

14 Judges and the political organs of State

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Introduction

Article 6 of the Irish Constitution refers to three organs of State and registers the separation of powers as an ideal of the Irish constitutional order. It provides:

1. All powers of government, legislative, executive and judicial, derive, under God, from the people...
2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.

Much of the remainder of the Constitution is dedicated to elaborating the powers enjoyed by these three organs. Articles 15-27 concern a bicameral Parliament, the Oireachtas. Article 28 refers to the Government which is to be comprised of members of the Oireachtas and responsible to its lower House, Dáil Éireann. Article 34 provides that justice shall be administered by judges in courts established by law. While the Constitution thus appears to establish a tripartite system of government, the constitutional structure might be better understood as essentially bipartite (Doyle, 2018: 19). The discipline of the party system generally enables Government to control Parliament such that the critical division of power from the constitutional point of view is that between the political organs on the one hand – Government and the Oireachtas that it tends to control – and the judicial organ on the other. It is that relationship, or aspects of it, that falls to be considered in this chapter. (See also the chapters by MacCarthaigh and Martin in this volume).

In order to understand that relationship, it is important to appreciate the nature and extent of the power vested by the Constitution in the courts. Article 34 invests the High Court with ‘full original jurisdiction in and power to determine all matters and

questions whether of law or fact’ and provides that its jurisdiction extends to the question of the constitutional validity of any law. It goes on to establish that the decisions of the highest appellate court, the Supreme Court, ‘shall in all cases be final and conclusive’. Judges of the Irish superior courts thus enjoy the authority to determine the meaning of the Constitution where such meaning becomes the subject of litigation.

Often – as in the cases considered in this chapter – such litigation will concern the nature and extent of the powers of one of the political organs. This means that the judges determine the limits of the powers of those organs and, by extension, that they determine the limits of their own power (Fennelly, 2018: 45). That is, in determining that something is not within the power of Government, for example, the judges are determining – or assuming, perhaps – that it is within their power to determine that it is not within the power of Government. This arrangement is typically defended by constitutional scholars with reference to Alexander Hamilton’s justification elaborated in *Federalist No. 78*: that unlike the other branches, the judicial branch has ‘no influence over either the sword or the purse’. It is thus the ‘least dangerous branch’ and so the one least unsuited to wielding this power.

As we shall see throughout this chapter, in these cases it is generally arguable either way as to whether the Constitution is best understood as vesting a particular power in the organ that is claiming the power. It is usually the case that different constitutional provisions are relevant to the question (not to mention other legal provisions and norms). Sometimes such provisions will pull in different directions. And they will usually be vague, as constitutional provisions contested in litigation tend to be. Thus in cases where judges do in fact step in to block a political organ from doing something it will be arguable as to whether they are legitimately exercising their constitutional authority or exceeding that authority.

This means that judges’ understandings of their own role within the constitutional system becomes quite important in practice. The general picture presented in the scholarship is that there have been three epochs in this regard since the foundation of the State. Through the lifetime of the Free State Constitution (1922-1937) and into the early decades of the current Constitution Irish judges tended towards a mechanical

formalism in constitutional interpretation. From the mid-1960s through to around 1990 they preferred a more expansive approach. They then retreated into a ‘technocratic’ mode to which they have remained committed ever since (Doyle, 2018: 20). The mainly non-empirical scholarship that presents this pattern tends to focus on certain rights-based challenges to social legislation over those periods. It is apparent in other domains too, including in respect of criminal process. And it is broadly vindicated by the empirical scholarship that exists, scarce though scholarship of that kind is in the field (see Hogan et al., 2015, Elgie et al., 2018).

The pattern is not so neat, however, in the domain of constitutional law under consideration in this chapter. As we shall see, the courts have handed down significant rulings against the political organs throughout the past two decades just as they did in the middle ages of Irish constitutional jurisprudence. In fact, whereas in some major cases in the earlier decades the Supreme Court was split on the key question, in some recent cases it has been unanimous in favour of intervention against a political organ. Compare the breakdowns in some of the cases considered below: a 3-2 split on the Court in *Crotty v An Taoiseach* (1987) ultimately going in favour of judicial intervention against the Government,¹ versus a 7-0 decision in favour of intervention against the Oireachtas in *Angela Kerins* (2019).²

The aim of this chapter is to present a general picture of the quandaries facing and approaches taken by Irish judges in challenges to the powers of the political organs of State. Rather than scanning the body of jurisprudence overall, it focuses on a small number of cases. These are selected on the basis of things such as i) the degree to which they represent novel departures in this area of constitutional principle and ii) their concrete significance in respect of particular aspects of Irish politics. The chapter is in four parts, including this Introduction. The next part sets out relevant aspects of three cases in which the courts ruled on the scope of the powers of the Oireachtas: *In re Haughey* (1971),³ *Abbeylara*⁴ and the aforementioned *Angela Kerins*. The subsequent part does the same with respect to two cases in which the courts have ruled on the scope of the powers of Government: the aforementioned *Crotty* and

¹ [1987] IR 713.

² *Kerins v McGuinness* [2019] IESC 11.

³ [1971] 1 IR 217.

⁴ ‘Abbeylara’ is the popular name used in reference to *Maguire v Ardagh* [2002] 1 IR 385.

Pringle v Government of Ireland (2012).⁵ The final part offers analysis in broader lens.

Judicial policing of the Oireachtas

In re Haughey and Abbeylara

In May 1970, Charles Haughey, later to become Taoiseach, was sacked as Minister for Finance. His sacking was attributable to the ‘Arms Crisis’ scandal in which it was alleged that certain members of cabinet had been involved in a conspiracy to smuggle weapons into Northern Ireland for use by the IRA. The events brought about a case that quickly became a landmark in Irish public law: in his judgment Ó’Dálaigh CJ set out what have since been referred to as the *In re Haughey* principles of procedural justice. But *In re Haughey* was significant for a different and under-appreciated reason. That is that it marked a departure in Irish constitutional law on the matter of the justiciability of internal Oireachtas proceedings.⁶

On the face of it, the Irish Constitution mimics UK constitutional norms on this question – including the assertion in Article 9 of the English Bill of Rights 1689 that ‘freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’. Article 15.12 of the Irish Constitution holds that official reports and publications of either House of the Oireachtas, and utterances made in them, ‘shall be privileged’, while Article 15.13 vests certain privileges in members of the Oireachtas including that they ‘shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself’. Article 15.10, meanwhile – which similarly evokes various resolutions and norms traceable to 17th century England (see Hunneyball, 2009) – refers to each House of the Oireachtas having the power to ‘make its own rules and standing orders’, to ‘ensure freedom of debate’, and to ‘protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties’.

⁵ [2012] 3 IR 1.

⁶ The ‘justiciability’ of a given matter refers to the competence/jurisdiction of a court to consider and make determinations on it.

This apparent pedigree of the Irish provisions might have been thought to suggest that Oireachtas proceedings were simply non-justiciable in the manner of the position consistently recognised by the UK courts with respect to proceedings at Westminster.⁷ Following Pádraic Haughey's victory in the Supreme Court, however, it appeared that this was not the case: that for all that the text of the Irish Constitution owed to English/UK history, the jurisdiction of Irish judges with respect to parliamentary proceedings would be different. It had been alleged that Pádraic Haughey – brother of Charles but a non-member of the Oireachtas – had facilitated the diversion of public money to the IRA leadership for the purpose of purchasing arms where the Dáil had voted that money for the different purpose of assisting in humanitarian relief in Northern Ireland.⁸ On foot of the allegations the Dáil passed a resolution directing one of its committees, the Public Accounts Committee (PAC), to investigate the matter and report back to the Dáil. The Oireachtas quickly followed up with a piece of legislation that conferred upon PAC a power to compel the attendance of witnesses and also set up a procedure whereby the High Court, on a referral of the matter from the chair of PAC, might ultimately punish any witness who had failed to cooperate.⁹

In the event, after having been compelled to attend, Pádraic Haughey made a brief statement to the committee and then refused to answer questions. This set the procedures envisaged by the legislation in train resulting in Haughey's being sentenced to six months' imprisonment. *In re Haughey* was a challenge taken by Pádraic Haughey comprising two parts. The first was to the constitutionality of the legislation which is of little interest in the present context. The second featured six distinct but related process-based claims all of which – while strictly speaking pertaining to the proceedings at the High Court – had to do with internal Dáil standing orders and proceedings and a Dáil resolution. The notable point is that in delivering judgment on these six claims – one of which prompted Ó'Dálaigh CJ's famous dicta on procedural fairness – the judges in *Haughey* crossed a line that UK judges would likely not have crossed: they happily reviewed the proceedings of a Dáil committee, including utterances made by the committee chair, as well as the terms of the

⁷ Following the decisions in *Stockdale v Hansard* (1839) 112 ER 1112 and its sequel, *Sheriff of Middlesex* (1840) 113 ER 419, the position in the UK was broadly that the role of the courts was limited to determining whether a privilege existed. If it did, then it was up to the House of Parliament to determine whether it had been breached.

⁸ See *In Re Haughey* [1971] 1 IR 217, at 243-44.

⁹ Committee of Public Accounts (Privilege and Procedure) Act 1970.

resolution and standing orders. Whereas Articles 15.12 and 15.13 expressly oust judicial review (in respect of ‘utterances’, specifically) in the manner of the English provision, Article 15.10 – the most relevant to any justiciability question that that second element of *Haughey* might be thought to have given rise – does not quite go as far as to do so. Nevertheless it must count as noteworthy that the authority of the judges to review those matters went unchallenged by counsel for the State in the case (Murray, 2008). The judges did not address the question of justiciability at any point in their judgments and, it would seem, simply assumed their authority in this regard.

If the judgments in *Haughey* had strongly suggested a preparedness on the part of Irish judges to interfere in Oireachtas proceedings, it was thus not quite established in the jurisprudence. It wasn’t until *Abbeylara* was decided nearly three decades later that we get this confirmation. *Abbeylara* was an action brought by a number of gardaí who had been summoned to appear before a subcommittee of the Oireachtas justice committee to answer questions in respect of a tragic episode in April 2000 in which members of the gardaí shot and killed an armed man following a siege at his home. Under the terms of the original Dáil and Seanad resolutions establishing the subcommittee its task had been merely to consider the Garda Commissioner’s report into the shooting. Its members subsequently instigated changes – approved in apparently shoddy fashion by the relevant internal Oireachtas actors – such that it would hear evidence and make findings aided again by a statutory power to compel the attendance of witnesses.¹⁰

The issues in *Abbeylara* might be considered in two categories. The headline question undoubtedly turned out to be whether the Oireachtas had an ‘inherent’ constitutional power to carry out an inquiry of the kind proposed, with attention focused on the issue of the possibility that such an inquiry might make formal findings adverse to the good name of individuals who were not members of the Oireachtas. The other question concerned justiciability of internal Oireachtas proceedings, which arose in part because of the complaints made by the applicants with respect to how the amendments to the terms of reference had been brought about in parliament.

¹⁰ For the most comprehensive account, see Keane CJ, at [2002] 1 IR 385, at 477-483.

Although the justiciability question was at least litigated in this instance, it got relatively little attention. Those judges on the Supreme Court who addressed it all ruled against the Oireachtas. Keane CJ identified two distinct pillars of Oireachtas immunity. The first comprised the three sub-articles referred to earlier: on these, Keane CJ emphasised the absence of an express ouster clause in Article 15.10 while also gesturing at outer limits of the ouster clauses in Articles 15.12 and 15.13 (i.e. that they pertained to utterances, specifically). Accordingly they did not preclude the review in question. The second pillar was ‘the separation of powers enjoined by this Constitution’.¹¹ It meant that the courts ‘will not accept every invitation to interfere with the conduct by the Oireachtas of its own affairs’ but it did not mean that it could not accept this particular invitation. Keane CJ pointed out that the *Abbeylara* episode, just as had the *Haughey* episode, involved the establishment of ‘a committee empowered to inquire and make findings on matters which may unarguably affect the good name and reputations of citizens who are not members of either House’.¹² Judicial scrutiny in such a context, he suggested, would ‘in no way trespasses on the exclusive role of the Oireachtas in legislation’ nor would it ‘in any way qualify or dilute the exclusive role of the Oireachtas in regulating its own affairs’.

It was on the headline question that there was significant disagreement among the judges in *Abbeylara*. Five of the seven ruled that the Oireachtas did not have inherent power to carry out the inquiry, whereas two of them were satisfied that it did. Those in the majority emphasised the fact that the inquiry had been empowered to make findings of fact against individual citizens including, potentially, one which, were it made by a court, would be a finding of unlawful killing. They acknowledged that such findings would be legally sterile but insisted that they could nevertheless ‘inflict enormous damage on the individual gardaí’.¹³ The dissenting judges, on the other hand, while recognising how significant any findings in respect of the killing might be for individual gardaí, emphasised the meaninglessness of such findings from a legal point of view.

These positions could be argued either way and so it might be suggested that certain

¹¹ *ibid*, at 537. See also the comments of McGuinness J, *ibid*, at 629.

¹² *ibid*, at 537–538.

¹³ McGuinness J, *ibid*, at 717. Hardiman J, *ibid*, at 668–672, 688–694.

underlying conceptions of the constitutional framework drove the judges to one rather than the other. One of these was their underlying conception of the functions of parliament: all seven agreed, after all, that the Oireachtas had inherent power to carry out inquiries ‘relevant to the exercise of its functions.’ Thus the judges in the majority tended to stress the legislative function, specifically. They were generally at a loss as to how the particular inquiry might have been thought necessary in pursuit of any legislation-related goals.¹⁴ The dissenting judges, on the other hand, insisted that the Oireachtas had constitutional functions beyond legislating, and in particular that it had a critical accountability function. Indeed Keane CJ seemed to understand the Oireachtas as having a broader constitutional role in holding the executive/administrative arm of the State to account than that formally set out (in respect of ‘the Government’) under Articles 28 and 13 of the Constitution (O’Hegarty, 2010: 81, Doyle and Hickey, 2019: 145-146).¹⁵ This *Abbeylara* inquiry, he felt, was accordingly within parliament’s constitutional remit.¹⁶

Angela Kerins

Following *Haughey* and *Abbeylara* it was quite clear that, for all that the Westminster model of responsible government had been adopted in the Irish setting, the Irish version was quite different so far as the relationship between judges and parliament was concerned. Irish judges would interfere in proceedings of the Oireachtas, and would prevent it from carrying out tasks that it might wish to carry out, in a manner that UK judges would never contemplate. Further light was shed on the nature and extent of this jurisdiction in 2019, when the justiciability of matters arising at a committee again came before the Supreme Court in *Angela Kerins*.¹⁷

While strikingly similar in many ways to *Haughey* and *Abbeylara*, *Kerins* was different in two key respects each of which made the judicial intervention less rather than more likely. First, the complaints arose directly from questions put to the applicant, and barbs hurled at her, by members of the Dáil at a Dáil committee

¹⁴ See generally the judgment of McGuinness J, *ibid*, at 612-615, 624.

¹⁵ As O’Hegarty points out, this practice, which is reflected in the foundational statutes of state agencies and semi-state bodies, is a response to the growth of the administrative state in the period since 1937. She further suggests that this ‘would seem to harmonise with the spirit of the Constitution...’ on the theme of accountability.

¹⁶ See Keane CJ, [2002] 1 IR 385, at 503.

¹⁷ [2019] IESC 11.

hearing in January of 2014. Various parliamentarians put it to the CEO of the publicly-funded Rehab charity that she was ‘grossly overpaid’; that she ran the organisation ‘like a personal fiefdom’ and so on.¹⁸ This meant that – however her lawyers might have presented them – they were very intimately connected with utterances made at an Oireachtas committee. And parliamentary utterances are privileged under Article 15, as set out earlier. Second, Angela Kerins had been invited to attend the Dáil Public Accounts Committee to answer questions in connection with her stewardship of the charity. That is, unlike the applicants in the two earlier cases, she was not under any obligation to attend and so her liberty, ultimately, was not in peril. (Similarly, the committee was not engaged in any kind of formal adjudication upon her. It was not proposing to issue a report, for instance, as had been the case in both *Haughey* and *Abbeylara*).

Thus if Kerins were to win her application for declarations including that PAC had acted unlawfully, it would likely represent the breaking of new ground in the relationship between these two organs. She got short shrift in the Divisional High Court, where Kelly P approved earlier dicta to the effect that protections afforded by Article 15 to the Oireachtas were ‘explicit and definite in their terms’ and ‘constitute a very far-reaching privilege indeed...’ which applies even in the face of a ‘major invasion of the personal rights of the individual’.¹⁹ Yet she won in the Supreme Court: indeed the seven judges were unanimous in the view that her case cleared not only the various hurdles in the sub-articles of Article 15 but also the broader separation of powers hurdle, as Keane CJ had elaborated them both in the similar context of the *Abbeylara* case.

So how was it that the Supreme Court saw her claims as justiciable despite the privileges and immunities in Article 15.12 and 15.13? A fully comprehensive answer to that question goes beyond the present scope but what was surely fundamental to it was that, whereas the Divisional Court had understood Kerins’ grievance as rooted fundamentally in those things that were said to and about her in the PAC hearing, the Supreme Court saw it as arising partially from those utterances, but as grounded

¹⁸ See [2019] IESC 11, at para 2.9.

¹⁹ [2017] IEHC 377, at para 93, quoting Finlay CJ’s dicta to the same effect in *Attorney General v Hamilton (No 2)* 3 IR 227, at 270.

fundamentally in what Clarke CJ (writing for the Court) described as an ‘action’ of the committee as a collective whole, where that action consisted in ‘inviting her to attend the hearing on a particular basis and then “acting significantly outside of the terms of the invitation once she attended”’. From there, the Supreme Court came to consider whether the protections for utterances in Articles 15.12 and 15.13 precluded it from ruling that this particular ‘action’ was unlawful. In reasoning towards its conclusion that they did not, Clarke CJ narrowed the range of the Article 15 protections in various ways and, by extension, extended the power of judges to intervene in parliamentary processes.

One of the ways in which he did so was by qualifying the use of the Westminster comparison in this domain of Irish constitutional adjudication. Such a comparative approach – as had been preferred by Kelly P in the Divisional Court, and indeed by judges in several other cases previously – would have tended to exclude the possibility of the Court relying on evidence of parliamentary utterances for the purposes of characterising PAC’s ‘action’ as well as the authority of the Court to make a finding of unlawfulness with respect to that action.²⁰ Clarke CJ recognises that the drafters of the Irish Constitution had indeed looked to Westminster and suggests accordingly that reference to UK norms and history could be helpful to contemporary interpretation of the Irish provisions.²¹ But he turns then to the particularities of Irish constitutional arrangements, concluding that if there is an absolute barrier to judicial intervention, “it is not to be determined by lazy analogy with current or historic practice in the United Kingdom [but rather...] from what is to be deduced from the text and structure of the Irish Constitution.”²²

Another of the ways he did so was by attributing considerable specificity to the phrases used in respect of parliamentary utterances in Articles 15.12 and 15.13. Clarke CJ finds that the use of the phrase ‘wherever published’ in the former implies that it is a (specifically) reporting-oriented form of privilege – one that is ‘designed to prevent people from being sued for what might otherwise be actionable statements

²⁰ It clashed even with the dicta of O’Donnell and Clarke JJ themselves in their joint judgment in *Callely v Moylan* [2014] 4 IR 112, at 181. (That is, both O’Donnell J and Clarke CJ were on the Court in *Kerins*).

²¹ [2019] IESC 11, at para 8.20.

²² [2019] IESC 11, at para 8.22.

such as those that are defamatory’ – with which Article 15.12 is ‘at least principally’ concerned.²³ (Because Kerins was not suing the individuals who made the utterances, this freed the Court to afford her the remedies she sought against parliament).

A third way in which Clarke CJ extended the power of judges to intervene was by dismissing the relevance of the fact that Pádraic Haughey and the gardaí in *Abbeylara* had been compelled to attend before the committees in question, and that those committees had set out on a process that would or might lead to the making of formal findings against individual citizens. Counsel representing the Oireachtas had of course urged the opposite; they insisted that *Haughey* and *Abbeylara* had been exceptional instances of judicial intervention in parliamentary proceedings justified by the compellability power in particular. Clarke CJ pointed out that in those earlier cases the judges had not in fact limited themselves to reviewing whether the use of particular compellability powers by the Oireachtas had been lawful. Rather, they had gone further, probing the underlying lawfulness of the business of a committee (*Abbeylara*) and of the procedures it intended to follow (*In Re Haughey*).²⁴

There is much more that is notable about the *Kerins* judgment, but space precludes much further consideration here. Basically, by reining in the privileges in this way, the judges rendered it possible that Kerins – despite her grievance appearing to be so closely connected to utterances made in an Oireachtas committee – might get around those privileges. She duly did, and she got around Keane CJ’s second pillar of non-justiciability too: that concerning the separation of powers more generally. Indeed, in that respect, Clarke CJ effectively articulates a new (and perhaps unavoidably vague) framework for considering which cases might cross the threshold now that the coercive power element had been deemed incidental rather than decisive. It would be inappropriate for the courts to intervene, he says, ‘where that which was alleged could be described as technical, insufficiently serious or closely aligned to those areas (such as utterances within the Houses) which are given express constitutional immunity’. The courts must also afford ‘a very significant margin of appreciation to the Houses as to the manner in which they conduct their business’.²⁵ In the end, the Court granted

²³ [2019] IESC 11, at para 9.13.

²⁴ [2019] IESC 11, at para 9.4.

²⁵ [2019] IESC 11, at para 9.28-29.

a declaration that PAC had acted unlawfully in treating Angela Kerins as it did in the hearing.²⁶

Judicial policing of Government

Just as they have with respect to parliament, Irish judges have stood ready to intervene with respect to Government in the exercise of its powers too – and in some instances, including ones of considerable drama and political import, have actively intervened. The text of the Constitution tells us relatively little about what the executive power of the State consists in (see generally Doyle and Hickey, 2019: 198-218). Article 28.2 simply says that it ‘shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government’. Certain sections of Article 29 go on to elaborate particular powers of the Government in the domain of foreign policy: under Article 29.4.1°, for instance, the Government can enter the State into binding treaties, subject to familiar checking functions of the Dáil and/or the Oireachtas.

Nowhere in the text is authority expressly granted to the courts to review the constitutionality of executive action although such authority was never seriously doubted (see generally Doyle, 2018: 142-45). Fitzgerald CJ first recognised it in *Boland v An Taoiseach*, a case involving a challenge to the Sunningdale agreement that had much in common with the cases considered below. He observed in his judgment that the courts had ‘no power, either express or implied, to supervise or interfere with the exercise by Government of its executive functions, unless the circumstances are such as to amount to a *clear disregard* by the Government of the powers and duties conferred on it by the Constitution.’²⁷ This accordingly set a threshold (‘clear disregard’) for judges to measure the constitutionality of executive action when it came to be challenged, as it famously did in *Crotty v An Taoiseach* (1987).

Crotty v An Taoiseach

Raymond Crotty was an agricultural economist at Trinity College and a Eurosceptic.

²⁶ [2019] IESC 42.

²⁷ [1974] IR 338, at 362 (emphasis added).

His case emerged on foot of the Single European Act (SEA), a Treaty entered into by the then 12 members of the European Economic Community representing the first significant amendment to the Treaty of Rome. The relevant part of the SEA for present purposes was Title III, which concerned foreign policy – a matter that had not been addressed in any form in the founding treaty. Basically, Title III committed each member state to ‘cooperation’ with respect to formulating and implementing a common European foreign policy. Among its ten terms – and illustrative of the others – was that the State, in formulating its foreign policy, ‘shall take full account of the position of the other member states and shall give due consideration to the desirability of adopting and implementing common European positions’.²⁸

Garret FitzGerald’s Government proposed to implement this Title III element of the SEA as a normal exercise of its executive power to conduct ‘external relations’ under Article 29 of the Constitution. Crotty threw a spanner in the works by bringing a court challenge on days before the anticipated coming into force of the SEA on January 1st 1987. Three of the five judges on the Supreme Court agreed with him that the terms of Title III meant that, in adopting it, Government would be abdicating its constitutional power to conduct external affairs under Article 29, rather than merely exercising that power. Walsh J commented:

In enacting the Constitution the people conferred full freedom of action upon the Government to decide matters of foreign policy and to act as it thinks fit on any particular issue so far as policy is concerned and as, in the opinion of the Government, the occasion requires. In my view, *this freedom does not carry with it the power to abdicate that freedom* or to enter into binding agreements with other States to exercise that power in a particular way or to refrain from exercising it save by particular procedures, and so to bind the State in its freedom of action in its foreign policy. The freedom to formulate foreign policy is just as much a mark of sovereignty as the freedom to form economic policy and the freedom to legislate.²⁹

²⁸ [1987] 1 IR 713, at 781.

²⁹ *ibid*, at 783.

The latter two freedoms had been curtailed in 1973 on joining the European Economic Community but – critically for the *Crotty* majority – this had been done with the consent of the people in the form of the ‘yes’ vote in the referendum the previous year. Any equivalent curtailment of the freedom to conduct foreign policy required equivalent approval by the people.³⁰

The dissenting judges, meanwhile, understood the ratification of Title III as a valid exercise by Government of executive power in the field of international relations under the terms of Article 29. They noted the limited and conditional nature of the commitments in Title III as well as the constitutional authority of Government to enter the State into binding treaties, with all that that implied. In particular, they emphasised the separation of powers ideal, with Finlay CJ describing it as ‘fundamental to all of the [Constitution’s] provisions’ and ‘an issue of a fundamental nature, the importance of which, in my view, transcends by far the significance of the provisions of the SEA’.³¹ Parsing the provisions of Articles 28 and 29, he identified the institutional mechanisms through which Government was to be answerable for how it exercises its power in the field of foreign policy: it was to the other organ of State, the Oireachtas (and often the Dáil alone – if a treaty were to have implications for the public purse, or if it were to be part of domestic law etc.). Thus there was nothing in the Constitution ‘from which it would be possible to imply any right in the Courts in general to interfere in the field or area of external relations with the exercise of an executive power.’³²

Pringle v Ireland

The general constitutional questions posed by *Crotty* returned to the Supreme Court three decades later, with signs this time of the judges seeking to rein in the findings of their predecessors. Just as Garret FitzGerald’s Government had with respect to Title III of the SEA in 1987, Enda Kenny’s Government proposed to ratify the European Stability Mechanism (ESM) treaty without a referendum in 2012. It established an organisation (the ESM) the objective of which was to provide for the ‘mobilisation’ of

³⁰ *ibid*, at 784. The injunction *Crotty* sought was accordingly granted and the Government promptly set the referendum process in train. There was a resounding ‘yes’ vote later that year; see also Gallagher, this volume.

³¹ *ibid*, at 772

³² *ibid*, at 774.

emergency funding which would support any member of the Eurozone in circumstances where such support was ‘indispensable to safeguard the financial stability of the euro area as a whole and of its member states’.³³

Thomas Pringle, an Independent TD, challenged the process in the Irish courts, arguing the terms of the treaty were such that both the Government and the Dáil would lose the control over budgetary policy vested in them by the Constitution: although unlikely, there were circumstances envisaged by the treaty in which an Irish Government could be obliged to pay in up to €11 billion where it did not agree that the conditions for mobilisation had been met.³⁴ Thus, on Pringle’s reading of the *Crotty* ruling, Ireland could not enter the ESM treaty without a referendum – where in *Crotty* the claim was that Government was losing its power to say No in the field of foreign policy, in *Pringle*, it was losing its power to say No in respect of budgetary policy.

This time the judges decided 6-1 against the applicant. If the dissenting judges in *Crotty* had focused attention on the limited nature of the foreign policy commitments in Title III, those in the majority in *Pringle* underlined the fact that, although enormous, the maximum liability of the Irish State was fixed under the terms of the ESM. This was understood to mean that the particular budgetary policy had been determined by the organs of State that the Irish Constitution mandates to determine Irish budgetary policy (the terms of the ESM treaty had been implemented in Irish law by the ESM Act 2012, with the Dáil thus approving the supply of funds in question), and that the particular foreign policy had been determined by the organ that the Irish Constitution mandates to determine Irish foreign policy. Any decision of the ESM board of governors upon which the Irish representative could conceivably be outvoted would pertain merely to the *implementation* of policy, not its *determination*.

Similarly, just as for the dissenting judges in *Crotty*, those in the *Pringle* majority gave careful attention to the separation of powers, and to the detail on institutional authority and functions in Articles 28 and 29. O’Donnell J picked up the Finlay CJ’s

³³ ESM Treaty, article 3.

³⁴ The most comprehensive account of the technical detail is offered in the opening pages of Denham CJ’s judgment.

line of thinking from the earlier case when he notes the different types of international treaties into which the Government may wish to enter the State, and the different constitutional consequences that attend to each of them.³⁵ Thus, under Article 29.5, all international agreements must be laid before the Dáil ‘consistent with the Government’s answerability to that house under Article 28.4.1°’. Any agreement that ‘goes further and involves a charge on public funds...must be approved by the Dáil, again consistent with that body’s distinct role in financial matters...’ reflected in various constitutional provisions which O’Donnell J lays out. And finally, under Article 29.6, no international agreement may become part of the domestic law without the approval of the Oireachtas, in line with the ‘vesting in the Oireachtas of the sole and exclusive power of making laws for the State’ under Article 15.2.1°.

O’Donnell J was thus satisfied that the relevant provisions ‘very deliberately impose little by way of judicially enforceable restriction on the substantive exercise by the Executive of its conduct of foreign relations’. He continued, again echoing Finlay CJ’s thinking:

Article 29.4 makes it clear that it is the Government which shall conduct external relations and by its reference to Article 28 emphasises that in that respect, the Government is responsible to the Dáil. That is the method the Constitution envisages for review and control of the exercise of the Executive power in the conduct of foreign relations.³⁶

Analysis

The aim of this chapter has been to present a general picture of the quandaries facing and approaches taken by Irish judges in challenges to the powers of the political organs of State. While the cases selected for consideration each count as significant in late 20th and early 21st century Irish constitutional jurisprudence, an entirely different set of cases might have served this aim equally well. The judgments in *Callely v Moylan* (2014)³⁷ and *O’Brien v Clerk of Dáil Éireann* (2019)³⁸ tell similar stories about the relationship of judges and Parliament to those in *Abbeylara* and *Kerins*,

³⁵ [2012] 3 IR 1, at 102-103.

³⁶ *ibid*, at 104.

³⁷ [2014] 4 IR 112.

³⁸ [2019] IESC 12.

albeit that in neither of those cases did a majority of judges support the intervention called for by the applicant. The same might be said – relative to *Crotty* and *Pringle* and in respect of judges and Government – of the judgments in *McKenna v An Taoiseach* (1995)³⁹ or *McCrystal v Minister for Children* (2012).⁴⁰ In those cases – each of which concerned the authority of Government to spend public money in support a ‘yes’ vote in a referendum campaign – the judges ultimately ruled in favour of the intervention called for by the applicant.

Stepping back from the detail, what is apparent is that Irish judges have not been at all meek in policing the political organs of State. In fact they have been quite robust in that regard, and consistently so too: the retreat into technocratic mode evident in other domains of constitutional law is not so evident in this one. The significance of *In re Haughey* is all too easily overlooked given its association with by-now firmly-established and widely-supported principles of procedural fairness. It turned the sod on the question of the justiciability of parliamentary rules and procedure and put paid to any notion that the Oireachtas enjoys the same status in Irish constitutional law as does Westminster in UK constitutional law. As Brian Murray observed, the decision ‘suggests a power of judicial intervention in the parliamentary process of some breadth’ (Murray, 2008: 147).

Unlike in that case, it is apparent from the judgments of those in the majority in *Abbeylara* – a decision which Lia O’Hegarty has described as representing a ‘seismic shift in the relationship between the courts and parliament’ – that the judges were themselves conscious of potential for the charge of overreach (O’Hegarty, 2010: 95). They were in no doubt as to the justiciability question: to recall, even Keane CJ – who dissented vehemently on the headline question as to whether the Oireachtas had an inherent power to carry out the inquiry – was satisfied that the judges could review the various resolutions of the Dáil and Seanad and what had transpired at the relevant committees. But for all the fervency of their conclusions on the question of inherent power, they sought as best they could to constrain their conclusion to the particular inquiry at issue and referenced the ‘unlawful killing’ element relentlessly throughout. For all that, the line associated with *Abbeylara* ever since has been that it precludes

³⁹ [1995] 2 IR 10.
⁴⁰ [2012] 2 IR 726.

Oireachtas inquiries from making findings of fact against non-members of the Oireachtas generally. Accordingly the ruling diminished the accountability-related capacities of the Oireachtas, as Keane CJ predicted it would in his dissent.⁴¹

As for the judicial intervention in *Kerins*, no doubt the judges on the Court would say that whatever questions might have arisen on the justiciability front in the constitutional abstract, that ship had sailed as a matter of concrete constitutional doctrine following the decisions in *In re Haughey* and *Abbeylara*. That much is surely true but it could hardly be said that *Kerins* was nothing new under the Irish constitutional sun: that there was no doctrinal evolution concerning judicial powers of intervention in the domain of parliament. As elaborated earlier, the Angela Kerins episode was different in those two respects in particular: that she had not been compelled to attend the committee and that her complaints were so intimately connected with utterances made in the Oireachtas. In any appraisal of the judgment, the overall purpose of parliamentary immunity might be recalled. It is concerned with ensuring that parliamentarians, in carrying out their critical constitutional functions, cannot be intimidated or cowed by the threat of intervention through the courts. To that end the immunity is concerned to counteract *the possibility of interference* rather than interference as such and so, for all the sophistication of the reasoning, it might be thought a step too far.

As for *Crotty*, it certainly sent a jolt through, and even beyond, the Irish political system (Fennelly, 2012). Garret FitzGerald, although by that stage no longer Taoiseach, arguably broke with the requirements of comity by describing it publicly as ‘abnormal, complex, damaging and dangerous’ while Des O’Malley, leader of the Progressive Democrats and former minister for justice, complained that the Court had ‘stepped beyond its normal bounds’ and that Irish Governments no longer had ‘the same normal power that any democratic state has to make international treaties and to ratify them and put them into effect’ (Mac Cormaic, 2016: 260-61). Although it probably left scope to avoid a referendum in some of these instances, it has been interpreted to mean that referendums were required in respect of the Maastricht, Amsterdam, Nice and Lisbon treaties, as well as the Treaty on Stability, Coordination

⁴¹ [2002] 1 IR 385, at 533.

and Governance, the Good Friday Agreement and the Rome Statute on the International Criminal Court (Cahill, this volume). Indeed, as Cahill suggests, it arguably contributed to the stalling of European integration, given the ‘no’ votes in the first instantiations of the Nice and Lisbon referendums.

Like most cases reaching an apex court, *Crotty* brought difficult questions of constitutional principle to the fore, and those that are emphatic about the outcome one way or another are probably not thinking deeply about them. The idea that Articles 28 and 29 grant authority to government to *conduct* foreign relations but not to *abdicate* that authority is surely compelling – regardless of one’s take on the application of that principle in the case itself, or of application of the related principle in the *Pringle* decision. It might well come down to a question of what counts as an abdication of that power in practice, and what counts as normal exercise; questions to which there are no scientifically determinable answers.

This brings us back to a point made in the Introduction: that judges’ understandings of their own role within the constitutional system play a considerable role in how cases like these get decided in the end. So too do matters such as a judge’s sometimes intuitive sense of the nature and extent of the constitutional role of the relevant political organ of State. Recall, for example, Keane CJ’s broader conception of the accountability function of the Oireachtas in his *Abbeylara* judgment and the role it appeared to play in his concluding that inquiring into the circumstances around the killing of a citizen by a bullet fired from a gun held by an on-duty member of the gardaí was very much the business of an Oireachtas committee. As he memorably observed, the provisions of the Constitution dealing with the national parliament ‘constitute a relatively small, carefully landscaped promontory behind which lies a vast hinterland of unwritten conventions, custom, precedents and modes of behaviour derived from history and experience’.⁴² Compare that then to the stricter, text-based reasoning concerning the role of the Oireachtas in the majority judgments in that case, or indeed to the stricter, text-based reasoning of Clarke CJ in *Kerins* concerning the meaning of phrases in Article 15.12 (where he refers to ‘lazy analogy with current or historic practice in the United Kingdom’).

⁴² [2002] 1 IR 385, at 504.

In the end, while these decisions – like any emanating from an institution comprising mere mortals – are open to criticism and could have gone in other ways, none of them should be understood as any kind of judicial lurch for power. The judgments shed light on the nature and (very considerable) extent of the power wielded by Irish judges, but also on how responsibly those judges generally exercise that power. They suggest that Irish judges work with fidelity to their best understanding of what the Constitution requires in this or that context. To recast a line of one among them, Irish judges on the whole have been ‘astute to respect and enforce the limitations and constraints upon the exercise of [their own] power’.⁴³

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⁴³ *Gilchrist & Rogers v Sunday Newspapers Ltd* [2017] IESC 18, at para 3., per O’Donnell J.

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