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THE EMERGENCY POWERS BILL, 1976

Judgment of the Supreme Court delivered by
O'Higgins C.J. on the 15th day of October 1976

I The Facts

On the 1st September 1976, Dáil Éireann resolved in the following terms - "That Dáil Éireann hereby resolves, pursuant to subsection (3) of section 3 of Article 28 of the Constitution that, arising out of the armed conflict now taking place in Northern Ireland, a national emergency exists affecting the vital interests of the State." On the same day Seanad Éireann passed a resolution in identical terms. On the 16th September 1976, the Emergency Powers Bill, 1976, was passed by both Houses of the Oireachtas. On the 24th September 1976, the President of Ireland, pursuant to the provisions of Article 26 of the Constitution and after consultation with the Council of State, referred the Bill to this Court for a decision on the question whether the Bill or any provision or provisions thereof is or are repugnant to the Constitution or to any provision thereof. Pursuant to the provisions of Article 26 section 2 of

the Constitution this Court has considered this question and has heard arguments by the Attorney General and his Counsel and by Counsel assigned by this Court.

II The Law

The Emergency Powers Bill, 1976, is a Bill entitled "An Act for the purpose of securing the public safety and the preservation of the State in time of an armed conflict in respect of which each of the Houses of the Oireachtas has adopted a resolution on the first day of September, 1976, pursuant to subsection (3) of section 3 of Article 28 of the Constitution."

The latter subsection of the Constitution reads as follows:

"Nothing in this Constitution shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion, or to nullify any act done or purporting to be done in time of war or armed rebellion in pursuance of any such law. In this sub-section "time of war" includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas

shall have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State and "time of war or armed rebellion" includes such time after the termination of any war, or of any such armed conflict as aforesaid, or of an armed rebellion, as may elapse until each of the Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist."

This subsection incorporates the First and the Second Amendments of the Constitution. Subsection (3) as originally enacted by the People made no reference to an armed conflict and the subsection ended with the words "in time of war or armed rebellion in pursuance of any such law". The First Amendment incorporated the reference to an armed conflict, and the portion of the subsection as it now stands beginning with the words "in this sub-section" down to the words "the vital interests of the State" represents the total effect of the First Amendment. The rest of the subsection as it now stands represents the whole of the Second Amendment of the Constitution. A resolution

of both Houses of the Oireachtas is not a condition precedent to the enactment by the Oireachtas of any law which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion. It is, however, a condition precedent to the enactment of any such law in a time when there is taking place an armed conflict in which the State is not a participant that such law must be expressed to be for the purpose of securing the public safety and the preservation of the State in time of such armed conflict. This Bill is expressed to be for that purpose. The resolutions upon which the Bill is grounded are not part of the Bill, ^{and in Section 3} although they are referred to in its long title, and are not and could not be the subject of a reference to this Court under Article 26. Each resolution states that there is an armed conflict taking place in Northern Ireland and that a national emergency arising out of that armed conflict exists affecting the vital interests of the State. The only recital of fact contained in the Bill is that each of the Houses of the

Oireachtas on the 1st September, 1976, adopted a resolution pursuant to subsection (3) of section 3 of Article 28 in respect of an armed conflict. The only resolutions in respect of an armed conflict adopted by the Houses of the Oireachtas on the 1st September, 1976, were those referring to an armed conflict in Northern Ireland and the Bill must therefore be confined to the armed conflict described in the resolutions.

As to the right of the President to refer the Bill to this Court, it is clear that he has power to do so, notwithstanding that the Bill is one passed by both Houses of the Oireachtas by reference to the provisions of subsection (3) of section 3 of Article 28. The power of the President to do so has not been questioned in these proceedings.

III The Submissions

It has been submitted by Counsel assigned by the Court that it should be decided that the provisions of the Bill are repugnant to the Constitution or to some of the provisions thereof and that the President should be so advised by this Court. If the Court were to do so, the President would be obliged by Article 26

section 3 subsection (1) of the Constitution to a line to sign the Bill, and so it would not become law.

Essentially, the submissions made by Counsel so assigned have been to the effect that the provisions of section 2 of the Bill are repugnant to the provisions of Article 40 of the Constitution and that the long title of the Bill is not in accordance with the provisions of Article 28, section 3, subsection (3) of the Constitution.

The Attorney General asked the Court to deal with this reference on the basis that section 2 would be repugnant if it were not saved by Article 28, section 3, subsection (3). As the matter has not been discussed further, the Court does not find it necessary to express an opinion on the question whether section 2 of the Bill or any part of it would be repugnant if it were not saved by Article 28, section 3, subsection (3).

The extent to which the Bill, if signed by the President and given constitutional validity as law by Article 28, section 3, subsection (3), would encroach on personal rights which would otherwise be constitutionally guaranteed was canvassed in argument.

In this context it is important to point out that in a law is saved from invalidity by Article 28, section 3, subsection (3), the prohibition against invoking the Constitution in reference to it is only if the invocation is for the purpose of invalidating it. For every other purpose the Constitution may be invoked. Thus, a person detained under section 2 of the Bill may not only question the legality of his detention if there has been non-compliance with the express requirements of section 2, but may also rely on provisions of the Constitution for the purpose of construing that section and of testing the legality of what has been done in purported operation of it. A statutory provision of this nature which makes such inroads upon the liberty of the person must be strictly construed. Any arrest sought to be justified by the section must be in strict conformity with it. No such arrest may be justified by importing into the section incidents or characteristics of an arrest which are not expressly or by necessary implication authorised by the section. While it is not necessary to embark upon an exploration of all the incidents or

characteristics which may not accompany the arrest and custody of a person under that section, it is nevertheless desirable, in view of the submissions made to the Court, to state that the section is not to be read as an abnegation of the arrested person's rights, constitutional or otherwise, in respect of matters such as the right of communication, the right to have legal and medical assistance, and the right of access to the Courts. If the section were used in breach of such rights the High Court might grant an order for release under the provisions for habeas corpus contained in the Constitution. It is not necessary for the Court to attempt to give an exhaustive list of the matters which would render a detention under the section illegal or unconstitutional.

It has been submitted by Counsel assigned by the Court that the immunity granted to the type of legislation contemplated by Article 28, section 3, subsection (3), against invalidation by any provision of the Constitution applies only to a law which becomes ^{so} by being signed by the President. It is urged that Article 28, section 3, subsection (3) is not to be

taken into account by this Court when considering the provisions of a Bill referred to it under the provisions of Article 26. If Article 26 stood alone and could be construed without reference to Article 28, section 3, subsection (3), that submission would be correct and this Court might have to advise the President that the Bill would be repugnant to the Constitution because of the provisions of section 2.

Every law enacted by the Oireachtas must initially have been a Bill passed by both Houses of the Oireachtas and is therefore capable of being referred to this Court by the President, unless it is a Bill of the kind expressly excluded by Article 26 from reference. The Bills which may be referred include Bills intended to be enactments in conformity with the provisions of Article 28, section 3, subsection (3). If such a Bill is not referred to this Court it must be signed by the President. Thereupon it becomes a law enacted by the Oireachtas and has the immunity conferred upon it by the subsection in question. The Constitution therefore contemplates that laws which would otherwise be invalid may be validly enacted provided they

conform with the requirements of Article 28, section 3, subsection (3).

When a Bill is validly referred to the Court under Article 26 the test of its repugnancy or invalidity is what its force and effect will be if and when it becomes law. Thus in regard to a Bill which is to take effect as law under Article 28, section 3, subsection (3), if it is shown to the Court that the preliminary and procedural requirements for the passing of the Bill by both Houses of the Oireachtas have been complied with, it is ipso facto, because of the exemption granted by Article 28, section 3, subsection (3), incapable of being struck down on the ground of repugnancy to the Constitution or to any provision thereof.

The next submission was that the long title, which is an essential part of the Bill - because it is relied on as expressing the Bill's purpose - fails to conform with the requirements of Article 28, section 3, subsection (3), in that the purpose of the Bill is not expressed to be for the preservation of the State "in time of war". This submission is based upon the

provisions of the First Amendment of the Constitution as incorporated in subsection (3), which provides that "time of war" includes a time when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas shall have resolved that arising out of such armed conflict a national emergency exists affecting the vital interests of the State. The argument is that even though it is the existence of an armed conflict that is relied upon, nonetheless the expression "time of war" must be used because the latter includes the former. As against this the Attorney General has submitted that in the subsection, particularly as amended by the Second Amendment of the Constitution, it is indicated that a time of war, an armed rebellion, ^{and} or an armed conflict in which the State is not a participant are to be regarded as separate and distinct events. He relies on the fact that the expression, "termination of any war, or of any such armed conflict as aforesaid, or of an armed rebellion", occurs in the latter portion of the subsection and is substantially repeated in the words

"by such war, armed conflict or armed rebellion has
ceased to exist" which follow a line or two later.
He furthermore pointed out that the subsection draws
other distinctions between the three types of
categories mentioned. Resolutions of both Houses of
the Oireachtas are necessary to declare that a national
emergency exists which affects the vital interests of
the State when the occasion is one of an armed conflict
in which the State is not a participant and such armed
conflict is actually taking place. This is to be
contrasted with what may be done in "time of war or
armed rebellion" when such resolutions are not
required. The existence of a "time of war or armed
rebellion" is sufficient to bring into operation any
law which has been enacted by the Oireachtas pursuant
to that subsection ^{and} which is expressed to be ^{for} the purpose
of securing the public safety and the preservation of
the State. If such a law had been enacted before the
occurrence of such event, it is brought into operation
by the occurrence of that event. The Attorney
General submitted that the inclusion in "time of war"
of "armed conflict" indicates the type of legislation

which may be enacted under the subsection, submitted that different formalities are required for the enactment of legislation for an armed conflict in which the State is not a participant, as distinct from legislation for a time of war or armed rebellion. In the view of this Court this submission is well founded. The Court is satisfied that the purpose of the Bill, as expressed by reference to a time of an armed conflict instead of by reference to a time of war, complies with the requirements of Article 28, section 3, subsection (3), while at the same time restricting the area of operation of the Bill, in that the Bill would not be applicable to a "time of war or armed rebellion", as distinct from "armed conflict", because it is not expressed to be for that purpose.

The last matter to be considered is the question of the existence of the state of affairs necessary to permit the application of Article 28, section 3, subsection (3). As pointed out earlier in this judgment, these are the matters or statements of fact which are contained in the resolutions of the two Houses of the Oireachtas. Submissions were made

as to the extent, if any, to which the Court could examine the correctness of these statements. It was submitted by the Attorney General that there is a presumption that the facts stated in the resolutions are correct. The Court accepts the existence of that presumption and the corollary that the presumption should be acted upon unless and until it is displaced. In this case it has not been displaced.

The Attorney General submitted the general proposition that when the resolutions referred to in Article 28, section 3, subsection (3) have been passed, this Court has no jurisdiction to review the contents of them. When the consequences of this submission were pointed out to him he withdrew it as he said it did not arise in this case. The Court expressly reserves for future consideration the question whether the Courts have jurisdiction to review such resolutions.

The Court has come to the conclusion that the different objections raised to the constitutionality of this Bill fail. To summarise, the exemption provided by Article 28, section 3, subsection (3) of the Constitution is the decisive factor in the consideration

of any question of repugnancy. The Bill's stated expression of its purpose accords with the requirements of the subsection and there is a presumption which has not been displaced that the facts stated in the resolutions are correct. For these reasons the Court decides that the Bill is not repugnant in any respect to the Constitution or any provisions thereof and will so advise the President.

The Court would like to express its appreciation of the assistance given to it by Counsel and Solicitors engaged in these proceedings.

I certify this to be the judgement
and decision of the Court.

Thomas M. O'Higgins
Chief Justice of
Ireland.

15.10.76