



Title	The Impact of the Constitution in the Deliberations of the Houses of the Oireachtas
Authors(s)	O'Dowd, T. John
Publication date	2008-09
Publication information	O'Dowd, T. John. "The Impact of the Constitution in the Deliberations of the Houses of the Oireachtas." Round Hall, 2008.
Publisher	Round Hall
Item record/more information	http://hdl.handle.net/10197/6248

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“The Impact of the Constitution in the Deliberations of the House of the Oireachtas”

John O’Dowd¹

Introduction

This brief survey could not and shall not attempt to survey the Constitution’s impact on the deliberations of the Houses of the Oireachtas since 1937. Instead, it will examine a few issues relating to the freedom that members of the two Houses can meaningfully have to act upon their own understanding and interpretation of the Constitution, perhaps one at variance with that which prevails in the Four Courts.

Constitutional Commonplaces

An important factor, particularly in the earlier years, is what one might term TDs’ and Senators’ “lay understanding” of constitutions and constitutionalism. Members often employ commonplaces about the functions and limits of a constitution that have little direct basis in Irish constitutional law. On occasion, even lawyers have as much recourse to these as their lay colleagues might. The United States of America has been a frequent point of reference, as one might expect given the general cultural familiarity and as the outstanding example of a democracy

¹ School of Law, UCD Dublin. Paper presented at *The Constitution at 70*, Trinity College Dublin Centre for Law and Democracy, 8-9 June 2007, published as 'The Impact of the Constitution in the Deliberations of the Houses of the Oireachtas' in Oran Doyle and Eoin Carolan (eds) *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008) 181-94.

operating under constitutional judicial review. A representative example should illustrate this.

In the debate on the Draft Constitution, Professor John Marcus O’Sullivan TD moved an amendment to alter the first sentence of Article 40.1 of the Draft Constitution to read: “All citizens without distinction of sex, class or religion shall be held equal before the law.” Speaking to this amendment, he illustrated his general point—the malleability of vague constitutional guarantees, through experience in the USA—

There was, for instance, the 17th (*sic*) amendment to the American Constitution, the famous amendment about race and colour, and so on, adopted after the civil war. States could not bring in any bar on the ground of colour after the passing of that amendment, but a number of States got over the amendment by a provision of the following kind in their Constitution — that nobody whose grandfather was a resident of the State and did not vote shall be entitled to vote. That did not mention colour, but it debarred all coloured people from voting.²

If he was seeking to describe the ostensible legal position in the mid-1930s, Professor O’Sullivan was inaccurate, even if perhaps faithful to the *de facto* position in many parts of the South. Over twenty years previously, the United States Supreme Court unhesitatingly struck down such “grandfather clauses” as clear violations of the Fifteenth Amendment.³ Such a comment does reveal, however, the “lay” understanding in 1937 of the US

² *Committee on Finance.—Bunreacht na hEireann (Dréacht)—Coiste (d’ath-thógaint—Airtíogal 38)* (2 June 1937) 67 *Dáil Debates*, at col 1579.

³ *Guinn v United States* 238 US 347; 35 S Ct 926; 59 L Ed 1340 (1915); *Myers v Anderson* 238 US 368; 35 S Ct 932; 59 L Ed 1349 (1915). See also *Lane v Wilson* 307 US 268; 59 S Ct 872; 83 L Ed 1281 (1939). As Frankfurter J put the matter in *Lane v Wilson*:

“The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.”

307 US 268, at 275; 59 S Ct 872, at 876; 83 L Ed 1281, at 1287.

experience; the pedantry of lawyers depriving constitutional guarantees of real effect as protections of fundamental rights. The general impression was that a legislature could, by sophisticated methods of discrimination or nullification of rights, achieve what it could not do directly. To some extent, De Valera appears to have shared such reservations about the effectiveness of constitutional guarantees.⁴

Shadows of sovereignty

A more general example of an enduring assumption among Deputies and Senators (especially the former) is that the bodies of which they are members (or the Oireachtas as a whole) are in some sense “sovereign.” This was understandable under the 1922 Constitution or in the earlier years of the present one, given the notion of parliamentary sovereignty ingrained by our previous parliamentary traditions. Note, however, the careful formulation used by Deputy Fitzgerald Kenny (then the Minister for Justice) in 1928: “Our powers are delegated to us by the people. They are inherent in us. The Oireachtas, except in so far as its powers are confined and limited by the Constitution, has sovereign power in this State....”⁵ Even De Valera himself could sometimes use language which, at least on a casual reading, could suggest a similar viewpoint: “The Legislature here is a sovereign representative assembly and can do anything that any such assembly in the world can do.”⁶

⁴ *Bunreacht na hEireann (Dréacht)—Coiste—(d'ath-thogaint)* (3 June 1937) 67 *Dáil Debates*, at cols 1693-1694 (eg “We could pass here the most oppressive laws; we could pass here the most unjust laws; and Legislatures that come after us will be able to do that, no matter what Constitution you enact....” *Ibid*, at col 1693.)

⁵ *Private Business. - Issue of Writ—North Dublin Constituency.* (1 March 1928) 22 *Dáil Debates*, at col 664 (arguing that Dáil Éireann had the inherent power to determine whether or not a vacancy had arisen by reason of an adjudication of bankruptcy against a TD.) It will be noted that Seán MacEntee (as Minister for Local Government) used a very similar formula in 1947 – *infra* note Error: Reference source not found.

⁶ *Offences Against the State Bill, 1939—Second Stage (Resumed)* (2 March 1939) 74 *Dáil Debates*, at col 1388. This is not, of course, to suggest that he was not perfectly aware of and able to express cogently the new constitutional postulate of the sovereignty of the People: eg *Interpretation Bill, 1937—Committee* (7 December 1937) 69 *Dáil Debates*, at cols 1783-1791.

One can easily find examples from each decade, since the enactment of the Constitution, of members using similar language to describe the Oireachtas or its component Houses.⁷ Even in the course of the last Dáil (2002-2007), TDs still unselfconsciously used the language of sovereignty in relation to the institution of which they were members.⁸

Such invocations of the “sovereignty” of the Dáil or the Oireachtas clearly involve a variety of meanings. For example, some (such as Michael Keating’s in 1987) emphasised the international sovereignty of the State, as exemplified in the freedom of the Oireachtas to legislate free of external commitments. Others, restricting the notion of “sovereignty” to a specific context, as John Bruton did in 1999 with the control of public expenditure, seem largely compatible with the views of some judges, at least.⁹ As has also been noted, more precise and deliberate formulations have tended to be expressed in terms of parliamentary sovereignty subject to the limits imposed by the Constitution.

Is it then any more than a verbal ‘tic’ if parliamentarians make reference to the “sovereignty” of the Dáil, Seanad or

⁷ *Committee on Finance. - Prices Commission (Extension of Functions) Bill, 1938—Second Stage.* (4 May 1938) 71 *Dáil Debates*, at col 505 (Lemass: “... there is no question of any invasion of the sovereignty to this House. This House is a sovereign Assembly, entitled at any time to take action in relation to tariffs or anything else, provided it has fully considered the matter and is aware of the consequences.”); *Local Elections Bill, 1947—Second Stage.* (26 November 1947) 109 *Dáil Debates*, at col 41 (MacEntee: “The [Oireachtas] is a sovereign Parliament whose competency to make laws is only circumscribed by the wide ambit of the Constitution.”); *Agricultural Institute Bill—Second Stage (Resumed).* (21 November 1957) 161 *Dáil Debates*, at col 871 (Dillon: “the Minister for Agriculture ... represents ultimately the sovereign power of this House”); *Industrial Development Bill, 1969: Second Stage.* (28 November 1969) 242 *Dáil Debates*, at col 2312 (Seán Keating: “... in this part of this island that we have a sovereign Parliament ...”); *Road Transport Bill, 1978: Report and Final Stages* (26 April 1978) 305 *Dáil Debates*, at col 1448 (TJ Fitzpatrick (Cavan-Monaghan): “... the sovereign Parliament, Dáil Éireann ... ”); *Nítrigin Éireann Teoranta Bill, 1987: Committee Stage.* (11 November 1987) 375 *Dáil Debates*, at col 284 (Keating: “This is the sovereign Parliament of this country ...”); *Private Members' Business. - Social Partnership: Motion (Resumed).* (15 December 1999) 512 *Dáil Debates*, at col 1732 (John Bruton: “The House is sovereign as far as the public purse is concerned. Any communications committing this House should be on the floor of the House.”)

⁸ *eg Commissions of Investigation Bill 2003: Second Stage (Resumed)* (5 March 2004) 581 *Dáil Debates*, at col 1113 (Pat Rabbitte TD: “the oldest committee of the sovereign Parliament”)

⁹ *eg Hardiman J in Sinnott v Minister for Education* [2001] IESC 63; [2001] 2 IR 545, at 695; *TD v Minister for Education* [2001] IESC 101; [2001] 4 IR 259, at 360-361.

Oireachtas, whilst being aware of the constitutional limitations under which each operates? The Supreme Court, of course, has taken a different view of the powers of the Dáil, Seanad and the Oireachtas; rather than enjoying general residual competence, limited only by the specific restrictions imposed by the Constitution, each of them is a creature of the Constitution, exercising only those powers which have been expressly or implicitly conferred upon it by the Constitution or by statute.¹⁰ A relatively flexible formula is applied by the Supreme Court in identifying those implied powers—

Having regard to the sovereign and democratic nature of the State, each of the organs of government enjoy the powers normally exercised by such organs in a sovereign and democratic state and are not restricted to the powers expressly set forth in the provisions of the Constitution. They are, however, subject to the provisions of the Constitution and in the exercise of such powers, are obliged to have regard to such provisions.¹¹

However, outside the domain of making laws for the State, the competence of either House or of the National Parliament as a whole must be shown, at least insofar as the constitutional rights of individuals may be affected by their actions. It is the State's sovereignty which is thereby asserted, not that of any of its organs.

Another aspect of denying sovereignty to the legislative branch is the non-delegation doctrine. US precedent on the relationship of the People, the Constitution and the legislative body differs from the general understanding in other common law jurisdictions that a parliament may be subject to constitutional limitations on the type of laws it can make, without being considered a 'delegate' of the power to make laws which is limited in the scope of authority it can confer

¹⁰ *Maguire v Ardagh* [2002] IESC 21; [2002] 1 IR 385.

¹¹ *Haughey v Moriarty* [1998] IESC 17; [1999] 3 IR 1, at 32.

upon others.¹² The intention to create an institution of a truly *parliamentary* character has traditionally been seen to be inconsistent with any such limitation on its powers.¹³ As Willes J put it in *Phillips v Eyre*:

“A confirmed act of the local Legislature ... whether in a settled or a conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament.”¹⁴

When the British Parliament conferred a power to make laws on a colonial legislature, that power was a plenary one, of the same character as that of the Westminster Parliament itself, albeit within whatever specific limits were imposed on the competence of the legislature in question. The courts of final appeal in several Commonwealth countries have repeatedly confirmed this to be the case, in rejecting the applicability of the non-delegation doctrine.¹⁵

Given the clarity of the text of Bunreacht na hÉireann and the clear understanding at the time of its adoption, it is perhaps unavoidable that the Supreme Court should have adopted a non-delegation principle and have rejected the notion that the Oireachtas is the successor of all the powers and privileges of the Westminster Parliament. It is also arguable that the non-delegation doctrine, at least, has had certain modest beneficial effects on the

¹² *City View Press Ltd v AnCO* [1980] IR 381 (SC). On the other hand, three years after the Supreme Court’s decision in *City View Finlay P had in The State (Walshe) v Murphy* [1981] IR 275, at 284 (HC) described the “the sole and exclusive power of making laws for the State ... vested in the Oireachtas” as being “absolute and all-embracing, subject to the qualifications imposed upon it by the Constitution” and spoke (at 286) of a:

“category of the legislative powers of the Oireachtas which seems to me to consist of all other areas or topics or matters in respect of which legislation might be enacted and in which, subject to the overall obligation not to enact a statute repugnant to the Constitution and subject to the other specific prohibitions against the enactment of laws having a particular effect or consequence, the Oireachtas may enact legislation.”

¹³ *R v Burah* (1878) 3 App Cas 889 (PC); *Hodge v The Queen* (1883) 9 App Cas 117 (PC); *Powell v Apollo Candle Co* (1885) 10 App Cas 282 (PC).

¹⁴ (1870) LR 6 QB 1, at 20 (Ex Ch).

¹⁵ *Victorian Stevedoring and General Contracting Company Proprietary Ltd v Dignan* (1931) 46 CLR 73; *Cobb & Co Ltd & Ors v Kropp* [1967] 1 AC 141; *Luscar Collieries Ltd v NS McDonald* [1925] SCR 460; *Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto* [1943] SCR 1. There are some limits, however: *Attorney General of Nova Scotia v Attorney General of Canada* [1951] SCR 31.

quality of the legislative process. Nevertheless, there is a case to be made that the alternative tradition of parliamentary rhetoric, which continues to locate some element of sovereignty in the Oireachtas itself is also a defensible reading of a constitutional tradition which we share with many other countries of the Westminster tradition of parliamentary democracy.¹⁶

Contest over the Constitution

Judicial decisions on the interpretation of the Constitution are directly criticised in the course of Oireachtas debates more rarely than one might expect. This partly reflects the inhibition the Standing Orders of each House place on debating the merits of judicial decisions—although this has been greatly relaxed in recent times.¹⁷ It also reflects, perhaps, a reluctance – often shared by some legally qualified members – to criticise in detail decisions which depend on technical legal arguments

There are, of course, exceptions. *Blake v Attorney General*¹⁸ and *In re Housing (Private Rented Dwellings) Bill, 1981*¹⁹ both led to relatively sophisticated and extended discussions in Dáil²⁰ and Seanad²¹ as to the correct interpretation of what the Supreme

¹⁶ See the chapter by Brian Murray in the present volume.

¹⁷ See *Dáil Éireann—Standing Orders Relative to Public Business* (2007) Standing Order No 58.

¹⁸ [1982] IR 117 (SC).

¹⁹ [1983] IR 181 (SC).

²⁰ *Rent Restrictions (Temporary Provisions) Bill, 1981: Second Stage* (9 July 1981) 329 *Dáil Debates*, at cols 377-409, cols 451-453; *Committee and Final Stages*, at cols 454-460; *Rent Restrictions (Temporary Provisions) (Continuance) Bill, 1981: Second Stage* (9 December 1981) 331 *Dáil Debates*, at col 1511; *Committee and Final Stages* (15 December 1981), at col 2036; *Housing (Private Rented Dwellings) Bill, 1981: Second Stage* (9 December 1981) 331 *Dáil Debates*, at cols 1374-1414, cols 1484-1511; *Housing (Private Rented Dwellings) Bill, 1981: Committee and Final Stages* (15 December 1981), at cols 2037-2040; *Rent Restrictions (Temporary Provisions) (Continuance) Bill, 1982: Second and Subsequent Stages* (1 April 1982) 333 *Dáil Debates*, at cols 1231-1232; *Housing (Private Rented Dwellings) Bill, 1982: Second Stage* (31 March 1982) 333 *Dáil Debates*, at cols 1117-1176; (1 April 1982), at cols 1232-1269; *Committee Stage*, at cols 1270-1302; *Committee (Resumed) and Final Stages*, at cols 1364-1397; *From the Seanad* (28 April 1982), at cols 1696-1712; *From the Seanad (Resumed)* (29 April 1982), at cols 1757-1767.

²¹ *Rent Restrictions (Temporary Provisions) Bill, 1981: Second Stage* (16 July 1981) 95 *Seanad Debates*, at cols 2264-2287; *Committee and Final Stages*, at cols 2288-2292; *Rent Restrictions*

Court had decided and the most appropriate means for the legislature to respond to the judgments. As Mary Robinson put the matter: “[I]t is necessary to know what precisely was the problem the Supreme Court identified, why the Supreme Court struck down the legislation, and then to ponder on whether we can reinstitute that position and continue it...”²²

The debates provoked by *Blake* and the decision on the 1981 Bill may, however, have been exceptional; an impressive array of parliamentarians were on hand to contribute, free of the constraints of ministerial office—notably Mary Robinson and the late Seán O’Leary in the Seanad and John Kelly, George Bermingham and Mervyn Taylor in the Dáil—and successive Governments found it difficult to formulate an appropriate response to the decisions. The debates mostly lacked any direct criticism of the Supreme Court’s decision, as the deliberations of the two Houses generally do. Ruairi Quinn TD’s notorious tirade against the Supreme Court was the spectacular exception. See the Appendix for a full reproduction of his remarks.²³

Quinn’s comments were notable not only for their rhetorical flair (“more constricted by our laws in relation to property and class than was the case under the laws of a foreign power ... [a] kind of millstone we have strung around our collective necks ... the myriads of property-owning people who have interest in the Supreme Court sufficient to bring about such a distorted interpretation of our Constitution”) but also because the Deputy rejected opportunities to withdraw any imputation that the

(Temporary Provisions) (Continuance) Bill, 1981: Second Stage (16 December 1981) 96 *Seanad Debates*, at cols 1477-1509; (17 December 1981), at cols 1579-1603; *Committee and Final Stages*, at col 1603; *Housing (Private Rented Dwellings) Bill, 1981: Second Stage*, at col 1603; *Housing (Private Rented Dwellings) Bill, 1981: Committee and Final Stages*, at cols 1603-1673; *Rent Restrictions (Temporary Provisions) (Continuance) Bill, 1982: Second Stage* (6 April 1982) 97 *Seanad Debates*, at cols 477-492; *Committee and Final Stages*, at cols 492-496; *Housing (Private Rented Dwellings) Bill, 1982: Second Stage*, at cols 496-499; 501-544; *Committee Stage*, at cols 545-587; *Committee and Final Stages (Resumed)* (16 April 1982), at cols 593-691.

²² (6 April) 97 *Seanad Debates*, at col 483.

²³ *Housing (Private Rented Dwellings) Bill, 1982: Second Stage* (31 March 1982) 333 *Dáil Debates*, at cols 1130-1137. He had made similar comments, as a Senator, in relation to the *Blake* decision itself: *Rent Restrictions (Temporary Provisions) (Continuance) Bill, 1981: Second Stage* (16 December 1981) 96 *Seanad Debates*, at cols 1495-1499.

members of the Supreme Court “did other than that which they regarded as being in compliance with their interpretation of the law or that they had landlords or anybody else to influence them” (“... if the allegation did not stick the first time I wish now to stitch it into the record.”²⁴) As Deputy Quinn conceded: “It may be that because I am not a lawyer my criticisms are more stark and naive than might otherwise be the case....”²⁵ It is interesting that, in his 2005 autobiography, Deputy Quinn omits any mention of this attack on the Supreme Court, even though he deals with other aspects of the rent restrictions decisions and their aftermath—notably his own involvement as Minister of State at the Department of the Environment in the drafting of legislation to address the consequences of the court’s two decisions.²⁶

Later in the 1982 debate, other TDs rallied to defend the integrity of the judges who had decided *Blake* and, in particular, *Re Housing (Private Rented Dwellings) Bill, 1981*, pointing out that Deputy Quinn had referred very selectively to the decision—ignoring, for example, the Court’s clear acknowledgment of the constitutional rights of tenants of controlled dwellings and the need for amending legislation to take account of these.²⁷

Deputy Quinn’s intemperate attack on the Supreme Court also contrasts with the more measured and philosophical reflections by

²⁴ (31 March 1982) 333 *Dáil Debates*, at cols 1142-1143.

²⁵ *Ibid*, at col 1143.

²⁶ Ruairi Quinn, *Straight Left: A Journey in Politics* (Hodder Headline Ireland, 2005) at 201-203. The only other significant mention of the Supreme Court is in relation to its decision ([1984] IR 268) that the Electoral (Amendment) Bill, 1983 was repugnant to the Constitution, another measure in whose drafting Deputy Quinn was involved: *ibid*, at 203-204.

²⁷ Fitzpatrick (*Cavan-Monaghan*) (FG), at cols 1155-1156; Shatter, at cols 1233-1236; R Burke, at col 1267. In its report on the subject of private property, the All-Party Oireachtas Committee on the Constitution—influence no doubt by the advice and guidance of Dr Gerard Hogan SC—also took a nuanced view of the Supreme Court’s decision in *Blake*, with the benefit of two decades of hindsight:

[*Blake*] did not decide that all forms of price control were unconstitutional: all it decided was that the form of rent control sanctioned by the Rent Restrictions Acts 1946-1967 was unconstitutional. It must be recalled, however, that key elements of the legislation which led to that finding included the arbitrary selection of the properties which were to be subject to rent control; the freezing of rents at wholly uneconomic levels without reference to the means of either landlord or tenant and the fact that the landlord was effectively precluded from ever recovering the land in question.

All-Party Oireachtas Committee on the Constitution, *Ninth Progress Report Private Property* (2004), at 40.

his long-time constituency colleague Dr Garret FitzGerald, on the problematic nature of the private property guarantee as interpreted by the Supreme Court and its distorting effect on public policy in relation to planning, housing and land use generally. In particular, Dr FitzGerald has called attention, as a former Taoiseach, to what he considers the undue caution of the Government's legal advisors as to which restriction on private property rights might survive scrutiny by the courts.²⁸ On the other hand, Deputy Quinn was not the only member of the Oireachtas to attack the correctness of the Supreme Court's decisions in *Blake* and *Re Housing (Private Rented Dwellings) Bill, 1981*. Senator Jack Fitzsimons (then of Fianna Fáil) also did so.²⁹ Although he avoided the colourful language and the claims of bias contained in Deputy Quinn's attack, he used very similar arguments (concerning the relationship of Articles 43 and 45 of the Constitution) to reach a conclusion even far-reaching in its implications—

I believe profoundly, and I gather there are eminent lawyers who feel likewise, that the Supreme Court has not the power of judicial review over the Rent Restrictions Acts which it declared in the recent past to be unconstitutional. I had not been long elected to the Seanad when I was approached to make strong representation and protest in this regard because of the importance of the question. All my subsequent consideration of the matter has convinced me that the Supreme Court has not this power.

...

²⁸ *eg Derelict Sites Bill, 1989: Second Stage (Resumed)* (16 February 1989) 387 *Dáil Debates*, at cols 748-750. This view was, in fact, shared by Deputy Quinn (a former Minister for the Environment) see *Private Members' Business. - Local Government (Planning and Development) (No. 2) Bill, 1988: Second Stage (Resumed)* (29 November 1988) 384 *Dáil Debates*, at col 2265. See also Garret FitzGerald, *Reflections on the Irish State* (Irish Academic Press, 2003), at 52-53.

²⁹ *Landlord and Tenant (Amendment) Bill, 1983: Second Stage* (7 March 1984) 103 *Seanad Debates*, at cols 328-333.

I am saying that the Supreme Court usurps the powers of Parliament in its judgment. ...

...

I am saying that the Supreme Court decision is wrong in law according to some concerned people qualified to express a view on this matter. It is not a decision in accordance with the law of this country for the following reasons. Article 43 of the Constitution gives power to the State to delimit the use of private property subject to the exigencies of the common good. The Chief Justice, in reading the judgment of the court, stated that this was subject to qualification, namely, it must not be unjust. I am convinced that the court is wrong in this interpretation because the Article means precisely what it states and there is no ambiguity about it. The people ratified this Article as it reads and not as the court would wish it to read. The court did not refer to Article 45 in its judgment. Why did it not do so?³⁰

Senator Fitzsimons's line of attack raises the underlying issue more clearly than Deputy Quinn's outburst on the same theme, although it seems clear that the basic argument being made was the same in both cases. Is there scope for members of the Oireachtas to hold and argue for their own interpretation of the Constitution, at variance with that adopted by the High Court or the Supreme Court? Just as any other individual might, they can have their own personal opinions as to whether the court's interpretation is correct, but is there any point in expressing it in their capacity as members of the Oireachtas?

³⁰ 103 *Seanad Debates*, at cols 328-330. It should also be noted that the Supreme Court's decisions attracted some unusually trenchant academic criticism as well: McCornack, "Blake-Madigan and its Aftermath" (1983) 5 *DULJ* (ns) 205. An additional point in the Supreme Court's defence—which could not have been anticipated in 1982-83—is that the recent decision of the European Court of Human Rights (Grand Chamber) in *Hutten-Czapska v. Poland*, Grand Chamber Judgment of 19 June 2006, Application No 35014/97, provides considerable support for the approach taken in *Blake v Attorney General* [1982] IR 117 (SC).

The initial reaction of most lawyers would be, I suppose, that there is not. Whatever opinions Deputies and Senators may have about the correct interpretation of the Constitution and whatever embodiment those opinions receive in legislation, the Supreme Court will have the final say as to its validity (although perhaps only many years after its enactment.) Less obviously, it might also be countered that the views of individual Deputies and Senators have only a slight impact on the content of legislation in any event. The vast bulk of legislation is prepared and sponsored by Ministers and the content of the proposals which they bring forward is controlled by the professional judgment of the Attorney General and the staff of his Office as to what is or is not likely to survive constitutional challenge. Even in the case of Private Members Bills, the Government is likely, in normal circumstances, to use its parliamentary majority to excise any elements of dubious constitutional validity. The only ultimate difference which a repudiation of a Supreme Court decision may have is in the bringing forward of a proposal for an amendment of the Constitution and, in that context, it will typically be unclear whether the mischief addressed is considered to be the Constitution itself or the courts' interpretation of it.

It might seem a matter of little importance, therefore, what Deputies and Senators make of the justice (or even the legality) of the Supreme Court's interpretations of the Constitution. Their views on these matters count for no more or no less than the private citizen's. Consequently, it serves little useful purpose to have these matters debated on the floor of either House or in Committee since it can have no bearing on what legislation the Oireachtas can or cannot validly enact. For example, the presumption of constitutionality can be shown in some cases to be inconsistent with the intentions expressed by members of the Oireachtas in the debates on a Bill, especially where the members of the Dáil and Seanad specifically intend a measure to bear a

meaning which the Supreme Court has subsequently held to be unconstitutional.³¹

I would suggest, however, that the implications of such challenges by legislators to the legitimacy of particular judicial interpretations of the Constitution are more profound. For example, in the United States, Mark Tushnet (among others) has developed an extended argument about the role of legislative interpretation of the Constitution, as an aspect of “popular constitutionalism.”³² Professor Tushnet’s position could be (very severely) summarised in this quotation:

“[S]elf-governance requires that reasonable interpretations of constitutional values as embodied in legislation enacted by representative institutions prevail over reasonable interpretations of such values as articulated in decisions by less representative institutions.”³³

³¹ For example, several statements made in the debate on the Health Bill, 1969 are clearly at variance with the presumption of constitutionality made in *Cooke v Walsh* [1984] IR 710 (SC): *Health Bill, 1969: Committee Stage (Resumed)*. (3 December 1969) 243 *Dáil Debates*, at cols 317-319 and *Health Bill, 1969: Committee Stage (Resumed)*. (29 January 1970) 67 *Seanad Debates*, at col 1312. The Minister for Health reassured TDs and Senators who were concerned by the omission from the Bill of a provision which would exclude from full eligibility for free hospital treatment those entitled to receive damages for personal injuries sustained in road accidents that—although such a provision might be absent from the Bill—he proposed to use his power to make regulations to provide for such an exclusion. In *Cooke v Walsh* O’Higgins CJ stated (at 729) that such a use of the power to make regulations relating to the matter in which services were provided would be “in reality, an attempt to amend the two sections by ministerial regulation instead of by appropriate legislation. In my view, the National Parliament could not and did not intend to give such a power to the Minister for Health when it enacted s 72 of the Health Act, 1970.” It is clear that TDs and Senators gave their approval to the Bill based, in part, on an assurance from the Minister sponsoring it that such an exclusion from full eligibility could and would be introduced under the power to make regulations.

³² See the following articles by Professor Tushnet: “Popular Constitutionalism As Political Law” 81 *Chi-Kent L Rev* 991 (2006); ‘Weak-Form Judicial Review and “Core” Civil Liberties’ 41 *Harv CR-CL L Rev* 1 (2006); “Non-Judicial Review” 40 *Harv J on Legis* 453 (2003); “*Marbury v Madison* Around the World” 71 *Tenn L Rev* 251 (2004); “Symposium: Judging Judicial Review: *Marbury* in the Modern Era: Alternative Forms of Judicial Review” 101 *Mich L Rev* 2781 (2003); “Symposium Article: New Forms of Judicial Review and the Persistence of Rights-and Democracy-Based Worries” 38 *Wake Forest L Rev* 813 (2003); “Symposium: Judicial Independence and Judicial Accountability: Searching for the Right Balance: The “Constitution Restoration Act” and Judicial Independence: Some Observations” 56 *Case W Res* 1071 (2006). For two other US exponents of somewhat similar views, see Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004) and Douglas S Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* (Princeton University Press, 2001)

³³ “Replies: Controlling Executive Power In The War On Terrorism” 118 *Harv L Rev* (2005) 2673, at 2675 n12.

At the very least, Tushnet contends, this is an understanding of how judicial review should operate which receives less consideration in the United States than it should do. The US Supreme Court, of course, rebuffed the most prominent recent attempt by the US Congress to instruct the courts as to what interpretation of the Constitution they should adopt.³⁴ As the Court there observed:

The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.³⁵

At least in this respect, Ireland also seems to have a "strong" form of judicial review—one in which the Supreme Court's interpretation of the Constitution is final and not liable to be affected by anything other than overruling by a future decision of the Court or the amendment of the Constitution itself. That characterisation needs to be qualified by an acknowledgment that are some parts of the Constitution (in addition to Article 45 which explicitly has such a status) the interpretation of which the courts are willing to leave to other organs of the State.³⁶ In addition, some *dicta* in recent years relating to the future of the unenumerated rights doctrine may imply that the Oireachtas has a role in

³⁴ *City of Boerne v Flores, Archbishop of San Antonio, et al* 521 US 507; 117 S Ct 2157; 138 L Ed 2d 624 (1997) holding the Religious Freedom Restoration Act of 1993 to be beyond the powers of Congress.

³⁵ 521 US 507, at 519; 117 S Ct 2157, at 2164; 138 L Ed 2d 624, at 638.

³⁶ Compare the approach taken to Articles 29.1-3 in *Horgan v An Taoiseach* [2003] IEHC 64; [2003] 2 IR 468 and *Dubsky v Government of Ireland* [2005] IEHC 442.

“interpreting” what is the full scope of the reference to “the personal rights of the citizen” in Article 40.3.1°. ³⁷

However, whatever view the Supreme Court takes of the role which the other branches of government can legitimately take in the interpretation of the Constitution, the question remains as to what role the members of those branches might legitimately claim, since it is *petitio principii* to assume that the Supreme Court’s view should settle the question. Should the Oireachtas provide a forum for argument by Deputies and Senators as to whether the High Court’s or Supreme Court’s decisions are the correct interpretation of the Constitution, according to the canons of interpretation and values which those parliamentarians may bring to bear? I won’t offer any concluded view on that issue in this context, except to comment that it raises issues about the democratic legitimacy of judicial review which are still, perhaps, insufficiently debated in an Irish context. The Houses of the Oireachtas have yet to devise a means of accommodating vigorous contestation of judicial interpretations by their members, as distinct from providing a forum in which members can debate possible amendments of the Constitution on the basis that the correctness of the courts’ interpretation cannot be questioned. It might be urged, as was pointed out to Deputy Quinn in 1982 that it is futile to rail against the courts; the true remedy is in the hands of legislators, that of proposing an appropriate amendment of the Constitution. However, one might point out that the formulation of a proposed amendment may differ considerably depending upon what view is taken of the case or cases to which it responds. In other words, is it being proposed to remedy the sound interpretation of a defective provision or a defective interpretation of a sound one?

Conclusion

³⁷ Keane CJ in *TD v Minister for Education* [2001] IESC 101; [2001] 4 IR 259, at 281.

These reflections on the approach taken to the Constitution in debates in the two Houses share at least one common theme: that in much commentary and analysis of the Constitution there remains a tendency to be preoccupied almost exclusively with how the courts understand and interpret it. Judged by such a yardstick, some of the views routinely expressed by parliamentarians, even in 2007, may seem, to use Ruairi Quinn's words in respect of his vigorous 1982 attack on the Supreme Court, "stark and naïve." There might, therefore, be thought to be all the more scope for those members of the Oireachtas who possess legal qualifications and expertise to act as guides for their colleagues through the labyrinth of constitutional adjudication.

However, any approach under which the issues before the Oireachtas are reduced to those of choosing the most appropriate response to unquestionable decisions of the High Court and Supreme Court, risks undervaluing the contribution which the people's elected representatives can make to the constitutional process. They can certainly make a valuable contribution on occasion by voicing their often vigorous disagreement with the manner in which the courts have interpreted the Constitution. Even if the Supreme Court claims to have final interpretative authority over the Constitution such a claim cannot, in the nature of things, constrain the deliberations of the Houses of the Oireachtas. In that regard, the claim by TDs and Senators to maintain, and to act upon, the correctness of their own interpretation of the Constitution may have value—if nothing else by providing a more appropriate context for the framing of proposals to amend it, a function which the Constitution reserves to the members of the national parliament alone.

APPENDIX

Housing (Private Rented Dwellings) Bill, 1982; Second Stage (31 March 1982) 333

Dáil Debates cols 1130-1137 (Extracts)

Mr. Quinn: ... Speaking on behalf of the Labour Party, I believe that members of the Supreme Court have disgraced themselves in so partially interpreting the Constitution because ... all the Articles of the Constitution place certain obligations upon the State and upon individuals.

...

If this conservative Government can effectively quote in their conclusion [Article 45] of the Constitution, how can five members of a Supreme Court with their accumulated wisdom say:

In the absence of any constitutionally permitted justification this clearly constitutes an unjust attack upon their property rights.

We could be coming back to the House day after day with different Bills trying to get around the Constitution. As long as we have Supreme Court judges so biased in their defence of property rights and in defence of people who own property we will always end up with this kind of situation.

The nub of the problem is not the legislative inventiveness of the civil servants, the Opposition or the members of the Government. The nub of the problem is not even our Constitution but the bias in the property interpretations of members of the Supreme Court. On whose behalf and in whose interests are the Supreme Court interpreting the Constitution? How can they say "In the absence of any constitutionally permitted justification this clearly constitutes an unjust attack upon their property rights" when our Constitution, riddled with all sorts of reservations quite clearly in Article 45 states that the Government have obligations to the weaker sections of the Community?

An Leas-Cheann Comhairle: The Deputy will appreciate that I have allowed him a certain latitude. We must not challenge the decisions of the courts in the House.

Mr. Quinn: Maybe it is about time we did.

An Leas-Cheann Comhairle: That would be another matter. I am informing the Deputy of what the tradition and convention is in the House.

Mr. Quinn: I am challenging some of these traditions. There are at least 4,000 people in my constituency who will be directly affected by the decision of the Supreme Court, who do not have the secure incomes and pensions that judges have. ...

Section 13 of the Bill is quite likely to be thrown out by the same group of conservative class-biased judges who threw out section 9 of the previous Bill. ... I am not challenging the right of the Supreme Court to make those decisions; I am merely criticising it. If the Supreme Court was more representative of all the class interests in our society we would not get the type of decision we have in front of us.

...

[T]his legislation ... is as naked an attack on the weaker classes in our society as has ever manifested itself here. It is doubly outrageous that it was supported by a biased interpretation of the Constitution by members of the Supreme Court who have clearly come down on the side of property as against people.

...

Surely we should be in this House, as we were not more than two hours ago, talking about amending the Constitution or perhaps replacing the members of the Supreme Court in such a way as to make this kind of legislation unnecessary.

An Leas-Cheann Comhairle: The Deputy appreciates that power is given to him, but he must follow it on the lines indicated in the Constitution. Under that he, as a member of this House, has power to act but I remind the Deputy that the convention and the tradition is that, not being a judicial body, we do not criticise to the extent to which he has criticised, the decision of any court.

Mr. Quinn: Perhaps I am not long enough in the House to be bound by those traditions. I do not intend to begin feeling myself bound by them now. I accept fully the advice given by the Chair in its experience but I think it is time that we — not challenge the rights of courts but perhaps criticise their decisions. That is what I am trying to do, to highlight what is the nub of the problem