

How to interpret the Irish Constitution: *Heneghan v Minister for Housing*

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1. Background and Overview

Over the longer haul, the significance of Murray J’s majority judgment in *Tomás Heneghan v Minister for Housing*¹ will likely be more for what it says about how judges are to approach the interpretation of the Irish Constitution than for the changes it demanded would be made to the electoral franchise in respect of the six ‘University seats’ in the Seanad. Murray J emphasises the fundamental importance of ‘context’ and ‘purpose’ in constitutional interpretation. The wording of this or that provision may on the face of it appear unambiguous, and to have crystal clear implications. But there is ‘no case’, says Murray J, ‘and no provision – no matter how clear it may be – in which it is other than appropriate to understand and have regard to the overall context in which that provision was adopted’.³ And he prefers the ‘harmonious’ and broadly ‘spirit-based’ approach to constitutional interpretation – as Henchy J had in his dissenting judgment in *People (DPP) v O’Shea* (i.e. where O’Higgins CJ, in a majority judgment in that case, had insisted that ‘plain words...must be given their plain meaning...’).⁴ Indeed, Murray J – on the face of it – could hardly have been more emphatic on the point: ‘...I do not believe that Henchy J’s analysis can or should now be seriously questioned as *the* authoritative explanation of how a court should view *any* issue of interpretation by *any* Article of the Constitution’.⁵

In the short term, however, the main impact of the *Heneghan* ruling is on the electoral franchise pertaining to those six seats. (That is, those referred to in Article 18.4.1° (i) and (ii) of the Constitution. I consider the text of this and other relevant constitutional provisions in the next section). Section 6 of the Seanad Electoral (University Members) Act 1937 established two constituencies in respect of these seats. One was the National University of Ireland constituency, which would elect three of them. The other was the University of Dublin constituency, which would elect the remaining three. Section 7 entitled graduates of the National University of Ireland (hereafter NUI) to be included on the register of electors for the NUI constituency, and graduates of the University of Dublin (hereafter TCD) to be included on the register for the TCD constituency. Tomás Heneghan was not a graduate of either the NUI or of TCD, but rather of the University of Limerick (hereafter UL). In 2019 he requested that he would be registered to vote in the next general election for Seanad Éireann on what he described as the ‘institutions of higher education panel’.⁶ This was refused on the basis that he did not meet the legislative criteria. Mr. Heneghan then initiated these proceedings, seeking a declaration that sections 6 and 7 were unconstitutional. He relied in part on Article 40.1. But he relied mainly on Article 18.4.2°. This

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¹ *Tomás Heneghan v Minister for Housing, Planning and Local Government* [2023] IESC 7.

³ [2023] IESC 7, [84] (Murray J).

⁴ For the key passage from the Henchy J judgment, see *The People v O’Shea* [1982] IR 384, 426. For the key passage from the O’Higgins CJ judgment, see *The People v O’Shea* [1982] IR 384, 397. Both passages are set out below: see the text accompanying notes 45 and 46.

⁵ [2023] IESC 7, [70] (Murray J). (italics in the original).

⁶ [2023] IESC 7, [9] (Murray J).

provision had been inserted on the coming into force of the Seventh Amendment to the Constitution (Election of Members of Seanad Éireann by Institutions of Higher Education) Act 1979. That is, it had been added to the Constitution following a Referendum held in 1979, where the proposal put to the people pertained to those six ‘University’ seats. The new clause opened with the phrase ‘Provision *may* be made by law...’⁷ And Mr. Heneghan’s claim was that Article 18.4.2° had imposed a duty on the Oireachtas to legislate so as to extend the franchise in respect of those seats such that it would include graduates of UL, at least.

The claim was rejected by a Divisional High Court in 2021 (Irvine P, Simons and O’Moore JJ), with O’Moore J concluding that Article 18.4.2° had conferred a power on the Oireachtas to legislate but had not imposed a duty.⁸ Mr. Heneghan was granted leave to appeal directly to the Supreme Court in 2022. And on 31st of March 2023 that Court ruled by a majority of six to one in his favour. Murray J – with whom O’Donnell CJ, Dunne, O’Malley and Baker JJ agreed (Hogan J concurring separately; Charleton J partially dissenting) – declared that Article 18.4.2° had indeed imposed a duty on the Oireachtas to legislate, and that the duty was to reconstitute this electorate such that it would include ‘one or more institutions of higher education *other* than (but in addition to) NUI or TCD’.⁹ (Cast a careful eye over that wording. I shall return to it). This meant that sections 6 and 7 of the 1937 Act were invalid.¹⁰

Charleton J characterised his own dissent as ‘partial’,¹¹ but his dubiousness in respect of the majority ruling should not be understated. He would have issued a declaration to the effect that the approval by the people of the Seventh Amendment had given rise to ‘a duty [on the part] of the Government to formulate a response and for the Oireachtas to debate, even now, what the people have enabled in 1979, namely a change to university and institutes of higher education representation in Seanad Éireann...’¹² Indeed, he described the failure to so respond and debate over the course of the intervening decades as a ‘negation of fundamental democracy’.¹³ But in his view it was ‘not appropriate to make the far-reaching order which the majority of the Court proposes’.¹⁴ He did not believe that that particular order could be reconciled with the words used in the text of Article 18.4.2°. Indeed, he felt that the majority ruling ‘risks undermining the integrity of the precisely constructed text of the Constitution and the limits set in the separation of powers within’.¹⁵

There was a further complication in *Heneghan*. Murray J had made that declaration, with the result that those statutory provisions were unconstitutional. But – for reasons that should become clear – those statutory provisions could on no analysis be thought to have been unconstitutional from the moment the Seventh Amendment came into effect in 1979. Rather, in Murray J’s view, and indeed in Hogan J’s, they had come to be invalid at some impossible-to-discern point in the intervening

⁷ Italics added.

⁸ [2021] IEHC 716 (O’Moore J).

⁹ [2023] IESC 7, [4] (Murray J) (emphasis and brackets in the original).

¹⁰ [2023] IESC 7, [4] (Murray J).

¹¹ [2023] IESC 7, [6] (Charleton J).

¹² [2023] IESC 7, [36] (Charleton J).

¹³ [2023] IESC 7, [1] (Charleton J).

¹⁴ [2023] IESC 7, [1] (Charleton J).

¹⁵ [2023] IESC 7, [36] (Charleton J).

years.¹⁶ This gave rise to a difficulty, however. On one theory, such a finding might cast doubt on the validity of every Oireachtas that had been composed since 1979, or at least on some of those that had been composed in the years since. (That is, insofar as any Seanad election that had taken place over that time could be said to have been run in accordance with legislation that was inconsistent with the relevant provisions of the Constitution as they stood at the relevant time). It might also mean that a future Seanad election – including one that might be required by the Constitution to take place – would take place in advance of any remedial legislation having been enacted.¹⁷ Murray J therefore clarified that the effect of the declaration of invalidity in respect the statutory provisions ‘must be wholly prospective’, and that the validity of the results of all past elections since the enactment of the Seventh Amendment ‘must be regarded as standing beyond legal challenge’.¹⁸ He also suspended the effect of the declaration until 31 July 2023 initially, inviting submissions from the parties as to the precise length of time that that suspension would apply.¹⁹ Then some four months later, days prior to expiration of that initial suspension, O’Donnell CJ delivered a judgment on behalf of a Court comprising the same seven judges in which he suspended the declaration until 31 May 2025.²⁰

The remainder of this article is in five parts. Part 2 looks at the text of the three subsections in Article 18.4. It considers the Divisional Court’s reading of those subsections, and introduces the ideas around why the judges in the Supreme Court majority were not inclined to agree with their colleagues on the court below. Part 3 considers Murray J’s analysis around constitutional interpretation in general. This is the critical aspect of the case, and so I give it most attention in this note. I split my assessment into two sub-parts. In the first, I address Murray J’s take on the supposed ‘O’Higgins v Henchy binary’ in approaching the interpretation of the Irish Constitution. (This is my own phrase, not Murray J’s). In the second, I turn to his analysis of the so-called ‘*Bacik* principles’ – that distillation of ideas on Irish constitutional interpretation set out in the Divisional High Court judgment in *Bacik v An Taoiseach*.²¹ Parts 4 and 5 turn to the application by Murray J of his interpretative analysis to those interpretative conundrums thrown up by the Seventh Amendment. I give these shorter sections the sub-title ‘*Judge Murray’s blue pencil*’ – for reasons that should become apparent. In Part 6, then, I consider the implications of the judgment for Irish constitutional interpretation in general. (And I give my view as to whether the outcome in the case was the right one).

¹⁶ [2023] IESC 7 [157] (Murray J). [2023] IESC 7, [43] (Hogan J).

¹⁷ Under Article 18.8 of the Constitution a general election for the Seanad ‘shall take place not later than ninety days after a dissolution of Dáil Éireann’, and the Dáil can be dissolved at any time.

¹⁸ [2023] IESC 7, [159] (Murray J). Hogan J agreed. Indeed the latter’s judgment is particularly insightful on the remedies question. See [2023] IESC 7, [49]-[71] (Hogan J).

¹⁹ [2023] IESC 7, [168] (Murray J).

²⁰ [2023] IESC 18, [39] (O’Donnell CJ). At the time of writing – March 2024, and thus with almost 14 months left on the shot-clock – it is not clear what steps the political organs will take to discharge the constitutional obligation identified by the Court. Murray J did point to two potential courses of action. One is that a law would be passed dividing the franchise in respect of these six seats between ‘one or more’ of TCD and NUI, and ‘one or more’ of the ‘other institutions of higher education’. The other is that a law would be passed vesting the franchise for one, two, three, four or five of the seats referred to in Article 18.4.1° (i) and (ii) in one or more of those ‘institutions of higher education’ in substitution for all but one of the seats currently vested in NUI and TCD. See [2023] IESC 7, [155] (Murray J).

²¹ [2020] IEHC 313.

Before proceeding, I should clarify that I do not give attention to the Article 40.1 element in this article. Murray J agreed with counsel for the respondents that ‘a difference in treatment of citizen... [had been] baked into the legislative and constitutional architecture of the Upper House’²² and accordingly found that ‘neither Article 40.1...nor the principles of political equality can be credibly overlaid on Article 18...’²³ Similarly, I give no further attention to the remedies element of the case – or indeed to O’Donnell CJ’s judgment in that regard in *Heneghan (No 2)*. And I give little in the way of direct or sustained attention to Hogan J’s concurring judgment, or indeed to Charleton J’s dissent. This is in no way to dismiss the importance of these judgments. Rather, it is that Murray J’s ‘principal’ judgment is so comprehensive – and so potentially significant for constitutional interpretation in general – as to demand almost all the attention that space affords here.

2. ‘An ink-stain on a Rembrandt’

The Irish Constitution provides for an Upper House of the Oireachtas, Seanad Éireann. Article 18.1 provides that it is to be ‘composed of sixty members, of whom eleven are to be nominated members and forty-nine shall be elected members’. (The eleven are to be nominated by the incoming Taoiseach, as per the clear words of Article 18.3.) Article 18.4.1° provides as follows:

The elected members of Seanad Éireann shall be elected as follows: –

- i) Three shall be elected by the National University of Ireland.
- ii) Three shall be elected by the University of Dublin.
- iii) Forty-three shall be elected from panels of candidates constituted as hereinafter provided.

This provision had been in the original text when the Constitution was adopted in 1937, though at that stage it was listed as Article 18.4. Its wording was left untouched by the Seventh Amendment in 1979, with the provision simply being re-listed at that point as Article 18.4.1°. And that was to accommodate the two further subsections that were added by that amendment, namely Article 18.4.2° and Article 18.4.3°. They provide as follows:

2° Provision may be made by law for the election, on a franchise and in the manner to be provided by law, by one or more of the following institutions, namely:

- i) the universities mentioned in subsection 1° of this section,
- ii) any other institutions of higher education in the State,

of so many members of Seanad Éireann as may be fixed by law in substitution for an equal number of the members to be elected pursuant to paragraphs i and ii of the said subsection 1°.

²² [2023] IESC 7, [118] (Murray J).

²³ [2023] IESC 7, [122] (Murray J). That is, it cannot be overlaid such that it would ‘mandate the exercise of legislative powers governing the composition of the Seanad in such a way as to render the electorate for that institution ‘equal’ or, for that matter, no more unequal than they had to be’.

A member or members of Seanad Éireann may be elected under this subsection by institutions grouped together or by a single institution.

3° Nothing in this Article shall be invoked to prohibit the dissolution by law of a university mentioned in subsection 1° of this section.

Article 18.4.1° was always going to be a significant factor in the case, and it represented quite a hurdle for Tomás Heneghan. Sections 6 and 7 of the Seanad Electoral (University Members) Act 1937 had plainly been drafted with reference to the terms of paragraphs (i) and (ii) of that provision – and indeed followed mechanically in the path it had set. Moreover, the provision was itself mechanical in nature, in the sense of having a meaning and implications that did not appear to be open for debate. (*‘Three shall be elected by the National University of Ireland’* and *‘Three shall be elected by the University of Dublin’*.) It was this that ultimately proved fatal for the applicant in the Divisional High Court. ‘The case made by Mr. Heneghan’, said O’Moore J, ‘involves asking the Court to decide that a form of election in respect of these six seats expressly permitted by the Constitution is itself unconstitutional’.²⁴ The Court ‘cannot under any circumstances draw a blue pencil through a provision of the Constitution’.²⁵ And in any event the reading of Article 18.4.2° urged by Mr. Heneghan – that is, that the word ‘may’ in the opening clause is to be read as ‘shall’ – was not sustainable. That construction ‘would, if correct, lead to a direct conflict between it and 18.4.1°’. This ‘would not involve a harmonious reading of the Constitution’ but rather ‘would set two sequential provisions at loggerheads with each other...’²⁶

The judges on the Supreme Court did not dismiss the Divisional Court’s analysis, appearing to regard its reading of Article 18.4.2° as the most immediately apparent one. Murray J uses phrases such as ‘at first blush’ and ‘on initial consideration’ in his assessment of the view that the clause had merely conferred a power.²⁷ But he quickly clarifies that the provision ‘is in no sense as simple as this suggested reading implies’.²⁸ Addressing O’Moore J’s ‘loggerheads’ idea, he insists that ‘no matter how one reads them, there *is* a conflict between Article 18.4.1 and Article 18.4.2’.²⁹ And what he means is that in the event of the Oireachtas actually exercising its power (if that is what it is) under Article 18.4.2° to replace one or some of the six seats then that arrangement would be in immediate and direct conflict with Article 18.4.1°. Suppose, for example, it were to replace one of the NUI seats with a seat elected by UL, and one of the TCD seats with a seat elected by Letterkenny IT (these are my own examples). Only two of the seats would now be elected by the NUI, in conflict with the obligation in Article 18.4.1°(i). And only two would be elected by TCD, in conflict with the obligation in Article 18.4.1°(ii). The point was that the drafters, inexplicably, had failed to account for what would become of Article 18.4.1° (i) and (ii) in the event that the power supposedly vested by Article 18.4.2° were ever to be actually exercised.³⁰

²⁴ 2021] IEHC 716, [140] (O’Moore J).

²⁵ 2021] IEHC 716, [152] (O’Moore J).

²⁶ 2021] IEHC 716, [150] (O’Moore J).

²⁷ [2023] IESC 7, [38] (Murray J).

²⁸ [2023] IESC 7, [39] (Murray J).

²⁹ [2023] IESC 7, [43] (Murray J). (Emphasis in the original).

³⁰ Hogan J makes the same point in his concurring judgment, suggesting that it means there is a ‘complete discordance between the two provisions’. [2023] IESC 7, [5] (Hogan J).

This was perhaps the primary reason leading Murray and Hogan JJ to conclude that the drafting of the Seventh Amendment had been ‘hapless, incoherent and confused’³¹ – with the latter adding the delightful suggestion that it had been ‘the [legal] equivalent of the attempted cleaning of an old master by a careless restoration artist who then proceeded to leave an ink-stain on a Rembrandt’.³² But there were other reasons. One concerned how the provisions might function in the event that the NUI were dissolved. Such a development had been proposed in the period leading up to 1979, and the wording of Article 18.4.3^o is strongly indicative of the notion that facilitating it was at least part of the motivation for the initiation of the Seventh Amendment. Yet there was nothing in the amendment to provide for what would become of Article 18.4.1^o (i) in that very event. That provision would continue to sit there in the text of the Constitution demanding that three seats in the Seanad would be elected by an institution that was no longer in existence.³³

Another difficulty was that the wording of Article 18.4.2^o appeared on its face to allow for the concentration of the franchise pertaining to these six seats in one third level institution alone – which Murray J suggested would be a ‘counterintuitive outcome’ (ie if the purpose of the Amendment was to facilitate the expansion of the franchise, this outcome would mean it had shrunk).³⁴ The first word in the phrase ‘one or more of the following institutions’ would appear to permit the Oireachtas to vest the franchise for all six seats in, for example, TCD alone, or in Letterkenny IT alone. And yet another difficulty – related to that one – was that it was not clear what would become of Article 18.6 – a provision stating simply that ‘The members of Seanad Éireann to be elected by *the Universities* shall be elected on a franchise and in the manner to be provided by law’³⁵ – in the event that the Oireachtas were to exercise its supposed power to vest the franchise in respect of all six seats in an institution or institutions that did not count as ‘Universities’.³⁶ If all six seats were to be elected by Letterkenny IT, for instance, then Article 18.6 would be left sitting there with nothing to do, in conflict with its apparently mandatory language.

The suggestion overall then was that the Seventh Amendment was not merely poorly drafted. Rather, it was so haplessly drafted as to authorise the judges – to oblige them, even – to perform ‘surgery’³⁷ on the constitutional provisions left in its wake, or certainly to engage in the innovative forms of construction required (in the view of the judges in the majority) to facilitate their coherent functioning. As Murray J puts it in his judgment: ‘The Court in construing any part of Article 18.4 must, clearly, strive to achieve an interpretation that resolves as many of these interpretative issues as possible in a manner that is coherent and workable while at the same time giving effect to the intent of the People in adopting the provision’.³⁸ The door was thus opened for Tomás Heneghan. It was now conceivable that the judges might just deploy a blue pencil on the text of these

³¹ The phrase was originally Hogan J’s. See [2023] IESC 7, [4] (Hogan J). But Murray J expressed his ‘full agreement’. See [2023] IESC 7, [3] (Murray J).

³² [2023] IESC 7, [4] (Hogan J).

³³ [2023] IESC 7, [47] (Murray J).

³⁴ See [2023] IESC 7, [51] (Murray J).

³⁵ Emphasis added.

³⁶ As Hogan J put it, there was ‘a clear contradiction between the mandatory obligation of Article 18.6 on the one hand and the permissive language of Article 18.4.2^o on the other...’ [2023] IESC 7, [12] (Hogan J). See also [2023] IESC 7, [52]-[54] (Murray J).

³⁷ Murray J used this phrase in this context when talking about Article 18.6, see [2023] IESC 7, [52] (Murray J). As for Article 18.4 in general, he says: ‘Far from being clear, simple and capable of literal interpretation, Article 18.4 requires implication, interpolation and reconstruction to make it work’. [2023] IESC 7, [134] (Murray J).

³⁸ [2023] IESC 7, [58] (Murray J).

constitutional provisions. (And Judge Murray’s blue pencil, as we shall see, ends up getting quite a day out). But first they would have to find a basis in the established authority on constitutional interpretation for this kind of innovation.

3. The *Heneghan* approach to constitutional interpretation

In defending the *Heneghan* case on behalf of the State, counsel had placed emphasis on a summary of the general principles governing the interpretation of the Irish Constitution that had been set out in a judgment for the Divisional High Court in 2020 in *Bacik v An Taoiseach*.³⁹ The ‘*Bacik* principles’ were presented in that judgment in list form – a), b), c), d), e) and f) – and came in paragraph 80 in the wake of a broader consideration by the Court of *dicta* from a range of older Supreme Court cases addressed to the matter of constitutional interpretation. These included *dicta* of Murray CJ in *Curtin v Dáil Éireann* from 2006⁴⁰ and of O’Higgins CJ and Henchy J in *People (DPP) v O’Shea* from 1982.⁴¹ O’Higgins CJ and Henchy J had disagreed on the outcome in the latter case, and their *dicta* on interpretation has tended to be set in contrast, one with the other, in the decades since (ie O’Higgins CJ in a text-based key, with Henchy J appearing to emphasise ‘an unstated constitutional “spirit”’).⁴² I shall get to the *Bacik* principles, and to where they now lie in the wake of Murray J’s ruling in *Heneghan*. But Murray J has plenty to say about those earlier cases too, and so it is to them that we should initially turn.

i) *Where now stand the O’Higgins CJ and Henchy J dicta from O’Shea?*

Both *Curtin* and *O’Shea* had involved questions concerning an arguable constitutional ‘silence’ – that is, where it might be thought that a master-text constitution has left unaddressed, or significantly under-determined, some matter of constitutional relevance.⁴³ In *O’Shea*, the suggestion was that there was a silence in Article 38, addressed as it is to guarantees in respect of the criminal trial. Patrick O’Shea had been charged with certain offences before the High Court (Central Criminal Court) but had been acquitted by direction of the trial judge. The DPP sought to appeal that acquittal to the Supreme Court, prompting Mr. O’Shea to claim that such an appeal was prohibited by the Constitution. The basis of his claim was that the old common law practice that acquittals could not be appealed against – though not expressly referenced in the text – had been absorbed into Article 38. One of the difficulties with the argument, however, was that it appeared to conflict with the plain words of Article 34.4.3^o: ‘The Supreme Court shall... have appellate jurisdiction from *all* decisions of the High Court’.⁴⁴ And so Mr. O’Shea had to persuade

³⁹ [2020] IEHC 313.

⁴⁰ [2006] IESC 14.

⁴¹ [1982] IR 384.

⁴² On this contrast in interpretative approaches, and indeed on constitutional interpretation generally in the Irish setting, see Oran Doyle and Tom Hickey, *Constitutional Law: Texts, Cases and Materials* (Clarus Press, 2nd ed, 2019), 59-71. For a comprehensive account of approaches to Irish constitutional interpretation, see Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (Bloomsbury Professional, 2018), 9-58. For contrasting scholarly perspectives, see Donal O’Donnell, ‘The Sleep of Reason’ (2017) 40 (2) Dublin University Law Journal 191, and Fiona de Londras, ‘In Defense of Judicial Innovation and Constitutional Evolution’, in Laura Cahillane, James Gallen and Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press, 2017). For a more general analysis of trends over the past decade (including some analysis of *Heneghan* that is focused on this theme of interpretation), see Conor Casey and Oran Doyle, ‘Higher Law or Great Charter of the Irish People? The Constitution under the New Supreme Court’ (forthcoming, Dublin University Law Journal).

⁴³ See Richard Albert and David Kenny, ‘The Challenges of Constitutional Silence: Doctrine, Theory, and Applications’ (2018) 16(3) International Journal of Constitutional Law 880.

⁴⁴ Italics added. Note that that provision has since been amended.

the judges not only that the common law norm had been incorporated into one provision but also that it qualified the seemingly unambiguous words of another.

The *O'Shea* case split the Supreme Court 3-2, with O'Higgins CJ and Henchy J handing down the principal judgments for the majority and the minority respectively. The Chief Justice of the day rejected the applicant's contention in respect of Article 38, but in any event supposed that the words of Article 34.4.3° meant what they appeared to mean. And he presented his understanding of the approach to be taken to constitutional interpretation in the following terms:

The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course, the Constitution must be looked at as a whole and not merely in parts and, where doubt or ambiguity exists, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words must, however, be given their plain meaning unless qualified or restricted by the Constitution itself.⁴⁵

Henchy J, on the other hand, was satisfied the common law norm had been incorporated into Article 38, and that the words of Article 34.4.3°, in those circumstances, should not be given a literal reading or taken in isolation. He supposed that such a literal and isolationist approach was not 'a correct method of constitutional interpretation' in general. And he presented his understanding of Irish constitutional interpretation as follows:

Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that 'the letter killeth, but the spirit giveth life'. No single constitutional provision... may be isolated and construed with undeviating literalness.⁴⁶

Henchy J followed this up some years later in his judgment for the Court in a case called *Tormey v Ireland* – the facts of which need not detain us here – with a paragraph in the same broadly 'purpose-based' vein:

The rule of literal interpretation, which is generally applied in the absence of ambiguity or absurdity in the text, must here give way to the more fundamental rule of constitutional interpretation that the Constitution must be read as a whole and that its several provisions must not be looked at in isolation, but be treated as interlocking parts of the general constitutional scheme. This means that where two constructions of a provision are open in light of the Constitution as a whole, despite the apparent unambiguity of the provision itself, the court should adopt the construction which will achieve the smooth and harmonious operation of the Constitution. A judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental purposes of the Constitution. It follows from such a global approach that, save where the

⁴⁵ [1982] IR 384, 397-398 (O'Higgins CJ)

⁴⁶ [1982] IR 384, 426 (Henchy J).

Constitution itself otherwise provides, all its provisions should be given due weight and effect and not be subordinated one to the other...The true purpose and range of a Constitution would not be achieved if it were treated as no more than the sum of its parts.⁴⁷

Now, in *Heneghan*, Murray J approves this analysis from Henchy J's judgment in *Tormey*, and – as we have seen – his analysis from *O'Shea* as well. But the key takeaway from Murray J's judgment in this respect is that he seems keen to bring greater nuance to the supposed 'Henchy v. O'Higgins binary' on Irish constitutional interpretation. He is at pains to point out that the disagreement between the judges in *O'Shea* was fundamentally as to whether the common law rule had been incorporated into Article 38. Sure, they had 'diverged in the emphasis they placed on language, purpose, history and background', (i.e. as they pertain to interpreting the Constitution), but the 'actual decision in *O'Shea* is properly viewed as turning on a difference not of interpretative principle, but of application'.⁴⁸ And on this basis he cautions against what he sees as the 'tendency to stress that Henchy J was in the minority in *O'Shea* and to contrast the terms in which he expressed his conclusion with those in the majority judgments'.⁴⁹ Murray J similarly points to the fact that O'Higgins CJ had very much qualified his assertions regarding literal interpretation.⁵⁰ (Read the short excerpt from O'Higgins CJ's judgment again). And Murray J himself likewise qualifies his emphatic endorsement of Henchy J's approach with an important proviso. The paragraph in which Murray J sets out the terms of that proviso demands our attention:

Parts of [Henchy J's] judgment have attracted some criticism and there can be no doubt but that unless carefully constrained the use of concepts such as 'constitutional order and modulation' or 'the fundamental purposes of the document' as mechanisms of interpretation raises valid concerns. For my part, I do not read the judgment in *O'Shea* – or any other decision of this Court – as necessarily requiring that anything other than the text of the instrument, rights that have been derived from, and general principles and purposes that can be related to, the text of the Constitution (together with clear evidence of context and purpose...) can be resorted to in the process of interpretation. That reflects the limitations suggested by Clarke CJ on the deduction of what used to be called 'unenumerated rights' in *Friends of the Irish Environment*... Those limitations are sharper again when it comes to the exercise of constitutional interpretation: the authorities make it clear that the text of any given Article both marks the proper starting point for, and delineates the finishing line of, the process of construction. Subject to that proviso, I do not believe that Henchy J's analysis can or should now be seriously questioned as *the* authoritative explanation of how a court should view *any* issue of interpretation presented by *any* Article of the Constitution.⁵²

⁴⁷ [1985] IR 289, 295-296 (Henchy J).

⁴⁸ [2023] IESC 7, [64] (Murray J).

⁴⁹ [2023] IESC 7, [64] (Murray J).

⁵⁰ [2023] IESC 7, [67] (Murray J), quoting O'Higgins CJ, [1982] IR 384, 397 (italics added).

⁵² [2023] IESC 7, [70] (Murray J). (Emphasis in original). I should point out that Murray J, when referencing the criticism that parts of Henchy J's judgment had attracted, cites to scholarly work including to the criticism set out in Oran Doyle and Tom Hickey, *Constitutional Law: Texts, Cases and Materials* (Clarus Press, 2nd ed, 2019), 63-65. His reference later in the passage is to the views articulated by Clarke CJ in *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49. I consider the comparison between Murray J's and Clarke CJ's analyses in my concluding section.

As for *Curtin*, in this case the applicant – a judge of the Circuit Court – had been acquitted by direction of very serious criminal charges after the trial judge found that the evidence against him had been procured on foot of a spent warrant.⁵³ The Houses of the Oireachtas subsequently initiated a ‘removal from office’ process pursuant to Article 35.4.1°, which Judge Curtin challenged on various procedural grounds. The trouble was that the text of this provision says next to nothing about how such a removal from office might occur – in contrast to Article 12.10, which provides considerable detail around how a President might be impeached. Article 35.4.1° simply states that a judge ‘shall not be removed from office expect for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal’. The question for the judges in *Curtin* was therefore as to whether they could fill in the silence, and, if so, on what basis and with what content. Should they read the procedural detail from Article 12.10 into the provision? Or might they draw on broader principles around judicial independence and procedural fairness?

The Supreme Court in *Curtin* was satisfied that Article 35.4.1° was silent in respect of certain important procedural matters, and it was happy to fill in that silence by drawing on various factors including those principles. The result – as Murray J puts it in *Heneghan* – ‘was a process that bore closer resemblance to the specific procedures identified for the impeachment of the President than to the bare text of Article 35.4.1°’.⁵⁴ And so Murray J’s main takeaway from *Curtin* was that it shows ‘precisely how – and why – there will be circumstances in which a seemingly clear constitutional provision must be supplemented by reference to broader but clearly ascertainable constitutional principles, and how these may combine to produce an interpretation of a provision that is radically different from that suggested by a clinical analysis of only the bare text’.⁵⁵

But *Curtin* had further significance for Murray J’s judgment. Counsel for the respondents in *Heneghan* had sought to rely on certain aspects of Murray CJ’s judgment for the Supreme Court. (It might be helpful to point out that in 2006, in *Curtin*, the then Chief Justice, John Murray, handed down the judgment of a unanimous Supreme Court. He is not to be confused with Judge Brian Murray, who delivered the principal judgment in *Heneghan* in 2023). They pointed out that Murray CJ had not referred at all to Henchy J’s judgment in *Tormey*, despite its having been cited by counsel in the case (ie in *Curtin*). They further pointed out that Murray CJ had not expressly approved Henchy J’s key passage on interpretation from his judgment in *O’Shea* (though Murray CJ did refer to that passage, as we shall see), and that Murray CJ had described the supposedly conflicting passage from O’Higgins CJ’s judgment as ‘particularly authoritative’.⁵⁶ And they pointed out that Murray CJ had also suggested that ‘words denoting numbers, places or identified persons admit of no debate’⁵⁷ – which, to put it mildly, seemed favourable to the State’s case in respect of Article 18.4 in *Heneghan*.

⁵³ For analysis of the case, see Laura Cahillane and Tom Hickey, ‘Impeachment’ in Irish Constitutional Law’ in Chris Monaghan and Matthew Flinders (eds), *British Origins and American Practice of Impeachment* (Routledge, 2024), 147-151.

⁵⁴ See [2023] IESC 7, [78] (Murray J).

⁵⁵ See [2023] IESC 7, [78] (Murray J).

⁵⁶ [2006] IESC 14, [91] (Murray CJ), as referenced in [2023] IESC 7, [73] (Murray J).

⁵⁷ [2006] IESC 14, [91] (Murray CJ).

Murray J felt this was all to ‘over analyse’ his namesake’s judgment in *Curtin*, however.⁵⁸ As we have seen, he did not see such a contrast between the positions taken by O’Higgins CJ and Henchy J in the first place. But he also pointed to certain other lines of emphasis in the 2006 judgment. Murray CJ had referred to the need to strike a balance ‘between the effect to be given to the literal meaning of particular words and the need to have regard to the terms of the Constitution as a whole’.⁵⁹ He had supposed that ‘where the text is silent or the meaning of words is not totally plain, resort may be had to principles, such as the obligation to respect personal rights, derived from other parts of the Constitution’.⁶⁰ And he had indicated that ‘the historical context of particular language may, in certain cases, be helpful’.⁶¹

ii) *Where now stand the ‘Bacik principles?’*

Those dicta from *O’Shea*, *Tormey* and *Curtin* had come to enjoy prominence in the caselaw whenever questions of constitutional interpretation arose, and they were again to the fore in *Bacik v An Taoiseach*.⁶² This was a rather technical case brought in June of 2020 concerning the question as to whether the Taoiseach had the constitutional authority to advise the President to convene the first meeting of the new Seanad in circumstances where only forty-nine of the sixty new senators were in office. (Recall that under Article 18.1 the Seanad is to be ‘composed of sixty members, of whom eleven are to be nominated members and forty-nine shall be elected members’. Recall further that under Article 18.3 the nominated members are to be nominated by the incoming Taoiseach). The case arose from the fact that the Dáil that had been elected the previous February had not yet managed to elect a new Taoiseach, meaning that the eleven ‘Taoiseach’s nominees’ had not yet been nominated. And so *Bacik* hinged upon the meaning of the words in Article 18.8 – ‘...the first meeting of Seanad Éireann after the general election shall take place on a day to be fixed by the President on the advice of the Taoiseach’. Did the reference to ‘Seanad Éireann’ necessarily mean the Seanad as composed in accordance with Article 18.1?

The question gave rise to a general analysis of constitutional interpretation, and so to that older line of cases. And that led to the list of principles at paragraph 80 in the *Bacik* judgment:

The following principles flow from the approach taken in *Curtin* and from the case-law cited by Murray CJ in that case:

- a) The starting point is to carefully consider the words used in a constitutional provision with a view to identifying their meaning.
- b) ...[I]t may also be necessary to consider the meaning of the words in the Irish language version of the text...
- c) Where the words used are clear and unambiguous, they are to be construed in their literal sense. Thus, for example, words denoting numbers, places or identified persons admit of no debate.

⁵⁸ [2023] IESC 7, [73] (Murray J).

⁵⁹ [2006] IESC 14, [73] (Murray CJ), as quoted in [2023] IESC 7, [75] (Murray J).

⁶⁰ [2006] IESC 14, [95] (Murray CJ), as quoted in [2023] IESC 7, [75] (Murray J).

⁶¹ [2006] IESC 14, [73] (Murray CJ), as quoted in [2023] IESC 7, [75] (Murray J).

⁶² [2020] IEHC 313.

- d) The words used in the provision in issue cannot be construed in isolation. They must be construed in the context of the Constitution as a whole.
- e) If a literal interpretation of one provision might bring it into conflict with the literal meaning of another provision, then it is legitimate to resort to the harmonious approach with a view to interpreting both provisions in a way which avoids inconsistency. In this context, while Murray CJ in *Curtin* did not expressly say that the harmonious interpretation favoured by Henchy J in *O’Shea* should be applied, he did not dissent from the observations of Henchy J to that effect in the passage quoted by him. It is interesting to observe that, although *Tormey* was cited by counsel in *Curtin*, the judgment of the Court does not refer to it. Having regard to the emphasis placed by the Supreme Court in *Curtin* on the principle that the words of the constitutional provision in issue should be the first port of call, it seems to us that the harmonious approach will only be taken in cases of apparent inconsistency. It will not be necessary to go beyond a literal interpretation of a constitutional provision unless such an interpretation gives rise to an apparent conflict with some other provision of the Constitution.
- f) In cases of doubt, ambiguity, inconsistency or silence, it is legitimate to have regard to factors such as the historical context. Although the issue did not arise in *Curtin*, this would appear to include, for example, a relevant amendment to the Constitution...⁶³

The application of these principles in *Bacik* itself was not especially complicated. The judges on the Divisional Court were satisfied that the words in Article 18.1 were ‘clear and unambiguous’ and that they ‘tell us what Seanad Éireann is composed of’, that is, sixty members in total.⁶⁴ They were further satisfied that there was ‘no conflict’⁶⁵ between that provision and Article 18.8, with the result that it was ‘not necessary to resort to a harmonious interpretation’ in the case.⁶⁶ The reference to ‘Seanad Éireann’ in the latter provision was thus a reference to the Seanad as comprising ‘both the elected and the nominated members’.⁶⁷

When it came to *Heneghan* the principles did not give such clear prescriptions. Unsurprisingly, counsel for the respondents laid emphasis on paragraph c), stemming as it did from Murray CJ’s corresponding line in *Curtin*. They insisted that Article 18.4.1° referred to numbers of identified persons in precisely the manner contemplated.⁶⁸ And they argued that Articles 18.4.1° and 18.4.2° were ‘technical’ provisions in the manner contemplated by Hardiman J in *Howlin v Morris*, such that, as Hardiman J had put it, it was appropriate to adopt ‘a ‘narrower and less liberal’ interpretative approach (as distinct from the approach that might be taken to a broadly framed provision addressing a fundamental right, for instance).

⁶³ [2020] IEHC 313, [80].

⁶⁴ [2020] IEHC 313, [84].

⁶⁵ [2020] IEHC 313, [82].

⁶⁶ [2020] IEHC 313, [82].

⁶⁷ [2020] IEHC 313, [95].

⁶⁸ [2023] IESC 7, [79] (Murray J).

But again Murray J was not convinced. And again he took some time to clarify – or to revise, I suggest – the principles in question. ‘Paragraphs a), b), d) and f) of this most useful distillation’, he says, ‘are clear and undoubtedly correct’.⁶⁹ And the remaining paragraphs ‘if read together... are also not an inaccurate encapsulation of the cases’. But counsel for the respondents had sought to construe some ‘in isolation from’ the others, which was an approach that was ‘liable to mislead’. And so Murray J proceeds to put a Henchy-based rinse through the *Bacik* principles:

...the statement in para. (c) that where words are clear and unambiguous they are to be construed in their literal sense is true only once it is appreciated that seemingly clear and unambiguous language may not actually be clear and unambiguous at all once understood in the light of other provisions of the Constitution, the general principles that underlie that document...and the overall context and purpose of the provision (as indeed I think is acknowledged in (d)). The statement in (e) that resort may be had to the ‘*harmonious*’ approach where there is a conflict between the literal interpretation of two provisions is right, but this is not the only circumstance in which this can happen: to rephrase what Henchy J said in *O’Shea*...a judicial attitude of strict construction should be avoided when it would allow the imperfection or inadequacy of the words used to defeat or pervert any of the fundamental principles of the Constitution...⁷⁰

He continues, building towards his interpretative crescendo:

The historical context may of course be relevant in any case of doubt, ambiguity, inconsistency or silence. Indeed some of the judgments in *Maguire v Ardagh*... show that in many such cases it may be quite important. But there is no case, and no provision – no matter how clear it may be – in which it is other than appropriate to understand and have regard to the overall context in which that provision was adopted. That context will often be indivisible from the purpose of the provision’.⁷¹

And this then sets up the key paragraph in the *Heneghan* ruling on the key question of constitutional interpretation:

These various strands come together in this way. The Constitution, as the basic law of the State, is animated by a number of fundamental principles and is intended to achieve its various purposes through a sequence of provisions intended to be read as one, and designed to function collectively. That understanding dictates the proper approach to the interpretation of any individual part of the instrument. As with any legal document, the intent of those adopting it is informed in the first instance by the language they have used... but the exercise of interpreting that language involves not merely deducing the meaning of the words appearing in the provision in question, but also reconciling the text of the Article with the document in its entirety while at the same time ensuring that both are analysed in the light of their underlying purpose. The predominant importance of that purpose, and the fundamental principles that inform it, means that in undertaking the exercise of constitutional interpretation the courts must incline more to flexibility in subordinating the strictly literal interpretation of the text in order to attain a

⁶⁹ [2023] IESC 7, [83] (Murray J).

⁷⁰ [2023] IESC 7, [83] (Murray J).

⁷¹ [2023] IESC 7, [84] (Murray J).

construction that is both internally harmonious, and that achieves a clearly ascertainable purpose, than might be the case when conducting the exercise of interpreting ordinary legislation.⁷²

This of course brought the ‘historical context’ and ‘purpose’ of the Seventh Amendment to the centre of Murray J’s interpretative stage. And it meant that Judge Murray’s blue pencil was being sharpened. Because attention was now turning away somewhat from the meaning of the words used in the text of Article 18, and towards what might have been in the minds – not so much of the ‘framers’⁷³ of the amendment – but rather of the institutional actors who proposed it, and of the people who voted to approve it.

4. Judge Murray’s blue pencil (the sharpening stage)

At the trial in the High Court two scholars gave evidence as to what they understood the purpose of the Seventh Amendment to have been. Laura Cahillane, a constitutional lawyer and historian at UL, and Eoin O’Malley, a political scientist at DCU, had drawn upon various sources including newspaper coverage around the campaign, statements made during relevant Oireachtas debates and by relevant Government ministers generally, and relevant Government advertising.⁷⁴ Cahillane testified that the amendment had ‘had a dual purpose’.⁷⁵ It arose in the first place ‘because of the planned dissolution of the NUI’ but later came to be ‘almost exclusively concerned with the extension of the franchise’.⁷⁶ O’Malley disagreed. In his view the amendment had had ‘one main purpose’, which was to facilitate the dissolution of the NUI.⁷⁷

The fact that this evidence was contested was one reason for the reluctance of the Supreme Court to set much store by it. But the main reason was that this kind of evidence generally – while by no means inadmissible – was not usually appropriate for the determination of the intention of those who might ratify a constitutional amendment. That is, that the same difficulties apply in this context as apply in the context of drawing upon parliamentary debates or ministerial statements when interpreting statutory provisions. As McGuinness J pointed out in her judgment in *Crilly v Farrington*, the process of legislation by the Oireachtas is ‘essentially collective’⁷⁸ – and different legislators approve legislation for different reasons, not all of them necessarily understanding or intending the various provisions in the same ways. It would therefore be ‘a misleading oversimplification of this process to rely, in interpreting a statute, on ministerial statements alone’.⁷⁹ And similarly in the case of the process around amending the Constitution. As Murray J puts in *Heneghan*: ‘... a court can rarely be confident that pre-enactment drafts, parliamentary debates around the Constitution or indeed contemporaneous public discussion illuminate in any way the intent of those ratifying the Amendment...’⁸⁰

⁷² [2023] IESC 7, [85] (Murray J).

⁷³ See what Murray J says in respect of the notion of ‘the framers’ at [2023] IESC 7, [88] (Murray J).

⁷⁴ [2023] IESC 7, [93]-[97] (Murray J).

⁷⁵ [2023] IESC 7, [94] (Murray J).

⁷⁶ [2023] IESC 7, [96] (Murray J).

⁷⁷ [2023] IESC 7, [97] (Murray J).

⁷⁸ [2001] IESC 60, (McGuinness J), as quoted at [2023] IESC 7, [87] (Murray J).

⁷⁹ [2001] IESC 60, (McGuinness J), as quoted at [2023] IESC 7, [87] (Murray J).

⁸⁰ [2023] IESC 7, [87] (Murray J).

But it was different where there might be ‘reliable evidence as to what the Houses of the Oireachtas as institutions (as opposed to the stated positions of individual members) believed they were proposing, or what the People might reasonably have understood they were adopting...’⁸¹ Murray J saw ‘no reason’ why such evidence, if it were available, could not ‘be taken into account in the construction of the provision’.⁸² And he had an eye here on one particular item of evidence that had come up for discussion in the case – an item that ended up being decisive to its resolution. This was the formal ‘statement of the proposal’ which had been set out in an appendix to section 1 of the Referendum (Amendment) Act 1979. (This Act was essentially procedural legislation governing the conduct of the referendum in question). The purpose of the explanatory statement was that it would be set out on the polling cards sent to each elector, for instance, and displayed by the presiding officer in the precincts of their polling station. It would also be read out to incapacitated voters in the event that they did not understand the proposal itself. And that statement read as follows:

The Seventh Amendment of the Constitution (Election of Members of Seanad Éireann by Institutions of Higher Education Bill, 1979, proposes the election by universities and other institutions of higher education specified by law of such number of members of Seanad Éireann, not exceeding 6, as may be specified by law. Those so elected would be in substitution for an equal number of the members elected at present (3 each) by the National University of Ireland and the University of Dublin. The Bill also proposes that nothing in Article 18 of the Constitution shall prohibit the dissolution by law of those Universities.⁸³

Now Murray J acknowledges the existence and apparent implication of the phrase ‘as may be specified by law’.⁸⁴ He recognises that a ‘trained lawyer’ might understand from it that the Oireachtas was being given ‘a widely drawn power as to whether it would, in fact, enact *any* such laws...’⁸⁵ But he is satisfied that the statement ‘reads more naturally as stating that the ‘*proposal*’ envisages the extension of the franchise to ‘*universities and other institutions* with the Oireachtas enjoying the power to determine by law which institutions would so benefit’.⁸⁶ Indeed he is rather emphatic on the point:

[I]n no sense could it be said that this ‘*statement of the proposal*’ communicates that the effect of the Amendment, if adopted, will be to vest in the Oireachtas an unbridled discretion to add, or not add, additional institutions to the Seanad franchise. Nor does it suggest that in fact the effect of the Amendment if adopted would be to enable the further concentration of the franchise for all the university members in a single institution: on the contrary, all references to universities and institutions of higher education in the statement are framed in the plural.⁸⁷

⁸¹ [2023] IESC 7, [89] (Murray J) (brackets in original).

⁸² [2023] IESC 7, [89] (Murray J).

⁸³ As set out at [2023] IESC 7, [102] (Murray J).

⁸⁴ [2023] IESC 7, [103] (Murray J).

⁸⁵ [2023] IESC 7, [105] (Murray J) (emphasis in original).

⁸⁶ [2023] IESC 7, [105] (Murray J) (emphasis in original).

⁸⁷ [2023] IESC 7, [103] (Murray J) (emphasis in original). Hogan J is of the same view. As he puts it, ‘...the context of [this] Amendment as disclosed by this official documentation really admits of no conclusion other than that the People did indeed intend that the franchise...should be extended beyond the pre-existing University of Dublin and National University of Ireland constituencies’. [2023] IESC 7, [36] (Hogan J).

This item of evidence was in a different category to those such as ministerial statements and government advertising.⁸⁸ The explanatory statement – insofar as it was ‘sent to every elector at their home’, ‘displayed at every polling station’, and ‘read by the presiding officer to any incapacitated elector who was unable to understand the proposal’ – was ‘as reliable an account of what the People might reasonably have believed they were voting for as one could conceive’.⁸⁹ Moreover, ‘and at least as importantly, this statement reflected the understanding of the Houses of the Oireachtas themselves as to what was being proposed’.⁹⁰

5. Judge Murray’s blue pencil (the deployment stage)

Recall that Murray J’s conclusion in *Heneghan* was very carefully formulated. It was not merely that the Oireachtas had an obligation to legislate so as to reconfigure the franchise in respect of these six seats. It was that the Oireachtas had an obligation to legislate so as to reconfigure it such that it would include ‘one or more institutions of higher education *other* than (but in addition to) NUI or TCD’.⁹¹ The conclusion might thus be thought to have two distinct parts. The first part was that the word ‘may’ as it appears in the opening line of Article 18.4.2° – ‘*Provision may be made by law for the election...*’ – should be taken to mean ‘must’.⁹² And the second was that the ‘must’ was to legislate so that the franchise would be reconfigured in accordance with that quite prescriptive formula.

The first part was the easy part, relatively speaking. And Murray J provides a few different justifications for his arriving at it. It stems fundamentally from that view that the Seventh Amendment was so poorly drafted as to render Article 18.4 technically unworkable, with the implication that a literal approach to interpretation had therefore been rendered inapplicable.⁹³ Related to this was the idea that the words ‘shall’ and ‘may’ as they appear in Article 18.4 would in some instances have to be taken to have meanings fundamentally different from their ordinary meanings (ie in Murray J’s view). If the Oireachtas were to in any way exercise its apparent power under Article 18.4.2° to revise the franchise in respect of these seats – to take my earlier examples, if it were to replace one of the NUI seats with a seat elected by UL and one of the TCD seats with a seat elected by Letterkenny IT – then the word ‘shall’ as it appears in Article 18.4.1° (i) and (ii) would have to be taken to mean ‘may’.⁹⁴ Or in the event that the NUI were dissolved then the word ‘may’ as it appears in Article 18.4.2° would have to be taken to mean ‘must’⁹⁵ (i.e. otherwise it would be impossible to fill the three ‘NUI’ seats). The suggestion overall, then – as far as Murray J was concerned – was that it was not so implausible that the word *may* in that provision would be taken to mean *must* ‘for all purposes’, as per Mr. Heneghan’s claim.⁹⁶

But the most fundamental justification for this first part of the conclusion was rooted in the fact that the provision had been inserted following a Referendum, and that the context of that

⁸⁸ See also [2023] IESC 7, [35] (Hogan J) on this point.

⁸⁹ [2023] IESC 7, [103] (Murray J).

⁹⁰ [2023] IESC 7, [107] (Murray J).

⁹¹ [2023] IESC 7, [4] (Murray J) (emphasis and brackets in the original).

⁹² [2023] IESC 7, [133] (Murray J).

⁹³ That is, it was simply ‘[not] capable of literal interpretation’ – thus licensing this more creative construction of this key phrase [2023] IESC 7, [134] (Murray J).

⁹⁴ This suggestion is made by Murray J. See [2023] IESC 7, [44], [136] (Murray J).

⁹⁵ [2023] IESC 7, [136] (Murray J).

⁹⁶ [2023] IESC 7, [136] (Murray J).

referendum – on the evidence of the ‘statement of the proposal’ – was that it would do more than merely vest a discretionary power in the Oireachtas. Armed now with that provisional license to draw on ‘historical context’ (i.e. it was provisional on there being a lack of clarity in the amendment), Murray J reasons as follows:

... This Amendment was presented to the People by the institutions of State responsible for its formulation and proposal as being one that would be followed by legislation extending the Seanad university franchise from TCD and NUI to other institutions of higher education... It communicated an intention to change, not to amend the Constitution so that everything could stay as it was. The provisions of the Referendum (Amendment) Act, 1979 and the statement [of the proposal] appended to s. 1 thereof affords a uniquely powerful pointer that if Article 18.4.2 said that the Oireachtas ‘*may*’ legislate following the adoption of the Amendment, it actually meant that it *would*, and therefore, it *must*.⁹⁷

Judge Murray’s blue pencil has thus been deployed. It has drawn a line through the word ‘*may*’ in Article 18.4.2° and replaced it with the word ‘*must*’. But it must also have made its mark on Article 18.4.1°. It may be that it has scratched out the word ‘*shall*’ as it appears in parts (i) and (ii) of that subsection (but not as it appears in part (iii), of course) and replaced them with the word ‘*may*’ in each instance. Or it may be that it has added an explanatory note somewhere in Article 18 to the effect that Article 18.4.1° (i) and (ii) are now ‘‘temporary’ or ‘transitional’’⁹⁸ in nature, applying only until the obligation under Article 18.4.2° to reconfigure the franchise has been met (i.e. the obligation under the now-tweaked version of the latter clause).

But the work of the blue pencil is not yet complete. Because even taking the word ‘*may*’ to mean ‘*must*’, that leaves open the possibility that the Oireachtas, while being obliged to legislate, would be entitled to do so in a manner that left the franchise entirely as it was, or in a manner that replaced one of the three TCD seats with a fourth NUI seat, for instance. Indeed it left open the possibility that it would be entitled to concentrate the franchise in respect of all six seats in one of the two ‘universities’ referenced in Article 18.4.2°(i) – in TCD alone, for example – just as it would be entitled to concentrate the entire franchise in any single ‘institution of higher education’ that might fall under the category referenced in 18.4.2°(ii) – in Letterkenny IT alone, for instance. As we saw, these conclusions seem to follow from the most natural reading of the words in the main body of Article 18.4.2°, and especially from the first word in the phrase ‘one or more of the following institutions...’

How then did Murray J read the words ‘*one or more of the following*’ to mean ‘*two or more of the following*, but with one, at least, being one of the two specified in the first part of what follows, and another, at least, being an institution *other than* those specified two?’⁹⁹ Well, again that Henchy-based take on constitutional interpretation is critical. And so too is that ‘statement of the proposal’. Its ‘plain language’, in Murray J’s view, indicates that the franchise ‘*would* be extended to other institutions of higher education’.¹⁰⁰ It would therefore be perverse if the Oireachtas were entitled to legislate in a manner that would not so extend it.

⁹⁷ [2023] IESC 7, [140] (Murray J). (Emphasis in the original).

⁹⁸ Murray J uses that phrase in [2023] IESC 7, [45] (Murray J).

⁹⁹ I should clarify that these are my own words, not Murray J’s.

¹⁰⁰ [2023] IESC 7, [154] (Murray J) (Emphasis in the original).

But for this part of the conclusion – ironically, perhaps – it is the text of certain parts of Article 18 and, more specifically, the formulation of the words in a certain part of that text, that seems to do the heavy lifting. Murray J is influenced by the fact that Article 18.6 had not been rephrased as part of the changes wrought by the Seventh Amendment. (This is that provision that reads: ‘The members of Seanad Éireann to be elected by *the Universities* shall be elected on a franchise and in the manner to be provided by law’.) In his view, this tended to suggest that the understanding in 1979 had been that ‘there was *always* going to be at least one of these universities forming part of the constituency’.¹⁰¹ But he is especially taken by the ‘odd’ formulation in the main body of Article 18.4.2°, whereby the two sets of institutions – the universities and the other institutions of higher education – are separated and enumerated in the manner that they are. He could see no reason as to why they would be split in this manner other than that it envisaged his particular formula:

It would make some sense that the institutions are split in this way if the intention was the Oireachtas had to ensure the inclusion of institutions from both (i) *and* (ii) in any final legislative prescription of the Seanad university constituencies. It is, in fact, hard to conceive any other substantive (as opposed to presentational) reason the provision would have been so framed. Thus construed, the words ‘*by one or more of the following institutions*’ assumes that what follows are read as conjoined so that the reference is to one or more of the following institutions from (i) *and* (ii). So, on this basis... the end result would be that the franchise could be vested in NUI and TCD *and* one or more other institutions, in NUI and one or more other institutions, or in TCD and one or more other institutions.¹⁰²

Murray J recognises that this part of his interpretative conclusion ‘is not the literal, or for that matter, obvious, interpretation’ of the words in the main body of Article 18.4.2°.¹⁰³ And he all but acknowledges that a blue pencil has been at work. He grants that his interpretation ‘sits uneasily with the manner in which the noun ‘*one*’ appears in Article 18.4.2’, and that it ‘assumes the word ‘*and*’ joins (i) and (ii)’ in the text of the provision.¹⁰⁴

5. Interpretative implications (and was the outcome justified?)

I opened with the suggestion that the significance of Murray J’s judgment, over the longer haul, will likely be for what it says about how to approach the interpretation of the Irish Constitution. There is much in the judgment that addresses that question at the level of theory. And there is little in that theory with which I would quibble. Murray J’s revision of the ‘*Bacik* principles’ is subtle but significant: it may well have the effect of consigning them to the constitutional dustbin. And we should not miss that he reins in the more nebulous concepts on the fringes of Henchy J’s interpretative analysis, tightening the link with the text of the Constitution. (Much like Denham CJ had done with respect to Henchy J’s ‘human personality test’ in *Fleming v Ireland*.)¹⁰⁵ Indeed,

¹⁰¹ [2023] IESC 7, [153] (Murray J).

¹⁰² [2023] IESC 7, [151] (Murray J). (Emphasis and brackets in the original).

¹⁰³ [2023] IESC 7, [152] (Murray J).

¹⁰⁴ [2023] IESC 7, [152] (Murray J).

¹⁰⁵ *Fleming v Ireland* [2013] IESC 19. That is, Denham CJ endorsed Henchy J’s test for the identification of rights falling to be protected under Article 40.3 insofar as she supposed that it ‘provides a useful structure and focus for analysis’. But she goes on to conclude that it could not be thought to mean that Marie Fleming had a right to have assistance in terminating her life, insofar as it would be hard to justify the idea that such a right was ‘fundamental to the personal standing of the individual...*in the context of the social order envisaged by the Constitution*’. (emphasis

it seems to me that a kind of reined-in, text-and-structure strain of Henchyism is discernible more generally now in contemporary Irish constitutional law. (Which is a broadly good thing, in my view, from the general perspective of legitimacy, and is certainly preferable to what we might think of as barely-constrained, look-into-their-hearts strain of Walshism).¹⁰⁶ Indeed, and further in this vein, Murray J's take on constitutional interpretation seems broadly in line with the thinking articulated over the past decade or two by other authoritative judicial sources. It is striking, for instance, that Murray J, in support of his own interpretative approach, invokes Clarke CJ's preference for the phrase 'derived rights' over the phrase 'unenumerated rights' in respect of those unexpressed rights that might fall to be protected under Article 40.3. (As we saw in that key extract from Murray J's judgment above).¹⁰⁷ In *Friends of the Irish Environment*, Clarke CJ supposed that his preferred phrase better captured how it was that judges were to find some 'root of title in the text or structure of the Constitution from which the right in question can be derived', whereas the older and more established phrase might be taken to imply that judges could 'simply... look into their hearts and identify which rights they think should be in the Constitution'.¹⁰⁸ And likewise Murray J insists that his endorsement of Henchy J's 'purposivism' should in no sense be taken to imply that judges can resort to just any old 'purpose', but rather – and recalling something like Ronald Dworkin's 'criterion of fit' – that they had to be able to 'relate' any purpose relied upon to the text of the Constitution.¹⁰⁹

Similarly, Murray J's theoretical analysis might be thought to chime with that articulated by O'Donnell CJ throughout his jurisprudence and academic commentary.¹¹⁰ (O'Donnell CJ was in the majority in *Heneghan*, of course, supporting Murray J's judgment). In his 'Sleep of Reason' article, O'Donnell refers to the humdrum and fundamentally legal interpretative methodologies deployed by judges over the centuries in humdrum and fundamentally legal contexts such as wills and contracts and statutes: that these – rather than the more exciting methodologies employed 'by the singers of songs and the dreamers of plays' – are the methodologies to be deployed by judges in the interpretation of a written constitution too.¹¹¹ And Murray J appears to be pointing judges, when interpreting the Irish Constitution, in the direction of such humdrum methodologies. We have seen that he sees 'the text of any given Article' as marking 'both...the proper starting point

added). Conor Casey and Oran Doyle have suggested that Denham CJ thereby 'tethered Henchy J's approach more closely to the text of the Constitution than perhaps he had done'. See Conor Casey and Oran Doyle, 'Higher Law or Great Charter of the Irish People? The Constitution under the New Supreme Court' (forthcoming, Dublin University Law Journal).

¹⁰⁶ For a theoretical exploration of the idea of a legitimacy-based approach to judicial review, see Tom Hickey, 'Legitimacy – *Not Justice* – and the Case for Judicial Review' (2022) 42(3) Oxford Journal of Legal Studies 983. For an application of the idea in the Irish setting, specifically, see Tom Hickey, 'How to Adjudicate a Rights Case in Irish Constitutional Law: *Gemma O'Doherty & John Waters v Minister for Health*' (2023) 5 Irish Supreme Court Review 33.

¹⁰⁷ See note 52 above, and accompanying text.

¹⁰⁸ [2020] IESC 49, [8.6] (Clarke CJ).

¹⁰⁹ Indeed Murray J seems to be here addressing – whether intentionally or otherwise – the objections to Henchy J's approach set out in Oran Doyle and Tom Hickey, *Constitutional Law: Texts, Cases and Materials* (Clarus Press, 2nd ed, 2019), 63-65. On Dworkin and the 'criterion of fit', see Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

¹¹⁰ It chimes, for instance, with the analysis he sets out so comprehensively in his judgment in *O'Doherty and Waters v Minister for Health* [2022] IESC 32 (O'Donnell CJ). For analysis, see Tom Hickey, 'How to Adjudicate a Rights Case in Irish Constitutional Law: *Gemma O'Doherty & John Waters v Minister for Health*' (2023) 5 Irish Supreme Court Review 33.

¹¹¹ Donal O'Donnell, 'The Sleep of Reason' (2017) 40 (2) Dublin University Law Journal 191, 210.

for, and...the finishing line of, the process of construction'.¹¹² And his endorsement of reliance on ideas like 'historical context' is qualified with reference to lawyerly concepts. He doubts, for instance, that 'pre-enactment drafts, parliamentary debates around the Constitution or indeed contemporaneous public discussion illuminate in any way the intent of those ratifying [an] Amendment', and – even in the case of 'reliable' and 'institution-based' evidence such as that which was decisive in the particular case – he sees this evidence, in general, as 'without a doubt...of less impact than other interpretative sources'. It is of less impact than 'other Articles of the instrument', for instance, or than 'established principles such as those of fair procedures'. And it is to 'treated cautiously where it is deployed to expand or reduce the literal meaning of an Article where the text is otherwise clear and capable of functioning without evident absurdity'.¹¹³ (We constitutional lawyers and scholars – indeed judges too – must take great care not to overlook this aspect of the *Heneghan* judgment into the future: the notion that the provision was not merely poorly drafted but rather so haplessly drafted as to be legally and technically unworkable was critical to the licensing of the interpretative innovation in the case. This is *not* a general license; it seems to me). Indeed Murray J points out that when having regard to the 'overall context' in which a given provision is adopted, judges might appreciate that – '*as with any legal document*' – the intent of those adopting it 'is informed in the first instance by the language they have used'.¹¹⁴

That is all at the level of theory, however. And my concern is that that theory may come to be understood in the future with reference to how it was applied in practice in the particular case; that is, with reference to the extraordinarily high interpretative hurdles that the judges managed to clear to get to the result. In that regard, I should acknowledge some playfulness on my own part when I refer to 'Judge Murray's blue pencil'. He should not be thought of as having circumvented the amendment procedure established in Articles 46 and 47; he was interpreting the Constitution as it stood. The rigour and sophistication of his reasoning – and its fundamentally legal orientation – should also be acknowledged. And I might add that the *Heneghan* ruling overall undoubtedly supported the 'democratic responsiveness' of the polity in the sense contemplated by Rosalind Dixon in her new book *Responsive Judicial Review*.¹¹⁵ That is, if we step back from the strict language of the provisions that were inserted by the Seventh Amendment, the ruling surely tends to *respond to*, as Hogan J puts it, 'the sovereign will of the People as democratically expressed through the referendum process in the manner envisaged by Article 46 and Article 47' (which process Hogan J supposes 'is the most fundamental and core feature of our constitutional identity as a State').¹¹⁶ It counteracts what Hogan J describes as the 'thwarting' of that will by 'an obvious failure of legislative inertia' – in just the kind of scenario that Dixon has in mind in her proposed theory of judicial review.¹¹⁷

But it is striking to me that Dixon – in this book that she pitches as a 'roadmap to judges who are interested in building up the capacity for courts to engage in [responsive] review of this kind'¹¹⁸ –

¹¹² [2023] IESC 7, [70] (Murray J).

¹¹³ [2023] IESC 7, [90] (Murray J).

¹¹⁴ [2023] IESC 7, [85] (Murray J). (Emphasis added).

¹¹⁵ Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023).

¹¹⁶ [2023] IESC 7, [38] (Hogan J).

¹¹⁷ [2023] IESC 7, [38] (Hogan J).

¹¹⁸ Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023), 15.

suggests at one point that constitutional constructions (or ‘implications’, to use her term) that are ‘designed to protect the ‘minimum core’ of democracy will generally be legitimate, *regardless of the degree of existing legal support* for such an implication (or support in the text, history, and structure of a constitution, or a court’s prior case law)’.¹¹⁹ Now there is plenty of ‘existing legal support’ for the outcome in *Heneghan*. But the case was fundamentally different from a *Curtin* for instance, or even from an *O’Shea*. Those cases essentially involved arguable constitutional silences, whereas in this one the constitutional provisions were loud and clear. (Or certain immediately relevant phrases in them were, at least: ‘*Three shall be...*’ ‘*...one or more of the following...*’ and, in my view, at least, ‘Provision *may* be made by law...’). Indeed, I struggle to think of an interpretative conclusion in an Irish constitutional law case that sits quite as uneasily with the plain text of certain aspects of the most immediately relevant constitutional provisions.¹²⁰

It is academic now, but the ‘least worst’ thing for the judges to do in *Heneghan*, in my view, would have been to effectively do nothing. Because at least then there would have been no obvious and direct conflict with the text and language of any constitutional provision, and – for all that it would have allowed for that effective mockery of the events of 1979 to persist – the democratic sky had hardly quite fallen in. It may be that some class of declaratory order was appropriate – perhaps along the lines of that set out in Charleton J’s dissent. That is, that the Court could have declared that the Government had some form of duty to ‘formulate a response’ to the decision of the people, even now, and that the Oireachtas had some form of duty to debate the question, at least. But I am not sure that the judges should have gone quite as far as even Charleton J was prepared to go; that is, to declare that the Oireachtas had a duty to debate ‘what the people [had] enabled in 1979, namely *a change* to university and institutes of higher education representation in Seanad Éireann...’¹²¹ Because to my mind the wording was so hapless and confused as to preclude even that mild-looking conclusion, insofar as any ‘change’ – no matter what kind – would have brought about an obvious and direct conflict with the plain text of Article 18.4.1° (i) and/or (ii).

In other words, for the constitutional actors in general (ie the judges in the case, but also the political actors over the decades), the wording of the Amendment was so hapless and confused as to leave few constitutionally-tolerable options on the table. For myself, I can only conceive of two. One – the less congenial, for sure – was to simply live with the status quo, albeit that it made a mockery of the referendum vote (and to that extent it only barely qualifies as constitutionally-

¹¹⁹ Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023), 100 (Emphasis added).

¹²⁰ In their analysis of *Heneghan*, Casey and Doyle suggest that the discussion of permissible evidence in the judgment, while important, ‘should not distract from the core interpretative move being made here, namely placing the text of the constitutional amendment not in the context of other constitutional provisions but instead in the context of what it was intended to achieve’. They suppose that it is an example of a ‘mischief-based approach to context’ in constitutional interpretation, where the judges look not so much to the text of the provision itself (or indeed of other provisions), but rather, in a ‘socio-historical’ way, to the ‘mischief’ against which the provision was fundamentally directed. They place that approach third in their list of four ‘layers of context’ that Irish judges have relied on in constitutional interpretation: the first is ‘the narrow textual context’, the second is ‘the broad textual context, and the fourth is the ‘constitutionalist context’ (ie where the provision would be read ‘in light of extra-textual understandings as to the sort of document the Constitution is...’). And they suggest that ‘the precise words of the Constitution become progressively less important as we move through the four layers of context’. See Conor Casey and Oran Doyle, ‘Higher Law or Great Charter of the Irish People? The Constitution under the New Supreme Court’ (forthcoming, Dublin University Law Journal).

¹²¹ [2023] IESC 7, [36] (Charleton J). (Emphasis added).

tolerable). And the other – the ‘best thing’ for the constitutional actors, in my view – would have been to go to the people again, in accordance with the mechanism established in Articles 46 and 47, but this time taking care with the wording. This no doubt should have been done at some point by the political actors, on their own initiative.¹²² But I think it might have offered some kind of route out of the mess for the judges in *Heneghan* too. Might they, in an Aileen Kavanagh-style “collaborative” key, have been able to work some ‘nudge’ or ‘prod’ around consideration of a further Referendum into a declaratory remedy?¹²³ (I think so, but have not explored the idea in sufficient depth to be sure).

With this notion of a further amendment in mind, let me close with another idea, this one from that ‘Sleep of Reason’ piece in which the now Chief Justice invites his readers ‘to consider more sceptically and rigorously the orthodox view that it is somehow inevitable that courts must go further than the boundaries implied by the text and language of the Constitution...’¹²⁴ He recognises that it is ‘nowadays accepted’ that in interpreting a written legal instrument courts should adopt an approach ‘that seeks to interpret it in the light of its object and purpose if that can be discerned’. But he supposes that there must be a ‘logical endpoint’ of that interpretive process:

[That endpoint...] is that in some cases the courts must nevertheless say that the document cannot be made to apply to a particular situation, that it is necessary that in the case of legislation, for example, to address and provide for the new circumstances. It is not permissible to make the contract, will or statute for the parties that they did not, even when the courts considers it knows what they would have wished. No one suggests that it is appropriate to reshape the legislation, the contract or the will by reference to an *ethos* or *telos*. On the other hand, it is said that when interpreting a constitution that a court should go further than any interpretation of the text, its purpose or object can carry, and reshape the constitution, to avoid the necessity for amendment.¹²⁵

That, ultimately, is what I am suggesting in respect of the conclusion in *Heneghan*: that it went beyond the ‘logical interpretative endpoint’ in O’Donnell CJ’s sense. (Though I am borrowing the idea from a judge who was part of the majority that I am suggesting went beyond it!) The judges, it seems to me, were happy to make the amendment for the proposers-and-approvers (ie for the Houses of the Oireachtas as institutions, and for the People) that those proposers-and-

¹²² It is again academic at this point, but it seems to me likely, or at least possible, that an Attorney General who might have sat down at some point over the decades to consider how they might go about legislating in response to the Seventh Amendment would quickly have formed the view that it was not possible to do so in a manner that would avoid bringing about some direct conflict with the wording of Article 18.4.1° (i) and/or (ii). Once they had formed that conclusion, it is in my view questionable whether it would have been constitutionally-tolerable to proceed with such legislation. A ‘less bad’ option, I suggest, would have been to do nothing (which may explain what in fact happened). And the best option would have been to seek to initiate a further amendment proposal. If, on the other hand, they had not formed that view (perhaps because they had not noticed the textual conflict), then I guess it would have been acceptable to proceed with legislation changing the franchise. It may well be that no constitutional lawyer would ever even have noticed the difficulty. And even if they did, the constitutional sky would not have fallen in.

¹²³ On Kavanagh’s ‘Judge as Nudge’ idea, see Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2024), 311-322. (My suggestion here may be thought to contradict that made earlier that the ‘least worst’ thing to do would have been to ‘effectively do nothing’. In making that suggestion, I did not mean to preclude this kind of declaratory nudging.

¹²⁴ Donal O’Donnell, ‘The Sleep of Reason’ (2017) 40 (2) Dublin University Law Journal 191, 212.

¹²⁵ Donal O’Donnell, ‘The Sleep of Reason’ (2017) 40 (2) Dublin University Law Journal 191, 210.

approvers had not themselves made, and on the basis that the judges considered that they knew what those proposers-and-approvers would have wished. And they went further in their interpretation than the text of the provision could carry, reshaping it so as to avoid the necessity for that further amendment. There was brilliance in the *Heneghan* judgment, for sure. But in the end, in my view, it was a judgment too far.