THE RELEVANCE OF SOVEREIGNTY IN CONTEMPORARY TIMES: THE POSTMODERN CONCEPTION OF SOVEREIGNTY AND *PRINGLE*.

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A INTRODUCTION

This article considers the case of *Pringle v Government of Ireland & Ors*[1] in light of the postmodern conception of sovereignty. This concept, coupled with the judicial conception evident in *Pringle*, would appear to illustrate the Irish State's current position in relation to sovereignty, not merely because the case is quite recent but also due to the fact that it seriously considers the implications of European integration. As noted by Cahill, '[w]hen the Irish Constitution was drafted in 1937, the capacity of a national government to act on the international sphere was one of the highest expressions of state sovereignty'.[2] Nowadays, it is more accurate to say 'that action on the international level poses the biggest threat to sovereignty' with the result that 'national constructions of sovereignty must either be re-construed in order to accommodate the shift from national to supranational sites of government, or that the nation state must surrender its self-understanding and self-description as 'sovereign'.[3] Accordingly, Walker highlights how the 'shift to a multi-dimensional configuration or authority' as a result of the emergence of the European Union and other post-state polities 'deepens and sharpens the challenge to sovereignty' and 'demands, at least, a radical overhaul in our understanding and conceptualisation of [the] key term, and at most, a renewed consideration of whether it is indeed facing redundancy.'[4] MacCormick, on the other hand, believes that the sovereignty of the Community's Member States has been subjected to a process of division and combination as opposed to truly lost.[5]

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[1] [2012] IESC 47 (*Pringle*).

[2] Maria Cahill, 'Judicial Conceptions of Sovereignty' in Eoin Carolan (ed) *The Constitution of Ireland: Perspectives and Prospects* (Bloomsbury 2012) 143-158 at 143.

[3] ibid.

[4] Neil Walker, *Sovereignty in Transition* (Hart 2003) 9.

[5] Neil MacCormick, *Questioning Sovereignty* (OUP 1999) 133.

First, the evolutions in the definitions of sovereignty advanced in theory by MacCormick and Walker in the recent history of European integration will be discussed. Secondly, the Supreme Court's contemplation and articulation of sovereignty in *Pringle* will be examined. This examination will focus on the judgments of Denham CJ, Hardiman J and Clarke J in particular as these appear to reflect the different viewpoints put forward by MacCormick and Walker while at the same time leading to distinctive conclusions within the case itself.

B MACCORMICK'S THEORY

This theory contends that 'we may at last be witnessing the demise' of the 'sovereign state' in Europe, 'through the development of a new and not-yet-well-theorized legal and political order in the form of the European Union.'[6] MacCormick defines sovereignty as 'power not subject to limitation by higher or coordinate power', held independently over some territory.[7] In distinguishing between internal and external sovereignty, he notes that external sovereignty 'may be present even when in the strict sense internal sovereignty is absent.'[8] Member States are 'no longer fully sovereign states externally, nor can any of their internal organs be considered to enjoy present internal sovereignty under law; nor have they any unimpaired political sovereignty.'[9] In one highly important sense, however, sovereignty has not been lost. The distinction of external and internal sovereignty indicates that 'even a strict definition of sovereignty permits a sense of divided or limited sovereignty.'[10] Due to the fact that under international law, no state or other entity outside the European Union has any greater power over Member States individually or jointly than before, 'there is a kind of compendious legal external sovereignty towards the rest of the world.'[11] This 'divided sovereignty' has taken us 'beyond the sovereign state',[12] thus 'it cannot be credibly argued

[6] ibid 125.
[7] MacCormick (n 5) 127.
[8] MacCormick (n 5) 129. External sovereignty 'characterises a state which is not subject to superior political power or legal authority in respect of its territory … In a legal sense, external sovereignty is the authority granted by international law to each state to exercise legal control over its own territory without deference to any claim of legal superiority made by another state or organisation.'
[9] MacCormick (n 5) 132.
[10] MacCormick (n 5) 130.
[11] MacCormick (n 5) 133.
[12] Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 Modern Law Review 1-18.

that any member state of the European Union remains politically or legally a sovereign state in the strict or traditional sense of these terms.'[13]

C WALKER'S THEORY

Walker defines sovereignty as 'the discursive form in which a claim concerning the existence and character of a supreme ordering power for a particular polity is expressed'.[14] Such 'supreme ordering power [thus] purports to establish and sustain the identity and status of the particular polity qua polity and to provide a continuing source and vehicle of ultimate authority for the juridical order of that polity.'[15] The debate over sovereignty under this theory 'is not a debate over the capacity of a particular concept to capture some underlying trans-theoretical essence, but, rather, over the heuristic value of this or that concept of sovereignty (or its demise) as a way of enhancing the claims of a particular theoretical understanding of the world.'[16] '[T]he particular understanding of the world that provides the theoretical context for discussion of sovereignty is that of constitutional pluralism', a position 'which holds that states are no longer the sole *locus* of constitutional authority, more prominently … those situated at the supra-state level, and that the relationship between state and non-state sites is better viewed as heterarchical rather than hierarchical.'[17]

The line of reasoning which seeks to '… reject or marginalise sovereignty as irrelevant is based upon the premise that in a world in which many circuits of power operate beyond the direct control of the sovereign state … sovereignty figures lower and lower in the register of explanatory variables which may be invoked to make sense of that world.'[18]

[13] MacCormick (n 5) 133.
[14] Walker (n 4) 6.
[15] ibid.
[16] ibid 4.
[17] ibid. This has both an explanatory dimension and a normative dimension. (emphasis added).
[18] ibid 6.

In present times, 'we have reached, or at least are in a process of transition towards,' a post-Westphalian phase 'ushered in by the linked pressures of globalisation on the one hand and multi-dimensionality and constitutional pluralism on the other.'[19] While it is claimed that '… sovereignty clearly continues to form part of the object-language, it is no longer so widely or so confidently conceived of as part of the meta-language or explanation and political imagination.'[20]

1 Reconceptualising Sovereignty in the European Union

Walker asserts that '[i]t is well-known that the European Court of Justice has been remarkably frugal in its discussion of sovereignty' whereas it has been 'much more assertive … in its development, and much more tenacious in its maintenance, of a doctrine of supremacy.'[21] He refers to the argument that '[w]hile supremacy is clearly not identical with sovereignty, the assertion of original authority and of priority over domestic law contained in the doctrine of supremacy appears to presuppose – and implicitly confirm – the EU's sovereign status.'[22] Therefore this leads to the conclusion that 'a deep presumption of sovereignty is implicit in the broader constitutional logic espoused by the ECJ and endorsed by the other European institutions.'[23] In referring to the position which views sovereignty in the European context in disaggregated terms, Walker identifies the 'vulnerability and instability' of this position as never being far from the surface.[24] Frequently the metaphorical language of sovereignty disaggregation, he contends, is referred to 'in self-consciously ironic quotation marks, a rhetorical flourish to highlight the oxymoronic suggestion in such strange couplings as "shared" or "divided" sovereignty, and thus to indicate the bankrupt

[19] ibid. Westphalian sovereignty is defined by Krasner as the principle of non-intervention and represents one key (but essentially derivative) aspect or incident, variously interpreted or qualified, of the claim to sovereignty in the external sphere.
[20] ibid 10. This is in contrast to during the earlier Westphalian phase, when sovereignty formed a confident part of the meta-language of political science, law, international relations, etc.
[21] ibid 12. On those few occasions when it has engaged in a discussion of sovereignty, it has 'been more forthright in the view that the sovereignty or Member States is limited by the implication in the EU order (see Case 6.64 *Costa v ENEL* [1964] ECR 585 and Case 26/62 *Van Gend en Loos* [1963] ECR 1) than in the more radical claim that the EU itself possesses sovereign authority.' Walker (n 4). For a discussion of what constituted acts of sovereignty in these cases, see Hans Lindahl, 'Sovereignty and Representation in the European Union'.
[22] ibid 12.
[23] ibid 12. The ECJ is now known as the CJEU.
[24] ibid 15.

currency of the traditional explanatory language of sovereignty.'[25] Walker therefore suggests 'adopting the language of late sovereignty to make sense of the new multi-dimensional order', which in turn suggests that 'the basic conceptual apparatus of sovereignty can be adapted to understand the new order.'[26] In the new post-Westphalian order 'with the emergence of functionally-limited polities which do not claim comprehensive jurisdiction over a particular territory *it becomes possible to conceive of autonomy without territorial exclusivity* – to imagine ultimate authority, or sovereignty, in non-exclusive terms.'[27] The 'charge of actual or anticipated redundancy' may be answered by 'suggesting that the dynamic of transformation within late sovereignty will involve the continuous evolution rather than the demise of sovereignty.'[28]

D PRINGLE

The case of *Pringle v Government of Ireland & Ors* revolved around whether the European Stability Mechanism Treaty, referred to as 'the ESM Treaty', involved a transfer of sovereignty to a degree that made it incompatible with the Constitution, when applying the principles set out by the Supreme Court in *Crotty v An Taoiseach* [29] meaning that a referendum amending the Constitution would have been necessary to permit the State to ratify the ESM Treaty. Both the appellant and the State relied on the majority judgments in *Crotty*, with Mr Pringle arguing that the Government in ratifying the Treaty establishing the ESM would be acting unlawfully and unconstitutionally in transferring power which is vested in it under the Constitution to an institution which exists outside the constitutional framework and which is responsible neither to Dáil Éireann nor to the people of Ireland.[30]

[25] ibid.
[26] ibid. Four characteristics of late sovereignty were identified by Walker to include continuity, distinctiveness, irreversibility and transformative potential.
[27] ibid 23. The key difference in the claim made in the multi-dimensional post-Westphalian order is that the boundaries are no longer merely territorial, but also functional.
[28] ibid 28.
[29] [1987] IR 713 (SC) (*Crotty*).
[30] Cahill (n 2). It is equally not responsible to the EU Institutions or the European Parliament as per Hardiman J.

In *Crotty* it was found that by undertaking in various ways to coordinate Ireland's foreign policy with those of other Member States, the Government was impermissibly fettering its future ability to conduct the external relations of the State.[31] Mr Pringle's argument alleged that 'participation in the ESM impinged on and diminished Ireland's budgetary, economic and fiscal sovereignty.'[32] In *Crotty*, 'the aspect of sovereignty in question was the foreign affairs power itself whereas in *Pringle*, the issue was a diminution of the State's sovereignty in economic and monetary matters'.[33] In the High Court in *Pringle*, Laffoy J accepted that the emergency procedure under Article 4(4) of the ESM Treaty could generate a decision that had adverse consequences for Ireland without Ireland's consent. However, she considered that the need for an emergency procedure, where both the European Commission and the European Central Bank considered that there was a threat to the economic and financial stability of the Euro area, could not be seen as a diminution in sovereignty since its objective was to protect the Eurozone. This, according to Doyle, is 'questionable'.[34]

In respect of the *Crotty* issue, four judges in the Supreme Court upheld the decision of Laffoy J, while Hardiman J dissented. The judgments of Denham CJ, Hardiman J and Clarke J illustrate the vastly different conclusions reached as well as judicial applications of some of those aspects of the theories of sovereignty discussed.

1 Denham CJ

While Denham CJ's focus emphasised external relations, she adopted the new and pithy definition of sovereignty as espoused at the time in *Crotty*; namely, 'the unfettered right to decide: to say yes or no'.[35] She identified the core issue in both cases as being whether the State in attempting to ratify the Treaty before the Court was endeavouring to act free from the restraints of the constitution and distinguished the facts in *Crotty* from the current case. At issue in *Crotty* was the executive power

[31] Oran Doyle, 'Constitutional Law' (2012) Annual Review of Irish Law 117.
[32] ibid 189.
[33] ibid. *Crotty* protected the State's ability to formulate and implement policy in relation to these and other matters.
[34] ibid 190. He accordingly argues that '[j]ust because there might be good reason to diminish the sovereignty of the State to allow for effective and timely collective action does not mean that the sovereignty of the State has not been diminished.'
[35] Cahill (n 2). As noted by Cahill in referencing *Crotty* (n 29) 769.

of the sovereign state to decide future external relations, whereas no such fundamental decision arose in relation to the ESM Treaty. The State had not ceded policy making for the future to another institution to enable the creation of policy in the future, nor the power to increase the State's financial contributions elsewhere.[36] Consequently, Denham CJ found that there had been no transfer of sovereignty to any degree incompatible with the Constitution because there had been no abdication of freedom of action nor any attempt to bind the State in its freedom of action in its formulation of foreign policy.[37] The distinction between internal and external relations employed by Denham CJ reflects those concepts underlying MacCormick's theory of postmodern sovereignty based on the distinction between internal and external sovereignty, which Cahill has indeed identified as being one of the two most obvious dichotomies that have emerged from judicial discussion of the concept of sovereignty.[38]

2 Hardiman J

Hardiman J, in his dissenting judgment, considered that *Crotty* did more than preclude the transfer or abdication of sovereignty. It also precluded the Government from signing up to an international organisation where decisions would be made other than by reference to the common good of Ireland under Article 6 of the Constitution.[39] Hardiman J favoured the analysis based on an altered 'point of reference' in Henchy J's judgment in *Crotty* and noted that while the Single European Act bound Ireland to adopt as its 'point of reference' the common position determined by Member States, that common position could not be arrived at without Ireland's consent. The ESM on the other hand allowed for an effective position among the members to be arrived at without any regard to Ireland's position. Therefore, Hardiman J found that the 'point of reference' was for the provision

[36] *Crotty* (n 29). In *Pringle*, Denham CJ emphasised that all treaties involve matters of policy but still presumptively fall within the foreign relations power of the Government. It is only a ceding of sovereignty that requires a mandate from the people.

[37] *Pringle* (n 1) 11 (Denham CJ) Following on from Laffoy J's judgment, Denham CJ considered that the compelling need for an emergency procedure meant that it could not be a diminution of sovereignty.

[38] Cahill (n 2) 144.The other being the contrast between 'state sovereignty' and 'popular sovereignty'.

[39] Doyle (n 31) 193. This had been the case with Title II of the Single European Act in *Crotty* but was also the case with the ESM Treaty since its decisions could be made in the interests of the financial stability of the Eurozone rather than Ireland's common good.

of support in the financial stability of the Euro area as a whole and its Member States, as opposed to the common good of the Irish people.

He considered the provisions of the ESM Treaty to do just what was prohibited in *Crotty*; they bound the State 'to exercise in a particular procedure' their power to decide, for example, whether or not to advance a particular sum of money to a particular state, alone or in conjunction with others. He also found that *Crotty* was not distinguishable from the present case; the Treaty in question being both in form and content an international agreement, nor was the freedom to formulate foreign policy distinguishable from the freedom to formulate economic policy and the freedom to legislate, as argued by the State. Rather, the quote relied on from the judgment of Walsh J in *Crotty* appeared to assimilate, and not to differentiate, these on the basis that they were all aspects of sovereignty. Furthermore, he noted that the Treaty was not a European Union instrument or something required by membership of the European Union.

An analogy may be drawn between Hardiman J's interpretation of the 'point of reference' and the distinction between internal and external reference points by Walker.[40] By qualifying the European Community as a 'new legal order of international law' and as 'an own legal system', the ECJ in the *Van Gend en Loos*[41] and *Costa v ENEL*[42] rulings asserted what Grimm denied; namely that law-making in the Community takes place by virtue of an 'internal reference point', as a result of which Community Law is the expression of collective self-legislation.[43] If sovereignty were 'shared' or 'pooled' (as is MacCormick's assertion, as previously discussed) this would be tantamount to acknowledging that the Treaty had an 'external reference point', namely the Member States.[44] In

[40] Walker (n 4) ch 2.
[41] Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.
[42] Case 6/64 ***Flaminio Costa v ENEL*** **[1964] ECR 585.**
[43] Walker (n 4) 170 Dieter Grimm contends that the EU is a legal community, not a political community, because there is no European people, in the singular and determinate, that could serve as the 'substrate' of an autonomous legal order. As a constitution gives expression to a people's self-determination, the Community Treaties cannot be a constitution because they 'do not refer to a single European people; rather, the many peoples of Europe are recognised as distinct groups'.
[44] ibid 170.

accordance with the tradition of democratic theory, 'the autonomy of a legal order implies that this legal order must be referred back to a people as its ground or bearer, which means that a people exercises its *pouvoir constituant* by directly enacting a constitution or by mandating a body to do so on its behalf.'[45] Therefore Hardiman J's finding that decisions must be made on the reference point of the common good of the Irish people seems to be in-keeping with this theory relating to the postmodern conception of sovereignty.

3 Clarke J

The judgment of Clarke J also appears to incorporate elements of MacCormick's theory of postmodern sovereignty. Clarke J considered that it might be possible to conceive sovereignty as being enhanced where small countries pool their sovereignties in order to gain greater leverage in international affairs, thereby conforming to the concepts of "pooled", "shared" or "disaggregated" sovereignty. 'However, such a model was not found to be endorsed by the Constitution, save in respect of the specific authorisation for the various EU Treaties in Article 29.4.'[46] The Irish constitutional organs do not have the power to cede the sovereignty of the State. The State's freedom to act includes the freedom to undertake commitments that fetter future freedom but cannot abdicate, alienate or subordinate their powers to the interests of others. On the basis of this illimitable conception of sovereignty, Clarke J was satisfied that ratification of the ESM Treaty amounted to an exercise of sovereignty, rather than an abdication. Like O'Donnell J, he distinguished the very specific commitment in the ESM Treaty from the Single European Act which concerned every aspect of foreign policy. Furthermore, he noted that the ESM Treaty was not a Union measure at all, since it was an international agreement only between the Member States within the Euro area, and pointed out that the Constitution does not require, as a matter of principle, that all international agreements be put to the people for approval through a referendum. It was noted that it would be a strange conclusion if the broad discretion given to the Government as to

[45] This, precisely, is the gist of Grimm's allusion to the 'internal reference point' of a constitution.
[46] Doyle (n 31) 193.

how to conduct the foreign policy of the State was to mean that it could not, as a means of exercising that discretion and thus, exercising its sovereignty, utilise the most common method of exercising its sovereignty.[47]

E CONCLUSION

National constitutional courts are one important forum in which the dilemma regarding the relevance of sovereignty in contemporary times is addressed [48] and in which the postmodern conception of sovereignty is advanced. The judgment of the Supreme Court in *Pringle* has been described as constituting 'a re-interpretation of *Crotty* which is less absolutist in defining what the exercise of sovereignty means'.[49] The drastically differing opinions of the judges illustrate a knock-on effect of the numerous definitions of sovereignty that have been espoused in the Irish courts throughout the history of the Constitution, as well as the different viewpoints put forward by MacCormick and Walker. Denham CJ's view that ratification of the ESM Treaty amounted to a current exercise of policy rather than a fettering of the power to make a policy in the future would appear to follow MacCormick's distinction between internal and external sovereignty, while Hardiman J's dissenting judgment would appear to be made on the basis of Walker's 'reference point' argument (though not necessarily intentionally). Clarke J, in addition, incorporates the 'disaggregation' element of MacCormick's theory into his consideration. Therefore *Pringle* is more 'usefully assessed for what it says about the current state of constitutional law than for what it says about *Crotty*' as well as the resulting 'dilemma over whether autonomy or sovereignty involves the power to constrain future exercises of one's autonomy or sovereignty.'[50] The implication is argued as being that '[i]t opens the possibility that future amendments of the EU Treaties may not be considered, by definition, to require a referendum, provided the amendments are limited to the method of decision-making and related to limited, specific and discrete competences.'[51] This is

[47] See further Eugene Regan, 'Policing the Conduct of Referenda; Recent Case Law' [2013] The Bar Review 3.
[48] Cahill (n 2) 143.
[49] ibid.
[50] Regan (n 47) 194.
[51] ibid 5.

particularly worrying given the scepticism over the use-value of sovereignty in the immediately relevant context of the European Union.[52] Whether Walker's or MacCormick's theory of postmodern sovereignty is favoured, there is no denying that sovereignty as formerly recognised in strict terms no longer exists. As Lindahl so accurately puts it, 'could it be that sovereignty is the name of a *problem*, far more than its solution [and,] if so, would attempts to move 'beyond' sovereignty unwittingly reintroduce the problem in another guise?'[53]

[52] Walker (n 4) 5.
[53] ibid 87-88.