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 on the 19th day of October, 2012 by Mr. Justice William M. McKechnie

In view of the other judgments of the Court dismissing this application, a conclusion with which I entirely agree, I propose to add a few brief observations only, to put in context my agreement with such decision.

The key issue on this part of the constitutional challenge is the application of *Crotty v. An Taoiseach and Others* [1987] IR 713 ("*Crotty*"): no-one has suggested that *Crotty* was wrongly decided. The defendants expressly acknowledge the correctness of the decision and say that whilst it may have been controversial at the time, that certainly is no longer the case. The plaintiff relies upon it as the fundamental pillar or cornerstone in the challenge undertaken by him. Therefore, how *Crotty* was decided is not the point, although I should say that in my view the decision was correct. Rather, it is whether, by reference to the principles properly deducible from the majority decision, the State, by becoming a contracting party to the European Stability Mechanism Treaty, done at Brussels on the 2nd February, 2012 ("ESM Treaty"), can be said to have "alienated", "abdicated", "surrendered", or "transferred" the powers bestowed upon it by the Constitution, in a manner not so permitted by it. This aspect of the case is in effect a single precedent one: is the State's ratification of the ESM Treaty prohibited by *Crotty*? In other words, has the Government, in the exercise of its executive authority in the field of foreign affairs, infringed the limitations imposed on that power, when referenced to *Crotty*?

Before looking at *Crotty* however, it is important to note that the suggested action of the Government is not challenged by virtue of any express constitutional provision. The absence of such challenge is entirely understandable because, at the level of principle, it is uncontroverted that:

> the executive power of the State, generally and in particular with reference to foreign affairs ("external relations" is the phrase used in Article 29.4 of the Constitution), is exercised solely by or on the authority of the Government;
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> subject to informing Dáil Éireann, and where a charge on public funds is involved, getting its approval, the State may enter into international agreements; and
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> where any such agreement is intended to be part of domestic law, the approval of the Houses of the Oireachtas is required;
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> these provisions do not apply to agreements of a technical and administrative character.
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> There is nothing surprising in any of these provisions: the Dáil requirement reflects domestic accountability at political level and the legislative requirement reflects the institutional structure of the Constitution.

There is thus no dispute about these general principles or the fact that the exercise of this power by the executive branch of Government, in the field of foreign affairs and indeed otherwise can be subject to judicial scrutiny, and therefore to judicial analysis (Walsh J. and Henchy J. at pp. 778 and 786 respectively of *Crotty*, and McCarthy J. at 541 of *Ellis v. O'Dea* [1989] I.R. 530). Equally so, any act done in this area, such as for example, entering into an international agreement or treaty, whether by virtue of entry alone or by reason of the commitments and obligations thereby undertaken, must be compatible with the Constitution. Article 29.4.1, in conjunction with Article 28.2 expressly states that such power is subject to the provisions of the Constitution. In such circumstances Walsh J. must surely have been correct when he said that the Government, or for that matter the Houses of the Oireachtas, cannot operate free from the constraints of the Constitution (p. 778 of *Crotty*). Subject to this limitation, which is imposed at the highest level of our legal order, it has also been readily acknowledged that the Government alone is the actor in this field and that it enjoys extensive autonomy in that regard. The source of this competence is not statute-dependent, but rather stems from the Constitution itself; see not only Article 29, but also the provisions of Articles 1, 5, and 6.

In considering the complaint and allegation of unconstitutionality in this case, the evaluation test or criteria to be applied, is to be found in *Crotty* and at a most general level can be described by stating that, the relevant powers of Government cannot be abdicated, alienated, transferred, or subordinated to other states or bodies. These words are rooted squarely on the sovereignty of the State and on the Nation's affirmation of its inalienable and indefeasible right, *inter alia*, to determine its relation with other nations (Article 1), and on the right of the people, in the final appeal, to decide all questions of national policy having regard to the requirements of the common good (Article 6). As can be imagined, much learned debate on both the judicial and academic side, has followed *Crotty* with a view to ascertaining the true meaning of these words. Of necessity and largely by reason of the paucity of cases where the issue arises, much of the discussion has been abstract lead. Notwithstanding the unquestioned value of such contributions, nonetheless, I believe that the real and essential import of such words are more likely to emerge from an examination of their practical effect, on a set of concrete circumstances such as those presenting in the instant case. Such an examination at a general level is briefly conducted at paras 13 and 14 *infra*. Whilst correctly there has been much concentration on these phrases, nevertheless, reference must of course also be made to the detail of *Crotty*, without which a full understanding of the decision would obviously be lacking.

Despite the fact as indicated, that the parameters of the decision still give rise to much debate and differing views, I do not believe that, for the purposes of this case, *Crotty* must necessarily be microscopically examined in such a way that a conclusion – supporting, refining, or dissenting – from each and every aspect of the decision, must be reached. I do not find such an exercise vital, at least at this stage, for the very fundamental reason that, at a comparative level, the subject of the investigation in that case, namely Title III of the Single European Act ("SEA"), is wholly distinguishable from the provisions of the ESM Treaty, the subject of the instant case.

The views of the majority in *Crotty* which underpin the Court's conclusion were described in varying and differing ways: these have been fully set out in the judgments of the other members of this Court and I gratefully adopt what they say. I wish to add only a few comments:

> Walsh J., in a passage referred to at p. 781 of the report, states that the essential nature of sovereignty is the right to say "yes or no". Sovereignty in this context can only mean that as provided for and as intended by the Constitution. It is said by the plaintiff that this right encapsulates the very heart, not only of the majority decision but of sovereignty itself. Without qualification or context I cannot agree with this proposition, either at a particular or general level. Given the extensive observations of the learned judge on this issue, to take such a phrase and to treat it, in isolation, as founding the essence of his decision is in my view, to misread his judgment. To suggest that the criteria for determining the instant challenge, to the exercise by the Executive of its power to ratify the ESM Treaty, can be determined on such a basis is simply not sustainable. In fairness, I should immediately say, lest I appear to do an injustice to the plaintiff, that his reference to and reliance upon this phrase may have been intended as a shorthand expression of his more general argument under this heading. Therefore, whilst the point has to be addressed, the overall case has to be determined on the entirety of what the majority said, and not simply on this passage.
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> Reverting to the particular argument for a moment, the reason why I reject the suggested significance of the expression is that in the first place, the judge himself expressly acknowledged that Finlay C.J. was the source of such phrase, when giving the Court's judgment on the challenge to the SEA save for Title III thereof. That remark, as originally made, was entirely appropriate to the context then under discussion by the Chief Justice. At page 769 of the report the context appears: "[t]he capacity of the Council to take decisions with legislative effect is a diminution of the sovereignty of Member States, including Ireland, and this was one of the reasons why the Third Amendment to the Constitution was necessary. Sovereignty in this context is the unfettered right to decide: to say yes or no". Therefore, having transposed such remark, it is not appropriate to assign or ascribe to it, the determinative importance which has been suggested.
> A much more representative version of the judgment of Walsh J. is to be found at the end of p. 780, and on pp. 782 and 783 of the report. What is stated there has been set out in the other judgments delivered and therefore I will not repeat them: everyone is familiar with the key expressions from that and the other majority judgments, such as the impermissibility of "abdicating", "alienating", "surrendering", or "transferring" such powers, save as allowed by the Constitution.
> It is clear from these passages that the learned judge was very much focusing on the freedom which the Constitution bestowed on the Government in deciding matters of foreign policy. That freedom was to develop, formulate and pursue policy and to change or adjust that policy as occasion required. That freedom to exercise, or not to exercise as the case may be, in a particular way, could not be abridged by the terms of an agreement binding on the Government and reached with a third party country or other entity.
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> It is true to say that some excerpts from his judgment may be capable of an interpretation consistent only with Ireland having an overriding control, within the terms of any such agreement, being one capable of exercise at all times and on all issues. For the reasons given by O'Donnell J. and Clarke J., I do not agree that such an interpretation is the correct one. In fact, Walsh J. pointed out several agreements to which Ireland was a signatory, where no such control existed and therefore could not be exerted.
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> In addition however, if there should be ambiguity in this regard, the words or expressions in question, must be looked at and measured against the terms of Title III, of the SEA, which were the subject matter of the challenge. Given the scope, breadth, and skeleton nature of the aspirations envisaged by that treaty and the demanded level of cooperation necessary to give effect to them, it is understandable how it could be said that the core constitutional freedom in question, at least in part, was being surrendered. Furthermore, when a comparative analysis is conducted between Title III of the SEA and the provisions of the ESM Treaty, the seismic distinction between both, becomes instantly demonstrable.

Henchy J. likewise viewed Title III as a vehicle to move foreign policy from a national to a Community level: it constituted a "fundamental transformation" in the relations between participating states. Such had the effect, amongst others, of entirely undermining the pre-eminence of the "common good", which should prevail in all government questions of national policy. Article 6 of the Constitution, in conjunction with Article 5 and others thereof, did not so allow. It was one thing to consult with other States in the conduct of foreign policy, but it was quite a different matter to enter into a binding agreement whereby the State was required to act "in the sphere of foreign relations in a manner which would be inconsistent with constitutional requirements". Such was not permitted.

Finally in this regard, Hederman J. was of the view that the Government could not submit or subordinate the exercise of its constitutional powers, in this field, "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" (p. 794 of the report).

All of the judicial observations made in *Crotty* must obviously be viewed against the Treaty provisions which the Court was called upon to examine: such provisions committing the State and all future Governments to do the following:

> "1. To endeavour to formulate and to implement a European foreign policy.
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> 2. To undertake to inform or consult the other Member States on any foreign policy matters of general interest (not just of common interest) so as to ensure that the combined influence of the States is exercised as effectively as possible through co-ordination, the convergence of their positions and the implementation of joint action.
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> 3. In adopting its position and in its national measures the State shall take full account of the position of the other Member States and shall give due consideration to the desirability of adopting and implementing common European positions.
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> 4. The State will ensure that with its fellow Member States common principles and objectives are gradually developed and defined.
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> 5. The State shall endeavour to avoid any action or position which impairs the effectiveness of the Community States as a cohesive force in international relations or within international organisations.
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> 6. The State shall so far as possible refrain from impeding the formation of a consensus and the joint action which this could produce.
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> 7. The State shall be ready to co-ordinate its position with the position of the other Member States more closely on the political and economic aspects of security.
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> 8. The State shall maintain the technological and industrial conditions necessary for security of the Member States and it shall work to that end at national level and, where appropriate, within the framework of the competent institutions and bodies.
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> 9. In international institutions and at international conferences which the State attends it shall endeavour to adopt a common position with the other Member States on subjects covered by Title III.
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> 10. In international institutions and at international conferences in which not all of the Member States participate the State, if it is one of those participating, shall take full account of the positions agreed in European Political Cooperation.
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> One other matter expressed in somewhat ambiguous terms at Article 6 (c) in Title II is as follows:

'Nothing in this Title shall impede closer cooperation in the field of security between certain of the High Contracting Parties within the framework of the Western European Union or the Atlantic Alliance.'"

Littered within the above obligations, are requirements, not only to consult with and inform other states, but also by endeavour to ensure that "common principles and objectives" are generally developed and defined; to take account of their position in adopting a national perspective; to adjust such perspective to accommodate the common good of other states; and to converge its interests so that the objective of reaching a common European policy could be furthered. In addition, the State was required to step down its own position if otherwise that would impede reaching a consensus or prevent joint action; and much more.

At a general level Title III of the SEA, constituted an abstract framework in many fundamental respects. It lacked specificity and failed to set out or provide parameters either by reference to the formulation or implementation of policy. It set broad and distant targets which if achieved, would bring about significant changes in constitutional structure. The method of progress in this regard was largely unspecified save to note the significance of the power vested in organs or bodies, external to the State: the outside boundaries were ill-defined as was the timescale and structures envisaged. It involved the State being made subservient to the interests of other member states and would have brought about a "fundamental transformation" of Ireland's relations with such states. It would have increased the essential scope and objectives of the Community. In all, it was very much a journey into the unknown.

When one contrasts the above position with that prevailing under the ESM Treaty, it becomes immediately clear that what is established by the latter, is an international financial institution, financed by contributions from contracting states as well as having an ability of itself to raise funds on the market. Its operational remit is to provide assistance to contracting states who cannot obtain finance on the market at reasonable and sustainable rates. Such assistance is subject to strict conditionality.

At the point of principle what is strikingly different between the provisions of the ESM Treaty and Title III of SEA, is the level of detail underpinning the former and the absence of such detail regarding the latter. The entire substance of the ESM Treaty structure is set out, commencing with the purpose of its establishment, its memberships, its governance – which includes voting rights of contracting states, how decisions are made, specifying those which require mutual agreement and those which can be recorded by qualified or simple majority and making specific provision for true emergency situations – and its initial capital which is maximised at a certain level with each contracting state's contribution being calculated or capable of ready calculation. It goes on to detail how such can be reviewed in accordance with Article 10(1) and Article 5(6)(b) thereof, how stability support can be provided to a contracting party with the use of a financial instrument most appropriate to its financial management and it also deals with the establishment of reserve and other funds, coverage of losses, etc..

This brief survey of its provisions do not do immediate justice to a comparative analysis with *Crotty*. If time and space permitted, the laying out of its terms in full, would immediately convey the disparity between it and Title III SEA. In effect the fundamental difference between both is the fact that the ESM Treaty is essentially policy implementing and not policy making. Therefore, it cannot be said that there is any fundamental transfer of sovereign power to the institution or to the other subscribing states.

Whilst I acknowledge that there are certain provisions, heavily relied upon by the plaintiff which might suggest the contrary, in reality and as a matter of practice, none of these involve an open-ended commitment by the State. In addition, the State has a voice on such matters. It is true that if the State defaults in making its contribution to the authorised capital stock or in honouring its obligations to reimburse any financial assistance obtained from the institution, then and for so long as such default continues, it shall be unable to exercise its voting rights, by virtue of Article 5(8) of the Treaty. However, even in such a situation it seems most unlikely that there could be any increase in authorised capital stock as any such decision could only enter into force after the members had complied with their applicable national procedures (Article 10). I rest this view not on any definitive interpretation of the Treaty's provisions, that ultimately being a matter for the General Court, but rather on the undeniable fact that as part of domestic law, the Dáil's approval would be required for any such increase. In this context it should be noted that subject to the possible review last mentioned, Ireland's maximum contribution has been capped and in fact the Minister for Finance has been authorised, by virtue of Section 2 of the European Stability Mechanism Act 2012, to make such payments as required.

In addition, whilst the institution may provide financial support for a member state during the currency of any default period, which of necessity would mean that the State could not influence the terms of any such assistance, nonetheless that consequence could not be classified as decisive or determinative in this area. In any event it is a consequence which is within the State's power to avoid. Equally so, when one considers the actual terms of the Treaty and the relevant provisions of Articles 28 and 29 of the Constitution, I do not believe that the absence of a specific provision for withdrawal, has any negative effect or consequence for sovereignty.

Consequently in my view, I cannot agree that the State, by entering into this Treaty, has acted impermissibly in the manner identified by the majority in *Crotty*. Rather, when the benefits of the Treaty are also accounted for, it can be said that its ratification, in the full knowledge of the commitments undertaken, is in itself an act of sovereign power and not a subjection of it. Furthermore, it can rightly be seen as a step in furtherance of the common good of the Nation even if in this regard the common good of other member states is also satisfied.

Finally, I agree with the judgment of the Chief Justice on the injunction issue.

For the above reasons, I would dismiss this aspect of Mr. Pringle's claim.