THE SUPREME COURT

Appeal No. 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 delivered the 19th day of October 2012, by O'Donnell J.

1 I gratefully adopt the account of both the procedural history of this case, and the nature and effect of the European Stability Mechanism Treaty ("the ESM Treaty") contained in the judgments of Denham C.J. and Clarke J. with which judgments I am in full agreement.

2 The central issue in this case is whether or not entry into an international treaty containing provisions such as those contained in the ESM Treaty, could contravene the constitutional limitations on the exercise of Executive power in the field of foreign affairs identified in *Crotty v. An Taoiseach* [1987] I.R. 713. The plaintiff's case in this regard was that the ratification of the ESM Treaty was a momentous decision on the part of the Irish Government involving a potential liability of up to €11.1454 billion by way of contribution to a fund totalling some €700 billion for the express purpose of securing the stability of the Eurozone, or any member thereof, in circumstances where the allocations from the fund could, at least in certain circumstances, be made by a qualified majority of the contracting states which might not include Ireland, either because Ireland disagreed with the allocation or was excluded from voting.

3 It was argued that the essence of the decision in *Crotty* was to be found in a passage of the judgment of Walsh J. at p.781 in which he said:-

> "As was pointed out in the decision of this Court in the first part of this case the essential nature of sovereignty is the right to say yes or to say no. In the present Treaty provisions that right is to be materially qualified."

The reference to the first part of the case was to the single judgment of the Court delivered by Finlay C.J. upholding the constitutionality of the European Communities (Amendment) Act 1986, which had brought into force those elements of the Single European Act ("the SEA") which did not involve foreign affairs. It was argued therefore, that the ESM Treaty was an unconstitutional fettering of Irish sovereignty because, to put it at its simplest, the ESM (including Ireland's contribution) could be applied in circumstances in which Ireland might not agree. It was argued that this could not be permitted other than by a decision of the People in a referendum, akin to the provisions of the third amendment inserting Article 29.4.3 which permitted the State to become a member of the European Communities.

4 There can be little doubt that if the essence of sovereignty, at least as contemplated by the Irish Constitution, is to be understood as meaning that Ireland fetters its sovereign right to decide by joining any organisation which acts collectively, or at least one in which Ireland does not retain a veto (and therefore the right to say no), then the ESM Treaty would be of dubious constitutional validity, along with, it must be said, many other important international agreements. However, judgments are not to be read in the same way as statutes. A single sentence in a judgment rarely encapsulates the essence of a lengthy judgment, and a judgment of one judge, even one as eminent and influential as Walsh J., is not to be taken, in isolation, as stating the *ratio decidendi* of a case. There is always a danger of substituting the invocation of a vivid and memorable phrase for the analysis of the substance of a judgment. Like Denham C.J. and Clarke J., and those of my colleagues concurring with those judgments, I am quite satisfied that the plaintiff's arguments here involve a clear misunderstanding and misinterpretation of *Crotty*, but perhaps more importantly, of the Constitution.

5 The provisions of the Constitution dealing with the exercise of Executive power in the field of foreign affairs were closely analysed in the judgments in *Crotty* and particularly in those of Barrington J. in the High Court and Finlay C.J. and Walsh and Henchy JJ. in the Supreme Court. It is indeed a distinctive feature of the Constitution adopted in 1937 that it deals with external relations at all. The historical background is usefully discussed in a Thomas Davis lecture delivered by Mr. Justice Barrington in 1988 entitled "The North and the Constitution" (published in Farrell ed., *De Valera's Constitution and Ours*, (Dublin: Gill & Macmillan, 1988)), which pointed out that in 1936 when the Constitution was being drafted, Mr de Valera was President of the League of Nations and that some of the values of the Covenant of the League of Nations were clearly reflected in the Constitution itself and in particular in Article 29. It is also noteworthy that the provisions dealing with the conduct of foreign affairs, and particularly the extent to which there was to be review of the Executive's conduct in such matters and the identification of the body exercising such power of review, were the subject of very carefully drafted, nuanced provisions, clearly influenced by, and consistent with, other aspects of the architecture of the Constitution. Thus it is noteworthy that the Constitution contemplates that the Government may enter into international agreements and then divide those agreements into a number of types, with different constitutional consequences. All international agreements must be laid before the Dáil under Article 29.5 (and it is to be noted, only the Dáil and not the Oireachtas generally), consistent with the Government's answerability to that house under Article 28.4.1. Any agreement which goes further and involves a charge on public funds (other than an agreement of a technical or administrative character), must be approved by the Dáil, again consistent with that body's distinct role in financial matters reflected in Articles 17, 20, 21, 22, and 28.7. Finally, in this regard no international agreement may become part of the law of the State save as may be determined by the Oireachtas as a whole pursuant to Article 29.6, a provision which is once again consistent with the vesting in the Oireachtas of the sole and exclusive power of making laws for the State under Article 15.2.1. From these provisions may be drawn the unremarkable conclusion that the Constitution contemplates that the conduct of the State's foreign relations will necessarily involve the making of binding agreements

with other states, which agreements could have financial consequences for the State, and on occasions require an alteration of its domestic law.

6 Among the other relevant provisions of the Constitution dealing with foreign affairs is the specific requirement that war may not be declared save with the assent of Dáil Éireann (Article 28.3). This is striking because it appears to be the single incidence in which the Executive power in the field of foreign affairs is restricted by a requirement to obtain the prior agreement or concurrence of any other body, but equally significant for present purposes in that the assent of the Dáil alone is required. Not only is there not a requirement of approval by the Oireachtas generally, but there is clearly no requirement for direct approval by the People. The more general and rarely litigated provisions of Article 29 are also instructive in this regard. Ireland's affirmation of its devotion to the ideal of peace and friendly cooperation, and adherence to the principle of pacific settlements of international disputes by international arbitration and judicial determination, together with its acceptance of the generally recognised principles of international law, may all appear unremarkable today, but were significant and far sighted provisions in 1937. It can be deduced from these constitutional provisions, at a minimum, that the Constitution clearly anticipated the Executive power could and would involve the making of binding agreements with other nations, and that Ireland might become involved in disputes which themselves might be resolved by a process involving a binding determination by which Ireland would be obliged to abide. Article 29.4.2 is a little discussed provision nowadays, being seen as of largely historically interest. However, it again clearly envisages that in its conduct of foreign affairs, Ireland could adopt mechanisms utilised by members of any group or league of nations with which the State could become associated for the purposes of international cooperation. This again contemplates that the business of the conduct of foreign affairs might necessarily involve the making of agreements with foreign States, cooperation with, and membership of, international bodies, and occasionally, and regrettably, the possible occurrence of disputes including the commitment of the State to a war.

7 While these explicit provisions are instructive, they very deliberately impose little by way of judicially enforceable restriction on the substantive exercise by the Executive of its conduct of foreign relations. Article 29.4 makes it clear that it is the Government which shall conduct external relations and by its reference to Article 28 emphasises that in that respect, the Government is responsible to the Dáil. That is the method the Constitution envisages for review and control of the exercise of the Executive power in the conduct of foreign relations. The courts have repeatedly affirmed their limited role in the review of Governmental activity in the field of foreign affairs. In Crotty at p. 774, Finlay C.J. said that:-

> "There is nothing in the provisions of Articles 28 and 29 of the Constitution, in my opinion, from which it would be possible to imply any right in the Courts in general to interfere in the field or area of external relations with the exercise of an executive power."

At p. 777, Walsh J. said, to similar effect:-

> "It is the Government <u>alone</u> which negotiates and makes treaties and it is the <u>sole</u> organ of the State in the field of international affairs." [Emphasis added]

The courts' function in this regard is to enforce those boundaries of, and limitations to, the exercise of the Executive power in foreign relations which are either express in, or to be implied from, the constitutional text, and at the same time to reject any attempt to impose limitations on Governmental conduct of foreign relations not justified by the Constitution. The *State (Gilliland) v. The Governor of Mountjoy Prison* [1987] I.R. 201 is a rare example of the enforcement of an express limitation in the Constitution where a treaty was found to involve a charge on public funds which had not been approved by the Dáil. Crotty is an example of a limitation derived from the structure of the Constitution itself. Since it is to the Government alone that the conduct of foreign affairs is consigned by the Constitution, it follows that such international relations must be conducted by the Government, which cannot abdicate, alienate, transfer or subordinate its functions to any other State or body.

8 Returning then to the present case, it is clear that the plaintiff's argument places considerable reliance on the single sentence from the judgment of Walsh J. referring to the right to say yes or no in order to contend that an agreement such as this, which creates at least the possibility of decisions being made on the allocation of ESM funds without Ireland's agreement, is unconstitutional. In my view, that contention is profoundly misconceived on a number of levels.

9 It seems clear to me that even in the very specific context in which the words are used, they should not be understood in the manner contended for. As already observed, Walsh J. referred back to the single judgment of the Court on the European Communities (Amendment) Act 1986 when he repeated the phrase that the essence of sovereignty was the right to say yes or no. The source of that observation was a portion of the judgment of Finlay C.J. at p. 769. That judgment however, upheld the 1986 Act which implemented the provisions of the SEA which took effect in domestic law on the grounds that the original licence granted by the People to join the European Communities was a licence to join a dynamic and developing entity. Therefore, incremental changes in European institutions within the scope of the existing licence did not require further express approval by the People. But one of the most significant changes challenged was the adoption by the Community of qualified majority voting rather than unanimity in certain cases. In each such case the consequence of the change was that Ireland (and necessarily every other member state) lost its veto: in specific terms, Ireland lost the right, in those circumstances, to say no. Yet that change was not incompatible with the Constitution. That in itself is a powerful indicator that the single phrase, vivid though it may be, cannot be read in the simplistic way put forward by the plaintiff in this case.

10 That conclusion becomes even clearer when the judgment of Walsh J. is looked at as a whole in the context of the case. As Clarke J. points out in his judgment, the essence of the decision of the majority is to be found in a series of passages in the majority judgments. For example, and perhaps most clearly, in the judgment of Henchy J. it is stated thus at p.787:-

> "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."

Hederman J. at p. 794 considered that the essential point was that the State could not "…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 …".

These statements are clearly consistent with the judgment of Walsh J. at p. 778 where he said:-

> "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."

Similarly, at p. 783 he said:-

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

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

11 This conclusion is I think, consistent with a fair reading of the case as a whole, and in particular when considered in the light of what was in issue between the parties. In the Supreme Court, the State parties had taken up an absolute position – that the Government's exercise of the Executive function of making treaties could never be the subject of judicial scrutiny – which was rejected by the entirety of the court. What divided the court itself was a narrower issue and essentially one of timing. There was little disagreement on the fundamental legal principle. The minority, comprised of Finlay C.J. and Griffin J. accepted that *if* the SEA created a form of political union then there could be no doubt that, in the words of Finlay C.J. at p.771 :-

> "…it would constitute an alteration in the essential scope of and objectives of the Communities to which Ireland could not agree without an amendment to the Constitution."

However the minority considered that this point had not yet been reached. The majority for its part, in the words of Henchy J., considered that the SEA was a significant and decisive step along a path of gradualism towards that objective. There was no dispute therefore that to agree to adopt a single European foreign policy would be inconsistent with the Irish Constitution since the Irish Government would no longer be exercising that power alone. The question which did divide the Court was whether that point had been reached.

12 I accept of course that there are elements of the judgment of Walsh J. which if taken out of both their specific, and general, context might suggest that it is not possible for the Government to enter into any international agreement which precludes it from saying no at some future stage, and that such freedom of action is of the essence of sovereignty. For a number of reasons I do not consider that the judgment should be so understood, and still less that such a test can be asserted to be part of the *ratio decidendi* of the case as a whole, or indeed could provide any workable test that is consistent with history, common sense, or the structure of the Constitution.

13 First, for reasons already identified, the issue in *Crotty* was not the question now raised as to whether the essence of sovereignty is to be found in an obligation not to alienate or abdicate the power to make foreign policy generally, or alternatively, in maintaining a complete freedom of action in the future in respect of any individual decision. The issue which divided the parties in *Crotty* was whether or not the courts could enforce any limitation on Governmental activity in the field of foreign affairs. The issue which divided the Court was not whether the creation of a European wide foreign policy would be an alienation of Irish sovereignty, but rather whether such a development had occurred.

14 Second, as Clarke J. points out in his judgment, any agreement made by a country or an individual almost necessarily limits the freedom of the parties. It certainly restrains the party from saying no to what has been agreed. Furthermore, in many cases the entry into an agreement may also create restraints on the freedom to enter into any inconsistent agreement. It is indeed in the nature of international relations, and expressly contemplated by the Constitution, that states will make treaties, enter into trade agreements, form alliances, join groups and assist in the setting up of international bodies with agreed mandates and which on occasion may have adjudicative functions. There is no sense in which Ireland or any other state can remain completely free to say no, once it has entered into any such agreement, alliance, grouping or body. It is the decision to enter into an agreement or alliance which is the exercise of sovereignty. Indeed as a matter of history, Ireland was a member of the League of Nations at the time that the Constitution was adopted, and in the early years of the Constitution's life became a member of the United Nations (1955), subscribed to the World Bank and International Monetary Fund ("IMF") (1957), became a member of the Council of Europe (1949), and accepted the jurisdiction of the European Court of Human Rights (1959). To take only one example, it cannot be suggested that Ireland retains a freedom not to abide by sanctions imposed by a UN resolution, even if Ireland considered that the sanctions were misguided, or that it stood to gain considerably by continuing to trade with the State in question. I do not see however, that that involves any loss of sovereignty: indeed I consider that the Constitution contemplates matters such as membership of the UN as an exercise in the sovereignty of a small country which at the time of the adoption of the Constitution was anxious to secure international recognition of its status as a nation. It is entirely inconsistent with the Constitution, and in particular the first two sub articles of Article 29, to conceive of Ireland being obliged to adopt a position of splendid isolation from other countries so that it could only engage in agreements in which Ireland (perhaps alone) insisted upon a veto over all future decisions, and indeed the right to resile from decisions already made and matters already agreed. The fallacy is perhaps to conceive of the breadth of the power accorded to the Government in the field of foreign affairs as amounting itself to a constraint: on this reading the Government only has freedom of action so long as it does not use it. Quite apart from the fact that such a conception makes little sense, and has not historically been the position taken by the State in the field of foreign affairs, it also appears to me to be inconsistent with what is explicitly contemplated both by the words and structure of the Constitution.

15 The understanding of *Crotty*, contained in the judgments of Denham C.J. and Clarke J., is I think, fortified by a consideration of the underlying concept of sovereignty, and particularly the manner in which such sovereignty is expressed in the 1937 Constitution. The concept of sovereignty was traditionally defined as containing not just the positive requirement of a political superior to whom the population was in the habit of obedience, but also, and importantly for present purposes, the negative requirement that such superior owe no obligation of obedience to the dictates of any other body. Thus, John Austin famously asserted in *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicholson, 1954) at p.193 that:-

> "The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority and from other society by the following marks or characters – 1. The bulk or the given society or the habit of obedience or submission to a determinative and a common superior: let that common superior be a common individual, or a certain body or aggregate of individual persons. - 2. <u>That certain individual or that certain body of individuals is not in a habit of obedience to a determinative human superior</u>." (Emphasis added)

Such a sovereign can of course enter into binding alliances with other sovereigns, even those which commit their respective countries to war. However a ruler cannot be a sovereign if he or she habitually acts in obedience to the wishes of another body or person, or to use the language of the majority judgments in *Crotty*, abdicates, alienates, subordinates or indeed transfers its decision making power

to that body. This is, I think, consistent with the use and understanding of the word "ceannasach" used in the Irish text of the Constitution.

16 Sovereignty, as being a condition of owing no allegiance or duty of obedience to any other entity, is, in my view, asserted very deliberately by the 1937 Constitution, and for obvious reasons, once the historical context is recalled. The new polity being established, in essence although not in name a republic, was one that consciously asserted all the attributes of sovereignty. This was a very deliberate contrast with even the expanded Dominion status which had existed prior to 1937. The Constitution reflected a fundamental truth as to the source of the sovereignty of the State, namely the people. The legal source of the Constitution was to be the decision of the People rather than a grant by a foreign Parliament. The preamble to the Constitution records that it came into being by virtue of the declaration that the people "Do hereby adopt, enact, and give to ourselves this Constitution." Accordingly, Article 1 states that "The Irish nation hereby affirms its… sovereign right to choose its own form of Government…..". Consistent with this assertion of sovereignty, Article 6 declares that "all powers of government, legislative, executive and judicial" derive from the people. Among the key attributes of such sovereignty was the right to conduct international relations on an equal basis with other countries and the exclusive exercise by the organs of government of the powers of government.

17 Both Clarke and Hardiman J.J. have, in their judgments delivered today, emphasised that the Constitution recognises the exclusive powers of the Legislative, Executive and Judicial branches, within their proper spheres. This is of course true. But it is perhaps noteworthy, as the late Professor Kelly was wont to observe, that the form of separation of powers adopted in the Irish Constitution was not the hermetically sealed branches of Government posited by Montesquieu, but rather involved points of intersection, interaction and occasional friction between the branches of Government so established. Thus, by way of illustration only, the Executive appoint the Judiciary and the courts rely on the Executive to execute their judgments; the courts for their part review the acts of both the Legislature and the Executive for compatibility with the Constitution; and the Executive in turn is accountable to the Dáil and in practice commands it; and the members of the Government are required to be drawn from the Legislature. In the architecture of the 1937 Constitution therefore, the respective branches did not exclude each other entirely. On the other hand however, the Constitution did assert the exclusive right of those organs to exercise their respective powers of Government, as against any executive, legislative or judicial competitor, internal or external. Again, the historical context makes this clear. Not only did the new State face an internal challenge from groups seeking to deny it legitimacy and assert their own title to govern, but perhaps even more significantly, the legal status of a dominion (which was how Ireland was viewed by the United Kingdom) was such that the Imperial Parliament still claimed, at least in theory, the right to legislate for Ireland (a claim contained in s.4 of the Irish Free State Constitution Act 1922); the army and navy of the United Kingdom still occupied the Treaty Ports, and the entitlement of the Privy Council to hear appeals from the Irish Supreme Court had only recently been removed in Ireland. This, then, was a very real context in which the exclusive power of the organs of Government was being asserted in the Constitution alongside the assertion in Article 29 of Ireland's entitlement to take its place among nations and conduct international relations with them. Thus at the very outset of the Constitution in Article 1 it is stated:-

> "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." (Emphasis added)

To the same effect are the statements in Article 28 that the Executive power is exercised by the Government (and it follows by no one else); in Article 34 that justice is administered in courts (and nowhere else), and in Article 15.2.1 that the Legislature has the "sole and exclusive" power to make laws for the State adding for good measure that "no other legislative authority has power to make laws for the State".

18 The interesting historical background to the late adoption of the words "sole and exclusive" in Article 12 of the Constitution of the Irish Free State, 1922, and the addition in 1937 of the words "no other legislative authority has the power to make laws for the State" contained in Article 15.2.1 is reviewed in Morgan, *The Separation of Powers in the Irish Constitution*, (Dublin: Roundhall, 1987) at pp. 262-263, and in Hogan, *The Origins of the Irish Constitution*: 1928-1941, (Dublin: RIA, 2012) at p. 335, which provide additional historical support for the conclusion contained in the judgment of Keane J. in *Laurentiu v Minister for Justice* [1999] 4 I.R. 26 at p. 83 that; "Historically, this Article can be seen as an uncompromising reassertion of the freedom from legislative control by the Imperial Parliament at Westminster of the new State". But this conclusion is in my view also apt, *mutatis mutandis*, for the assertion of executive and judicial power in the new Constitution.

19 Returning then to *Crotty* it is perhaps clear why the majority considered that the SEA was at the very minimum a "subordination" of Irish sovereignty. In the first place it is plain that the provision affected the entirety of the foreign policy of the State and not simply one area of agreed cooperation. Once enacted, such foreign policy would no longer be made by the Government alone but would be arrived at under a requirement of convergence with the policy of other member states. Seen in this way it is perhaps easy to see why it was claimed that the Executive power of the State in relation to the entirety of its foreign policy was being subordinated, and at least to some extent alienated and transferred, and to that extent abdicated. Ireland would no longer make its own determination of its relationship with other states, to use the language of Article 1, but would make decisions in the light of an embryonic collective foreign policy into which other countries would necessarily have an input. There would therefore have been, to that degree, a diminution of the sovereignty asserted and established under the Constitution, and effected without the assent of the People.

20 This also demonstrates in my view why the provisions of the ESM are distinct from, and in constitutional terms markedly less significant than, the provisions of the SEA. The ESM does not concern Ireland's foreign policy as a whole. Instead it relates solely to a decision by Ireland to invest, alongside other member states, in an institution which may make those funds available in accordance with the terms and criteria established by the Treaty, to contracting states, including Ireland. The decision to participate in the ESM was in my view an exercise in sovereignty rather than an alienation of it, and was taken by the organ of Government to which such decisions are consigned by the Constitution. In one sense it is a one off decision by Ireland to invest up to a defined maximum pursuant to a scheme which prescribes the countries to whom funds can be lent, the procedure under which any decision to lend will be made, and the criteria for such a decision. It is no more a breach of Irish sovereignty asserted under the Constitution and defended in *Crotty*, than a person who decides to invest a large portion of his or her wealth in a limited company with a defined investment objective could be said to lose his or her status as a citizen.

21 There is no doubt that the figures involved here are very substantial and the decision to ratify the ESM is one which may have significant consequences for the Irish economy, but the quantum of a decision does not alter the identity of the actor required by the Constitution to make the decision. As a matter of history, Irish Governments have expended very considerable sums indeed in, for example, the education and health sectors, pursuant to departmental circulars, and without even the benefit of legislation still less the approval of the People in referenda. In more recent times, Governments have made decisions involving both the expenditure and borrowing of enormous sums of money. In none of these cases has it been suggested that the approval of the People in a referendum

is required. Under the Constitution, Governments are expected, and required, to make decisions which on occasion may be momentous, including indeed the declaration of war, albeit in that case with the agreement of Dáil Éireann. In my view there is no reason to conclude that the decision to join the ESM is not one within the Executive power of the Government for which it is answerable to the Dáil.

22 In my view this approach also demonstrates why it is not possible to read the majority decision in *Crotty* as requiring that individual decisions made by the Government in the field of foreign policy must, if they are to be valid, make provision for future decisions to be made by unanimity or alternatively, accord to Ireland alone a veto over any such future decision. First, it is plain that no such individual decision was in issue in Crotty: on the contrary, the case concerned the requirement to bend Ireland's foreign policy *in general* towards a common European policy. For the reasons already set out, I do not consider that any such supposed principle could be required by the Constitution, and in my view it is not required by *Crotty*. There is nothing in *Crotty*, or indeed in logic, to suggest that the concept of sovereignty contained in the Irish Constitution requires that Ireland, while it may enter into agreements, must insist that it retain the capacity to change its mind. Even if the judgment of Walsh J. in *Crotty* could be interpreted differently (and for the reasons already set out, I do not accept that that is the case), there is in my view no basis for attributing to that judgment, still less a phrase from it, a position of primacy within the case. The *ratio decidendi* of a decision made by a collegiate court is in my view to be determined by that proposition, or reason, which decides the particular case and on which, it can be said, a majority of the court is agreed. In my view that *ratio decidendi* is that already set out above, and as addressed in the judgments of the Chief Justice and Clarke J.

23 This is sufficient to dispose of the centre piece of the plaintiff's case. But it is also suggested that the ESM is not compatible with the Irish Constitution at least without the approval of the People in a referendum, on two interrelated grounds: first, that it involves Ireland committing a very large of sum of money to be expended by a body outside the Irish legal order; and second, in reliance on dicta contained in the judgment of Henchy J., that it involves an expenditure of monies for a purpose quite different from that of furthering the common good of the People of Ireland. It is necessary to consider these points separately.

24 It is true that the ESM fund, including that portion subscribed by Ireland, *may* be expended outside the territory of Ireland. But it is commonplace for public funds to be extended to, and expended by, bodies outside the Irish legal order whether under the guise of overseas aid, specific grants in cases of national emergencies, or subscriptions to international bodies such as the IMF, the World Bank or any international body. In my view, what the Constitution requires is that the decision to subscribe such funds should be taken by the correct organ of Government on its own, and not in subordination to any other body. That decision cannot be transferred, alienated or abdicated to another body. The relevant decision however is the decision to subscribe the funds for an identified purpose. Here that decision was made by the appropriate organ of government, in accordance with the procedures, and accountability, provided for in the Constitution.

25 Second, I very much doubt that the judgment of Henchy J. is to be understood as suggesting that the courts can review the actions of the Government in the field of foreign relations and if appropriate restrain Governmental action on the grounds that the Court considers, by some standard not identified, that the action or agreement is not in pursuance of the common good of the Irish People. I consider that this portion of the judgment of Henchy J. is really an illustration of the central holding that the SEA, if enacted without constitutional amendment, would involve Ireland in an impermissible alienation or subordination of Governmental authority since the Irish Government would by definition have to take account of considerations outside Ireland's national interest. To borrow a concept from administrative law, the Irish Government would, to that extent, be making decisions by reference to a consideration which was constitutionally irrelevant and indeed impermissible. I do not think that this could be taken, without much more elaborate and detailed argument and consideration, as an authority for the proposition that the Court can review individual decisions of the Government on the grounds that the decision to adhere to any particular international agreement are not within the interests of the common good of the People of Ireland. Such a proposition would raise very serious issues indeed as to the standard of review and, more fundamentally, the constitutional justification for it. But it is not necessary to address and resolve such issues here because in my view, it is very clear that the Government was fully entitled to conclude that it was in the national interest of Ireland, a country whose currency is the euro and which has suffered significant financial instability, to enter into an agreement which provides for support of the Eurozone generally, or for the economies of individual countries therein. In the circumstances I would dismiss the appeal on this issue.

Interlocutory Injunction

26 The plaintiff's application for an interlocutory injunction was refused by Laffoy J., for reasons set out at section VII of her judgment. That decision has been appealed to this Court. However, although formulated as an appeal against the refusal of the injunction by the High Court, the application here was in substance a fresh application for an interlocutory injunction pending the determination of the appeal, akin to that granted by the Supreme Court in *Crotty*, after the refusal by the Divisional Court of the plaintiff's claim, and pending the hearing of the appeal by the Supreme Court. See: *Crotty v. An Taoiseach* [1987] I.R. 713 at p.763.

27 Much jurisprudence has grown up around the grant of interlocutory injunctions. Such orders can be of very considerable, and sometimes decisive, significance. The grant of an interlocutory injunction is often a difficult decision particularly in the field of public law. That difficulty becomes more acute where, as here, matters of fundamental constitutional significance both in relation to Bunreacht na hÉireann, 1937 and the Treaties establishing the European Union are asserted. Nevertheless an injunction remains a flexible remedy designed essentially to control a temporary situation pending the final determination of a dispute by a court. A basic element in the calculation that the court must make therefore, is to identify, and if possible limit, the period of time during which any temporary regime must be in place.

28 Here the plaintiff made a number of different claims which required determination in plenary hearing. This raises further difficulties for the analysis of the interlocutory injunction application because it is necessary to identify and analyse the differing arguments on the harm that will be occasioned by the grant or refusal of an injunction in respect of each different claim. The manner in which the Court has dealt with this case has however usefully sharpened the focus of the hearing. Thus as is recounted in more detail in the judgment of Clarke J., the Court fixed a time for the hearing of what might be described as the pure *Crotty* point, that is the argument that the ratification of the ESM Treaty was an impermissible ceding of sovereignty by the Government of Ireland and was accordingly something that could only be permitted by approval of the People in a referendum. This in the helpful terminology adopted by Clarke J. is the "sovereignty claim". The Court heard the full appeal on that point on Tuesday 24th July. Not only was it a useful exercise in case management, since it allowed for focussed debate upon a single important issue, but this approach also had the effect of reducing the number of variables that the Court had to consider on the application for an interlocutory injunction: if the plaintiff's *Crotty* argument had succeeded he would have been entitled to a permanent injunction and no issue of an interlocutory injunction would have arisen; conversely it was only if his *Crotty* argument failed, or was not determined, that it would be necessary to consider the interlocutory application but without reference to the Crotty issue. That is the basis upon which the argument proceeded, on the 24th. In the event, the Court announced its decision on the 31st July rejecting the plaintiff's claim based upon *Crotty*. Accordingly the issue for this Court became whether an interlocutory injunction should be granted pending the final resolution

of the remaining issues in the case.

29 The most significant issues which remain are matters of EU law. The logical sequence of the issues might be first, whether the ratification by Ireland of the ESM Treaty as a stand alone international agreement is itself a breach of this country's obligations under the Treaty Establishing the European Union ("TEU") or the Treaty on the Functioning of the European Union ("TFEU") (and hereafter collectively referred to as the "Treaties") ("the ESM Treaty claim"). If not, the remaining questions are less relevant. If, however, ratification of the ESM Treaty is contrary to the Treaties, then a question arises whether the Treaties may be amended by a Council decision such as that contained in Council Decision 2011/199/EU, so to permit relevant member states to accede to the ESM Treaty. Finally, even if such amendment is permissible in principle, an issue would remain as to the validity of the individual decision particularly the use of the accelerated procedure (these two related issues are the "Council Decision claim"). The Court has decided that it was necessary, in conformity with Art.267 of the TFEU to refer questions to the European Court of Justice ("ECJ") on these issues, and requested the Court to consider adoption of its accelerated procedure given the asserted urgency of the situation. The ECJ will hear argument on this issue on the 23rd of October. Accordingly, the question to be addressed on the interlocutory injunction application now becomes more limited again, both by reference to the legal issues in play (which are now largely matters of European law) and the period of time before a definitive answer can be given to those legal issues.

30 In analysing the issues in this way, I do not lose sight of the argument made on behalf of the plaintiff that a breach of the Treaties is *ipso facto* a breach of the Irish Constitution because it is said that it is only to the Treaties in their unamended forms, that the Irish People have given approval in the Constitution, and to that extent the relevant treaties have become part of the constitutional law of Ireland. It is apparent however that this constitutional point is an entirely consequential one. It is completely dependent on, and follows ineluctably from, the European law argument. The alleged breach of the Constitution occurs <u>because</u> there is an alleged breach of the Treaties. The European issue is therefore logically anterior to the constitutional argument, and whatever that constitutional argument adds in terms of rhetoric and significance, it adds nothing in scope. Unless the European law argument succeeds the constitutional argument cannot succeed. It also follows, and this is important in the context of an interlocutory injunction application in particular, that if it is possible to remedy a breach of the European law, then the constitutional breach is also remedied. In my view therefore, and even assuming for the purposes of this stage of the argument that there is or may be merit in the contention that a breach of the Treaties is a breach of the Constitution (on which I express no view), it adds nothing to the calculation the court must carry out on an application for interlocutory injunction to say that the European law argument can also be framed in domestic constitutional terms.

31 Finally an argument was also made, described helpfully by Clarke J. as the "power transfer claim", to the effect that the European Stability Mechanism Act 2012, being the statutory mechanism utilised to implement the ESM Treaty in Irish law, involved an impermissible transfer of power from the Dáil to the Minister for Finance. However like Clarke J., I consider that this claim, whatever its merits, could not itself give rise to any plausible claim for an interlocutory injunction. On the assumption that all other more substantive claims failed but this succeeded, then the matter would be purely the method of implementation of the ESM Treaty, which is both capable of adjustment in accordance with any judgment of this Court, and as a purely domestic matter is in any event within the power of these courts. This in my view is fatal to any allegation of irreparable damage, which is the starting point for any claim for an injunction. Accordingly it is not necessary to address the question which might otherwise arise as to what considerations should apply to an application to restrain the operation of legislation, validly enacted and presumed constitutional, pending a trial, or as in this case, an appeal.

32 The Court must therefore assess how best the situation should be managed pending the determination of these issues on foot of the reference to the European Court which will as a matter of a practicality resolve the European law points, and therefore in all probability, the litigation. It is argued by the Plaintiff that this was essentially the same task as faced the court in *Crotty* and it was pointed out that in a short judgment in that case (at p.763) the Supreme Court per Finlay C.J., granted an interlocutory injunction restraining ratification of the Single European Act, after the dismissal of the Plaintiff's claim in the Divisional Court of the High Court, and pending the hearing of the Supreme Court appeal. It was also suggested that the appropriate test was that set out in the decision of the ECJ in *Zuckerfabrik Süderdithmarschen (Case 143/88 and 92/89)* [1991] E.C.R. 1-415 and restated in case *Atlanta Fruchthandelsgesellschaft mbH and others v. Bundesamt für Ernährung und Forstwirtschaft (Case 465/93)* [1995] E.C.R. 1-3761 at p.3795 where it is provided that a national court should only grant interim relief with respect to a national administrative measure adopted in the implementation of a community regulation if:

> "(1) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already an issue before the Court of Justice, itself refers the question to the Court of Justice;
>
> (2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
>
> (3) the court takes due account of the Community interest; and
>
> (4) in its assessment of all those conditions, it respects any decisions of the Court of Justice or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at Community level."

Some doubt was expressed as to whether this test differs in substance from the well known test in *Campus Oil v. Minister for Industry and Energy (No.2)* [1983] I.R. 88. There may be cases in which it is necessary to address that point, and in particular to determine whether some higher threshold should be established before an injunction is granted restraining the implementation of a measure asserted to be invalid, but for the reasons as expressed by Clarke J., I consider it is possible to resolve this case by reference to the balance of convenience, or balance of justice as it is sometimes expressed.

33 Counsel on behalf of the plaintiff also relied on the well known passage from *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (Case 106/77)* [1978] E.C.R. 629 at p.644:

> "It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirely and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.
>
> Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very

> essence of Community law. …
>
> The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."

The essence of the Plaintiff's case was that he considered that what he described as respect for the rule of law required that the Court grant an injunction. It was said if the plaintiff was correct in his legal argument – and that was the assumption upon which the interlocutory injunction application must be approached – then ratification of the ESM Treaty would involve the creation of a permanent and irreversible arrangement that was itself a breach of EU law.

34 The Plaintiff swore a detailed affidavit in support of his application. The thrust of the affidavit was to assert that unless an injunction was granted, the State would have entered into an irreversible binding commitment in international law, and the court would be deprived of jurisdiction to grant remedies in the event the Plaintiff succeeded. Furthermore the State would then be bound permanently to a breach of European law and consequently Irish constitutional law, and to financial commitments totalling €11.144 billion with the possibility of subsequent increases. The Plaintiff also referred to an unsuccessful challenge in the Estonian courts and a pending challenge in the German Constitutional Court, both of which appear to be by reference to provisions of the domestic constitutions. He also asserted that there was no particular urgency in ratification, because Ireland would be fully funded under the Memorandum of Understanding with the so called Troika, until the end of 2013.

35 Counsel on behalf of the State for his part stated that he was expressly instructed that it was the unambiguous and unqualified view of the State parties, that should the ECJ find that the entry into the Treaty was a breach of European law, there would be a remedy at that level; indeed such a finding and declaration would be part of such a remedy. An affidavit had been sworn by Mr Jim O'Brien the second Secretary in the Department of Foreign Affairs asserting that irreparable harm would be caused to the interests of the State, and indeed those of the European Union, were Ireland not to be in a position to ratify the ESM as soon as possible. At paragraph 7 of his affidavit he stated:

> "I say and believe that the need for the ESM is urgent, and it is the carefully considered view of the Government that it is essential in the national interest that Ireland should ratify the ESM Treaty as soon as possible. The Euro area member states and the European Union also have pressing interest in Ireland's ratification of the ESM Treaty at the earliest possible opportunity."

36 Counsel on behalf of the State sought to distinguish *Crotty* in three respects. First, he said there was not similar urgency involved in the ratification of the SEA, and the injunction was only granted for a number of days to permit the Supreme Court hear and determine the appeal in that case. Second, *Crotty* concerned an issue solely of Irish constitutional law. Third, and perhaps most importantly, it was asserted, and accepted by the Court in that case, that there was serious risk of irreversibility. If the SEA was ratified, the consequence would have been an amendment of the then applicable European Treaties which it was said would put the Treaty beyond constitutional challenge by virtue of the provisions of Article 29.4.3. That he asserted, was simply not the case here.

37 Notwithstanding the vigour with which the case was made, and the skill and learning shown in the written submissions advanced, I have come to the conclusion that the application for an interlocutory injunction in this Court is profoundly misconceived. On every single consideration I am satisfied that the balance is decisively against the grant of such an order.

38 First, I am satisfied that the analogy with *Crotty* is misplaced. *Crotty* was a truly exceptional case involving an issue of Irish constitutional law, and a view, which appears to have been accepted at least for the purpose of the application by the Court, that the decision to ratify the SEA would put it beyond any subsequent challenge. The question of the irreversibility of the measure was therefore central to the decision to grant the injunction in *Crotty*. Furthermore, the period of time involved was very limited, and a matter within the Court's own control. Here by contrast the issue is one of European, rather than Irish, law and at its core is the capacity of members of the Euro area to enter into a separate ESM Treaty. In my view it is clear therefore that ratification pending the conclusion of the case would not put the ESM treaty beyond effective challenge at the level of EU law.

39 Second, it follows from the foregoing that no irreparable harm would be caused, still less any irreparable harm to the plaintiff in these proceedings, if the injunction is not granted. If for example the ECJ considered that the ESM Treaty contravened the Treaties in some respect, then given the fact that every participant of a treaty in the ESM Treaty is a member of the EU and is bound by the decisions of the ECJ, it would clearly be within the power of the EU, whether alone or in conjunction with the national courts, to secure compliance with what it had determined to be the true interpretation of the Treaties and the obligations of the relevant member states. Indeed it would be the duty of the participant countries to conform to the law as so declared. That would be the application of the principle in *Simmenthal* rather than a breach of it.

40 Third, on the assumption that an effective declaration of invalidity might indeed be made even after ratification, the Plaintiff nevertheless argued that steps could be taken quite quickly on foot of ratification such as calls for capital, borrowing on foot of that, and even advancement of loans, which might be difficult to reverse. It was emphasised that the sums involved were enormous. Even allowing this I do not consider that this compels the grant of an injunction. First, it is not beyond the power of courts, whether at national or EU level, to require steps taken to be reversed if it is considered necessary to bring parties in to conformity with the requirements of the law. Furthermore, the Plaintiff has never expressed himself to be opposed to the advancement of particular monies to particular countries. His objection, repeatedly stated during this case, lay at the level of principle, and was to a *permanent* mechanism with the possibility of a requirement for further funding from this country. Notably, he has not challenged, and apparently has not raised any complaint about, the EFSF mechanism which has been in place since May 2010, and made considerable disbursements thereafter, and which the ESM is intended to replace. It follows, that in the event that the plaintiff should succeed in these proceedings pursuant to the reference to the ECJ, then the ESM in its current form would be brought to an end, and would have had a lifetime much shorter than that of the EFSF. Accordingly, in such an event, neither Mr Pringle, nor the interests he asserts, would have suffered any irreparable harm, or indeed any harm at all.

41 Fourth, it must be recalled that the point which now remains in this case is an issue of pure European law equally applicable in theory in every country throughout the European Union. However, if the Plaintiff were to succeed and if an injunction were to be granted, the effect would only be that Ireland would not ratify the Treaty. Such an injunction would not restrain approval by other Member States, or indeed the coming in to force of the ESM, which is the object Mr Pringle seeks to achieve. The remedy of an injunction would therefore produce the worst of all outcomes even if temporary: it would run the risk of causing the harm to the defendant's interests which they apprehend without benefiting the plaintiff's interest in any material way. If the plaintiff were

ultimately to succeed, that would have the same impact across the Eurozone. Pending such a decision there is no compelling reason why Ireland should not be in the same position as its European partners.

42 A fifth consideration is that as set out in *Zuckerfabrik*, which requires that the interests of what was then the Community (and now the Union), should be taken into account. The domestic concept of the balance of convenience is I think sufficiently flexible to take such a consideration into account. It seems apparent that the interests of the Union weigh heavily against the grant of an injunction at this stage, since the only certain consequence of such an order is further uncertainty in an already volatile financial world. Furthermore it does not appear that any other citizen of the EU has commenced a challenge to the ESM on grounds of European law. The citizenry of the Union have interests and rights which would be affected, perhaps severely, by the grant of an injunction. In circumstances where the Plaintiff's case is not compelling, and where the outcome of any order is unpredictable, I consider that the interests of the Union lie against any temporary order under which the interests of the wider citizenry of the Union and the Eurozone in particular might be affected, without the possibility of representation in the proceedings, or remedy should the proceedings ultimately fail.

43 Finally, there is in my view, a real risk of irreparable harm to the defendants if an injunction is granted. It cannot be ignored that an affidavit has been sworn by a high official in that Department of Government which exercises the Executive function in the conduct of foreign affairs. That duty is consigned solely to the Government pursuant to Article 29.4, of the Constitution subject only to the Government's accountability to the Dáil (of which, it might be observed, the Plaintiff is a member) pursuant to Article 28.4.1. Mr O'Brien has sworn that it is the considered view of the Government that it is essential in the national interest not just that Ireland ratify the Treaty but that it do so as soon as possible. If ratification is prohibited by order of this Court , then it follows that the national interest, at least in the view of the organ entrusted with the sole power to conduct international relations and which for good measure manages the State's economic affairs, is necessarily damaged. Furthermore, that particular damage is irreparable. If the injunction sought is granted, then the one thing that cannot be done, and can never be done whatever the subsequent outcome of this case, is that Ireland should proceed to ratify the Treaty at that time which the body entrusted with that decision had decided it was in Ireland's national interests to do so. It is manifest that there is nothing that the plaintiff or indeed this Court could do to remedy that damage. It is also truly remarkable that on this application the courts should be invited simply to disregard that stark statement, and to accept instead the assertion of the plaintiff, who lacks both the constitutional function and it appears any professional expertise to make such a judgment, that Ireland is fully funded until 2013 and that therefore no damage will be done to Ireland's national interest by a delayed ratification, even if it should later transpire that such ratification would have been perfectly lawful.

44 This leads me to a consideration which appears to have been largely overlooked in the plaintiff's analysis, but which in my view is also decisive. In *Crotty*, in the course of a short judgment granting the injunction, Finlay C.J., with whom all other members of the court agreed, recognised that in the constitutional context the balance of convenience was exceptional and considerations different to those of the ordinary injunction applied. The very fact that the plaintiff does not even address the question of an undertaking as to damages, normally a *sine qua non* of the grant of an injunction in private law is perhaps an acknowledgement, albeit tacit, of the accuracy of this observation. In the plaintiff's determination to challenge the wisdom and legality of the Government's decision, he appears to give no weight to the fact that it is a decision made by the Government. That is the body to which the Constitution has allocated the task of making such decisions whether trivial, important, wise, or profoundly misguided. Here the Court is invited to restrain the exercise of constitutional function by a body authorised to carry out that function, and in respect of which function the Constitution imposes little in the way of express limitation, and contemplates direct accountability to the Dáil and indirectly the People, rather than to the courts. Indeed, in one sense this case goes further. It has been asserted, in my view plausibly, that it is in the national interest for Ireland not only to ratify the ESM Treaty, but to do so as soon possible. No one can be unaware of the importance of speed and the unpredictable consequences of delay in such matters. Time therefore is more critical in the context of this application than even in *Crotty*, where it might be said that Ireland's national interest would be protected by ratification within a reasonable time. A court requested to grant an injunction in circumstances such as this , is faced with a form of zero sum calculation. It is not possible to freeze the time for making this decision. Events, both in Ireland and elsewhere, will move on. Accordingly, if the decision cannot be made to ratify the Treaty immediately, then that is, in effect, a decision <u>not</u> to ratify the Treaty immediately. The question then becomes not just <u>what</u> decision should be made but <u>who</u> should make it, even temporarily. That is a question on which the Constitution gives clear guidance. The Constitution makes that decision one for the Executive branch and does not confer that function upon either this Court, or any individual plaintiff. The fact that the decision may be momentous does not alter the constitutional allocation. Governments are elected to make decisions whether trivial or momentous successful or catastrophic, and for those decisions they are answerable to the Dáil, and through it to the People.

45 Accordingly, this case presents in a particularly acute way an invitation to the Court, which is itself obliged to ensure that the functions of the other constitutional bodies are exercised within their proper sphere, not just to prevent what is, on its face, a performance of constitutional function by the body to which the Constitution has allocated that function, but also to become, however temporarily, a participant in the exercise of the function. This is something which in the general sphere, a court is correctly, reluctant to do. For example a court simply will not interfere with the legislative process prior to the enactment of legislation, no matter how plain the alleged defect is: *Wireless Dealers' Association v. Fair Trade Commission* (Unreported, Supreme Court, 14 March, 1956). Once enacted, and the Legislature has performed its function, the legislation may be challenged. The exercise of the State's exercise in foreign affairs may be somewhat different, because it can occasionally carry with it the prospect of a decision being implemented and immunised, and effectively put beyond contest, review or remedy. But that should not obscure the fact that fundamentally, a court should be very slow to take a step which may involve effectively substituting its decision even if only temporary and suspensive , for that of the Government in matters of foreign affairs. Accordingly, in my view, the proper functioning of the constitutional balance requires that considerable weight indeed should be accorded to the constitutional interest in ensuring that the Government performs the executive functions assigned to it in the way it considers appropriate and for which it is accountable in the first place to the Dáil and through it to the People. The constitutionality of the measure can still be challenged after it has come into effect. There may be cases which are particularly clear and strong, and which are attended by considerations such as unreviewability, immunity and urgency. It is not necessary or indeed wise to anticipate such eventualities. It is enough to say, that this case is decidedly not one such. Here, the balance of convenience, on any view, weighs heavily against the grant of an injunction. The Plaintiff's claim has been addressed with considerable expedition, in the High Court, this Court, and the ECJ. That process will provide a very speedy resolution of the issues raised by the plaintiff. Pending the final outcome of those proceedings the challenged measures, both at domestic and EU level, remain in place. In my view that is the appropriate, and certainly preferable, way to the address the Plaintiff's concerns.