

**Re: Proposed Referendum on Article 35.5 of
The Constitution
Memorandum on the Proposed Amendment**

1. No one doubts for a moment the seriousness of the economic crisis facing the country. The judiciary has not opposed the proposal for amendment of Article 35, section 5 of the Constitution. The ultimate decision on would, of course, be entirely a matter for Oireachtas and the People. The issue here is not whether judges' pay should be reduced, but rather how that reduction should be achieved, while effecting the least interference with the principle of independence of the Judiciary which that provision of the Constitution is designed to protect.

Historical context

2. If judicial pay is cut, this will be the first time that this has occurred in the legal history of these islands since the Act of Settlement 1701.

3. Article 68 of the 1922 Constitution provided that the remuneration of judges "may not be diminished during their continuance in office". Writing in 1932 in his seminal text, Professor Kohn observed that:

“The independence of the judges has been further safeguarded by the provisions of Article 68 of the Constitution that their remuneration may not be diminished during their continuance in office.”¹

4. Article 35.5 of the Constitution provides that:-

“The remuneration of a judge shall not be reduced during his continuance in office.”

5. During the debate on the Constitution, Deputy Norton (then leader of the Labour Party) observed with regard to Article 35.5:-

“I take it that [Article 35.5] is intended to establish the independence of the judiciary which function through [the High Court and the Supreme Court] and it is probably intended to demonstrate to the community as a whole and to judges in particular that judges are not liable to have their salaries reduced if for any reason they do things which incur the displeasure of the [Government].”²

The rationale for the present rule

6. Article 35.5 of our Constitution is designed to protect judicial independence. As one of the great US Founding Fathers, Alexander Hamilton, put it in *The Federalist Papers, No. 79* at the time of the enactment of the US Constitution:-

“Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. In the

¹ Kohn, *Constitution of the Irish Free State* (London, 1932) at 328.

² 67 *Dail Debates*, June 1, 1937.

general course of human nature, a power over a Man's Subsistence amounts to a power over his Will.”

7. This principle is internationally acknowledged and cherished today. The words of Hamilton were quoted with approval by a majority of our Supreme Court in *O'Byrne v. Minister for Finance*³ in holding that Article 35.5 did not exempt judges from the necessity to pay income tax:

“The purpose of the Article is to safeguard the independence of judges. To require a judge to pay taxes on his income on the same basis as other citizens and thus to contribute to the expenses of Government cannot be said to be an attack on his independence.”⁴

8. Article III of the US Constitution provides that judicial compensation “shall not be diminished during their Continuation in Office”, words which clearly inspired Article 68 of the 1922 Constitution and Article 35.5 of the Constitution.

9. The European Charter on the Statute for Judges, adopted at Strasbourg, 8 - 10 July 1998 under the auspices of the Council of Europe provides at Article 6.1:

“Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.”

³ [1959] I.R. 1 at 35, per Maguire C.J.

⁴ [1959] IR 1 at 38, per Maguire CJ.

10. On 23rd November 2001, the Consultative Council of European Judges (CCJE) adopted Opinion No 1, which included reference to Recommendation No. R (94) 12, which provided that judges' remuneration should be guaranteed by law and commensurate with the dignity of their profession and burden of responsibilities and that that it was generally important (and especially so in relation to the new democracies) to make specific legal provision guaranteeing judicial salaries against reduction

11. The underlying issue of principle is more complex. Mere knowledge that the Oireachtas has the power to legislate to reduce salaries may be perceived, even if it is not so in fact, as having the potential either to pressurise judges on the one hand or, alternatively, make them liable to view the other branches of government with suspicion or even hostility. In the words of one of the most internationally respected judges in recent times, the late Lord Bingham:-

“There is also, perhaps, another and subtler link between independence and remuneration. In most societies, and subject to obvious exceptions, there is some perceived relationship between what someone earns and the status or prestige which he enjoys. Financial rewards are not, of course, everything, but nor are they nothing. Unless, therefore, the rewards of judicial office (with or without other benefits) are sufficient to attract the ablest candidates to accept appointment, albeit with some financial sacrifice, the ranks of the Judiciary must be filled by the second best, those who (under our system) have failed to make it in private practice, and there would be an inevitable lowering in the standing and reputation of the Judiciary and a sea change in the relationship between advocate and judge.”⁵

⁵ *Judicial Independence* (OUP, 2005)

12. In *O’Byrne v Minister for Finance*⁶, Lavery J. observed that from a consideration of the 1922 Constitution and the corresponding provisions of Article 35 of the Constitution that:-

“The idea emerges – that the judicial power of the State should be vested in judges set apart in many important ways from the life of the community and denied important civil rights in order that they should be independent in the exercise of their functions.”⁷

13. A number of significant restrictions on a member of the Judiciary are explicit in the Constitution: disqualification from membership of the Oireachtas, and prohibition on the holding of any other office of emolument: Article 35.3. Some of the constraints on the judiciary are regarded as implicit in the concept of independence, and observed by convention since the foundation of the State : the fact that judges do not speak or engage on matters of public controversy; the convention that judicial appointment is normally for full service until retirement, and that, even on retirement, a retired judge should not pursue any vocation or employment either public or private, which is inappropriate for a judge. Nor do the judges organise collectively. All these are understood to be components of an independent judiciary. In return, the Constitution provides for fixity of tenure, that a judge cannot be removed save for stated misbehaviour and then by separate resolutions of the Dáil and Seanad (Article 35.4.1), and by a guarantee that remuneration will not be reduced (Article 35.5).

14. It is clear that these matters are themselves essential requirements of the independence of the judiciary which is an essential component in the concept of separation of powers. This is why the guarantee against reduction in salaries

⁶ [1959] IR 1.

⁷ [1959] IR 1 at 40.

is deeply embedded not only in the Constitution, but one finds it throughout the constitutions and fundamental laws throughout the common law world.

15. In Canada, *The Provincial Judges Reference*⁸ held that the reduction in pay of provincial court judges in order to help address a budget deficit was unconstitutional, as being inconsistent with the guarantee of judicial independence contained in the Canadian Charter of Rights and Freedoms. A majority of the Canadian Supreme Court held that independent compensation commissions are required to enable salaries to be set free of political influence. The Court pointed out that, if remuneration of provincial judges is to be raised, lowered or kept the same, this may be done along with the remuneration of other government employees or with the judges' alone. The continued independence of judges, however, will be kept apparent in any of these circumstances if it involves review by an "independent, effective, and objective" body, *i.e.*, the salary commissions. What is involved in such circumstances is that, because what is being done is to the financial disadvantage of judges, it is important that the extent of discretionary power of the government of the day be kept to a minimum.

16. Furthermore, judges of the High Court and Supreme Court are effectively debarred by the Rules of the Bar Council from returning to legal practice following resignation or retirement.⁹ As Kennedy C.J. put it in *James O'Connor's* case, these principles:

“reflect a common understanding underlying these [judicial] appointments, that, with security of tenure and fixed and adequate

⁸ [1997] 3 SCR 3.

⁹ *Re Sir James O'Connor's Application* [1930] IR 631, Rule 5.21 of the Code of Conduct of the Bar (2010) provides:-

“Judges of the Irish Courts, following retirement or resignation, who return to the Bar may not practice in a court of equal or lesser jurisdiction than the court of which they were a judge.”

remuneration and pension, the practice of the profession of the law is abandoned for ever by the person appointed.”¹⁰

16. If, however, the constitutional principle that there be no reduction in judicial remuneration is altered, then the basis for the permanent abandonment by a judge of the practice of his profession is undermined. The proposition that it is undesirable that a judge to return to practice was explained by Kennedy C.J.:-

“There is good and powerful reason in support of such a rule, for it is beyond doubt that if a man should step down from the privileged position of the Bench and throw off what is a sacred office to engage in the rough-and-tumble of litigious contest, and compete with practitioners for the feed business of the Court, perhaps challenge the decisions which he pronounced, or even fail to support them in argument, he will shake the authority of the judicial limb of government and mar the prestige and dignity of the Courts of Justice upon which the whole structure of the State must always lean.”¹¹

17. There is here a question of perception and fairness. If, for example, a High Court or Supreme Court judge returned to practice and appeared before the High Court, then either the opposing counsel (and, more importantly, their clients) might feel that they were at an unfair disadvantage. But no one would be prepared to give up the right to practice a profession permanently if they did not have the assurance of fixity of salary and tenure of office.

¹⁰ [1930] IR 623 at 630.

¹¹ [1930] IR 623 at 631.

18. The same is true with respect to Article 35.3. Thus, for example, a member of the Oireachtas (with whom, as we shall see, judges may be expressly compared under the terms of the suggested wording at present available) who is unhappy with reduction in his or her salary can, for instance, supplement that by holding an office or position of emolument. There are numerous instances where Oireachtas members quite properly derive income as academics, lawyers, doctors, architects, teachers, company directors and so forth.

19. Why, then, should this rule be maintained in such circumstances if the quid pro quo - no reduction in pay - is being abandoned? Many continental judges (including, for example, judges of the Court of Justice and the German Constitutional Court) hold offices of emolument for example as Professors in universities. Other continental judges engage in part-time arbitration and mediation work.

20. Yet in a small jurisdiction such as ours, any relaxation of this rule might have unfortunate consequences. Could, for example, a judge who engaged in part-time arbitration work continue to hear arbitration cases in his or her judicial capacity?

Fundamental flaws associated with the existing suggested wording

21. According to press reports, the approach to the amendment seems to be grounded on the following wording, attributed to the Department of Justice:-

“The remuneration of judges shall not be reduced during their continuance in office save as may be regulated by law on the basis of reductions that are made by law, in the public interest, in the remuneration of persons generally

or a class of such persons in the public service, including the Oireachtas and other office holders.”

22. It is fundamental that in any proposed amendment, which seeks to protect the independence of the judiciary, wide discretion is not left to the government of the day (and, by extension, the Oireachtas of the day which would be empowered to enact the appropriate legislation giving effect to the pay reductions) as to the circumstances in which and extent to which reductions in pay are implemented. Otherwise, there is a risk of perception that the judiciary may be influenced by the government.

23. The suggested draft wording invites a number of comments. First, the language is extremely loose. It would provide no limitation on the *circumstances* in which a reduction should be made; the government’s view of the “public interest” (as reflected in the legislation enacted by the Oireachtas) would suffice. There is no method of calculating the reduction identified. The only figure by reference to which such a reduction should be effected is contained in a phrase of very broad potential application, namely, “in the public interest”. But perhaps most significantly, the bodies which are to be charged with deciding the reduction, both as to whether it is required and by reference to what comparator such reduction should be calculated, are the other branches of government, *i.e.*, the Executive and Legislative branches. At a minimum it might be thought that any

amendment should closely and specifically identify the circumstances in which any deviation from the historic principles set out in Article 35.5 could be contemplated such as a financial crisis involving the public finances accompanied by the mechanism by which any salary reduction should be calculated, which should itself be independent of government.

24. There would be furthermore nothing to stop the Oireachtas enacting legislation cutting the pay of any *other* office holder(s) and applying that particular pay cut to the judiciary. There is nothing in the suggested wording of the proposed amendment to prevent a series of “tactical” cuts being applied to different classes of public servants, but each of whom can be applied to the judiciary.

25. The proposed wording would also provide less safeguards than that previously proposed during the last Dáil in the 29th Amendment of the Constitution Bill, 2009:-

“The remuneration of a judge shall not be reduced during his continuance in office, save where it is necessary to address a serious threat to the State’s economy, there is a compelling need to stabilise the State’s finances and as a consequence it is necessary to effect a reduction in public service remuneration. In such circumstances, any reduction in the remuneration of all public servants or in the remuneration of a class of public servants may be applied to effect a comparable reduction in the remuneration of all members of the judiciary.”

26. Even then, however, that Bill would have been open to the fundamental objection that it did not provide for an in-built mechanism for an independent review of the levels of the reduction of judicial pay.

Conclusions

27. In our view, the suggested wording as published in the press is fundamentally deficient and would compromise the substance of judicial independence in the manner indicated. The principles of judicial independence require that any decision regarding judicial remuneration and the reduction in judicial pay must be taken by an independent body.

28. If it were otherwise, one of the essential features of a constitutional democracy and the rule of law would be compromised. Many judges dealing with asylum and immigration cases have encountered country of origin information dealing with the position of judges in developing countries where the independence of the judiciary is parlous and where such judges have limited institutional independence.

29. A finding by a reputable international court or observations by an international organisation that these fundamental guarantees of constitutional independence had been - even unwittingly - compromised, were the suggested wording for the amendment to be adopted, would have huge reputational implications for Ireland and for confidence in our legal system. That confidence is not only a bulwark of the Constitution's freedoms which we as citizens enjoy in a free society, but is an essential bedrock of economic confidence on which our recovery from the ordeal to which the State is at present subject is completely premised.

30. This memorandum is not prepared in opposition to an amendment of the Constitution so as to ensure that judges bear a fair share of the burden of pay reductions, but rather proposes that, if this is to be achieved, the essence of constitutional independence must be safeguarded by means of an independent adjudication on what these reductions should be.