Neutrality and the Irish Constitution

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Ireland, like other neutral states, has witnessed intense debates in recent weeks over the future of its neutral status. Ireland is not a member of NATO and has maintained an ambiguous status of 'neutrality' since independence. However, neutrality as such is not a constitutional requirement, and insofar as it obtains at all, has more the character of a policy or tradition. Departures from that tradition – particularly the joining of NATO – would nonetheless likely encounter certain constitutional barriers. In particular, it seems likely that membership of NATO would require a constitutional referendum, for reasons I discuss in this essay.

International relations: The constitutional framework

The Constitution of Ireland of 1937 contains detailed provisions for international relations. Broadly speaking, international relations falls within the executive power conferred upon the Government, subject to certain limited oversight by the lower house of parliament, Dáil Éireann.

Article 29 of the Constitution, in sections 1-3, sets out general principles concerning the State's conduct of international relations, but these provisions are of a broadly aspirational character which do not enshrine 'neutrality' as such, and they do not impose concrete restrictions on the conduct of international relations by the Government.:

> 1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.
>
> 2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination
>
> 3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other State

These general principles, in and of themselves, do not pose much by way of a justiciable restriction on the Government's decisions in the international realm (see *Horgan v An Taoiseach* [2003] 2 ILRM 357). The power to conduct international relations, under Article 28.4 is one of the relatively few 'autonomous' constitutional powers explicitly conferred on the Executive, which can be exercised without parliamentary or legislative authorisation. There are some exceptions to the autonomy of this specific power. In particular, the State cannot declare war or 'participate' in war, according to Article 28.3, without authorisation by Dáil Éireann (see further *Horgan v An Taoiseach* [2003] 2 ILRM 357). Equally, the Dáil must, according to Article 29.5, approve any 'international agreement involving a charge on public funds.'

In summary, then, the constitutional framework ostensibly provides for a relatively wide autonomy for the Executive power in relation to international affairs, subject to relatively limited legislative oversight.

Membership of international organisations: Constitutional barriers

However, there are further constitutional barriers to the Government's conduct of international relations, beyond these limited procedural requirements of parliamentary consent. In particular, the Supreme Court has found that the Government's conduct of international relations is subject to justiciable limits based on general constitutional principles.

This emerged in a landmark case, *Crotty v An Taoiseach* (1987), which considered a challenge to Ireland's signing of the Single European Act.

Ireland's membership of the European Communities had been understood as necessitating a specific constitutional amendment – and therefore a referendum – via the Third Amendment of the Constitution in 1972. This provides:

> no provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State … that are necessitated by the obligations of membership of the Communities … or prevents laws enacted, acts done or measures adopted by … the Communities … from having the force of law in the State.

Subsequently, it was assumed this amendment might authorise further European treaties given that the Constitution was to be read subject to measures "necessitated … by membership". Cahill describes this as a theory of "implied constitutional amendment", via EU treaties.[1)]Maria Cahill, 'Crotty after Pringle : The Revival of the Doctrine of Implied Amendment' (2014) 17 *Irish Journal of European Law* 1

However, in *Crotty v An Taoiseach* [1987] IR 713 a pacifist campaigner successfully obtained a Supreme Court injunction against the Government's attempt to ratify the Single European Act without authorisation by a specific constitutional amendment. In a landmark ruling, the Supreme Court held that the Government, as the executive power, had no power to ratify Title III of the Single European Act without a constitutional-amendment referendum – because in particular, it undermined the State's sovereignty by committing it to a joint foreign-policy platform with other states.[2)]Article 5 provides: "Ireland is a sovereign, independent, democratic state".

On the one hand, the Supreme Court recognised international relations as exclusively an executive competence:

> The Constitution confers upon the Government the whole executive power of the State … In its external relations it has the power to make treaties, to

> maintain diplomatic relations with other sovereign States. The Government … is the sole organ of the State in the field of international affairs (pg 777).

However, it rejected the Government's argument that the separation of powers precluded judicial review of executive acts in the international realm:

> … Nevertheless the powers must be exercised in subordination to the applicable provisions of the Constitution. It is not within the competence of the Government, or indeed of [the parliament], to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution (pg 778).

And as for the substance of the constitutional violation, the Court's majority concluded that the State had to retain the freedom to control its foreign-relations policy co-equally with other states – this being an essential attribute of national sovereignty:

> The State would not be completely sovereign if it did not have in common with other members of the family of nations the right and power in the field of international relations equal to the right and power of other states. These powers of the State include the power to declare war or to participate in a war, to conclude peace, to make treaties, and maintain diplomatic relations with other states (pg 778).

Sovereignty, then, in Walsh J's famous phrase, meant the right to say no (pg 781). The State's sovereignty, enshrined in Article 5, was undermined by any arrangement in which the State might find itself outvoted and bound accordingly. Thus the net issue, for Hederman J, was whether or not the State could "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" (pg 794). And he concluded: "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." (pg 794).

Thus while the State's external sovereignty was exercised by the Executive, it was not free to alienate this power. Such sovereign competences could be qualified only via constitutional amendment:

> In enacting the Constitution the people conferred full freedom of action upon the Government to decide matters of foreign policy… 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 … and so to bind the State in its freedom of action in its foreign policy. The freedom to formulate foreign policy is just as much a mark of sovereignty as the freedom to form economic policy and the freedom to legislate (pg 793).

In political and geopolitical terms, the main implication of *Crotty* was not so much that most new European treaties would require constitutional amendments, but

rather that they would require referendums – simply because, unusually in Europe, the Irish constitution requires referendums for all constitutional amendments.

The question of NATO membership

Based on *Crotty*, the main constitutional difficulty posed by hypothetical NATO membership is of this legal commitment fettering the Executive's conduct of international relations into the future. Specifically, Article 5 of the NATO charter would, in effect, commit future Governments to automatically participate in wars upon other NATO members over international affairs which the Supreme Court affirmed in *Crotty*.

Crotty's decisive conclusion was that the Executive could not commit the State to any international arrangement, touching on sovereign competences including foreign relations itself, in which the State would bind itself to future acts or policies over which it retained no veto. With respect to sovereignty, it noted, 'unanimity is a valuable shield' (pg 769).

Thus the ruling identified 'sovereignty' with certain competences or attributes which are understood as being incapable of alienation. According to Henchy J, 'the State's right to conduct its external relations is part of what is inalienable and indefeasible' (pg 786).

By contrast, in the more recent case of *Pringle v Government of Ireland* [2013] 3 IR 1, the Supreme Court rejected a challenge to the European Stability Mechanism – which had not been authorised by referendum – based primarily on the finding that Ireland would retain a veto, within the governance of the treaty, over any future increase in its capital contribution to the fund.

Therefore, a crucial factor is whether any impugned international agreement creates legal obligations that fetter the discretion of future Governments in their conduct of international relations. At face value, this would seem to prevent Ireland from joining NATO without a referendum. This seems to inevitably follow from of *Crotty* and the 'right to say no'.

There is a possible counterargument based on the opinion of O'Donnell J in *Pringle*. O'Donnell J sought to qualify the meaning of the 'right to say no'. He cautioned that the phrase should not be taken 'in isolation' as encapsulating *Crotty's* ratio decidendi. The case, he says, should not be read as precluding the State from joining organisations which may involve binding it to future commitments over which the State retains no veto. It could be deduced from the constitutional provisions, he said, 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' (para 6. He denies, then, that sovereignty consists in 'maintaining a complete freedom of action in the future in respect of any individual decision' (para 13). He points out that 'there is no sense in which Ireland or any other state can remain completely free to say no, once it has entered into any … agreement, alliance, grouping or body' (para 14). He suggests instead that sovereignty concerns

the state's 'foreign policy as a whole', and that the SEA was unconstitutional only because the Executive power of the State in relation to the entirety of its foreign policy was being subordinated' (para 19, emphasis added).

In these terms at least, the necessity of a constitutional amendment for NATO membership would depend on whether or not Article 5 of the NATO Charter would involve a 'subordination' of the Government's discretion over foreign policy in a manner that is comparable to the impugned provisions of the Single European Act. It should be noted that O'Donnell J specifically argues, which discussing the general meaning of sovereignty, that 'a sovereign can of course enter into binding alliances with other sovereigns, even those which commit their respective countries to war' (para 15). This suggests membership of military alliances would be permissible, though it should be treated as obiter dictum.

Concluding remarks

There is some ambiguity concerning whether the Irish Constitution would permit NATO membership without a referendum. The realpolitik, however, is that in the absence of any mechanism for an advisory opinion, constitutional ambiguity probably requires the holding of a referendum on precautionary grounds, for fear of membership otherwise being constitutionally challenged. In any event, it is likely that such a significant departure from the State's traditional stance would require a referendum for symbolic and political reasons, as some members of Government seem to have recently conceded.

References

- Maria Cahill, 'Crotty after Pringle : The Revival of the Doctrine of Implied Amendment' (2014) 17 Irish Journal of European Law 1
- Article 5 provides: "Ireland is a sovereign, independent, democratic state".