THE SUPREME COURT

339/2012

Denham C.J.
Murray J.
Hardiman J.
Fennelly J.
O'Donnell J.
McKechnie J.
Clarke J.

Between:

THOMAS PRINGLE

Plaintiff/Appellant

and

THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

Defendants/Respondents

JUDGMENT of Mr. Justice Hardiman delivered the 19th day of October, 2012.

1. This judgment concerns the compatibility with the Constitution of Ireland of the ratification by the Irish Government of the Treaty establishing the European Stability Mechanism (ESM). The issue is raised by the plaintiff, Deputy Thomas Pringle who is an independent member of Dáil Eireann. Deputy Pringle's proceedings also raise other issues to do with the ESM Treaty but these do not arise for immediate determination and some have been the subject of a reference to the Court of Justice. The constitutional issue comes before this Court by way of appeal from the judgment and order of the High Court (Laffoy J.) perfected the 18th day of July, 2012.

Irrelevant factors.
2. It will, of course, be understood that the question before the Court is an entirely legal one. The Court is not required to express, or to form, any view of the merits of the European Stability Mechanism or of its efficacy for the purposes for which it was intended. Those are political questions, outside the jurisdiction of the Court and firmly in the political domain. Similarly, during the weeks of reservation of judgment in this case a number of persons expressed in the media the view that the Irish government should be enabled to take steps in a European context without having to submit them to referendum. This, too, is a purely political issue and the Court must proceed on the basis of the Constitution as it now stands and whose relevant provisions are fully discussed below. Finally, there has been much discussion as to the true scope of the European Stability Mechanism and in particular whether it can be, or will in practice be "mobilised" to provide support to members of the Euro zone whose financial difficulties predate the existence of the European Stability Mechanism itself. This question is also a political one and one which, it would appear, will be decided by entities quite outside the Irish State and its constitutional order.

Financial dimension of issues.
3. Section 3 of the European Stability Mechanism Act 2012 provides as follows:

> "3.—There may be paid out of the Central Fund or the growing produce of that Fund sums, aggregating to a sum not exceeding €11,145,400,000 to enable the State to make payments in respect of its contribution to the authorised capital stock of the ESM in accordance with the Treaty."

4. As will be seen below, Ireland will have no veto on the question of whether this entire sum is called upon or not and will bind itself in the Treaty "irrevocably and unconditionally" to pay this sum if called upon.

5. The sum will be payable either at the rates set out in the Treaty (quoted below) or at an accelerated rate.

6. It is manifest that this is a vast sum of money, one of macro-economic significance. I do not intend to repeat this observation each time the sum is mentioned in this judgment. For comparative purposes, however, it may be observed that it is almost four times the €3 billion which is sought to be saved from Ireland's budget in the current year; that it dwarfs the €1.6 billion which is Ireland's estimated take from the Common Agricultural Policy; that it approaches the total amount of Ireland's health budget and that it would represent the **combined** current voted expenditure of:

> (1) Department of Education and Skills: €8,241,643,000.
>
> (2) An Garda Síochána: €1,424,837,000.
>
> (3) Department of Agriculture Food and the Marine: €1,143,934,000.

7. It may be argued that the figure is irrelevant since if it were twice as big, or only half as big, that would not affect the legal issue of whether the ratification by Ireland of the Treaty is compatible with the Constitution. Nevertheless, it is salutary to bear in mind the truly enormous scale of the figure at issue in the decision on whether or not to adhere to the Treaty. The disposition of a sum of taxpayers' money in the order of €11 billion is truly a question of national policy, as that phrase is used in Article 6 of the Constitution.

Some constitutional provisions.
8. The plaintiff's case has been expounded with regard to a large number of constitutional provisions, which will be mentioned below. The fundamentally important provisions for present purposes seem to me to be Articles 1, 5 and 6 of the Constitution which provide:

> Article 1.
>
> "The Irish nation hereby affirms its **inalienable, indefeasible and sovereign right** to choose its own form of government, to **determine its relations with other nations**, and to develop its life, political economic and cultural, in

accordance with its own genius and traditions."

Article 5.

"Ireland is a **sovereign** independent, democratic State".

Article 6.

"(1) All powers of government, legislative, executive and judicial derive, under God, from **the people**, whose right it is to designate the rulers of the State and, in final appeal, **to decide all questions of national policy** according to the requirements of the common good". (Emphasis supplied)

9. The plaintiff also relies on Articles 28.2, which provides that the Executive power of the State shall be exercised by (or on the authority of) the Government and Article 29.4 (which provides that the Executive power of the State in or in connection with its external relations shall in accordance with Article 28 of the Constitution be exercised by or on the authority of the government). He asserts, as also do the defendants, the authority of the case of *Crotty v. An Taoiseach* [1987] IR 713. There, the two last mentioned Articles were construed, per Walsh J. as follows:

> "The combined effect of these two constitutional provisions clearly is that the Executive power of the State in connection with its external relations shall be exercised by or on the authority of the government but that in so exercising that power the government is subject to the provisions of the Constitution".

10. The same learned judge held that the powers of the government in the international field "must be exercised in subordination to the applicable provisions of the Constitution" and that, therefore:

> "It is **not within the competence of the government, or indeed of the Oireachtas**, to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered to do so by the Constitution. They are both **creatures of the Constitution and therefore are not empowered to act free from the restraints of the Constitution. To the judicial organ of government alone is given the power conclusively to decide if there has been a breach of constitutional restraints**". (Emphasis supplied)

11. This, then, is the jurisdiction which the plaintiff calls on the Court to exercise. In a number of cases, notably *T.D. v. Minister for Education* [2001] 4 IR 259 and *Sinnott v. Minister for Education* [2001] 2 IR 545, this Court has unambiguously asserted the exclusive power of the Legislature and the Executive within their proper sphere and has declined to exercise any sort of general supervisory jurisdiction in those spheres. The limits of those spheres and of the powers and prerogatives of the Government and the Oireachtas derive from the Constitution. Those powers cannot be trespassed upon by any other entity, public, private or international; equally they cannot be surrendered, transferred or given away, even by the organs of government in which they are vested. That is so because those organs of government are "the guardians of these powers - not the disposers of them", as it was put in *Crotty.*

12. The plaintiff's fundamental claim is that the Government (and subsequently the Oireachtas) propose to act inconsistently with the Constitution in divesting themselves of power which the Constitution gives to them and conferring that power instead, on the European Stability Mechanism, an international financial institution created by the Treaty mentioned above which will be based in Luxembourg and which is a permanent institution. Basically, Mr. Pringle charges, the Government in ratifying the Treaty establishing the ESM would be acting unlawfully and unconstitutionally in transferring power which is vested in it under the Constitution, in the exercise of which it is accountable to Dáil Eireann and ultimately to the people of Ireland, to an institution which exists outside the constitutional framework and which is responsible neither to Dáil Eireann nor to the people of Ireland. It is equally not responsible to the E.U. Institutions or the European Parliament.

13. There was no issue, on the hearing of this appeal, and there is therefore no doubt, but that Mr. Pringle has standing to raise these issues.

14. Mr. Pringle does not deny that the power in question **might** lawfully be transferred to the European Stability Mechanism. But he says that that cannot be done by the Government or by the Oireachtas alone; it requires a decision of the people i.e. a referendum. That is how the people exercise their right to decide in final appeal all questions of national policy, a right acknowledged in Article 6.1 of the Constitution.

Structure of Judgment.

15. On the basis of the foregoing summary, it appears to me that the Court is required, first, to consider the nature of the constitutional constraints on the Government in ratifying a treaty such as that in question here, secondly to consider the ESM treaty with a view to determining and thirdly, whether adherence to it without the authority of the people in a referendum is consistent with the Constitution or not.

Constitutional constraints.

16. On the hearing of this appeal both sides agreed that the nature of constitutional constraints or restraints on the Government, in the conduct of its external relations, were correctly stated in the majority judgments in *Crotty v. An Taoiseach* [1987] IR 713 (from here on *Crotty*). It is, therefore, inescapable that we must shortly turn to this decision. It will be necessary first to see what that case related to.

17. Before doing so, however, it is appropriate (by way of general caution) to recall the words of Kearns J. (as he then was) in *Horgan v. An Taoiseach* [2003] 2 IR 468, when he spoke of the "strictly circumspect role which the Courts adopt when called upon to exercise jurisdiction in relation to the Executive's conduct of international relations generally". This echoes the words of Barrington J. in *McGlinchey v. Ireland* [1988] IR 567 when he said "The conduct of the foreign policy of the State is not a matter which easily lends itself to judicial review, and if there is any area in which judicial restraint is appropriate, that is it". Similar principles led the State to refuse relief in *Boland v. An Taoiseach* [1971] IR 388, on the basis that was in issue there was simply a statement of policy which was quite outside the power of the Court to review.

18. In *Crotty*, nevertheless, the plaintiff challenged the Government's ratification of the Single European Act on the basis that such ratification infringed the provisions of the Constitution. He succeeded in this Court in a majority judgment, the majority consisting of Walsh, Henchy and Hederman JJ. Their judgments are pivotal in the present case.

19. Henchy J. referred to Article 1 of the Constitution, where the Irish Nation affirms its "**inalienable, indefeasible, and sovereign**"

right to determine its relations with other nations" and continued:

> "It appears to me that this affirmation means that the State's right to conduct its external relations is part of what is inalienable and indefeasible in what is described in Article 5 as a 'sovereign independent, democratic State'. It follows, in my view, that any attempt by the government to make a binding commitment to alienate in whole or in part to other States the conduct of foreign relations would be inconsistent with the government's duty to conduct those relations in accordance with the Constitution."

Defining some terms.

20. The term "inalienable", a word used several times in the Constitution, has a connotation of "incapable of being given away, transferred or sold". The term is also found in Articles 41 and 42 of the Constitution in association with the word "imprescriptible" which has a connotation close to that of "indefeasible", and indeed is rendered by the same word in the dominant, Irish language, version of the Constitution*, dochloite*.

21. "Defeasible" according to the Oxford English Dictionary (1991) means "capable of being, or liable to be, defeated or made void". Indefeasible, accordingly, means "not liable to be defeated, made void, or done away with; that cannot be forfeited". *(Ibid)*

22. The same edition of the Oxford English Dictionary (OED) defines the term "inalienable" as follows:

> "Not alienable; that cannot be alienated or transferred from its present ownership or relation incapable of being alienated or transferred to another by law".

23. This meaning seems quite consistent with the ordinary and natural meaning of the additional term used, "indefeasible". In *Ryan v. Attorney General* [1965] IR 294 Kenny J. said that:

> " 'inalienable' means that which cannot be transferred or given away while 'imprescriptible' means that which cannot be lost by the passage of time or abandoned by non-exercise".

24. The adjectives "inalienable" and "imprescriptible" are used in the Constitution to describe and define the rights referred to in Articles 41 and 42. The latter adjective is not used in Article 1, the near synonym "indefeasible" being preferred. It is of interest to note, however, that the OED defines "impresriptible" as follows:

> "Not subject to prescription**; that cannot in any circumstances be taken away or abandoned".** (Emphasis supplied)

25. The Dictionary then goes on to give, by way of an example of the use of the term, a quotation from Tom Paines *The Rights of Man* as follows:

> "The natural and imprescriptible rights of man… are liberty, property, security and resistance of oppression".

26. The word "sovereign" is both a noun and an adjective: in the latter use it donotes the qualities associated with the former. The principal definition of it by the Oxford English Dictionary is:

> "One who has supremacy or rank above, or authority over, others frequently applied to the Deity in relation to all created things the supreme ruler of a people."

27. The term "sovereignty" which refers to the state of being a sovereign or the defining characteristics of the sovereign, it is defined as the same source as referring to:

> "The supreme controlling power in communities not under monarchical government".

Irish language text.

28. If one considers the wording of the Constitution in the dominant (Irish language) text, one finds the sense of "inalienable" in the Irish word "doshannta". This word, like its English equivalent, appears in Article 41.1.1 and in Article 42.1 while the word "shannadh" is used in Articles 10.3 and 10.4 to express the notion of "transfer" or "alienation". The word "do shannta" is composed of the negative prefix *do-* and the participle of *shann*. It is translated as "unassignable" in Ó Dónaill's Dictionary. "*Sannaim*" is translated as "I assign" in Téarmaí Dlí, which is a compilation of statutory origin. The effect of the prefix "do -" is like that of "in -"in English as in the case of "indefeasible", discussed above.

29. The notion conveyed in English by the phrase "indefeasible" seems very precisely rendered by the Irish term "dochlorite" which means "invincible or conclusive".

30. It may be of significance to note that this very word is also used to express "inprescriptible" in Articles 41 and 42 and to express in Articles 25.4 and 25.5 the quality conveyed in English by the word "conclusive". Accordingly these concepts may also be seen as present in the national "right" referred to in Article 1. It is indelible, inalienable, indefeasible, inprescriptible and conclusive as well as sovereign.

31. The notion of sovereignty is conveyed in the Irish text by the word "ceannasach" which is defined in Ó Dónaill as "ruling, sovereign" and in Dineen as "having supreme power".

32. I can detect no nuance of conflict or inconsistency in the connotation of the words used in the Irish, and in the English, texts respectively. The English words, or at least the first two, are unusual and perhaps now old fashioned. But they have a long history in a constitutional context: for example the American Declaration speaks of "unalienable" rights.

Summary on the definition of terms.

33. I believe that in the formulation "inalienable, indefeasible and sovereign" and the Irish equivalent of those words, the Constitution deploys the very strongest words that are available in either language to indicate the absolute nature of the inherent and unrestricted right of the Irish nation to which they are applied, which includes the right "to determine its relations with other nations". This is surely put beyond doubt by the fact that the word "sovereign", accordingly to the OED, is "frequently applied to the Deity in relation to all created things". A right so described is not simply one amongst a number of rights: it is the origin of other rights and

exists at an entirely superior level.

34. The words used in the Constitution in each of its languages are apt to connote a right which is permanent, incapable of being given away or transferred, or sold, or bargained away and incapable of being defeated or trumped by any process, including a process of law, and a right superior to, and untrammelled by, any other authority or any other right or prerogative vested elsewhere.

Is voluntary abdication of such a right possible?
35. In *Crotty*, Walsh J. asserted in some detail the fullness of the freedom of action given to the Government to decide on matters of foreign policy and continued:

> "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".

36. He continued; in a passage relied on by both sides:-

> "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. The latter too have now been curtailed, by the consent of the people to the amendment of the Constitution which is contained in Article 29.4.3. If it is now desired to qualify, curtail or inhibit the existing sovereign power to formulate and pursue such foreign policies as from time to time to the government may seem proper, it is not within the power of the government itself to do so."

37. The plaintiff says that, applying the standards expressed in the extracts above, the European Stability Mechanism clearly represents a transfer of a significant part of Ireland's sovereignty to an extra-national (and extra-E.U.) authority. This contention is based on a detailed analysis of some of the provisions of the European Stability Mechanism Treaty, which will be considered below. On their competing analysis of the same material, the State defendants deny that it involves a transfer of sovereignty.

38. It is therefore necessary at this stage to consider the nature of those aspects of the Single European Act which, in *Crotty*, were considered to be of such a nature that its ratification by Ireland required a referendum. It will also be necessary to distil if possible a single ratio from the three majority judgments in *Crotty*.

The Single European Act.
39. The "Single European Act" or SEA refers to a number of Treaties of the 17th February, 1986 and the 28th February, 1986 whereby the then twelve Member States of the European Union amended and considerably expanded the scope of the Treaties governing the European communities. Title III of the SEA embodied a separate treaty whereby each of the members agreed to adapt its foreign policy positions to those of the others and "to refrain from impeding" a consensus and joint action within a structured framework known as European Political Cooperation. Title II embodied structural changes in the Treaties and provided for the increased use of voting by qualified majority (as opposed to the former practice of requiring unanimity); the listing of detailed objectives of the European Economic Community and other matters.

40. At p.781 of the Report, Walsh J. set out various relevant aspects of the Single European Act including the obligation to attempt to formulate a **European** Foreign Policy; to undertake to inform or consult the other Member States on foreign policy matters; to take full account of the position of other Member States in such matters and to ensure that "common principles and objectives" are generally developed and defined.

41. In light of these matters Walsh J. said:

> "If it is now desired to qualify, curtail or inhibit the existing sovereign power… **it is not within the power of the government itself to do so**. The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, the State or upon the people the contemplated restrictions upon freedom of action. To acquire the power to do so would, in my opinion, require a recourse to the people". (Emphasis supplied)

42. Henchy J., equally, set out the terms of s.2 of Article 30 of the Single European Act, at p.785 of the Report. He then observed:

> "it is clear from those provisions that once the Member States ratify this treaty each State's foreign policy will move from a national to a European or Community level. Apart from becoming bound to **endeavour** jointly to formulate and implement a European foreign policy, each Member State will become specifically bound to inform and consult its fellow members, to refrain from deciding on a final position as to an issue of foreign policy without prior consultations, and to **take full account** of the positions of the other partners in adopting its position". (Emphasis in original)

43. He continued:

> "Those and other commitments expressed in Article 30 make manifest that, although the approach to the ultimate aim of European Union is to be reached by a pathway of gradualism, each Member State will immediately cede a portion of its sovereignty and freedom of action in matters of foreign policy… **a purely national approach to foreign policy is incompatible with accession to this treaty**". (Emphasis supplied)

44. It will be noted that the obligations undertaken in the 1986 Treaties as set out, for example, by Mr. Justice Henchy, were largely preparatory, procedural and/or aspirational, and were expressed at a level at one remove from definite complete or binding action ("to inform and consult each others to ensure the convergence of their positions to have 'consultations' before adopting a final position and to 'take full account of the positions of the other partners')". The plaintiff says that the obligations undertaken in the ESM are much more immediate and specific and, in particular, that they include a commitment to making specific payments within a fixed time, and to obey certain decisions, over which Ireland will not have any sort of veto and about which Ireland may not have a right to be consulted at all in certain circumstances. Therefore, he says, his position is stronger than that of the successful plaintiff in *Crotty* because the transfer of sovereignty is much more immediate, specific and sharply defined, and less aspirational, procedural or preliminary.

Basis of *Crotty*.
45. The plaintiff relies on a passage in the judgment of Walsh J. at p.777 of the Report, as follows:

> "It is the government alone which negotiates or makes treaties and is the sole organ of the State in the field of

> international affairs. For these functions it does not require as a basis for their exercise an Act of the Oireachtas. Nevertheless the powers must be exercised in subordination to the applicable provisions of the Constitution."

46. The defendants take no issue with that statement.

Common Aspects of the majority judgments: deriving a ratio.

47. It is convenient to deal first with the brief but very significant concurring judgment of Hederman J. at p.794 of the Report. Hederman J. first expressed agreement with the judgments of Walsh and Henchy JJ, thereby creating the majority. He went on to state the "essential point at issue" as follows:

> "Whether the State can by any act on the part of its various organs of government enter into binding agreements with other States, or groups of States, to subordinate, or to submit, the exercise of the powers bestowed by the Constitution to the advice or interests of other States, as distinct from electing from time to time to pursue its own particular policies in union or in concert with other States in their pursuit of their own similar or even identical policies".

48. Hederman J. answered this question by holding that:

> "The State's organs cannot contract to exercise in a particular procedure their policy making roles or in any way to fetter powers bestowed unfettered by the Constitution. They are the guardians of these powers - not the disposers of them".

49. From these passages two things emerge which appear to me to be echoed in the other majority judgments. First of all, what was under consideration in *Crotty* was not a binding agreement to take a particular course of action, but simply a binding agreement to submit the exercise of the Government's powers "to the advice or interests" of other States. Secondly, the essence of Hederman J.'s approach is perhaps found in the statement that the State "cannot fetter powers [which are] bestowed unfettered by the Constitution". This, in turn, leads to Hederman J.'s distinction between agreeing "to subordinate, or to submit, the exercise of [Irish governmental] powers to the advice or interests of other States", which is impermissible, in contrast to "electing from time to time to pursue [Ireland's] own particular policies in union or in concert with other States", which is permissible under the Constitution.

50. It is these aspects of *Crotty* that render necessary the close analysis of Articles 1, 5 and 6 of the Constitution conducted earlier in this judgment, in order to establish the nature and scope of the right there recognised to inhere in our State, and thus to establish whether or not this right has been "fettered" by the ESM Treaty.

51. From the judgment of Henchy J. it emerges that he also saw the terms of the Single European Act as involving an obligation to consult, to co-ordinate, to seek to converge with, the policies of other countries and to keep those other countries informed, and to "endeavour to" avoid action which would impair cohesiveness as between the other States, as opposed to an obligation actually to do a particular thing or things in the positive conduct of foreign policy in a specific instance.

52. Henchy J., at p. 787, grounded himself on Article 6.1 of the Constitution, cited earlier in this judgment, and found, first, that the "common good, referred to in that Article is the common good of the **Irish** people". (Emphasis supplied)

53. This, to my mind, is an essential feature of *Crotty*, and it is "the ultimate standard by which the constitutional validity of the conduct of foreign affairs by the government is to be judged". This is inconsistent with a commitment to act in the interest of or, in a manner decided by some other nation, or some group of Nations.

54. He then held that, in sharp contrast to the "purely national" approach of the Constitution, by reason of the Single European Act:

> "each ratifying Member State would be bound to surrender part of its sovereignty in the conduct of foreign relations. That is to happen as part of a process designed to formulate and implement a European foreign policy. **The freedom of action of each State is to be curtailed in the interests of the common good of the Member States as a whole."** (Emphasis added)

55. Henchy J. continued:

> "Thus, for example, in regard to Ireland, while under the Constitution the **point of reference** for the determination of a final position on any issue of foreign relations is the common good of the Irish people, under Title III [of the Single European Act] the **point of reference** is required to be the common position determined by Member States. It is to be said that such a common position cannot be reached without Ireland's consent, but Title III is not framed in a manner which would allow Ireland to refuse to reach a common position on the ground of its obligations under the Irish Constitution." (Emphasis added)

56. This, I believe, is a profoundly important passage. The analysis based on an altered "point of reference" is extremely suggestive. The last passage quoted is also a reminder that, while the Single European Act bound Ireland to adopt as its "point of reference" the common position determined by Member States, nevertheless, (under Title III) that common position could not (then) be arrived at without Ireland's consent. But when we come to examine the European Stability Mechanism it will be seen that, at least in one important respect, an effective position amongst the members of the Stability Mechanism can indeed be arrived at without any regard to Ireland's position. To that extent, the position in the present case, by comparison with that in under the SEA, is *a fortiori*.

57. Henchy J. continued, in another important passage:

> "There is no provision in the Treaty for a derogation by Ireland where its constitutional obligations so require. On the contrary, Title III expressly provides: 'in adopting its positions and its national measures each high contracting party shall **take full account** of the positions of the other partners and shall **give due consideration** to the desirability of adopting and implementing common European positions'. Thus, if the other Member States were to take up a common position on an issue of external relations, Ireland, in adopting its own position and in its national measures, would be bound by Title III to 'take full account' of the common position of the other Member States. **To be bound by a solemn international Treaty to act thus is, in my opinion, inconsistent with the obligations of the government to conduct its foreign relations according to the common good of the Irish people.** In this and other respects, Title III amounts to a diminution of Ireland's sovereignty, which is declared in an unqualified terms in the Irish Constitution". (Emphasis supplied)

58. This last passage appears to me entirely consistent with the citations given above from the judgment of Hederman J. in *Crotty* and to be strongly suggestive, therefore, of a *ratio* for the case as a whole.

59. The judgment of Walsh J. is often regarded by commentators as the principal judgment in the majority. It must be first pointed out that, at p.781 of the Report, Walsh J. adopted an insight of Finlay C.J., (who, together with Griffin J. composed the minority on the Title III issue):

> "the essential nature of sovereignty is the right to say yes or no".

60. This pithy phrase, originated by Finlay C.J., is to my mind wholly consistent with and illustrative of Hederman J.'s finding that:

> "The State's organs cannot in any way fetter powers bestowed unfettered by the Constitution".

61. Turning to Article 29.4 of the Constitution, in relation to foreign policy, Walsh J. held at p.782:

> "In my view it would be quite incompatible with the freedom of action conferred on the government by the Constitution for the government to qualify that freedom or to inhibit it in any manner by formal agreement with other States [so] as to qualify it".

62. And, at p.783:

> "Equally clearly [the framers of the Constitution] refrained from granting to the government the power to bind the State by agreement with such groups of nations as to the manner, or under what conditions, that executive function of the State would be exercised".

63. Referring again to the freedom of action in relation to foreign affairs conferred on the Government by the Constitution, Walsh J. said on the same page:

> "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".

64. Neither Walsh J. nor the other members of the majority held that the State could not, in any way at all, agree to limit its freedom of action in foreign policy. But Walsh J. said:

> "If it is now desired to qualify, curtail or inhibit the existing sovereign power to formulate and to pursue such foreign policies as from time to time to the government may seem proper **it is not within the power of the government itself to do so**. The foreign policy organ of the State cannot, within the terms of the Constitution, **agree to impose upon itself, the State, or upon the people the contemplated restrictions upon freedom of action**. To acquire the power to do so would in my opinion require a recourse to the people 'whose right it is' in the words of Article 6 ' in final appeal to decide all questions of national policy, according to the requirements of the common good'." (Emphasis supplied)

An example.

65. Thus, (to take an example removed from the specific context of the ESM), consider the position that would arise if a new State emerges, or were in the process of emerging, perhaps after the break up of an existing State as in the recent case of Ethiopia. The decision on whether Ireland should recognise, or withhold recognition from, the new polity is obviously within the prerogative of the Irish government. It falls within the Nations "inalienable, indefeasible and sovereign right to determine its relations with other nations" in Article 1 of the Constitution. It is, of course, legitimate for the Government to consult with other countries, and with any international organisation it may choose, before making its sovereign decision to grant or to withhold recognition. That is a matter for the Government. But, on the authority of *Crotty*, it would not be consistent with the Constitution for Ireland to agree not to recognise any new State save with permission or agreement of some other country, countries, or organisations. Equally, it would not be possible, consistently with the Constitution, for Ireland to agree to recognise new States only if some percentage of some group of nations also decided to recognise it, or to agree to be bound to recognise a new State if some particular State, or 80% or 85% of a group of States, decided to give recognition. Nor would it be possible for the government to agree not to recognise a new State except after consultation with other States and after "taking full account" of their views.

66. This is so because to enter into any agreements of the kind described would be "to enter into binding agreements with other States to exercise [Irelands sovereign] power in a particular way or to refrain from exercising it save by particular procedures" as Walsh J. put it in a passage already quoted. More fundamentally, it would be to change Ireland's "point of reference" for the determining of a question of relations with other States from the interest of the Irish people to a new point of reference, viz, the interests or the declared positions of some other State or States, (to adopt the language of Henchy J. also quoted above).

67. There is always a risk of distortion in adopting a single phrase, or series of phrases, to epitomise the *ratio* of a multi-judgement decision of the Court. Nevertheless, having considered the judgments in *Crotty* as a whole I believe that the phrase I have quoted more than once from the judgment of Hederman J. is a fair epitome of the ratio of *Crotty*. This is:

> "The State's organs cannot contract to exercise in a particular procedure their policy making roles or in any way to fetter powers bestowed unfettered by the Constitution. They are the guardians of these powers - not the disposers of them".

68. I wish also respectfully to express my agreement, though it is in some respects a statement of the obvious, with the insight of Finlay C.J. and of Walsh J. that "the essential nature of sovereignty is the right to say yes or to say no". Obvious it may be, but it is a precise and memorable statement of an essential quality of constitutional sovereignty, which is asserted in the Constitution, and which may otherwise be liable to erosion by the pressure of events, or by unreasoning enthusiasm for novelties, or by a desire please others from whom some advantages is expected or at least hoped for.

Summary on Constitutional Constraints.

69. The right "to determine its relations with other nations" is expressed to be a part of the "inalienable, indefeasible and sovereign right" attaching to the State by virtue of its nature and affirmed in Article 1 of the Constitution.

70. Moreover, the Nation in which this right exists is, by Article 5, "**a sovereign independent democratic State**". (Emphasis added)

71. By Article 29.4, the Executive power of the State "in or in connection with its external relations" is to be exercised by or on the authority of the Government.

72. The power of the people of Ireland " in final appeal to decide all questions of national policy" is to be exercised "according to the requirements of the common good". (Article 6)

73. Henchy J. in *Crotty* at p.787 found that "the common good, referred to in that Article, is the common good of the **Irish** people". This is "the ultimate standard by which the constitutional validity of the conduct of foreign affairs by the Government is to be judged". *(ibid)*

74. Accordingly, the Executive power of the State in connection with its external relations is to be exercised by or on the authority of the Government but "in so exercising that power the Government is subject to the provisions of the Constitution" and " to the judicial organ of government alone is given the power conclusively to decide if there has been a breach of constitutional restraints". (per Walsh J.)

75. It therefore appears to me that the fundamental approach mandated by the Constitution in relation to the external relations of the State is what Henchy J. called "a purely national approach to foreign policy" and the "point of reference" for the determination of the final position on any issue of foreign relations is the common good of the Irish people". *(Ibid. at 787)*

76. In *Crotty* it was held, speaking of the restrictions of the Irish Government's freedom of action contained in the Single European Act:

> "The foreign policy organ of the State cannot, within the terms of the Constitution, agree to impose upon itself, [upon] the State or upon the people the contemplated restrictions upon freedom of action".

77. Walsh J. continued:

> "To acquire the power to do so would in my opinion require a recourse to the people".
>
> This is because:
>
> "it would be quite incompatible with the freedom of action conferred on the Government by the Constitution for the Government to qualify that freedom or to inhibit it in any manner by formal agreement with other States [so] as to qualify it".
>
> This in turn is because:
>
> "clearly [the framers of the Constitution] refrained from granting to the Government the power to bind the State by agreement with such groups of nations as to the manner, or under what conditions, that Executive function of the State would be exercised".

78. Accordingly, in the words of Hederman J., the organs of the State who enjoy the various individual power set out in the Constitution, such as the Oireachtas and the Government, "are the guardians of these powers - not the disposers of them". *(ibid 794)*

Other Constitutional Provisions.
79. The foregoing summary focuses on the Executive power of the State in relation to the Nation's external relations. This, of course, is only one amongst many powers of the Executive branch of government. The exercise of Executive power generally is subject to the restrictions, or checks and balances, on the exercise of Executive power, notably in relation to the exercise of that power in a manner which is accountable to the Dáil and, through it, to the people. The Constitution therefore lays down democratic processes and procedures for the exercise of that power.

80. The plaintiff relies on certain of these provisions and says, broadly, that the European Stability Mechanism would interfere with the established Irish governmental and parliamentary procedures, mandated by the Constitution, and designed to ensure accountability **to the Irish people as opposed, for example, to a financial institution based in Luxembourg.**

81. In this connection it is relevant to recall the provisions of Article 11 of the Constitution which provide as follows:

> "All revenues of the State from whatever source arising shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes and in the manner and subject to the charges an liabilities determined and imposed by law".

82. In particular, the plaintiff relies on Article 17 of the Constitution which provides:

> Article 17.1.1
>
> "As soon as possible after the presentation to Dáil Eireann under Article 28 of this Constitution of the Estimates of Receipts and the Estimates of Expenditure of the State for any financial year, Dáil Eireann shall consider such Estimates.
>
> 2° Save insofar as may be provided by specific enactment in each case, the legislation required to give effect to the Financial Resolutions of each year shall be enacted within that year".
>
> Article 17.2
>
> "Dáil Eireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Eireann by a message from the Government signed by the Taoiseach."

83. The plaintiff also refers to Article 28.4 of the Constitution and in particular on the following provisions:

> Article 28.4.1
>
> "1° The government shall be responsible to Dáil Eireann.
>
> 2° The government shall meet and act as a collective authority and shall be collectively responsible for the Departments

of State administered by the members of the Government.

4° The government shall prepare Estimates of the Receipts and Estimates of the Expenditure of the State for each financial year and shall present them to Dáil Eireann for consideration."

Article 28.12 provides:

"The following matters shall be regulated in accordance with law, namely, the organisation of, and distribution of business amongst, departments of State, the designation of member of the government to be the Ministers in charge of the said departments…".

84. I interpret Article 6 of the Constitution as requiring that the Ministers, in discharging the responsibilities they have been given by the Constitution and by the law, are exercising the powers of government acknowledged by Article 6 and are, accordingly, required to exercise them "according to the requirements of the common good". Following the passage already quoted in this judgment from Henchy J., I consider the "common good" referred to be the common good of the people of Ireland.

85. The plaintiff likewise relies on Article 29.4.4 which affirms Ireland's commitment to the European Union within which the Member States work together to promote peace shared values and the well being of their people, and Article 29.4.5, which authorised the State to ratify the Treaty of Lisbon of 13 December, 2007.

86. The plaintiff also relies on what one might call a negative way on Article 29.4.6 which provides that:

"No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5 of this Section or of the European Atomic Energy Community or prevent laws enacted, acts done or measures adopted by -

(i) The said European Union or the European Atomic Energy Community or institutions thereof,

(ii) The European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or

(iii) Bodies competent under the Treaties referred to in this section from having the force of law in the State."

87. The negative points made by the plaintiff arising from this last constitutional provision are, firstly, the obvious point that the Treaty in question here is not necessitated by the obligations of membership of the European Union and is therefore not protected by Article 29.4.6. This much is agreed by the State. The Treaty is, therefore, in the plaintiff's submission established outside the legal order of Ireland and outside the legal order of the European Union. The plaintiff strongly contends that these facts render the defendants' repeated contention that the world has changed a great deal since *Crotty* was decided "a generation ago" simply irrelevant. In particular, the plaintiff alleges, the constitutional changes which have trenched upon Ireland's sovereignty in the context of European Union measures are wholly irrelevant to the standing in Irish law of the present Treaty, because of that Treaty's existence outside the Irish and European legal orders. The fact that the Treaty confers a certain status on organs of the E.U. for example on determining when the ESM shall use "an emergency voting procedure", does not in any way detract from the nature of the ESM as an extra-E.U. body. I did not understand the State to argue the contrary.

88. Finally, the plaintiff relies on Article 29.6 of the Constitution which requires that no international agreement shall be a part of the domestic law of the State save as may be determined by the Oireachtas.

89. It is of course true that Article 29 of the Constitution has been amended on a number of occasions to provide constitutional immunity for measures "necessitated" by the State's membership of what is now the European Union, and in relation to certain more specific European Union Instruments. This is acknowledged in a passage from the judgment of Walsh J., quoted above. But these exempting provisions, suggestive in themselves of a felt necessity to amend the Constitution, by referendum, are specific in their scope and do not extend to what the State describes in its written submissions as the "residual sovereignty", unaffected by the amendments in question, for example measures not "necessitated" by membership of the E.U.

Point of divergence.

90. Since I have the misfortune to differ from my colleagues in this case, it seems appropriate to indicate with some precision the precise nature of the divergence.

91. As mentioned above, and mentioned also in the judgments of my colleagues (see, for example, the judgment of the Chief Justice at paragraphs 14 and 14(i)) the authority of the case of *Crotty v. An Taoiseach* [1987] IR 713 has not been doubted or challenged by either side in this case. On the contrary each side urged that that case, properly understood, would lead to a resolution of the present litigation in its favour. Accordingly, the precise meaning of *Crotty* and the correct identification of the *ratio* of that case lies at the heart of the present judgment, and of the divergence of it with those of my colleagues.

92. At p.7 of his judgment in this case, Mr. Justice O'Donnell declares:

"In the words 'abdicate', 'alienate', 'subordinate' and indeed also 'transfer' is to be found in my view, the essence of what was considered impermissible in *Crotty*."

93. This seems to me quite consistent with what is said by Mr. Justice Clarke. At p.26 of his judgment, quoting from Walsh J., he identified the substance of the limitation on the Executive power in the relevant area to be one which did not permit the government "to abdicate that freedom or to enter into binding agreements with other States to exercise that power in a particular way". Similarly, he cites Henchy J. for the proposition that government is not permitted "to alienate in whole or part to other States the conduct of foreign relations" nor to "subordinate, or to submit, the exercise of the powers bestowed by the Constitution to the advice or interests of other States".

94. Even viewing the phrases quoted above as being exhaustively descriptive of the limitations on Executive power in connection with external relations, I would consider, for the reasons given elsewhere in this judgment, that adherence to the present Treaty would trespass on those limitations. But I do not consider that those limitations are exhaustively stated in the passages quoted. In the first place, I consider that, to adopt the words of Henchy J. in *Crotty* " a purely national approach to foreign policy is incompatible with

accession to this Treaty". To similar effect is the statement of that learned judge that:

> "in regard to Ireland, while under the Constitution the **point of reference** for the determination of a final position on any issue of foreign relations is the common good of the Irish people, under [the Treaty] the **point of reference** is required to be the common position determined by the Member States".

95. What Henchy J. said there about the Single European Act and the Treaty whereby Ireland came bound by it seems to me manifestly to be true of the European Stability Mechanism which requires Ireland to contribute to a fund to be expended in the interest of the Euro area and its members. I am far from saying that this is a lower, or less worthy, criterion than that of the common good of the Irish people: I am merely saying that it is different from that other criterion.

96. I do not consider that the essence of what is impermissible by virtue of the *Crotty* is comprehensibly epitomised in the word of "abdicate" or the other words cited by O'Donnell J. These words, it appears to me, are firstly not exhaustive of what is impermissible under the *Crotty* regime; they are also somewhat vague and open to interpretation. Thus, the word "abdicate" is classically used of a Monarch resigning his crown, and its other usages are by analogy from that. The judgments in *Crotty* certainly preclude abdication but also precludes more specific acts such as "to make a binding commitment to alienate in whole or in part to other States the conduct of foreign relations". More, and very significantly "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".

97. It appears to me, with great respect, to be beyond argument that in the ESM Treaty the State has agreed to exercise its power, which is of its nature sovereign and unfettered, in relation to making financial advances to other countries from the sum authorised in the 2012 Act, in compliance with the rules of the European Stability Mechanism. That, manifestly, appears to me to be a binding commitment to exercise that power "in a particular way".

98. This interest may very well be a worthy one but it is manifestly not identical to the "purely national approach" which is mandated in the Constitution. Whether the change is worth making or not is a political question on which I abstain from comment, but if it is to be made it must in my opinion be made by the people.

99. Equally, it appears to me that the prohibitions contained in *Crotty* extend not merely to substantive decisions (such as whether or not to advance money from a particular fund, alone or in conjunction with others, to a particular country) but to the procedures whereby such a decision can be taken. To quote a passage of Hederman J. which is fully set out above, "The State's organs cannot contract to **exercise in a particular procedure** their policy making roles or in any way to fetter powers bestowed unfettered by the Constitution".

100. It appears to me to be clear to demonstration that the provisions of the ESM Treaty which are set out in this judgment do just what is prohibited there; they bind the State "to exercise in a particular procedure" their power to decide, for example, whether or not to advance a particular sum of money to a particular State, alone or in conjunction with others. Those "particular procedures" are those laid down in the Treaty. The "procedures" lay down the constitution and the nature of the body which is to take those decisions, at least with regard to the €11.2 billion fund authorised by the Act of 2012, the nature of the majority of the Member States of that body necessary to take such a decision, and even the circumstances in which Ireland will lose its right to participate in the voting procedures, while still being bound by its financial obligations.

101. Certain of my colleagues have referred to the State's adherence to other international bodies, such as the United Nations. This is by way of suggestion that, if adherence to this Treaty requires a vote of the people, adherence to those other Treaties or organisations might, or even must, do so as well. I believe this form of argumentation is inadmissible. No-one has challenged the State's action in assuming the obligations of a member of the United Nations or any other such body. If such a challenge were made it would no doubt be met by the organs of the State with arguments appropriate to the particular Treaty or organisation in question. It is not prudent, proper or even logical to assume that those arguments would replicate those deployed in the present case.

102. Finally, I wish to emphasise that the right of the people (as opposed, for example, to the Government, the Oireachtas, or the European Union) in final appeal to decide all questions of national policy is enshrined in the Constitution and must be respected and upheld by the Courts.

103. That right can of course be changed, qualified, or even abolished by the procedures laid down in the Constitution, but it is the people, and not the Government or the bureaucracy or the European Union who must do this. I would regard an interpretation of *Crotty* which undermines this basic principle as emptying that great case of meaning.

Areas of agreement.

104. There were certain areas of agreement between the parties which removed certain issues from the field of debate in this case. It has already been noted that the State conceded that Mr. Pringle had *locus standi* to raise the points which he did in fact raise.

105. It was also agreed that the ratification by the State of the ESM Treaty is not something which is "necessitated" by the obligations of membership of the European Union. Accordingly, the State was unable to rely on Article 29.4.6 of the Constitution which provides an immunity from constitutional challenge to measures "necessitated" by that membership. On the contrary, the European Stability Mechanism is a proposed new financial institution, whose headquarters happen to be in Luxembourg and which is established by agreement of some members, but by no means all members, of the European Union. Membership of it, from the point of view of domestic and European law, is voluntary and is not in any way required by membership of the European Union or by Irish or European law.

106. The next area of agreement which requires to be noted is a very significant one indeed. The State did not contend that the Government or indeed the Oireachtas was immune from judicial control in the conduct of the State's external relations. Indeed, on the hearing of this appeal the State specifically conceded that both are liable to judicial control in that area, based on the authority of *Crotty v. Ireland*. The Court was not invited by either party to depart from that precedent but on the contrary we were invited by both sides to apply it to the facts of this case, insofar it is relevant to them.

107. The foregoing are important matters which require to be borne in mind throughout the discussion which follows. In the course of the argument on the hearing of this appeal certain other areas of agreement on specific points arose, which however are more comprehensible if discussed in the particular context in which they arose. There is however one area of mixed agreement and disagreement which it is convenient to set out and resolve now.

Permanence of the Treaty Provisions.

108. It was agreed between the parties that there is no provision in the ESM Treaty to bring its provisions to an end, and no provision in the Treaty permitting a party to withdraw from the Treaty.

109. It is also agreed that Article 56(1) of the Vienna Convention on the Law of Treaties applies a presumption **against** a capacity to withdraw from a Treaty where there is no specific provision providing for "denunciation" or withdrawal.

110. The State, however, contends that, because all of the parties to the Treaty are members of the European Union, and because the ESM Treaty is "separate from but closely interlinked with the E.U. Treaties", and because any Member State may withdraw from the European Union, that there is an implied power to withdraw or, as the State's written submissions put it "its nature must be regarded as allowing for withdrawal". This is on the basis **either** that the parties to the Treaty intended to admit the possibility of withdrawal **or** a right of denunciation or that withdrawal may be implied by the nature of the Treaty.

111. In my view these submissions are wholly lacking in logical force and are without legal merit.

112. The ESM Treaty is not, despite what is said at para. 73 of the State's submissions "an international Treaty that has emerged from the participation of the Member States in the E.U. Treaties". If it were so, then in my view that would imply that all members of the European Union were party to the present Treaty, but they are not. It would be true to say that the Treaty arises from the participation of some member States in the Euro currency. But this is a wholly different thing: it is not required by membership of the European Union nor does membership of the European Union imply that a Member State will necessarily, or ever, at any stage, adopt the Euro. The present Treaty, indeed, arises directly from the notorious crisis which has afflicted that troubled currency. Throughout, the States submissions were marked by attempts subliminally to assimilate the E.U. Treaty to an E.U. document. Those efforts cannot succeed, because it is not a European Union measure.

113. The State's submissions do not in any way seek to address the question of why, if there is a power to withdraw from the Treaty after it has been ratified, that power is not made express in the Treaty itself. In this regard the position is in sharp contrast to the express power to withdraw from the European Union: see Article 50 TEU.

114. I believe that logic and prudence alike require one to proceed on the basis that the Treaty, once ratified, will not permit the withdrawal of a State from the obligations set out in the Treaty. This is wholly consistent with the wording of the ESM Treaty itself. In Article 8(4) the States which are party to it "irrevocably" and "unconditionally" undertake to make their capital contributions. This language is of course radically inconsistent with a power to withdraw, just as "irrevocably" is inconsistent with "revocably".

115. Finally on this topic, it is to be noted that the long title of the European Stability Mechanism Act 2012 recites *inter alia* that the Act is too:

> (A) TO MAKE PERMANENT PROVISION TO PROVIDE FOR MATTERS RELATING TO THE PARTICIPATION BY THE STATE IN THE EUROPEAN STABILITY MECHANISM PURSUANT TO THE TREATY ESTABLISHINGTHE EUROPEAN STABILITY MECHANISM DONE AT BRUSSELS ON 2 FEBRUARY 2012 BETWEEN THE EURO AREA MEMBER STATES."

116. I do not believe that, once in this mechanism, Ireland will be able by its own act to leave it or to terminate its obligations under the Treaty once it has taken them on.

The European Stability Mechanism.

117. Some members of the European Union, those who are also members of the Euro area, but not the others, agreed, on the 11th July, 2011, a Treaty establishing the European Stability Mechanism. The Treaty establishes what is described as a new "international financial institution" called the European Stability Mechanism, to be based in the Grand Duchy of Luxembourg.

118. By Article 3 of the Treaty the purpose of the ESM is to "mobilise" (i.e. raise from the taxpayers of each member country under compulsory process and transfer out of the national jurisdiction to the new financial institution) funding to be used to provide support to members of the Eurozone in financial difficulty. It contemplates that this support will be provided only where such support is "indispensable to safeguard the financial stability of the Euro area **as a whole** and of its Member States".

119. Thus, (to borrow the language of Henchy J.) the "point of reference" for the provision of support in the financial stability of the Euro area **as a whole** and its Member States, as opposed to the common good of the Irish people. This change may be worth making - that is a political matter - but change it self evidently is, either from the "purely national" approach, envisaged by the Constitution, or from an E.U. "point of reference", envisaged in the SEA and other Treaties. The ESM is a *tertium quid*, so far uncontemplated in the Irish Constitution or the original European Treaties.

120. The European Stability Mechanism Treaty is a treaty, then, outside the structures of the Irish Constitution and also outside the structures of the European Union. It is to operate in the interests of the financial stability, not of Ireland, or of the European Union, but of the Euro area and its Member States, as determined or certified by powers external to Ireland: see below. Of course these interests may, or they may not, overlap in any particular case. There is, for example, no provision requiring equality of treatment amongst different support-receiving States. Thus Ireland or some other state might find itself in the odd position of funding support to another ESM country on terms less onerous than on which the funding country itself had had to accept support.

121. According to the defendants, the Treaty originated in discussions amongst Euro Area Member States following the establishment of the Greek loan facility and the European Financial Stability facility in 2010.

122. According to the learned High Court judge (Laffoy J.) the ESM has two interrelated functions:

> (1) To mobilise funding and
>
> (2) To enter into agreements to provide funding and stability support to ESM members experiencing or threatened by severe financing problems. Such support may be given **only** where it is "**indispensable** to safeguard the financial stability of the Euro area as a whole or of its Member States".

Operation of the ESM.

123. The ESM operates by using a capital stock comprising "paid-in contributions" of ESM members to support its borrowing and lending operations. The authorised capital stock is fixed by the Treaty at €700 billion. The initial paid-in capital is to be €80 billion.

The subscription of each ESM member to capital stock is set out at Annex II of the Treaty and is calculated in accordance with a "contribution key" set out in Article 11 and Annex I of the European Stability Mechanism Treaty.

124. Ireland's "contribution key" is 1.5922%. To give an idea of scale, that of Germany is 27.1464%, and that of France is 20.3859%. Spain and Italy also have contribution keys above 10%. These four States, between them, account for 77.3497% of the total. The four smallest states, by contrast, account in aggregate for only 0.8849%. If Ireland's contribution key were added to those of this group the aggregate would be 2.4771%.

125. Ireland's subscription to the authorised capital stock mentioned, above is the sum of €11.1454 billion. Ireland would have a share holding in the ESM in proportion to that, 111,454 shares, compared with 1,900,248 shares in the case of Germany, 1,427,013 shares in the case of France, 1,253,959 in the case of Italy and 833,259 in the case of Spain. The entire schedule of contribution keys and of shareholdings and subscriptions is set out in the Annexes to the Treaty.

Working of the ESM.
126. The necessity for mentioning these figures arises from the provisions of Article 4(2) of the Treaty which provides:

> "The decisions of the Board of Governors and the Board of Directors shall be taken by mutual agreement, qualified majority or simple majority as specified in this Treaty. In respect of all decisions a quorum of 2/3rds of the members with voting rights representing at least 2/3rds of the voting rights must be present."

127. One might wonder why a member whose vital interests might be affected by a decision of the ESM might not always be present and ready to exercise its vote. But this situation might arise by reason of the terms of Article 4(8) of the Treaty:

> "If any ESM member fails to pay any part of the amount due in respect of its obligations in relation to paid-in shares or calls of capital under Articles 8, 9 and 10, or in relation to the reimbursement of financial assistance under Article 16 or 17, such ESM member **shall be unable, for so long as such failure continues, to exercise any of its voting rights. The voting thresholds shall be recalculated accordingly**". (Emphasis added)

128. Thus, failure to pay one's subscriptions or additional subscriptions (which might arise in the way set out below), or total or partial failure to repay assistance received from the mechanism, at the times agreed will result in the automatic loss of voting rights. One or other of these events does not seem entirely improbable in certain cases.

129. Article 4(3) provides that;

> "The adoption of a decision by mutual agreement requires the unanimity **of the members participating in the vote**. Abstentions do not prevent the adoption of a decision by mutual agreement".

130. It will be seen, therefore, that if a member looses its ability to "participate in the vote", under Article 4(8), its consent is not necessary to a decision requiring unanimity either. The requirement of mutual agreement is further limited by Article 4(4) which provides as follows:

> "By way of derogation from paragraph (3), an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure **to urgently adopt a decision to grant or implement financial assistance would threaten the economic and financial sustainability of the Euro area**. The adoption of a decision by mutual agreement by the Board of Governors and the Board of Directors under that emergency procedure requires a qualified majority of 85% of the votes cast."

131. By Article 4(5) is provided that:

> "The adoption of a decision by qualified majority requires 80% of the votes cast".

132. The following paragraph provides that "the adoption of a decision by simple majority requires a majority of the votes cast".

133. Portion of the reality underlying these provisions is illustrated by the provisions for the coming into effect of the Treaty. It will come into effect when ratified by the holders of 90% of the paid up shareholding in the ESM. See Article 48 of the Treaty. This means, in practice, that it will come into effect if and when ratified by Germany and will not come into effect at all unless ratified by Germany.

134. Chapter 2 of the Treaty deals with the "governance" of the Stability Mechanism. It provides for a Board of Governors, a Board of Directors, a Managing Director and other dedicated staff. By Article 5(1) the Governor nominated by each member must be the Finance Minister. Further, the ESM is given immunity from regulation and its officials are given diplomatic-type immunities.

Funding.
135. Article 41(1):

> "payment of paid-in shares of the amount initially subscribed by each ESM member shall be made in five annual instalments of 20% each of the total amount. The first instalment shall be paid by each ESM member within fifteen days of the date of entry into force of this Treaty. The remaining four instalments shall each be paid on the 1st, 2nd , 3rd and 4th anniversary on the payment date of the first instalment."

136. Article 41(2) however provides:

> "During the five year period of capital payment by instalments, ESM members shall accelerate the payment of paid-in shares, in a timely manner prior to the issuing State, in order to maintain a minimum 15% ratio between paid-in capital and the outstanding capital of ESM issuances and guarantee a minimum combined lending capacity of the ESM and of the EFSF of €500,000 million".

137. Article 42 makes provision for a "temporary correction" of a contribution key in the event of a Member State's gross domestic product being less than 75% of the European average. In that event (by Article 42.4) "the relevant proportion of shares allocated to an ESM member shall be reallocated amongst the ESM members not benefiting from a temporary correction on the basis of their share holding in the ECB".

Increase in authorised capital.
138. It is also necessary to take account of the provisions of Articles 8, 9 and 10 of the Treaty in relation to the authorised capital of the ESM. These provide:

ARTICLE 8

Authorised capital stock

1. The authorised capital stock shall be EUR 700 000 million. It shall be divided into seven million shares, having a nominal value of EUR 100 000 each, which shall be available for subscription according to the initial contribution key provided for in Article 11 and calculated in Annex I.

2. The authorised capital stock shall be divided into paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares shall be EUR 80 000 million. Shares of authorised capital stock initially subscribed shall be issued at par. Other shares shall be issued at par, unless the Board of Governors decides to issue them in special circumstances on other terms.

3. Shares of authorised capital stock shall not be encumbered or pledged in any manner whatsoever and they shall not be transferable, with the exception of transfers for the purposes of implementing adjustments of the contribution key provided for in Article 11 to the extent necessary to ensure that the distribution of shares corresponds to the adjusted key.

4. ESM Members **hereby irrevocably and unconditionally undertake to** provide their contribution to the authorised capital stock, in accordance with their contribution key in Annex I. They shall meet all capital calls **on a timely basis** in accordance with the terms set out in this Treaty.

5. The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to the authorised capital stock in accordance with this Treaty are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM.

ARTICLE 9

Capital calls

1. The Board of Governors may call in authorised unpaid capital at any time and set an appropriate period of time for its payment by the ESM Members.

2. The Board of Directors may **call in authorised unpaid capital by simple majority** decision to restore the level of paid-in capital **if the amount of the latter is reduced by the absorption of losses** below the level established in Article 8(2), as may be amended by the Board of Governors following the procedure provided for in Article 10, and set an appropriate period of time for its payment by the ESM Members.

3. The Managing Director shall call authorised unpaid capital in a timely manner if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors. The Managing Director shall inform the Board of Directors and the Board of Governors of any such call. When a potential shortfall in ESM funds is detected, the Managing Director shall make such capital call(s) as soon as possible with a view to ensuring that the ESM shall have sufficient funds to meet payments due to creditors in full on their due date. ESM Members hereby irrevocably and unconditionally undertake to pay on demand any capital call made on them by the Managing Director pursuant to this paragraph, such demand to be paid within seven days of receipt.

4. The Board of Directors shall adopt the detailed terms and conditions which shall apply to calls on capital pursuant to this Article.

ARTICLE 10

Changes in authorised capital stock

1. The Board of Governors shall review regularly and at least every five years the maximum lending volume and the adequacy of the authorised capital stock of the ESM. **It may decide to change the authorised capital stock and amend Article 8 and Annex II accordingly**. Such decision shall enter into force after the ESM Members have notified the Depositary of the completion of their applicable national procedures. The new shares shall be allocated to the ESM Members according to the contribution key provided for in Article 11 and in Annex I.

2. The Board of Directors shall adopt the detailed terms and conditions which shall apply to all or any capital changes made under paragraph 1.

3. Upon a Member State of the European Union becoming a new ESM Member, the authorised capital stock of the ESM shall be automatically increased by multiplying the respective amounts then prevailing by the ratio, within the adjusted contribution key provided for in Article 11, between the weighting of the new ESM Member and the weighting of the existing ESM Members."

139. These provisions are manifestly of great importance. It will be observed, in particular, that by Article 9 the Board of Governors "may call in authorised unpaid capital at any time". If that is done Ireland would become liable to make a payment, which it has already committed itself to make, at a time fixed by the Board of Governors.

140. Moreover, the Board of Directors of the ESM may call in authorised unpaid capital by **simple majority decision** for the purpose of restoring the level of paid in capital "if the amount of the latter is reduced by the absorption of losses below the level established in Article 8(2), as that Article may itself be amended by the Board of Governors. This, too, will be a call which Ireland will then be powerless to resist, or, to use some of the wording of *Crotty*, to say "no" to, simply because it would be deemed already to have said "yes".

141. It will, of course, be understood that the effect of these provisions might be, **depending on what an entity entirely outside Irish democratic control** says to compel Ireland forthwith to pay the balance of authorised but unpaid capital up to a maximum of €11.145 billion.

142. By Article 10, the Board of Governors are required to review regularly the maximum lending volume and the question of the adequacy of the authorised capital stock of the ESM. It will be remembered that this has been fixed, by Article 8, at €700 billion. But this sum may be changed by the Board of Governors of the European Stability Mechanism, which body is also authorised to amend Article 8 and annex 2 accordingly. The effect of this is that the Board of Governors are empowered to increase the authorised capital and to make demands on the Member States, in sums not capable of anticipation at the moment, to supply the balance of the authorised capital stock so fixed, or such proportion of it as the Governors demand.

143. Some comfort in this regard is taken by certain persons from the following phrase in Article 10:

> "Such decision [a decision to increase the authorised capital] shall enter into force after the ESM Members have notified the Depositary of the completion of their applicable national procedures."

144. It has been suggested that this provision means that the approval of each Member State is necessary for an increase in the authorised capital. I consider that this interpretation is grossly optimistic and, as a matter of probability, wrong. The power to increase the capital is conferred on the Board of Governors of the European Stability Mechanism. The reference to the Members relates to the **time** at which a decision of the Board of Governors shall enter into force. It does not appear to me to confer any discretion on the Members, but merely to recognise that they must go through "applicable national procedures". If it were desired to confer a veto on each individual Member State in relation to an increase in capital it would have been very easy to say that in so many words. I consider that the effect of Article 10 combined with the other provisions of the Treaty is to oblige Member States to do whatever is necessary to provide their increased contributions if the Board of Governors increase the authorised capital stock.

Defendants' case on *Crotty* with observations.
145. As already noted, the defendants do not doubt the authority of *Crotty* or invite the Court to depart from it. But they say that the ESM Treaty is "qualitatively different" from the Treaty contained in Title III of the Single European Act, which was the instrument under consideration by the Supreme Court in *Crotty*.

146. The defendants deny that the European Stability Mechanism would:

> (1) Constitute a transformation in relations between Ireland and the other States party to the agreement.
>
> (2) Undermine the essential nature of what they call "Ireland's residual sovereignty" or
>
> (3) "Fetter", in relation to a policy making role, powers bestowed unfettered by the Constitution and "which remain unfettered thereunder".

147. The defendants go on to say, in a sentence suggestively complex construction, that the ESM Treaty "apart from being qua international agreement a formal exercise in international relations".

148. I pause at this point to note the necessarily implicit agreement (albeit reduced to an introductory subordinate clause) between the parties to this Action that the Treaty is indeed "an exercise in international relations", though the State qualifies this by the insertion of the adjective "formal". This qualification is without meaning in my view, but is plainly an attempt to take the ratification of the treaty out of the category of Acts which "determine the States relations with other Nations". (Article 1 of the Constitution)

149. The basis of this qualification is to be found in the next phrase they employ which is to say that the Treaty, though "a formal exercise in international relations":

> "has little to do with the conduct of the State's foreign policy".

150. On this basis, the defendants appear to suggest that *Crotty* is distinguishable.

151. I do not at all agree that *Crotty* is thus distinguishable from the present case. The Treaty in question here is in reality, in totality and both in form and in content an international agreement. It is nothing else. I frankly do not understand the nature of the difficulty with this characterisation which is coyly epitomised by the State defendants in their by the use of the word "formal", which has no basis in the Treaty or in Irish or European law.

152. The text of the Treaty is set out in the English language in Part II of the Schedule to the Europeans Stability Mechanism Act, 2012. It recites as follows:

PART 2

Text of Treaty in the English Language

TREATY

ESTABLISHING THE EUROPEAN STABILITY MECHANISM

BETWEEN THE KINGDOM OF BELGUM, THE FEDERAL

REPUBLIC OF GERMANY,

THE REPUBLIC OF ESTONIA, IRELAND, THE HELLENIC

REPUBLIC,

THE KINGDOM OF SPAIN, THE FRENCH REPUBLIC,

THE ITALIAN REPUBLIC, THE REPUBLIC OF CYPRUS,

THE GRAND DUCHY OF LUXEMBOURG, MALTA,

THE KINGDOM OF THE NETHERLANDS, THE REPUBLIC

OF AUSTRIA,

THE PORTUGUESE REPUBLIC, THE REPUBLIC OF

SLOVENIA,

THE SLOVAK REPUBLIC AND THE REPUBLIC OF FINLAND

153. The document so headed is manifestly and unarguably an International Agreement.

154. It then goes on to introduce the text of the Treaty with the statement that:

"THE CONTRACTING PARTIES [the States involved as set out] HAVE AGREED AS FOLLOWS".

155. The text of the Treaty is then set out. In my view the foregoing makes it quite clear that the Treaty to which this action relates is in reality, in form and in substance an international agreement. That is its nature: it has no other nature. It is utterly meaningless to qualify this in some way by saying that it is only "formally" **an exercise in international relations**. Both the form and the content makes clear that, in the matters to which it relates, the Treaty is an instrument which "determine(s) [Ireland's] relations with other nations", to use the words of Article 1 of the Constitution.

156. The substantial purpose of the Treaty, as set out in Article 3 (ESM) is "mobilise funding and provide stability to support to the benefit of ESM members which are experiencing, or are threatened by, severe financing problems". That is to say, the new financial institution constituted by the Treaty will enter into the relationship of debtor and creditor with countries which are party to the Treaty and which are experiencing financing problems. The countries who are party to the Treaty will provide the finance to do this in the way set out in the provisions of the Treaty already cited in this judgment. In Article 8 those countries "irrevocably and unconditionally" undertake to do so. Once the Treaty is ratified, the provision of this finance becomes mandatory on the countries which ratify it, in the proportions already outlined, and either at the stated intervals or even sooner on the accelerated basis set out above.

157. The State in their submissions seek to distinguish the freedom to formulate foreign policy from the freedom to formulate economic policy and the freedom to legislate. This is on the basis of a quotation from the judgment of Walsh J. in *Crotty*; which has been set out earlier in this judgment, and includes the words:

> "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. The latter too have now been curtailed, by the consent of the people to the amendment of the Constitution which is contained in Article 29.4.3."

158. This passage appears to me to assimilate, and not to differentiate, the freedom to form economic policy and the freedom to legislate on the one hand with the freedom to formulate foreign policy in the other hand. What they have in common, and it is a very fundamental quality, is that they are all aspects of **sovereignty**. It is certainly true that the third amendment to the Constitution of 1972 provided an exemption from constitutional scrutiny for acts "necessitated" by membership of what is now the European Union. This was re-iterated at the time of the Lisbon Treaty. But it is common case that the present measure is not so necessitated and is not, indeed, a European Union measure at all. Not withstanding this, the State defendants submit that the plaintiff's case in this respect "ignores the fundamentally altered legal landscape and invites the Court to assume that the constitutional context is the same as that which prevailed a generation ago in 1987 when *Crotty* was decided".

"When *Crotty* was decided".

159. In the State defendants written submissions the somewhat vague statement just quoted is, perhaps, put more specifically by saying:

> "The respondents submit that the concerns expressed in *Crotty*, regarding the justiciable limits to the exercise by the government of its unfettered foreign relations power, do not arise in this case".

160. I regard this as the substance of the defendants' case and as meaning that the State does not take issue with the statement, in *Crotty*, of the constitutional limitations on the Government's foreign relations power, but does not consider that these limits have been breached in the case of the present Treaty. I consider that the wording of the State defendants' submissions, just quoted, is not properly representative of *Crotty*. Firstly, the majority judgments in that case do not express "concerns" but make binding and authoritative findings as to the constitutional limitations on the power of the Executive "in or in connection with [the State's] external relations".

161. Secondly, it appears to me that the specific subject matter of any Treaty which the State may arrive at with another State or States does not affect the nature of such Treaty as an exercise "in or in connection with [the State's] external relations, that is, as an instrument which, in one regard or another, is used "to determine [the State's] relations with other nations". The instruments' nature as an exercise in International relations is unaffected by whether the subject matter of the agreement is economic, defence - or security - related, commercial, or for that matter by whether it relates to the protection of wild birds. I say this in light of the State defendant's submissions, quoted above, that the ESM Treaty " apart from being *qua* international agreement a formal exercise in international relations has little to do with the conduct of the State's foreign policy".

162. At the present time, and probably at all times, the State's foreign policy concerns have included, and not in any inferior position, policy considerations of a commercial and of an economic nature. I do not believe that there is any area of pure "foreign policy": it always has its focus on some specific area of the State's policy concerns which have a foreign dimension. This must especially be true at the present time, when notoriously, the State's domestic economic concerns reflect a felt need to meet certain criteria articulated outside the State and to make certain payments in respect of funding sourced outside the State.

Nature of the Treaty.
163. It is in my view clear from the provisions of the Treaty set out above that it involves all the countries which are party to it, in varying degrees, in the ownership of shares in a new international financial institution; in the payment for those shares at the times and in the enormous amounts set out, and in acquiescence in the use of the sums contributed for shares, and other sums paid or raised by borrowing in accordance with the Treaty, in providing support to countries selected by the Government of the new institution on conditions, as to repayment and otherwise, to be laid down by the ESM, and not by Ireland or by any other individual country.

164. It appears to me self evident that, if Ireland were itself to loan €11 billion or any part of that sum to individual country on terms agreed individually, that would be a transaction which is part of the Irish State's relations with another State (or States). Ireland would be entering into the relationship of debtor and creditor with such State.

165. By virtue of the ESM Treaty, Ireland has entered into relations with the States set out in the preamble to participate with them in the European Stability Mechanism and to make payments to that body, which agreements are of a binding nature, "irrevocable and unconditional" as the Treaty says (Article 8).

166. In *Crotty*, Walsh J. said, speaking of the Single European Act, at p.780 of the Report:

> "The object of this Treaty, so far as Ireland is concerned, is to bind this State in its relations with the other Member States of the European Communities. Adherence to the Treaty, or indeed the Treaty itself, is not in any sense an obligation arising from or necessitated by membership of the European Communities".

167. It appears to me that that statement can be repeated of the Treaty in question here with the following alterations only:

> "The object of this Treaty, so far as Ireland is concerned, is to bind this State in its relations with **some other States and with a new entity created by those States, the European Stability Mechanism. Adherence to the Treaty, or indeed the Treaty itself, is not in any sense an obligation arising from or necessitated by membership of the European Communities**".

168. This was the basis on which the SEA was required to be submitted to referendum.

169. I cannot see that these alterations, which are all that are necessary to apply the statement of Walsh J. to the present Treaty, make any difference at all to the vital question of whether ratification of this Treaty requires recourse to the people because it is outside the powers of the Government and the Oireachtas.

170. To judge by para. 88 of the State defendants' written submission, they conceive the *ratio* of *Crotty* as follows:

> "*Crotty* turns on the transfer of sovereign powers in the field of foreign policy that this Court considered was involved in the EPC Treaty and which the majority of the Court regarded as impermissible. It was because such an impermissible transfer was involved (since no political co-operation was envisaged or then provided for in the European Communities Treaties) that the binding commitment to co-operate with other contracting parties was involved in the EPC Treaty in respect of the formulation of foreign policy radically altered the then legal landscape as regards the freedom of the State to pursue its own foreign policies as it saw fit from time to time. As Henchy J. put it: '[a] purely national approach to foreign policy', which was then the case, '[wa]s incompatible with accession to this Treaty'."

171. I interpret this submission as involving the concession that a "purely national approach to foreign policy" is what was envisaged by the Constitution. But the State defendants, clearly, regard that as having changed in the interval: hence their submissions, quoted above, about a "fundamentally altered legal landscape".

172. The landscape is indeed altered, but exclusively with regard to the European Union. The present Treaty is not a European Union Instrument or something required by membership of the European Union. That appears to me to be a simple and dominating aspect of the analysis of the present claim. Under the ESM the use of some €11 billion of Irish taxpayers money, a sum sufficient to be of macro-economic significance, will be removed from the power of expenditure of the Irish government and the parliament to which it is accountable. Instead, that money will "irrevocably and unconditionally" be given by Ireland to a new financial institution which exists physically outside Ireland and legally and constitutionally outside the Irish constitutional and legal order, as well as outside that of the European Union.

Irish provisions on public monies.
173. It appears to me that terms of the European Stability Mechanism Treaty involve Ireland in committing a very large sum of money subscribed by the taxpayers of Ireland to be expended by a body outside the Irish legal order.

174. Further, it appears to me that the terms of that Treaty are such that those monies are to be expended for a purpose quite different to that of furthering the common good of the people of Ireland.

175. I say this for the following reasons:

> For the reasons already set out in this judgment the entire revenues of the Irish State form a single fund (Article 11 of the Constitution) which is to be expended in the manner provided by Irish law (Article 11 also) and in the interest of the common good of the people of Ireland (Article 6 of the Constitution).
>
> In particular, such funds are to be "appropriated for the purposes and in the manner" laid down by Irish law (Article 11). The most immediately relevant provisions of this law appear to me to be those enshrined in Article 17 of the Constitution and Article 28.4.3 of the Constitution both of which have been cited above. The "Single Fund" referred to in Article 11 is, by reason of the Constitution (Consequential Provisions) Act 1937, s.6, to be known as the "Central Fund".

176. Section 6 of that Act provides as follows:

> "6(1) The fund mentioned in Article 11 of the Constitution as the one fund to be formed by the revenues of the State shall be called and known as the Central Fund and is in this section and the next following section of this Act referred to for the purpose of distinction as the Central Fund of Ireland".

177. That constitution of the Central Fund appears to invoke the jurisdiction of the Comptroller and Auditor General. Article 33.1 of the Constitution provides:

> "There shall be a Comptroller and Auditor General to control on behalf of the State all disbursements and to audit all accounts of monies administered by or under the authority of the Oireachtas."

178. The banking transactions on the Central Fund, which were formerly conducted through the Exchequer Account in the Bank of Ireland are now, by virtue of s.49 of the Central Bank Act 1971 conducted through the Central Bank. This measure provides as follows:

> "49(1) The Exchequer account in the Bank of Ireland shall be transferred to the Bank [i.e. the Central Bank] and, accordingly, references in sections 10, 11, 13 and 15 of the Exchequer and Audit Departments Act 1866 to the Bank of Ireland shall be construed as references to the Bank."

179. Section 2 of the Comptroller and Auditor General (Amendment) Act 1993 provides as follows:

> "Upon receipt of a requisition in that behalf from the Minister the Comptroller and Auditor General shall, if he is satisfied as to the correctness thereof, grant to the Minister, on the account of the Exchequer at the Central Bank or on the growing balance thereof, credits -
>
> (a) That are to meet disbursements in respect of supply services and do not exceed the amount authorised by the Central Fund (Permanent Provisions) Act, 1965 or, as the case may be voted by Dáil Eireann for any supply service for the financial year to which the requisition relates, or
>
> (b)(i) that are to meet disbursements in respect of Central Fund services the making of which is certified by the Minister to fall due during the period of three months commencing with the commencement of the period in respect of which the credits are sought,
>
> (ii) That are of the amounts estimated to be required for the purposes specified in subparagraph (i) and
>
> (iii) That comply in all other respects with the provisions of the enactments relating to them.

Conclusions.

180. It will be remembered that monies paid to the ESM will be used for the purpose of providing support to members of the Euro zone in financial difficulty, where such support is "indispensable to safeguard the financial stability of the Euro area as a whole and of its Member States (Article 3 ESM Treaty).

181. It will also be remembered that, in relation to a specific decision to provide such support, the ESM may take a decision by "qualifying majority" in the following circumstances:

> "an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure **to urgently adopt a decision to grant or implement financial assistance would threaten the economic and financial sustainability of the Euro area**" (Emphasis added) (Article 4 ESM Treaty).

182. It thus appears to me that the Treaty involves a change to the fundamental values and procedures enshrined in the Constitution in that:

> (a) A significant sum of money subscribed by Irish taxpayers would be given "irrevocably and unconditionally" to a body which exists outside the Irish, and the European, legal and constitutional order.
>
> (b) That body would be obliged by its constitution to expend these monies, or monies raised on the basis of them, in the interests of the Euro zone or its Member States, as opposed to devoting them, as the Irish government would have been obliged to do, to the common good of the Irish people.

183. As I have already said, these interests may of course overlap in any particular case but, on the other hand, they may not overlap. It is impossible, looking at these matters before the commencement of the Stability Mechanism, to say in advance whether these different interests will always, sometimes, or never overlap in practice. Such an assessment would depend on matters which are simply unknown at the present time and which in any event would fall to be assessed politically. For example, the question of whether the Fund would be used only to address difficulties which arose after the coming into existence of the Fund, or whether on the other hand it might be available to assist in "historic" or "legacy" difficulties (for example, banking difficulties) which arose before that date, is an issue not now capable of resolution.

184. It appears to me, therefore, that adherence to the ESM Treaty would infringe Ireland's sovereignty and her inalienable right independently to decide her relations with other States in the following ways.

185. Firstly, as set out above, by requiring a substantial sum of Irish public money to be transferred to a new financial institution, outside both Irish and European Union control, and to be spent by that institution on providing funding to other countries which are experiencing severe financial problems where it is "indispensable to safeguard the financial stability of the Euro area as a whole or of its Member States", rather than retained in Irish control and employed, in the manner specified in the Constitution, in furtherance of the common good of the Irish people.

186. Secondly, by requiring Ireland to submit to decisions as to the expenditure of the fund already mentioned, and itself to exercise its relevant powers, in "particular procedures" (as Walsh J. put it) being those laid down by the ESM Treaty.

187. This appears to me to be amongst the very things held to be impossible in terms of the Constitution in *Crotty*. Walsh J., in a passage already quoted pointed out that the Government's freedom of action in relation to foreign affairs:

> "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** ".

188. The subject matter of these decisions relates **both** to the expenditure of Irish public money and to Ireland's relations with the States which would be beneficiaries of this expenditure and thereby engages both the constitutional provisions relating to the expenditure of public monies and those relating to the conduct of the State's external relations. The Constitution as adopted in 1937 envisaged what Henchy J. called, in passages already cited in this judgment, "a purely national approach" two questions of external relations and, indeed, to public expenditure. Subsequent amendments to the Constitution, the most general of which is quoted above in its entirety, have committed the State, in varying degrees, to replace "a purely national approach" with an approach affected by, and sometimes dictated by, the European Union. What is now proposed is outside the scope either of a purely national approach or of a European Union approach. It is a *tertium quid*, a new dispensation of an entirely different nature, and is not in my view contemplated or mandated by the Constitution. Neither is it compatible with its terms, for the reasons outlined above.

189. Thirdly, and quite apart from the foregoing, I have considerable doubts as to whether the commitments into which it is now proposed that Ireland should enter are consistent with the constitutional provisions for ensuring the democratic accountability of the government and of Ministers, and for ensuring democratic accountability, to the Irish people, for the appropriation and expenditure of the monies which compose the Central Fund.

190. Having regard to the conclusions already expressed above, it is unnecessary for the resolution of this case to resolve these issues. But I propose now to indicate matters which seem to me to require serious consideration in this regard.

191. These concerns relate, for instance, to the position of the Minister for Finance. The Minister is a member of the Government, to whom has been allocated the Department of Finance. In that capacity he is a member of body which "shall meet and act as a collective authority and shall be collectively responsible for the Departments of State administered by the members of the Government" (Article 28.4.2) and which "shall be responsible to Dáil Eireann" (Article 28.4.1). Furthermore, the Minister is constituted by the Ministers and Secretaries Act 1924 as a corporation sole with perpetual succession and having the capacity to sue or be sued.

192. The position of the Minister in his capacity as a Governor of the European Stability Mechanism presents some contrast. Firstly, by Article 5(1) each ESM member shall appoint a governor. The governor **must** be the member of the Government of the member who has responsibility for finance.

193. By Article 34 of the Treaty all members, or former members, of the Board of Governors "shall not disclose information that is subject to professional secrecy" and are required, even after retirement, "not to disclose information of a kind covered by the obligations of professional secrecy".

194. It is not clear to me how this is consistent either with collective responsibility or with accountability to Dáil Eireann. Moreover, by Article 35 of the Treaty, the Governors "shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents".

195. It is not clear to me how this is consistent with the Minister's statutory capacity to sue or be sued.

196. The Minister, if the Treaty is adhered to by Ireland, will be a member of the Board of the Governors of the ESM by virtue of his capacity as Minister for Finance. In that capacity he is collectively responsible with his government colleagues, and is accountable to Dáil Eireann, and is liable to be sued by a citizen who thinks he has cause to do so. Is he responsible to the Government, or to the Dáil, for his actions as a member of the Board of Governors of the ESM? Is he liable to be sued in respect of these, or not? It appears to me that these questions have simply not been addressed.

197. Equally, the fund out of which the €11 billion which Ireland must pay to the ESM is to be paid is the Central Fund. The constitutional and statutory provisions in relation to payments out of that fund have been set out above. It is not clear to me that the question whether or not the payments to the ESM are consistent with those provisions has been addressed at all.

198. Is the Treaty itself, or the 2012 Act, intended to be an appropriation for the purposes of Article 11 of the Constitution? Are the very substantial disbursements "irrevocably and unconditionally" promised by the State, required to be provided for in the Estimates of Expenditure of the State referred to in Article 17 of the Constitution? There does not appear to be, in the 2012 Act or elsewhere, any provision "by specific enactment in each case" exempting such payments from the requirement that these Estimates be approved by legislation passed "each year", contained in Article 17.2. Equally, it is not clear whether the requirement that the Comptroller and Auditor General authorise payments out of the Central Fund to the ESM applies or not. What would be the position, having regard to Article 17.2, of a future Government, Taoiseach, who did not wish to approve, or to recommend, an appropriation for payments to the ESM to Dáil Eireann?

199. I consider the foregoing to be matters of significance. It may be that they have been addressed, in each case, and that it is considered that no constitutional amendment or legislation is necessary in relation to them. On the other hand, it may be that those questions have not been addressed at all. But my conclusion in this case is based on the more fundamental and clearly established propositions that adherence to the Treaty establishing the European Stability Mechanism is not possible without recourse to the people having regard to the significant changes it introduces both as to the manner in which the sum of €11 billion of Irish tax payers money is to be spent, and the purposes for which that expenditure is to take place.

Proposed Order.

200. Accordingly, using the language contained in the State's submissions as to the issues that arose in this case I would hold that, having regard to the various arguments advanced by the appellant, the ESM Treaty involves a transfer of sovereignty to a degree that makes it incompatible with the Constitution when one applies the principles set out by this Court in, such that a referendum amending the Constitution is necessary to permit the State to ratify the ESM Treaty on behalf of Ireland.