently and legally operable as representing the will of the legislature'.[31] These self-imposed rules both reveal and reinforce the reluctance of the judiciary to find legislation repugnant to the Constitution.

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25 *NVH v Minister for Justice and Equality* [2017] IESC 35, para. 21.

26 This presumption was first established in relation to the Article 26 procedure in *In Re Article 26 and the Offences Against the State (Amendment) Bill* 1940 [1940] IR 470 and in relation to the Article 15/34 procedure in *Pigs Marketing Board v Donnelly* [1939] IR 413.

27 *Buckley v Attorney General* [1950] IR 67, 80.

28 *McDonald v Bord na gCon* [1965] IR 217, 239.

29 See, generally, Brian Foley, *Deference and the Presumption of Constitutionality* (Institute of Public Administration, 2008).

30 *M. v An Bord Uchtála* [1977] IR 287, 293. Cf. *Cooke v Walsh* [1984] IR 710.

31 *Maher v Attorney General* [1973] IR 140, 147. Cf. *King v Attorney General* [1981] IR 233. This doctrine does not apply in respect of review under Article 26 because the Court must instruct the President either to sign the Bill, in which case all of it becomes law, or to refrain from signing the Bill, in which case none of it has legal effect. Cf. *In re Article 26 and the Housing (Private Rented Dwellings) Bill 1981* [1983] IR 181.

A *Restraint that undermines parliamentary democracy*

As noted above, the Irish Constitution uncompromisingly affirms that Parliament is invested with the 'sole and exclusive power of making laws for the State'.[32] The democratic ideal to which this provision aspires is compromised by the realities that the legislative and executive branches are fused, that party discipline is both strict and comprehensive, and that legislation is often introduced by the very Ministers who will be the beneficiaries of delegations of legislative power. Adjudicating on judicial review cases which come before them for breach of Article 15.2.1, the courts have articulated a non-delegation doctrine, which requires parliament to refrain from abdicating its law-making function. Initially, this doctrine was established in *Cityview Press v An Comhairle Oiliúna*,[33] and formulated as the 'principles and policies' test, designed ultimately to safeguard the constitutional separation of powers by ensuring 'that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power neither contemplated nor permitted by the Constitution'.[34] Specifically, the test requires that delegated legislation should go no further than to '[give] effect to principles and policies which are contained in the statute itself', such that 'the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body'.[35] The judgment became the most authoritative precedent on the interpretation of Article 15.2.1 in relation to the permissible limits of delegation, and has been cited with approval by the Supreme Court in every relevant case since. In 2013, the High Court described *Cityview Press* as having 'almost canonical status in this sphere of constitutional law'.[36]

From a democratic perspective, the test seems to be a reasonable interpretation of Article 15.2.1: if Parliament would allow secondary legislation to establish principles and policies, then it would effectively be conferring its legislative function on the delegated authority, whereas if Parliament only allows the delegated authority to operate within the frame provided by the principles and policies established in Acts of Parliament, then Parliament both exercises its legislative function and curtails and controls the power of the delegatee. However, later cases have insisted that the application of the *Cityview Press* test is conditioned by the presumption of constitutionality and the double construction test which have sometimes been used to save legislation as compatible with the constitution, on the basis of interpretations that are semantically possible, but very obscure and unlikely.[37] Moreover, from a practical perspective, the test may not always be easy to apply both because legislation does not always clearly specify its principles and policies in order to assist the reviewing judge and because sometimes 'filling in the detail' can have a profound effect. For example, in the *Cityview Press* case itself, the delegated authority was entitled to determine the amount of the levy to be charged on employers in a particular sector but if they determined that they levy should be inordinately high, it could have the effect of bankrupting several businesses, or even wiping out private enterprise in that particular sector.

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32 Article 15.2.1
33 *Cityview Press v An Comhairle Oiliúna* [1980] IR 381.
34 Ibid 398.
35 Ibid 399.
36 *Collins v Minister for Finance* [2013] IEHC 530.
37 *Cooke v Walsh* [1984] IR 710; *Harvey v Minister for Social Welfare* [1990] 2 IR 232.

Nonetheless, the *Cityview Press* test has been used to invalidate legislation that invested in the Minister for Justice untrammelled power to make deportation orders on the basis that:

> [the legislature] should not abdicate its position by simply handing over an absolute discretion to the executive. It should set out standards or guidelines to control the executive discretion and should leave to the executive only a residual discretion to deal with matters which the legislature cannot foresee.[38]

It has also twice been used to invalidate legislation that allowed the Labour Court to legalise employment agreements negotiated by representatives of employers and employees working in a particular sector which established remuneration and conditions of employment for that sector.[39] In the first case, sections of Industrial Relations Acts 1946 and 1990 were declared to be invalid for unconstitutionality because they left complete discretion to the Labour Court to determine statutory minimum rates of pay and statutory terms and conditions of employment in the regulated sectors, 'there [being] no core policies or principles identified in the Act to guide the exercise of delegated power'.[40] In the second case, the Supreme Court invalidated other sections of the same Acts on the grounds that they entailed 'a wholesale grant, indeed abdication, of law-making power to private persons unidentified and unidentifiable at the time of grant to make law in respect of a broad and important area of human activity'.[41] Although these results are consistent with the *Cityview Press* test, the judgments in these cases discussed the possibility of taking into account other aspects of the legislation — apart from principles and policies — in reaching a decision on unconstitutionality. In the deportation case, *Laurentiu v Minister for Justice*, the Supreme Court noted that it is 'quite usual' that Parliament would retain for itself a power of supervision or even annulment but ruled that 'it could [not] be seriously suggested that a provision of this nature was sufficient, of itself, to save an enactment which was otherwise clearly in breach of Article 15.2'.[42] However, in the employment cases the judgments held that the retention of a power of supervision, revocation or annulment was something that *could* be taken into account in the application of the *Cityview Press* test.[43] Although these cases regard the lack of a power of supervision or revocation as exacerbating the unconstitutional effect of the nonexistence of principles and policies, later judges, as discussed below, seem to believe that the existence of a power of supervision or revocation can actually compensate for the nonexistence of principles and policies, thus contradicting the *Laurentiu* dictum.

When the courts reviewed the *Misuse of Drugs Act 1977* in the case of *Bederev v Ireland*, the results made international headlines because the effect of the Court of Appeal's decision was to decriminalise certain drugs for 24 hours in March 2015 while

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38 *Laurentiu v Minister for Justice* [1999] 4 IR 26, at 70-71. However, this legislation, the *Aliens Act 1935*, was enacted prior to the coming into force of the 1937 Constitution and therefore did not enjoy the presumption of constitutionality.

39 *John Grace Fried Chicken Ltd. v Catering Joint Labour Committee* [2011] IEHC 277 and *McGowan v Labour Court* [2013] IESC 21.

40 *John Grace Fried Chicken Ltd. v Catering Joint Labour Committee* [2011] IEHC 277, para. 31.

41 *McGowan v Labour Court* [2013] IESC 21, para 30.

42 *Laurentiu v Minister for Justice* [1999] 4 IR 26, 93.

43 *John Grace Fried Chicken Ltd. v Catering Joint Labour Committee* [2011] IEHC 277, at para. 22. Indeed, the fact that there was no capacity for review built into the Industrial Relations Acts seemed to operate to their disadvantage: *John Grace Fried Chicken Ltd. v Catering Joint Labour Committee* [2011] IEHC 277, at para. 24 and *McGowan v Labour Court* [2013] IESC 21, at para 30.

Parliament hastily rushed through emergency legislation. The Court of Appeal invalidated the 1977 Act on the grounds that there were no principles and policies in the Act which could guide the Minister in the exercise of his discretion to declare certain drugs to be illegal.[44] In respect of the power of annulment, the Court held (consistently with the *Laurentiu* dictum, though without referencing it) that '[w]hile the existence of such a power is undoubtedly a valuable safeguard, it is not the particular safeguard which the Constitution requires, namely, that the law making power is reserved to the Oireachtas'.[45] In June 2016, however, the Supreme Court reversed the decision, affirming that the Act was not unconstitutional. The judgment disturbs the ground upon which the non-delegation doctrine rests because, although it does not overturn *Cityview Press*, it claims that the 'two principles' of the non-delegation doctrine are that 'legislation must set boundaries and a defined subject matter for subsidiary law-making and those affected by secondary legislation have an entitlement to know from the text of the legislation where those boundaries are and what that subject matter is'.[46] Essentially, this is simply a call for legislative clarity, which is intentionally indifferent to whether the legislative principles and policies are determined by Parliament or not. Moreover, although the Supreme Court did not expressly overturn *Cityview Press*, it does come close to reversing the *Laurentiu* dictum by stating that:

> there is a fundamental difference between the Oireachtas launching the possibility of subsidiary legislative enactment as a boat which is never to return to the harbour of oversight [by Parliament] and one which, as under s.38(3) in the present case, requires a subsidiary order to be subject to parliamentary scrutiny.[47]

While the presence or absence of principles and policies is considered by the Court to be immaterial, the presence or absence of a power of supervision and annulment is described as 'fundamental', if 'not necessarily … decisive'.[48] It is the latter rather than the former which the Supreme Court deems to be the indication that 'control is thus retained by the legislature'.[49] This approach downgrades the legislative function entrusted exclusively to the Parliament by virtue of Article 15 of the Constitution to a mere oversight arrangement with the possibility of revocation.

Six months later, in the case of *Collins v Minister for Finance*, the Supreme Court had an opportunity to repudiate the *Bederev* decision as insufficiently respectful of the legislative role when it ruled on the validity of the *Credit Institutions (Financial Support) Act 2008*. Section 6 of the Act allows the Minister for Finance to offer financial support to credit institutions on any terms — commercial or otherwise — which he sees fit to design, with no necessary expectation that the monies would ultimately be recouped. The legislation was famously used to bail out certain banks through the issuing of promissory notes worth in excess of €30 billion. Remarkably, the Supreme Court judgment mentions the *Cityview Press* case only in passing, makes no reference whatsoever to the 'principles and policies' test, and seems to hint that legislation providing for financial regulation may be judged by a standard other than that provided

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44 *Bederev v Ireland* [2015] IECA 38.
45 Ibid para. 72.
46 Ibid para. 24.
47 Ibid para. 24.
48 Ibid para. 32.
49 Ibid para. 32.

by Article 15.2.1.[50] Moreover, the Court notes that the legislation imposes on the Minister a duty to inform Parliament in respect of financial support being provided. Although there is no power of revocation or annulment, and the ministerial duty is only a reporting responsibility to be carried out once per year, the Court describes it as facilitating legislative 'review and control' over the Minister's decisions,[51] thereby giving the impression of equivalence with the situation in *Bederev*. It is undeniable that there would have been profound and almost certainly catastrophic economic consequences were the Supreme Court to declare the Act unconstitutional. In acknowledgement, the Court heavily and repeatedly stressed the exceptional nature of the case, warning that the 2008 Act could not be seen as 'a template for broader Ministerial power on other occasions' and specifically emphasised that if Parliament were to 'concede such wide ranging power in other less pressing circumstances … it clearly would not follow from this case that such was constitutionally permissible'.[52] Nonetheless, and quite inexplicably, the Supreme Court insisted that the 2008 Act 'is not consistent with the Constitution as an exception to some otherwise generally applicable rule'.[53] In other words, although stressing the exceptional nature of *Collins*, the Supreme Court in the next breadth seemed to claim that the outcome of the case was *not* exceptional.

If indeed *Collins* is not exceptional, that means that the requirement that Parliament should write 'principles and policies' has fallen out of favour with the judiciary, and has *de facto* been overruled. Latterly, the courts have instead focussed to a high degree on the safety valve provided by legislative powers of annulment where they exist and even, in the *Collins* case, on reporting obligations as evidence of legislative 'control', in order to support a finding that Parliament has not abdicated its function. The point here is that the result of the courts' deference to legislative output undermines the role of Parliament because the executive manipulates the legislative output for its own ends and the courts, in deferring to Parliament, are in fact complicit in allowing the executive to poach legislative responsibility as a ministerial privilege. In doing so, the courts — in their seeming judicial restraint — are seriously undermining the principle of separation of powers, the quality of our legislative democracy, and the supremacy of the Constitution which seeks to vindicate those principles.

B *Restraint that undermines popular democracy*

The same pattern is to be seen in respect of referenda. Quite unusually in comparative constitutional terms, Ireland holds a referendum in order to approve every amendment of the Constitution, and, to date, has made 29 amendments although the Constitution is not yet 80 years in force. Article 46 prescribes that a Bill to amend the Constitution must first be passed by the Houses of Parliament before being put to the people, a provision which ensures that there will always be a majority of parliamentarians in favour of the amendment proposal. The superior courts have several times dealt with the problem of government interference in referenda campaigns, specifically, government use of taxpayers' money to fund one side of the campaign. The cases have called both for review of executive action in respect of public expenditure and review of ensuing results.

Initially, in 1992, the High Court was reluctant to accept that the court had jurisdiction to review executive decisions on public expenditure, holding that 'judges

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50 *Collins v Minister for Finance* [2016] IESC 73, at para. 66.
51 Ibid para. 80.
52 Ibid para. 84.
53 Ibid para. 84.

must not allow themselves to be led, or, indeed, voluntarily wander into areas calling for adjudication on political and non-justiciable issues',[54] and concluding that this was a matter of '*political misconduct* on which this court can express no view'.[55] However, in the 1995 case of *McKenna v An Taoiseach (No. 2)*, the Supreme Court ruled that the government's action 'was not an action in the exercise of the executive power of the State'[56] and therefore could be judicially reviewed to determine 'whether such activity constitutes an interference with the constitutional process of amending the Constitution'.[57] Emphasising the honour with which the Constitution treats the Irish people — 'the guardians of the Constitution' — as well as 'the democratic nature of the State enshrined in the Constitution', the Court concluded that the use of public funds to campaign for a 'yes' vote was 'an interference with the democratic process and the constitutional process for amendment of the Constitution',[58] and that it was 'bordering on the self-evident that in a democracy … it is impermissible for the Government to spend public money in the course of a referendum campaign to benefit one side'.[59] Moreover, the expenditure was held to have breached the right to equality and the right to freedom of expression.[60] In 2012, the Supreme Court was again charged with examining taxpayer-funded referenda campaign literature for unconstitutionality in the case of *McCrystal v Minister for Children*.[61] Here, the argument was slightly different because the literature did not overtly exhort a 'yes' vote, but rather gave ostensibly neutral information which the Supreme Court ruled was biased in favour of a 'yes' vote. Finessing the legal principles, the Court listed nine principles, which centred on the need for respect for the right to equality, the right to a democratic process, the right to fair procedures and the right of freedom of expression, together with an acknowledgment that the Government is entitled to campaign for a 'yes' vote, and to spend personal or party money to support that campaign, and to give information and clarifications, but they should stop short of spending public money to finance a 'yes' vote.[62] In short, according to the Court, 'a publicly funded publication about a referendum must be fair, equal, impartial and neutral',[63] and since this literature 'contain[ed] just one narrative … in support of a 'yes' vote without expressly calling for a 'yes' vote',[64] once more the Government was found to have acted unconstitutionally.

In the aftermath of both referenda, the outcomes were challenged on grounds that they had been tainted by the illegal government action during the campaign. Details of factual circumstances are needed in order to appreciate the impact of the government illegality. The *McKenna* case was taken during the referendum campaign leading up to the divorce referendum, which proposal was carried by 50.3% of the votes (the slimmest margin ever) but the Supreme Court decision had been handed down on the 17th November and voting took place on 25th November. The *McCrystal* case was taken in the lead-up to the children's referendum (recalibrating the balance between children's rights, family rights and state duties in respect of children) which proposal was carried

54 *McKenna v An Taoiseach* (No. 1) [1995] 2 IR 1, 5.
55 Ibid 6.
56 *McKenna v. An Taoiseach* (No. 2) [1995] 2 IR 10, 38.
57 Ibid 40.
58 Ibid 42.
59 Ibid 43.
60 Ibid 51 *et seq*.
61 *McCrystal v Minister for Children* [2012] IESC 53. It should be noted that the authors were involved in an advisory capacity with this case.
62 Ibid *per* Denham CJ, para. 77.
63 Ibid.
64 Ibid *per* Murray J, para. 77.

by 58% of voters, but the Supreme Court decision was handed down at noon on the 8th November, while voting took place on the 10th November,[65] and, as usual, there was a media blackout on the 9th, meaning that the electorate had half a day to learn about the government's illegality and try to understand how much of the information they had received as neutral information was in fact biased. Both challenges failed and, paradoxically, the reason the Court gives is the same reason that the earlier challenges had succeeded: reverence for the role of the people. The result of the divorce referendum (permitting the dissolution of marriage) was upheld in *Hanafin v Minister for the Environment* on the technical grounds that the unconstitutional activity itself 'was not an electoral wrongdoing within the meaning of [the Referendum Act]',[66] and the secrecy of the ballot meant that the true effect of the illegal government action was 'incapable of proof'.[67] However, the overriding concern was that reverence for the role of the people required that the judges not set aside the outcome of the referendum: '[t]he will of the people as expressed in a referendum providing for amendment of the Constitution is sacrosanct and, if freely given, cannot be interfered with'.[68] On one reading of the judgments, it was not reverence for the people, but anxiety about the limits of their own role and the 'awesome undertaking' of displacing a referendum result which preoccupied the judges.[69] Whatever the real motivation, the judges did not grasp the nettle that the will of the people very well may have been contaminated by the illegal government action, and that the referendum result was therefore not a reliable indicator of that will, particularly when the margin of victory was so insignificant.

The result of the children's referendum was upheld in *Jordan v Minister for Children* for largely the same reasons. The Supreme Court clarified that the test to be applied is to establish whether 'it is reasonably possible that the irregularity or interference identified affected the result', in other words, 'to identify the point at which it can be said that a reasonable person would be in doubt about, and no longer trust, the provisional outcome of the election or referendum'.[70] In applying that test, the Court directed itself to take into account 'some simple rules of common sense', including the fact that irregularities 'have the capacity to interfere with, and distort, the outcome', the fact the opinion polls and voting trends 'are relevant considerations', and the margin of victory. Notably absent from the list (which is presumably designed to assist the court in arriving at the decision of the reasonable person) are the time period between the identification of the irregularity and the polling day, and how difficult it is for the citizen to understand the nature of the irregularity and to calibrate its effect on their decision about how to cast their vote. Moreover, given the focus on the margin of victory in the application of the reasonable person test in *Jordan*, it cannot be said with certainty that the outcome in *Hanafin* is consistent with the test proposed in *Jordan.* These inconsistencies do not inspire confidence, and in terms of practical effect, the *Hanafin* and *Jordan* cases indicate that the courts do not seem to have the will to impose legal consequences on the government for illegal interference with a referendum campaign. In upholding the results of referenda campaigns that were tainted by illegalities affecting democracy, equality and freedom of expression, however, the judiciary loses the opportunity to hold the government to account for breaching those standards, and becomes complicit in the constitutional trade-offs that follow.

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[65] Polling on the islands surrounding Ireland took place on the 8th.
[66] *Hanafin v. Minister for the Environment* [1996] 2 IR 321, 414.
[67] Ibid 437.
[68] Ibid 425.
[69] Ibid 438.
[70] *Jordan v Minister for Children* [2015] IESC 33, *per* O'Donnell J, para 85.

IV CONCLUSION

In ideal circumstances, the government would not control parliament, party discipline systems would not short circuit deliberative debate and the Irish Parliament would become a model of a parliamentary democracy in which reasoned and measured debate about policy objectives and their achievement within the framework provided by the Constitution would be intrinsic to the process of promulgating legislation. In those circumstances, judicial restraint would serve as the perfect complement to an already healthy democracy, creating a virtuous cycle by reinforcing parliamentary responsibility. In the less than ideal circumstances in which we find ourselves, however, the prevailing attitude of judicial restraint operates to undermine the very principles that it purports to respect. The judiciary becomes complicit in the erosion of parliamentary democracy as well as popular democracy when they demonstrate misguided deference to the outcomes that those processes present, when the processes themselves are constitutionally deficient. In these circumstances, the judiciary knowingly participates in undermining key constitutional principles even if they operate under the banner of judicial restraint.