

**“POLITICAL QUESTIONS”  
AND JUDICIAL REVIEW IN IRELAND**

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**INTRODUCTION: STATEMENT OF PROBLEM  
AND THEORETICAL BACKGROUND**

The first question to be discussed in this essay is whether there are areas of Irish law where judicial review by the superior courts is excluded. Put another way, are there nonjusticiable matters, or “political questions”, in Irish law? Some decisions or types of decision might be classified as nonjusticiable because of their politically sensitive nature, or because they are thought to be best left to the political branches of government rather than resolved by the courts, or because the courts are simply not equipped to review the judgments of the executive, legislature or delegated decision-makers in technical areas of policy. If it turns out after close examination that there are no nonjusticiable decisions or types of decision, then a second question arises: do special rules and arrangements govern judicial review of some decisions or types of decision? In other words, do the superior courts sometimes conduct judicial review with less intensity, and subject some decisions to less scrutiny than others? The two questions can be joined as follows: what are the rules of justiciability in the Irish legal system? To answer the question, some brief theoretical discussion will be necessary. I will then analyse the Irish cases under three headings: executive power, legislative function, and delegated powers. The analysis of the Irish cases will be split into two, for reasons that will become clear.

There is a tangle of terminology in the literature, which is liable to lead to confusion, so I ought to be clear about the way in which I am using the term “justiciability”. As employed here, it

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has two components: the jurisdiction of a court to hear a case, and what I initially call the “political question” doctrine. The first component will not be canvassed here, but some examples may be helpful: where a litigant fails to establish *locus standi*; where a case is not ripe for judicial resolution; or where the remedy is sought in the incorrect forum. In addition, the Constitution provides that certain areas shall be immune from review as a matter of jurisdiction. Under Article 13.8.1°, for example, “[t]he President shall not be answerable to either House of the Oireachtas or to any court for the exercise and performance of the powers and functions of his office or for any act done or purporting to be done by him in the exercise and performance of these powers and functions”. Provisions immunising from judicial review decisions taken by particular actors are not examples of a “political question” doctrine at work; rather, they simply prevent a court from having jurisdiction over decisions taken by particular actors.<sup>1</sup> A further provision worth flagging here, because it will be mentioned below, is the prohibition on reviewing the contents of a bill. The Constitution expressly vests the power of judicial review in the courts, but it is a power only to review acts. Thus review of bills is prohibited: *expressio unius est exclusio alterius*.

Of interest for present purposes is the second component. Courts invoke so-called “political question” doctrines, ostensibly to avoid considering the merits of a particular case which has come before them. No definition has common currency,<sup>2</sup> which

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<sup>1</sup> See also: Article 15.13 (parliamentary privilege); Article 28.3.3° (emergency powers, though see *In Re Article 26 and the Emergency Powers Bill 1976* [1977] I.R. 159); Article 34.3.3° (a Bill referred to the Supreme Court and held to be constitutional); and Article 45 (Directive Principles of Social Policy).

<sup>2</sup> See e.g. *Baker v. Carr* (1962) 369 U.S. 186 (United States); *Council of Civil Service Unions v. The Minister for the Civil Service* [1985] 1 A.C. 374 (House of Lords) (England); *Horgan v. An Taoiseach* [2003] I.E.H.C. 64, [2003] 1 I.R. 468; Barkow, “More Supreme than the Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy”, (2002) 102 *Columbia Law Review* 237; Choper, “The Political Question Doctrine: Suggested Criteria”, (2004) 54 *Duke L.J.* 1457; Harris, “Judicial Review, Justiciability and the Prerogative of Mercy”, (2003) 62 *C.L.J.* 631. Cf. Barak, *The Judge in a Democracy* (2006), pp. 177-189; Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (2006); Jowell, “The Democratic Necessity of Administrative Justice”, [2006] *Acta Juridica* 13, 21-22; Redish, “Judicial

creates obvious difficulties; accordingly, I will present a hypothesis and test it against the Irish cases.

*A. Primary and Secondary Justiciability*

The key question to be answered is whether a “political question” doctrine allows courts to avoid reviewing a particular category of decisions altogether, or is the formal cloak in which a court wraps up a belief that, having examined a decision, the decision is not apt for application of the principles of judicial review. In this regard, Harris has usefully distinguished primary from secondary justiciability. Primary justiciability refers to the category of decision. Secondary justiciability refers to the grounds of review sought, and whether the court has the necessary tools at its disposal to resolve the case.<sup>3</sup> I will use Harris’ distinction to discuss justiciability further.

On the one hand, judges speak of formal categories of “political question” or justiciability, suggesting that matters falling within these categories are beyond the jurisdiction of the courts, as a matter of primary justiciability:

Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.<sup>4</sup>

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Review and the ‘Political Question’”, (1984-1985) 79 *Nw. U. L. Rev.* 1031, 1060.

<sup>3</sup> Harris, “Judicial Review, Justiciability and the Prerogative of Mercy”, (2003) 62 *C.L.J.* 631.

<sup>4</sup> *Council of Civil Service Unions v. The Minister for the Civil Service* [1985] AC 374, at 418, per Lord Roskill. See however Neenan, “Reviewing Prerogative Powers: Roskill’s List Revisited”, [1998] *J.R.* 36; Barkow, “More Supreme than the Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy”, (2002) 102 *Columbia Law Review* 237.

On the other hand is the secondary justiciability position that, despite judicial protestations to the contrary, no category of decision is *a priori* beyond the scope of review, although various considerations may decrease the intensity of review.<sup>5</sup> From a normative point of view, secondary justiciability avoids the “moral cost” of permitting illegal action by the state to go unremedied. My hypothesis is that *secondary justiciability, not primary justiciability, is an accurate description of the Irish legal system, with one limited exception.*

The definition of primary justiciability should be clarified. Sometimes it is tempting to talk of non-justiciability where a court has refused to grant a remedy, but it is only where a court automatically refuses to review a decision on the basis of the decision’s subject-matter that we can properly talk of non-justiciability. On the occasions that courts ostensibly determine a power exercised by another branch of government to be unreviewable, one of two things has occurred. Either the court has in fact reviewed the power and found judicial intervention to be inappropriate, or the court has refused to exercise a review jurisdiction. The distinction is subtle, but important. In the first scenario, review has been exercised, even though the litigant has gone home unhappy. Often in the first scenario, it will be obvious from the court’s decision that review is not being ruled out in principle, though the circumstances in the instant case do not warrant judicial intervention; but on occasion judicial rhetoric may mislead the reader. In the second scenario, areas of decision are being hived off from judicial review, and represent a real threat to my hypothesis.

Any confusion can be teased out by considering a passage in Hamilton C.J.’s judgment in *Haughey v. Moriarty*, regarding the issue of whether judges can chair public inquiries:

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<sup>5</sup> See Finn, “The Justiciability of Administrative Decisions: a Redundant Concept?”, (2002) 30 *Federal Law Review* 239, at 249; Barkow, “The Ascent of the Administrative State and the Demise of Mercy”, (2008) 121 *Harv. L. Rev.* 1332, 1334-1335. See Part II, Secondary Justiciability, below.

Whether the Taoiseach or the government ought to invite a judge to be a sole member or other member of a tribunal is a policy matter on which the plaintiffs, like other citizens, are entitled to have their opinions. But *it is a policy matter on which it would not be appropriate for this Court to express an opinion*. This Court realises, however, the importance of the work which such tribunals may have to carry out in our system of government and *sees no constitutional or legal objection* to a judge being a member, or the sole member, of such a tribunal provided he or she is willing to serve and provided his or her absence from his or her normal duties does not impose an undue strain on the work of his or her court and has the approval of its President.<sup>6</sup>

The first highlighted passage might indeed lead one to believe that the Supreme Court is marking out an area as free from judicial intrusion. However, the second highlighted passage reveals in fact that the Court *has* reviewed the constitutional appropriateness of the appointment of judges to chair public inquiries, and has held that there is no resultant constitutional breach. Further, the concluding words indicate that situations might arise where a remediable constitutional breach would result from a judge's service as chair of a public inquiry.

The essay proceeds in two parts. First I flesh out primary justiciability and analyse the Irish cases. I then do the same with secondary justiciability. I break the cases down along the formalistic lines of the executive power, legislative function and delegated power split favoured by the courts. The appropriateness of relying on a formal classification, rather than a functional approach which concentrates on the effect of the decision, is open to question.<sup>7</sup> However, the Irish courts have been quite concerned to follow the formal classification, and it accordingly is the best tool for describing the law.

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<sup>6</sup> *Haughey v. Moriarty* [1998] I.E.S.C. 17, para. 236; [1999] 3 I.R. 1, at 64, emphasis added.

<sup>7</sup> Carolan, "The Separation of Powers and Administrative Government", paper to *Constitution at 70* Conference, Law School, Trinity College Dublin, June 2007. For an alternative classification, see McDermott, "The Separation of Powers and the Doctrine of Nonjusticiability", (2000) 35 Ir. Jur. 280.

### I. PRIMARY JUSTICIABILITY

The best starting-point for consideration of primary justiciability is Justice Brennan's well-known elaboration of the "political question" doctrine in *Baker v. Carr*:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of judicially discoverable and manageable standards for resolving [the case]; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements of various departments on one question.<sup>8</sup>

Despite the force of his exposition of the doctrine, just a handful of lines below it, Justice Brennan notes "the impossibility of resolution by any semantic cataloguing" and the "necessity for discriminating inquiry into the precise facts and posture of the particular case".<sup>9</sup> The message of Justice Brennan's opinion is that various considerations may militate against applying the general principles of judicial review, but that there are no categories of decision that are logically beyond judicial review.

However there is one possible exception to my exclusion of primary justiciability. The exception is to be found in the first line of Justice Brennan's definition: primary justiciability might be said to exist where there is a *textually demonstrable commitment* of a particular power to a particular branch of government. One small area that the Irish courts have accepted as immune from review, in line with this exception, is the content of a bill which it is proposed to send to a referendum. *Finn v. Attorney*

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<sup>8</sup> *Baker v. Carr* (1962) 369 U.S. 186, at 217.

<sup>9</sup> 369 U.S. 186, at 217.

*General*<sup>10</sup> concerned a constitutional amendment which, if adopted, would have inserted an express protection in the Constitution for the unborn child. The plaintiff alleged that the proposed amendment was of no legal force or effect, because it duplicated the existing constitutional protection of life. The duplication was alleged to put the amendment outside Article 46.1 of the Constitution, which permits amendment via referendum “whether by way of variation, addition, or repeal”. In the High Court, Barrington J. dismissed the plaintiff’s case. His view was that the constitutional structure gives the people, the source of sovereignty, “full power to amend any provision of the Constitution and ... this power includes a power to clarify or make more explicit anything already in the Constitution”.<sup>11</sup> Thus, the content of a bill proposed to amend the Constitution is beyond the purview of the courts.<sup>12</sup> The underlying principle was that the Constitution itself clearly commits the final decision on amendment of the Constitution to the people.<sup>13</sup>

However, the importance of the textually demonstrable commitment exception should not be overstated. This is the only area of Irish law where it applies. Moreover, it is important to note that nothing in *Finn* suggests that a court could not intervene if the amendment *process* – rather than the amendment’s substantive content – prescribed by the Constitution was not followed. The point is borne out by *Slattery v. An Taoiseach*, an

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<sup>10</sup> [1983] I.R. 154. For other referendum cases, see McDermott, “The Separation of Powers and the Doctrine of Non-justiciability”, (2000) 35 Ir. Jur. 280.

<sup>11</sup> [1983] I.R. 154, at 164. See also *Byrne v. Ireland* [1972] I.R. 241. For criticism of the view that sovereignty is the source of legal validity in the Irish Constitution, see Doyle, “Legal Validity: Reflections on the Irish Constitution”, (2003) 25 D.U.L.J. 56.

<sup>12</sup> There may appear at first blush to be some overlap between jurisdiction and primary justiciability, or textually demonstrable commitments, but there is an important formal difference. The constitutional barriers discussed earlier in the Introduction *preclude* judicial review by their own terms; but demonstrable commitments commit decisions to a particular branch (and then maybe only presumptively).

<sup>13</sup> See O’Hanlon, “Natural Rights and the Constitution”, [1993] I.L.T. 8, and Murphy, “Consent and Constitutional Change” in O’Reilly (ed.), *Human Rights and Constitutional Law: Essays in Honour of Brian Walsh* (1992), p. 123.

unsuccessful attempt to prevent the government from holding a referendum on the Maastricht Treaty: “[a] proposal to amend the Constitution cannot *per se* be unconstitutional and the procedure adopted for so doing cannot be unconstitutional if it complies with the requirements of the Constitution. *Nothing in this case has demonstrated any failure to comply*”.<sup>14</sup>

Thus it is clear that the contents of a proposal for a constitutional amendment are beyond judicial control, but failure to comply with “the requirements of the Constitution” would permit a successful challenge.

#### *A. The Executive Power*

On a reading of Article 28.2 of the Constitution it seems axiomatic that the government is subject to judicial review when exercising the executive power: “[t]he executive power of the State shall, *subject to the provisions of this Constitution*, be exercised by or on the authority of the government”. However, as one might expect, given the political sensitivity and complexity of many decisions taken by the executive, matters are not as straightforward as a literal reading of the constitutional text would indicate.

The litigation in *Boland v. An Taoiseach* concerned the 1973 Sunningdale Agreement between the British and Irish governments. Under the terms of the Agreement, the two governments agreed (through slightly different texts running side-by-side) that until a majority of its citizens wished otherwise, Northern Ireland would remain part of the United Kingdom. The plaintiff alleged that clause 5 of the Agreement ran contrary to the old Articles 2 and 3 of the Constitution, in that it was “an infringement of the territorial sovereignty of Ireland ...”.<sup>15</sup>

The Supreme Court unanimously held that the “Agreement” was merely a statement of policy by both sides: “the respective declarations [were] no more than assertions of the policies of the respective governments and matters clearly within their respective executive functions”.<sup>16</sup> Nonetheless, a majority held that an exercise of the executive power would in certain

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<sup>14</sup> [1993] 1 I.R. 286, at 300, emphasis added.

<sup>15</sup> [1974] I.R. 338, at 352.

<sup>16</sup> [1974] I.R. 338, at 362, emphasis added.

instances be subject to judicial review. In the words of Fitzgerald C.J., “the Courts have no power, either express or implied, to supervise or interfere with the exercise by the government of its executive functions, unless the circumstances are such as to amount to a *clear disregard* by the government of the powers and duties conferred upon it by the Constitution”.<sup>17</sup>

The “clear disregard” standard was strongly affirmed by the Supreme Court in *Crotty v. An Taoiseach*,<sup>18</sup> a case concerning the government’s efforts to give effect to its obligations under the Single European Act (SEA). The plaintiff sought two remedies: a declaration that the European Communities (Amendment) Act, 1986, which ratified parts of the SEA, was repugnant to the Constitution, and an injunction restraining the government from taking any further action to ratify Title 3 of the SEA, headed “[p]rovisions on European cooperation in the sphere of foreign policy”. Title 3 had been approved (though not incorporated as legislation<sup>19</sup>) by Dáil Éireann, but no further action had been taken before the plaintiff requested the High Court to intervene. The plaintiff was concerned that the cooperation envisaged by the SEA would fetter Ireland’s sovereignty in the future. The government argued that it had the authority to ratify the SEA under the constitutional amendment passed when Ireland first joined the European Community. In relevant part, Article 29.4.10° (at the time, Article 29.4.3°) of the Constitution states: “[n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the European Union or Communities ...”. Thus, the government argued, the Irish people had “signed up” to a “developing organism”,<sup>20</sup> and the courts could not require the holding of a referendum on every development of the Community institutions. The government’s argument that the SEA was within the scope and objectives of the

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<sup>17</sup> [1974] I.R. 338, at 362. One might think that Griffin J.’s judgment in that case better captured the reality of the constitutional situation, but the above quotation from Fitzgerald C.J. is the one that has stood the test of time.

<sup>18</sup> [1987] I.R. 713.

<sup>19</sup> As required by Article 29.5.2° when treaties will impose a charge on the public purse.

<sup>20</sup> [1987] I.R. 713, at 770.

original amendment sufficed to save the 1986 Act, but it did not pass muster as to the provisions of the SEA pertaining to foreign policy, perceived as more radical by the Court.

One of the arguments for the government in *Crotty*, based on the *Sinn Féin Funds case*,<sup>21</sup> was that the Court could not interfere with the signing of a treaty which had not yet been incorporated into domestic law. But, Walsh J. held:

It does not follow from [the *Sinn Féin Funds case*] that the actions of the executive can never be reviewed by the Courts even in respect of matters which are on their face apparently within the exclusive domain of the government. It is beyond dispute and well settled in many cases that one of the functions of the Courts is to uphold the Constitution. That includes restraining the government from freeing themselves or purporting to free themselves from the restraints of the Constitution.<sup>22</sup>

Certainly as soon as the government makes any attempt to incorporate a treaty into Irish law, the High Court and Supreme Court have the power, if requested, to review the legislation to ensure that it is compatible with the Constitution. But Walsh J. went further. He held that the Court had the power to restrain the government from lodging instruments of ratification with the Italian government, even though the SEA had not yet been incorporated into domestic law, because “the [executive] powers must be exercised in subordination to the applicable provisions of the Constitution”.<sup>23</sup>

A challenge to an exercise of the executive power succeeded in *McKenna v. An Taoiseach (No. 2)*.<sup>24</sup> Here the plaintiff challenged the expenditure by the government of IR£500,000 in support of a “Yes” vote in a referendum which proposed to remove the prohibition on divorce from the Constitution. She was unsuccessful before the High Court in two

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<sup>21</sup> *Buckley and others (Sinn Féin) v. Attorney General* [1950] I.R. 67 (Supreme Court).

<sup>22</sup> [1987] I.R. 713, at 779 (Supreme Court). See also Henchy J., *Sinn Féin Funds Case*, at 786.

<sup>23</sup> [1987] I.R. 713, at 778 (Supreme Court).

<sup>24</sup> [1995] 2 I.R. 10.

actions (pertaining to two different referendums). In the second action, Keane J., like Costello J. before him,<sup>25</sup> held that the complaint was of political, rather than constitutional, misconduct and that the courts could accordingly express no view on the matter. To do otherwise “would be for them to assume a role which is exclusively entrusted to [other] organs of state, and one which the courts are conspicuously ill-equipped to undertake”.<sup>26</sup> A majority of the Supreme Court allowed the plaintiff’s appeal, reasoning rather opaquely that there was a breach of the plaintiff’s equality rights,<sup>27</sup> or the right to a fair and democratic procedure in a referendum.<sup>28</sup> Only Hamilton C.J. mentioned the “clear disregard” standard.<sup>29</sup>

In *T.D. v. The Minister for Education*<sup>30</sup> the applicants were troubled teenagers whose needs for secure accommodation had not been met.<sup>31</sup> In a series of High Court judgments, Kelly J. criticised the failure of the responsible minister to meet the needs of the teenagers, and declared that the failure breached the requirements of the Constitution. As the respondent continued to drag his heels on the matter, Kelly J. granted an unprecedented and detailed mandatory injunction directing the construction at specified locations within a specified time period of ten secure accommodation units.

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<sup>25</sup> *McKenna v. An Taoiseach (No. 1)* [1995] 2 I.R. 1.

<sup>26</sup> *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10, at 18. Keane J. also cited with approval Justice Brennan’s seminal passage from *Baker: McKenna v. An Taoiseach (No.2)* [1995] 2 I.R. 10, at 19.

<sup>27</sup> [1995] 2 I.R. 10, at 42 (O’Flaherty J.), at 48 (Egan J.) and at 51 (Denham J.).

<sup>28</sup> [1995] 2 I.R. 10, at 40-41 (Hamilton C.J.), at 44 (O’Flaherty J.), at 48-49 (Egan J.) and at 52-53 (Denham J.).

<sup>29</sup> [1995] 2 I.R. 10, at 31.

<sup>30</sup> [2001] I.E.S.C. 101; [2001] 4 I.R. 259.

<sup>31</sup> The obligation on the state to provide such facilities had previously been held to be constitutional in nature. *F.N. v. The Minister for Education* [1995] 1 I.R. 409 (High Court). *Cf.* Murphy J.’s dissenting judgment in the present case: *T.D. v. The Minister for Education* [2001] I.E.S.C. 101, at paras. 165-183; [2001] 4 I.R. 259, at 315-322.

The government's appeal to the Supreme Court was successful. In Keane C.J.'s words, the mandatory injunction "involve[d] the High Court in effectively determining the policy which the Executive are to follow in dealing with a particular social problem";<sup>32</sup> a "Rubicon" had been crossed.<sup>33</sup> It is important to note that for Keane C.J. (with whom Murphy J. agreed on this point), the High Court order was impermissible as a matter of principle.<sup>34</sup> However, two of the majority judges refused to rule out mandatory orders in all cases (of necessity, Denham J. agreed on this point in her dissent). Murray J. (as he then was) was clear that he did "not wish to determine that the courts may never make a mandatory order in *any* form as opposed to a declaratory or other order, against an organ of state".<sup>35</sup> An order would issue where there was "clear disregard" on the part of the government.

In summary then, the exercise of the executive power is reviewable, albeit to a standard of "clear disregard".

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<sup>32</sup> [2001] I.E.S.C. 101, at para. 80; [2001] 4 I.R. 259, at 287. To similar effect, see the comments of Murray J. (as he then was), in *T.D. v. The Minister for Education* [2001] I.E.S.C 101, at para. 212, [2001] 4 I.R. 259, at 331 and Hardiman J., in *T.D. v. The Minister for Education* [2001] I.E.S.C 101, at para. 337; [2001] 4 I.R. 259, at 363.

<sup>33</sup> [2001] I.E.S.C. 101, at para. 81; [2001] 4 I.R. 259, at 288. Again, for similar views, see the comments of Murray J. (as he then was), in *T.D. v. The Minister for Education* [2001] I.E.S.C 101, at para. 224; [2001] 4 I.R. 259, at 335.

<sup>34</sup> Writing extra-curially, however, the former Chief Justice has subsequently suggested otherwise: "[w]hile a majority of the Supreme Court were of the view that the order in the form in which it was made was inconsistent with the separation of powers, it would be unsafe to assume that the decision wholly excludes the Court's jurisdiction to grant mandatory injunctions in every case where a Minister disregards the constitutional rights of children or anyone else": Keane, "Book Review: *Educational Rights in Irish Law*", (2007) 1 J.S.I.J. 209, 211-212. This would bring his position into line with the majority of the Supreme Court in *T.D. v. The Minister for Education* [2001] I.E.S.C 101; [2001] 4 I.R. 259.

<sup>35</sup> [2001] I.E.S.C. 101, at para. 232; [2001] 4 I.R. 259, at 336, emphasis in original. Hardiman J. commented that an "absolutely extreme situation" might justify a mandatory order, if the mandatory order was "made as an absolutely final resort in circumstances of great crisis and for the protection of the constitutional order itself": *T.D. v. The Minister for Education* [2001] I.E.S.C 101, at paras. 364-367; [2001] 4 I.R. 259, at 372.

*B. Legislative Function*

The first two cases demonstrate a touch of judicial circumspection. In *O'Malley v. An Ceann Cómhairle*,<sup>36</sup> the applicant sought judicial review of the decision of the respondent to disallow a full Dáil question. The question the applicant had sought to put to the Minister for Enterprise, Trade and Employment about export-credit insurance for beef exporters was amended significantly. The point of contention in the judicial review was whether the respondent had complied with Order 33 of the Standing Orders of Dáil Éireann. While the Standing Orders gave the respondent the power to examine, on broad grounds, any question posed, any amendment of the question could only be accomplished “after consultation with the member responsible for the Question”. The applicant alleged that no consultation had taken place. On appeal to the Supreme Court, O’Flaherty J. dismissed the application:

How questions should be framed for answer by Ministers of the government is so much a matter concerning the internal working of Dáil Éireann that it would seem to be inappropriate for the court to intervene except in *some very extreme circumstances which it is impossible to envisage at the moment*. But, further, it involves to such a degree the operation of internal machinery of debate in the house as to remain within the competence of Dáil Éireann to deal with exclusively, having regard to ... the Constitution.<sup>37</sup>

The quoted passage is ambivalent. On the one hand, regulating the “internal machinery of debate” is expressed to be within the sole competence of the legislative branch; on the other hand, O’Flaherty J. clearly indicates that, at best, only some of the “internal machinery of debate” is solely for regulation by the legislature; he invokes the possibility of “some very extreme circumstances” where the courts might intervene, regardless of the extent to which the “internal machinery of debate” is at issue.

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<sup>36</sup> [1997] 1 I.R. 427. See also *Wireless Dealers Association v. The Minister for Industry and Commerce*, unreported, Supreme Court, 14 March 1956.

<sup>37</sup> [1997] 1 I.R. 427, at 431.

The key point is that in extreme circumstances decisions might be quashed.

Circumspection, tempered again by the possibility of an extreme case, is also evident in *Horgan v. An Taoiseach*.<sup>38</sup> Here, the applicant mounted a High Court challenge against the legality of the use of Shannon Airport by the United States military during and after the invasion of Iraq. *Inter alia*, he made a challenge centred on Article 28.3.1° of the Constitution, which provides that “the State shall not participate in any war save with the assent of Dáil Éireann”. The case thus straddled the executive and legislative powers: the government made a decision to allow the use of Shannon Airport and the Dáil passed a resolution acknowledging the decision, but this ground of challenge related to the adequacy of the Dáil resolution. Denying relief, Kearns J. held that “[t]he judicial organ does not decide an issue of ‘participation’ in this context as a primary decision-maker. Under the Constitution, those decisions are vested in the government and Dáil Éireann respectively”.<sup>39</sup> Kearns J. accepted, however, that if “some quite egregious disregard of constitutional duties and obligations” occurred, the courts would be permitted to intervene.<sup>40</sup>

The applicant in *Curtin v. Dáil Éireann*<sup>41</sup> was a Circuit Court judge who became the subject of removal proceedings in the Oireachtas, after his acquittal on charges of possessing child pornography. The applicant was found not guilty by direction of the trial judge when it emerged at trial that the Gardaí had used an out-of-date warrant to seize his personal computer. Despite the ensuing public furore, the applicant refused initially to resign his position, and the legislature publicly announced its intention to remove him from office.<sup>42</sup> The particulars of the removal

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<sup>38</sup> [2003] I.E.H.C. 64; [2003] 2 I.R. 468.

<sup>39</sup> [2003] I.E.H.C. 64; [2003] 2 I.R. 468, at 515.

<sup>40</sup> *Horgan v. An Taoiseach* [2003] I.E.H.C. 64; [2003] 2 I.R. 468.

<sup>41</sup> [2006] I.E.S.C. 14; [2006] 2 I.R. 556.

<sup>42</sup> [2006] I.E.S.C. 14, at paras. 70-71; [2006] 2 I.R. 556, at 609. Article 35.4.1° of the Constitution provides for the removal of a sitting judge: “A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal”. The provisions were extended to Circuit Court judges by legislation, namely the Courts of

procedures established by the Oireachtas are not relevant here, save to say that the applicant challenged their constitutionality. Murray C.J. expressed no doubt that the superior courts had the power to oversee the removal process and a “duty to guarantee fair procedures”.<sup>43</sup> However, after analysing the proposed procedures very closely, he held that none of them demonstrated “clear disregard” of the relevant constitutional provisions.

The decision in *Curtin* might be taken with a grain of salt. As the Chief Justice was at pains to point out, the case made “it necessary for this court for the first time to pronounce on the limits, if any”.<sup>44</sup> on the removal powers given to the Oireachtas. Thus the Court felt “it should take the opportunity ... to provide constructive guidance to the Houses in the exercise of [their] unique constitutional power to remove a judge from office”.<sup>45</sup> It was, if you will, a certificate of road-worthiness, issued by the appropriate authority after a detailed inspection; but it was also a certificate that had to be issued. The Court might simply have said that the choice of procedures was for the legislature alone, and any remedy political in nature because of a demonstrable textual commitment. Instead, however, it undertook a searching review of the procedures put in place by the Oireachtas. The “clear disregard” standard announced in *Curtin* resembles the heightened standards suggested by Kearns J. in *Horgan* and O’Flaherty J. in *O’Malley*.

Another recent case to touch on judicial review of the legislative function was *Howlin v. Morris*.<sup>46</sup> Here, by way of an order for discovery, a tribunal of inquiry sought information from the applicant, a Dáil member, about the comments he had made in the Dáil. The Committee on Procedure and Privileges of the Dáil then purported to pass a resolution extending the protection of Article 15.10 – which permits the houses of the Oireachtas to make rules protecting members’ “private papers” – to information received in confidence by members of the Dáil. Treating as

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Justice Act, 1924, s. 39, reaffirmed by the Courts (Supplemental Provisions) Act, 1961, s. 48.

<sup>43</sup> [2006] I.E.S.C. 14, at para. 129; [2006] 2 I.R. 556, at 627.

<sup>44</sup> [2006] I.E.S.C. 14, at para. 103; [2006] 2 I.R. 556, at 620.

<sup>45</sup> [2006] I.E.S.C. 14, at para. 149; [2006] 2 I.R. 556, at 632.

<sup>46</sup> [2005] I.E.S.C. 85; [2006] 2 I.R. 321.

axiomatic that it had the power to review the exercise of the power in question, and without any mention of the applicable standard of review, the Supreme Court accepted that Article 15.10 was designed to allow the legislature to promulgate rules which would apply automatically whenever privilege was claimed by a member. However, “Article 15.10 does not envisage some kind of *ad hoc* exercise of a power to impose a privilege”.<sup>47</sup> The power is that of the legislative body as a whole, not of an individual member who wishes to claim it.

The case is also interesting for Hardiman J.’s expression of the view that the courts will intervene in the exercise of the legislative power only when individual rights are infringed: “On the small numbers of occasions when the courts have been prepared to supervise the orders or procedures of an Oireachtas body, it has been at the suit of non-members whose rights were affected”.<sup>48</sup> If we accepted this statement at face value, we could very well say that one area in which the “political question” doctrine does have bite in the Irish context is with respect to Oireachtas procedures, but only as they affect the members. But in fact, the ultimate outcome in *Howlin* was to *permit* review of the procedure by which the Dáil attempted to throw the cloak of privilege over information given to one of its members. While an outside party – the tribunal – had an obvious interest in the outcome, the Supreme Court decision bore entirely on the manner in which the Oireachtas is permitted to privilege certain information, a matter strictly internal to the legislative function.

Another example of judicial review of the legislative function, albeit in a case where individual rights were at stake, was *Maguire v. Ardagh*.<sup>49</sup> This case arose out of an incident during which a man was shot dead by Gardaí. Subsequently, an Oireachtas joint committee established a sub-committee to inquire into the incident. The applicant members of the Gardaí feared that the procedures of the sub-committee were “liable to result in findings of fact or expressions of opinion [by Oireachtas members] adverse to [the applicants’] good name, reputation

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<sup>47</sup> [2005] I.E.S.C. 85, at para. 94; [2006] 2 I.R. 321, at 386. See also Hardiman J.’s comments, [2005] I.E.S.C. 85, at para 50, [2006] 2 I.R. 321 at 367.

<sup>48</sup> [2005] I.E.S.C. 85, at para. 48; [2006] 2 I.R. 321, at 366.

<sup>49</sup> [2001] I.E.H.C. 133; [2002] I.E.S.C. 21; [2002] 1 I.R. 385.

and/or livelihoods”.<sup>50</sup> The High Court and, on appeal, the Supreme Court agreed that the power to conduct an inquiry capable of leading to adverse findings of fact or expressions of opinion was *ultra vires* the Oireachtas.

The Supreme Court focused on the question of whether the Oireachtas had the inherent authority to initiate an inquiry which might lead to adverse findings of fact or expressions of opinion against lay-persons. As a result, only two of the seven Supreme Court opinions discussed the issue of justiciability in detail, but Keane C.J. and McGuinness J. both made interesting comments about the availability of review of the legislative function. Like the divisional High Court, Keane C.J. was exercised by the fact that no express constitutional barrier had ever been erected against judicial review of the exercise of the powers of the Oireachtas.<sup>51</sup> He nevertheless accepted that in some areas, the courts will not intervene: the making of rules and standing orders to ensure free debate, as long as no citizen’s rights are infringed thereby; the legislative function prior to a Bill being enacted; and the raising of taxation and distribution of public resources.<sup>52</sup> Of the three categories of decision cited by Keane C.J., we have already seen that in the third category, mandatory orders may lie in extreme circumstances.<sup>53</sup> As to the second category, we have already seen that a constitutional barrier has been erected against judicial review of a bill by the rule *expressio unius est exclusio alterius*, and thus the issue of justiciability does not arise.<sup>54</sup> As to the first category, it is respectfully submitted that Keane C.J.’s view sits uneasily with the *dicta* of O’Flaherty J. in the *O’Malley* case.

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<sup>50</sup> [2001] I.E.H.C. 133; [2002] 1 I.R. 385, at 407.

<sup>51</sup> [2001] I.E.H.C. 133; [2002] I.E.S.C. 21; [2002] 1 I.R. 385, at 412 (High Court), at 537 (Keane C.J.) (Supreme Court).

<sup>52</sup> [2002] I.E.S.C. 21; [2002] 1 I.R. 385, at 537.

<sup>53</sup> Examples can be found in *Curtin v. Dáil Éireann* [2006] I.E.S.C. 14, [2006] 2 I.R. 556; *Horgan v. An Taoiseach* [2003] I.E.H.C. 64, [2003] 2 I.R. 468; *O’Malley v. An Ceann Comhairle* [1997] 1 I.R. 427; and *Howlin v. Morris* [2005] I.E.S.C. 85, [2006] 2 I.R. 321.

<sup>54</sup> See Introduction: Statement of Problem and Theoretical Background.

One should also note McGuinness J.'s view that the administration by the committees of both Houses of the Oireachtas of their rules and standing orders as applied to the members of both Houses is beyond judicial review: "[t]here is no doubt but that all these matters are nonjusticiable in accordance with Article 15.10".<sup>55</sup> McGuinness J.'s comment is curious for two reasons. First, it does not take account of the possibility of an extreme case of abuse as raised by O'Flaherty J. in *O'Malley*; indeed, no reference is made to *O'Malley*. Secondly, it is puzzling that she ends her comment with a reference to Article 15.10; in fact, Article 15.10 does not erect any express barrier to judicial review. It merely directs each House to "make its own rules and standing orders". It is a stretch to say that "*in accordance with Article 15.10*" the rules and standing orders are non-justiciable, especially in the light of the more recent decision in *Howlin*.

One fly in my primary justiciability ointment is *Haughey v. Moriarty*.<sup>56</sup> In the course of a challenge to the establishment of a tribunal of inquiry into the affairs of the plaintiff, an argument was put to Geoghegan J., then in the High Court, that the Houses of the Oireachtas were not properly convened before they passed the resolutions establishing the tribunal of inquiry. Geoghegan J.'s response was "to rule out all evidence directed to showing that there was some irregularity in the convening of the Seanad ... as it seemed to me that these matters were not justiciable in the courts on the grounds of the constitutional separation of powers. The Dáil and the Seanad regulate and enforce their own procedures".<sup>57</sup>

Geoghegan J.'s statement is the strongest indication that a "political question" doctrine might have some force in Ireland as applied to the legislative function. However, his position, it is submitted, is not persuasive on the point. A failure to comply with procedural requirements, whether the requirements are internally or externally imposed, cannot be gainsaid by Article 15.10.

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<sup>55</sup> [2002] I.E.S.C. 21; [2002] 1 I.R. 385, at 629. Geoghegan J., who commented briefly on the point, expressed the view that any possible infringement of the "rights of an outsider, that is to say a non-member of the House" would be justiciable: [2002] I.E.S.C. 21; [2002] 1 I.R. 385, at 736.

<sup>56</sup> [1998] I.E.H.C. 213; [1999] 3 I.R. 1.

<sup>57</sup> [1998] I.E.H.C. 213; [1999] 3 I.R. 1, at 16.

It goes to the jurisdiction of the Houses in the narrowest sense, and is the sort of basic pre-requisite that courts are well-equipped to enforce.<sup>58</sup> Nonetheless, descriptively – rather than normatively – speaking, *Haughey* does indicate an area entirely removed from judicial review on the basis of its subject-matter.

### C. Delegated Powers

*The State (Sheehan) v. Ireland*<sup>59</sup> almost represents an area of non-justiciability. Here, the government had failed to bring into force the Civil Liability Act, 1961, s. 60(1), which removed a highway authority's common law immunity from suit for non-feasance or non-repair of a public highway within its jurisdiction. The legislation specifically provided that no commencement order could be made before 1967, but the lapse of time before the applicant sought an order of mandamus was considerable. In the Supreme Court, Henchy J. was much exercised by the use of the word "may", rather than "shall" in the relevant statutory provision:

The uses of 'shall' and 'may', both in the sub-section and in the section as a whole, point to the conclusion that the radical law-reform embodied in the section was intended not to come into effect before the 1st April, 1967, and thereafter only on such day as *may* be fixed by an order made by the government. Not, be it noted, on such date as *shall* be fixed by the government. Limiting words such as 'as soon as may be' or 'as soon as convenient', which are to be found in comparable statutory provisions, are markedly absent ... The discretion vested in the government to bring the section into operation on a date after the 1st April, 1967, was not limited in any way, as to time or otherwise.<sup>60</sup>

Although Henchy J.'s statement seems *prima facie* a strong challenge to my hypothesis, it is not: the power was in fact reviewed by the court. Though the statutory construction is dubious, no abdication of judicial responsibility has occurred: the

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<sup>58</sup> Daly, "Explaining Jurisdiction", [2007] I.L.T. 72.

<sup>59</sup> [1987] I.R. 550.

<sup>60</sup> [1987] I.R. 550, at 561, emphasis in original.

court fulfilled its role by construing the statute.<sup>61</sup> Moreover, in *Rooney v. The Minister for Agriculture*<sup>62</sup> O’Flaherty J. suggested that a Minister’s decision not to introduce a statutory scheme could be reviewed by a court “if it were satisfied that the decision and course of conduct was *mala fide* – or, at the least, that it involved an abuse of power”.<sup>63</sup>

In the main, delegated powers in Ireland are quite clearly justiciable.<sup>64</sup> The most troublesome cases concern those powers which were once exercised against subversive organisations such as the IRA, but are now being exercised against “ordinary decent criminals”. One area which appears to have been judicially hived-off from review is the decision of the Director of Public Prosecutions (DPP) to send an accused for trial on a non-scheduled offence in the Special Criminal Court. The Offences against the State Act, 1939, Part V of which comes into effect on foot of a government declaration that the ordinary courts are inadequate to secure the effective administration of justice, provides that scheduled offences (defined by government order) are to be tried before the Special Criminal Court. In respect of non-scheduled offences, the DPP may, under sections 46(2) and 47(2) of the Act, certify that in the circumstances the ordinary courts are inadequate to secure the effective administration of justice and the preservation of peace and public order; and require that the accused be tried before the Special Criminal Court.

In *Savage and McOwen v. Director of Public Prosecutions*, Finlay P. (as he then was) held that the decision under section 46(2) “is not reviewable by the courts”,<sup>65</sup> because revealing anything of the substance of the DPP’s opinion in open court

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<sup>61</sup> Hogan and Morgan describe the effect of the decision as giving the executive “an unreviewable discretionary power ...”: Hogan and Morgan, *Administrative Law in Ireland*, 3<sup>rd</sup> ed. (1998), p. 685. But to describe the power as “unreviewable” in the sense that Hogan and Morgan use the word is not to say that it is an example of primary justiciability in the sense that I am using the term; not that the unhappy litigant would be impressed by my distinction!

<sup>62</sup> [1991] 2 I.R. 539.

<sup>63</sup> [1991] 2 I.R. 539, at 546. See also *Bakar Abdi v. The Minister for Justice* [2002] I.E.H.C. 179; [2002] 4 I.R. 234, at 240-241.

<sup>64</sup> See Hogan and Morgan, *Administrative Law in Ireland*, 3<sup>rd</sup> ed. (1998), pp. 678-690.

<sup>65</sup> [1982] I.L.R.M. 385, at 388.

would have made the operation of the legislation impossible. It is worth noting that Finlay P. would have permitted review of the *existence* of the DPP's opinion, but not of its *substance*. Nonetheless, the substance of the opinion was held to be nonjusticiable: Finlay P. made no mention of the possibility of review for either bad faith or use of the statute to achieve an improper purpose.

A further attempt was made to make section 46(2) amenable to judicial review in *O'Reilly and Judge v. Director of Public Prosecutions*.<sup>66</sup> Here the plaintiff sought a "private investigation by the court into the certificate of the DPP". Carroll J. held, however, that the plaintiff had failed to:

[establish] the proposition that the courts have power to enquire into the grounds [for the DPP's opinion] and decide whether such grounds are reasonable or not ... The courts do not have power to set [the DPP's] opinion aside, for to do so would be to substitute in a negative way their opinion as to the adequacy of the grounds on which the opinion was based.<sup>67</sup>

Carroll J. also held that because the power was granted by legislation passed pursuant to Article 38.3 of the Constitution, it would be inappropriate to treat it in the same manner as legislation granting a power to the executive.

Unsurprisingly, the pair of decisions on section 46(2) has been roundly criticised as cutting against "the gradual retrenchment by our courts of the notion that powers conferred by statute in apparently unlimited terms are not susceptible to judicial review".<sup>68</sup> Nonetheless it deals a considerable blow to my hypothesis. However, the decisions may be untenable in the light of more recent cases.

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<sup>66</sup> [1984] I.L.R.M. 224.

<sup>67</sup> [1984] I.L.R.M. 224, at 229.

<sup>68</sup> Pye, "Judicial Review of Discretionary Powers under Part V of the Offences against the State Act, 1939", [1983] I.L.T. 65, 68. See also Byrne, "Criminal Procedure – the Director of Public Prosecution's Power to Refer Cases to the Special Criminal Court – Judicial Reviewability", (1984) 6 D.U.L.J. (n.s.) 177.

The most important of these is *Kavanagh v. Ireland*.<sup>69</sup> The accused, who had been arrested and charged with offences in connection with a kidnapping, challenged the government declaration bringing Part V of the 1939 Act into force. The key constitutional provision is Article 38.3.1°: “[s]pecial courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order”. The law in question is the 1939 Act, and the declaration in question may be made under section 35(2), “if the government is satisfied” of the inadequacy of the ordinary courts. Thus, Barrington J. commented, the questions were, respectively, “a matter for the legislature and ... a matter for the government”,<sup>70</sup> and once the answers were *bona fide* given by the respective branches of government, the courts had no further role. “The question of whether the ordinary courts are or are not adequate ... is primarily a political question, and, for that reason, is left to the legislature and the executive”.<sup>71</sup> A decision would be quashed only on “evidence of *mala fides*”.<sup>72</sup> Keane J. (as he then was) came to a similar conclusion: “... where the Constitution has unequivocally assigned to either the government or the Oireachtas a power to be exercised exclusively by them, judicial restraint of an unusual order is called for before the courts intervene”.<sup>73</sup> Clearly then Keane J.<sup>74</sup> and Barrington J. do not rule review out entirely, though they greatly reduce its intensity: “there is nothing to prevent the government from bringing Part V into force where it is satisfied ... that the DPP should have power to require the trial before a special criminal court ... e.g. where there appeared to be

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<sup>69</sup> [1996] 1 I.R. 321; [1997] 1 I.L.R.M. 321.

<sup>70</sup> [1996] 1 I.R. 321, at 354; [1997] 1 I.L.R.M. 321, at 327.

<sup>71</sup> [1996] 1 I.R. 321, at 354; [1997] 1 I.L.R.M. 321, at 328.

<sup>72</sup> [1996] 1 I.R. 321, at 360; [1997] 1 I.L.R.M. 321, at 333.

<sup>73</sup> [1996] 1 I.R. 321, at 363; [1997] 1 I.L.R.M. 321, at 335.

<sup>74</sup> Keane J.’s description of the power in question as executive in nature ([1996] 1 I.R. 321, at 361; [1997] 1 I.L.R.M. 321, at 334) may be misleading. A better description would have been a power delegated by the legislature and exercised by the executive.

a significant risk that those engaged in organised crime would resort to the intimidation or corruption of juries”<sup>75</sup>.

In contrast to the earlier cases, then, review was exercised. However, the standard applied was not an exacting one: it was satisfied by the existence of hypothetical justifications for exercising the power.

The final nail in the coffins of *Savage and McOwen* and *O'Reilly* is *The State (McCormack) v. Curran*.<sup>76</sup> The applicant had been charged in Northern Ireland with regard to terrorist offences committed south of the border. He sought an order of mandamus compelling the DPP to initiate a prosecution in Ireland. If successful, the application would have had the effect of halting pending criminal proceedings in Northern Ireland. Finlay C.J. rejected the application, but only on the facts presented, and held out the possibility of mandamus issuing in some circumstances:

I reject ... the submission that [the DPP] has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. *If, of course, it can be demonstrated that he reaches a decision mala fide or influenced by an improper motive or improper policy then his decision would be reviewable by a court.* To that extent I reject the contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court.<sup>77</sup>

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<sup>75</sup> [1996] 1 I.R. 321, at 364; [1997] 1 I.L.R.M. 321, at 337.

<sup>76</sup> [1987] I.L.R.M. 225.

<sup>77</sup> [1987] I.L.R.M. 225, at 237, emphasis added. In his concurring judgment, Walsh J. suggested that though mandamus always would, certiorari might not lie against the DPP in certain instances, as it would “be devoid of legal effect” ([1987] I.L.R.M. 225, at 238). It is difficult to interpret the short judgment: at a later point Walsh J. accepts that a decision is reviewable where “it could be reasonably inferred that the [DPP’s] opinion was either perverse or inspired by improper motives” ([1987] I.L.R.M. 225, at 239). Surely this rationale would extend to the availability of certiorari as well as mandamus. The best

Thus *Savage and McOwen* and *O'Reilly* appear as aberrations. Both, it is worth mentioning, were High Court cases, and they do not sit comfortably, if at all, with the subsequent Supreme Court decisions in *Kavanagh* and *McCormack*.

## II. SECONDARY JUSTICIABILITY

Descriptively speaking only three areas of Irish law are fully immune from review in the sense of primary justiciability: the wording of a proposal for referendum (*per* the demonstrable textual commitment exception);<sup>78</sup> the convening of the Houses of the Oireachtas;<sup>79</sup> and the DPP's decision to send an accused person for trial at the Special Criminal Court (though the authority of the latter position is doubtful).<sup>80</sup> At the same time, we have seen that the applicable standards of review vary quite dramatically. By standards of review, I mean the level of scrutiny, or intensity of judicial review, that the courts have been willing to apply. We can visualise standards of review as a spectrum: at one extreme lies non-justiciability, where there is no review at all. Close to that extreme would be a "rational basis" standard, according to which a decision will not be quashed as long as there was some possible explanation for it, or a "clear disregard" standard, according to which a decision will not be quashed unless there has been some flagrant disregard of legal obligations. At the other extreme lies a "standard of correctness" according to which if a court thinks the decision was wrong in any way, it will correct the decision. In the middle might lie standards such as reasonableness or proportionality, according to which decisions

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interpretation of Walsh J.'s judgment, I submit, is that his comments as to the availability of certiorari applied only to the specific power in question in the instant case, where an order of certiorari would have been "devoid of legal effect".

<sup>78</sup> See the discussion in Section I above, text at n. 10, and *Finn v. Attorney General* [1983] I.R. 154.

<sup>79</sup> *Haughey v. Moriarty* [1998] I.E.H.C. 213, [1999] 3 I.R. 1, discussed in text at n. 56 above.

<sup>80</sup> *Quilligan v. Director of Public Prosecutions* [1986] I.R. 495, at 520; [1987] I.L.R.M. 606, at 625; the case is discussed in text at n. 90 below.

will be quashed only if unreasonably taken, or if the interference with a right or interest was disproportionate, respectively.

There are good reasons why judges might be reluctant to apply a standard of correctness in some areas. First, there is “the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be”;<sup>81</sup> courts may not be competent – by dint of cognitive limitations or the restrictions of the adjudicative process – to resolve certain matters.<sup>82</sup> Secondly, there are the prudential considerations outlined by Justice Brennan in the passage quoted earlier from *Baker*: for example the need for comity between the branches of government and the necessity to maintain an appearance of unity. The first two reasons are especially relevant as applied to review of the executive power and the legislative function. Thirdly, exercise of the general principles might require the release of sensitive information. For example, Finlay P.’s reasoning in *Savage and McOwen* was that permitting review of the DPP’s decision would necessitate the revelation “in open court in litigation at the instance of the accused person himself of all the information, knowledge and facts upon which [the DPP] formed his opinion. This would obviously, as a practical matter, entirely make impossible the operation of [the legislation]”.<sup>83</sup>

At the end of the theoretical discussion, a cautionary note is worth sounding. Just because a decision or type of decision is sensitive does not mean that a low standard of review should always apply: countervailing considerations – such as the effect on individual rights – might increase the appropriate standard of review.<sup>84</sup>

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<sup>81</sup> Bickel, *The Least Dangerous Branch: the Supreme Court at the Bar of Politics* 2<sup>nd</sup> ed. (1986), p. 184.

<sup>82</sup> See Fuller, “The Forms and Limits of Adjudication”, (1978) 92 Harv. L. Rev. 353, 355. Cf. King, “The Pervasiveness of Polycentricity”, [2008] *Public Law* 101.

<sup>83</sup> [1982] I.L.R.M. 385, at 389.

<sup>84</sup> See e.g. Feldman, “Human Rights, Terrorism and Risk: the Roles of Politicians and Judges”, [2006] *Public Law* 364.

*A. Executive Power*

It is well-established that the standard of review of the executive power is “clear disregard”. However, elaborations of what “clear disregard” actually means have been rare. For example, in *Crotty*, the majority took the view that the Constitution would be infringed by ratification of the SEA; but the “clear disregard” standard implies something more than “mere” unconstitutionality – however implausible it seems that something can be “merely” unconstitutional or, say, “merely” dead. The Supreme Court in *Crotty* consciously – or perhaps self-consciously – employed a “clear disregard” standard, but it appears to have been no more than window-dressing. Essentially, the Court applied a standard of correctness, and insisted upon a “right” answer to the question whether a parliamentary ratification of the SEA was constitutional. It was not as if the government was acting in bad faith, or attempting to evade constitutional requirements: it had already incorporated one element of the SEA into domestic law, in the honest belief that a referendum was unnecessary. Similarly, in *McKenna (No. 2)*, a standard of correctness applied: as soon as the constitutional breach was identified, the remedy flowed. As in *Crotty*, there was no “clear disregard”: in fact, the government was acting under High Court authority – Costello J.’s decision in *McKenna (No. 1)* – to the effect that its actions were perfectly legal. One might think then that the judicial fascination with “clear disregard” is quite misplaced, and *Crotty* and *McKenna (No. 2)* confirm that, at least as to misuse of the executive power, a standard of correctness applies.

That suggestion remained plausible until *T.D.*, where the plaintiff was unsuccessful even though the government had been declared by the High Court to be in breach of its constitutional obligations. Murray J. (as he then was) attempted some elaboration of the “clear disregard” standard, holding that it would be met:

... where an organ or agency of the State had disregarded its constitutional obligations in an exemplary fashion [evidencing] a conscious and deliberate decision by the organ of the state to act in breach of its constitutional obligation to other parties, accompanied by bad faith or

recklessness. A court would also have to be satisfied that the absence of good faith or the reckless disregard of rights would impinge on the observance by the State party concerned of any declaratory order made by the court.<sup>85</sup>

Murray J.'s restatement heightens the standard of review: if one were to apply Murray J.'s bad faith and recklessness standard, *Crotty* and *McKenna (No. 2)* would probably have been decided differently. As demonstrated above, in both *Crotty* and *McKenna (No. 2)*, the government had a colourable argument that it was acting lawfully, which belies any suggestion of recklessness or bad faith.

The key factor in the Court's reluctance to get involved in *T.D.* was that a mandatory order was sought.<sup>86</sup> Thus while the standard of review of the executive power is nominally "clear disregard", there appear in fact to be two different standards of review. There is a standard of correctness review where the Constitution has been breached by executive action; and another, more exacting standard, where an individual attempts to have a mandatory order issued against the government. In the latter case, either bad faith or recklessness on the part of the executive must be demonstrated.

#### *B. Legislative Function*

Of particular relevance here are the comments of Murray C.J., in *Curtin v. Dáil Éireann*, on the separation of powers and the amenability of the removal procedure to judicial review. His comments are especially important because, unlike Article 28.2, which specifically provides that the executive power is exercisable subject to the constraints of the Constitution, Article 35.4.1<sup>o</sup> has no such built-in restriction. One might think, then, that judicial scrutiny of the legislative function ought to be less intense than judicial scrutiny of the executive power. Despite the absence of a similar specific restriction; however, Murray C.J. held that the standard of "clear disregard" which applied to review of executive power should also apply to review of the

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<sup>85</sup> [2001] I.E.S.C. 101, at para. 232; [2001] 4 I.R. 259, at 337.

<sup>86</sup> See O'Mahony, "Education, Remedies and the Separation of Powers", (2002) 24 D.U.L.J. 57, 70-71.

removal power: “[t]he standard should also be applied, in the opinion of the court to the performance of the exceptional and sensible function constitutionally assigned to one organ of government, the legislature, of removing judges from office”.<sup>87</sup> Similarly, Kearns J.’s decision in *Horgan*, which set the threshold of review at “some quite egregious disregard of constitutional duties and obligations”;<sup>88</sup> and O’Flaherty J.’s *dicta* in *O’Malley*, indicate that “clear disregard” might be the relevant standard of review in the context of the legislative function.

However, the message from the other cases on the legislative function is that a correctness standard will apply. In *Howlin*, there was no mention of any standard of review: the Supreme Court simply answered the question of whether the Oireachtas could protect its members’ papers in the manner chosen. Similarly, in *Maguire* a correctness standard was applied. In *Curtin*, notwithstanding Murray C.J.’s invocation of “clear disregard”, the standard of review seemed to be one of correctness: each impugned element of the proposed removal procedure was considered and approved by the Supreme Court. There was no question at any point that a “clear disregard” standard had to be applied. In *Maguire* and *Curtin*, it should be emphasized that the rights of individuals who were not members of the Oireachtas were directly at issue, which may have motivated the Supreme Court to exercise close scrutiny of the legislative function.

In conclusion, as with the executive power, there would appear to be two tiers of review of the legislative function: a correctness standard where individual rights are concerned; and a “clear disregard” standard in other cases. *Howlin* would appear to fit more readily into the latter category, and thus was arguably wrongly decided<sup>89</sup>.

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<sup>87</sup> [2006] I.E.S.C. 14, at para. 134; [2006] 2 I.R. 556, at 628.

<sup>88</sup> [2003] I.E.H.C. 64; [2003] 2 I.R. 468, at 515. I have put *Horgan* firmly in the legislative power box, even though in his judgment Kearns J. refers on occasion to the executive’s role. Under Article 28.3.1°, the question is what amounts to “the assent of Dáil Éireann”, a matter primarily for the legislature. However, the legislature’s position will naturally be influenced to a considerable extent by the government.

<sup>89</sup> This impression is hardened by the decision in *Minister for Justice, Equality and Law Reform v. Puta* [2008] I.E.S.C. 29, in which the Supreme Court held

### C. Delegated Powers

It is in the nature of delegated powers that they cover a broader area than the executive power or legislative function. Discretion is granted in varying degrees, by different statutory language and frameworks.<sup>90</sup> It is also in the nature of delegated powers that review will never be to a “correctness” standard: otherwise, the important distinction between review and appeal would collapse. However, the usual grounds of review of administrative action generally apply: for example a power must not be used for an improper purpose, in bad faith, or unreasonably; and all relevant considerations must be taken into account. Of interest here are departures, occasioned by the considerations of secondary justiciability, from this norm.

A hint of a “rational basis” standard of review comes from Walsh J.’s judgment in *Quilligan v. Director of Public Prosecutions*, with respect to the ability of the respondent to send “ordinary decent criminals” for trial in the Special Criminal Court:

There could well be a grave situation in dealing with ordinary gangsterism or well financed and well organised large scale drug dealing, or other situations where it might be believed or established that juries were for some corrupt reason, or by virtue of threats, or illegal interference, being prevented from doing justice. This is a matter on which the executive arm of government must make up its mind before issuing a proclamation but ... it is not left solely to the discretion of the executive arm of government.<sup>91</sup>

Here, review is certainly being exercised, and the concluding words indicate that judicial review is not entirely ousted. The problem with the standard of review is that it is a rational basis test: *i.e.* could the government have any

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that a standard of “clear disregard” would apply to the question of whether a measure had received the “prior approval” of the Oireachtas for the purposes of Article 29.4.6° of the Constitution. It is difficult to distinguish the question at issue there from the one at issue in *Howlin*.

<sup>90</sup> Galligan, *Discretionary Powers* (1986).

<sup>91</sup> [1986] I.R. 495, at 520; [1987] I.L.R.M. 606, at 625.

hypothetical reason for wanting to extend the Special Criminal Court's jurisdiction?

Also relevant here is Finlay C.J.'s acceptance in *The State (McCormack) v. Curran*<sup>92</sup> that a court would quash a decision of the DPP where "it can be demonstrated that he reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court".<sup>93</sup> Thus, Finlay C.J. indicates that only certain grounds of review will be available: here, the exercise of the power could not be reviewed for its reasonableness or a failure to take all relevant factors into account; rather, only bad faith and improper motives or purposes would vitiate the decision.

Thus in some sensitive cases, secondary justiciability dictates that a rational basis standard will apply, or some grounds of review will not be available. As a general rule, however, judicial review of delegated powers will not be so restricted in ordinary cases.<sup>94</sup>

### CONCLUSION

In summary then, only two areas of Irish law can confidently be said to be beyond the purview of the superior courts. In the first place judicial review of the substance of a proposal to amend the Constitution is excluded. However, the exclusion of review in this category of cases results from a demonstrable textual commitment by the Constitution to the people. This first exclusion from review poses no threat to my hypothesis. In the second place, the question whether the Houses of the Oireachtas have been properly convened, does pose a direct threat to my hypothesis. However, given the range of cases considered here – from ratification of treaties, to parliamentary inquiries, to the sending of criminals for trial in non-jury courts – *Haughey v. Moriarty* begins to look like the exception that proves the general rule. The hypothesis that primary justiciability has no traction in Irish law seems to hold. Two decisions of a 1980s

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<sup>92</sup> [1987] I.L.R.M. 225.

<sup>93</sup> [1987] I.L.R.M. 225, at 237. Barrington J. suggested a similar approach in *Kavanagh v. Ireland* [1996] 1 I.R. 321; [1997] 1 I.L.R.M. 321.

<sup>94</sup> See Hogan and Morgan, *Administrative Law in Ireland*, 3<sup>rd</sup> ed. (1998).

vintage may also pose a threat to the hypothesis, but subsequent decisions have rendered them obsolescent, if not obsolete. In Irish law, no decision or type of decision is nonjusticiable.

At the same time, the courts are not permitted to roam at large in the fields of executive and delegated powers and the legislative function. In some areas, it will be impermissible for reviewing courts to exercise a high level of scrutiny. The prudential considerations of secondary justiciability are very much relevant in Ireland. Appropriately, however, the considerations do not apply to all exercises of the executive power or the legislative function, and they apply only rarely to exercises of delegated powers. To conclude on a normative note, it is clear that – despite rhetoric which occasionally points in a different direction – the Irish courts have minimised any “moral cost” incurred by excluding judicial review.<sup>95</sup> This is a judicial tendency worth celebrating: sunshine is, after all, the best disinfectant.

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<sup>95</sup> Redish, “Judicial Review and the ‘Political Question’”, (1984-1985) 79 *Nw. U. L. Rev.* 1031, 1060.