Why Does Ireland Have All Those European Referendums?
A Look at Article 29.4 of the Irish Constitution

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"Why Does Ireland Have All Those European Referendums?" - A Look at Article 29.4 of the Irish Constitution
Introduction

Somewhat like the sand that can be seen flowing through the narrow midsection of a sand timer, European Union law is constrained – according to the usual view of Irish constitutional legal theory – to pass into Irish law through the aperture formed by Article 29.4 of the 1937 Constitution, Bunreacht na hÉireann.¹

Article 29.4 constitutes a narrow such opening - even if it is, at the same time, one which has been restructured and widened over time through repeated constitutional amendments. The opening Article 29.4 provides for the entry into Irish law of European Union norms was originally formed by Article 29.4.3°, which itself was inserted in the Constitution by section 1 of the Third Amendment of the Constitution Act, 1972.² Article 29.4.3° consisted of a single rather densely formulated paragraph:

“...The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the European Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.”

It will be noted that this then-new paragraph had two distinct aspects. The first was that it (a) authorised Irish accession to the three then-extant Communities. The second was that it (b) provided a shield of immunity which both prevented the constitutional invalidation of any laws, acts or measures by the Irish State which were ‘necessitated’ by the obligations of membership and prevented laws, acts or measures by the Communities, or their institutions from being deprived of legal force within the State.

It is perhaps as important, however, to understand what this constitutional amendment did not do as what it did. Article 29.4.3° did not effect Irish entry to the Communities, but merely rendered it constitutionally possible.³ It did not incorporate the law of the then Communities into Irish law. That task was left instead to s.2 of the European Communities Act 1972 (with its provision that “from the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties”). In particular, Article 29.4.3° did not embed the doctrine of the supremacy of (what was then) Community law in the Irish

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1 See now however the discussion in the text below of Article 15.2.1° as interpreted in Maher v. Minister for Agriculture and Food [2001] 2 I.R. 139 at 147. There the view was taken that the absorption of European Union law ought was also facilitated by a broader understanding of that provision of the Constitution than had previously been adopted. Note further that what is discussed in this paper is the domestic Irish legal perspective. The view of European Union law itself regarding its status in national legal systems is different. See in this regard the classical statement of the European Court of Justice in Case 6/64 Flaminio Costa v ENEL [1964] ECR 585 at 593 that “by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.”

2 The Third Amendment of the Constitution Act, 1972, subsequent to its being passed by both Houses of the Oireachtas, was approved by the electorate in a referendum held on 10 May 1972 by 1,041,890 votes (83% of valid votes cast) to 211,891 (17% of valid votes cast) on a turnout of 1,264,278 (71%). It was signed into law by President Eamon de Valera on 8 June, 1972.

3 From a domestic legal perspective, Irish entry to the Communities was effected by its ratification, which culminated with the deposit of the Irish instrument of ratification of the Accession Treaty with the Italian government, followed by the subsequent entry into force of the Treaty.
Constitution. Rather than resolve the issue of which legal order would prevail in the even of a collision between the national and the supranational, it simply made sure that, insofar as national constitutional norms were concerned, such collisions would not take place in the first place. (Again, the supremacy doctrine made its entry into domestic law – at least insofar as concerns sub-constitutional norms - through the agency of s. 2 of the 1972 Act).

Notwithstanding any such limitations, however, the new subsection was clearly of immense significance. The combined effect of this constitutional amendment and the entrenchment of Community law in the domestic legal order by s.2 of the European Communities Act 1972 was described by one judicial commentator as being

“as if the people of Ireland had adopted Community law as a second but transcendent Constitution, with the difference that Community law is not to be found in any single document – it is a living, growing organism, and the right to generate it and give it conclusive judicial interpretation is reserved to the institutions of the Community and its Court.”

Just over four decades later, and the brief, if far from entirely simple, constitutional checkpoint provided in Article 29.4.3° for the laws of the then European Communities entering into the Irish legal system has evolved considerably in both length and complexity. Counting that first 1972 intervention – designed as it was to make constitutionally possible Irish membership of what has subsequently developed into the European Union - Article 29.4 has now been amended on no less than seven separate occasions in the process of facilitating acquiring, maintaining and adjusting to Ireland’s place in the evolving process of European integration. Furthermore, in that time, nine referendums have been held on this section (the last of them the referendum held on 31 May 2012 on amending Article 29.4 so as to facilitate ratification of the Fiscal Stability Treaty). The extent of the process of change is testified to by the fact that what we may call the 'European clauses' in the Irish Constitution have now expanded to over eight separate subsections (now numbered Article 29.4.3° to Article 29.4.10°).

Using a computer software analogy, these provisions can be regarded as Version 2.1 of the Article 29.4 permit to engage in European integration. In other words, they are the now-once-amended replacement of the original much-amended European Union-related clauses. The replacement occurred at the time of the Lisbon Treaty amendment in 2009, when the opportunity was taken, in the words of the then Minister for Foreign Affairs, Micheál Martin TD to “set out in a streamlined and more user-friendly form” Ireland’s constitutional arrangements relating to the European Union.

The European-related text of Article 29.4 has thus clearly evolved very considerably over time. In addition, some significant case-law has also been produced by the Courts over the years since 1973 concerning this section of the Constitution. A comprehensive examination of all the issues that have arisen would be beyond the scope of any article of this length. However, it is intended

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4 Hence the observation of Costello J. in his High Court ruling in Pigs and Bacon Commission v McCarron (1978) JISEL 77 that Community law “takes effect in the Irish legal system in the manner in which it itself provides”.
5 S. 2 of the 1972 Act.
6 Henchy J., writing extra-judicially in “The Irish Constitution and the EEC” (1977) 1 DULJ 20 at 23.
7 Once-amended in that the Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Bill 2012 (inserting Article 29.4.10° into the Constitution so as to facilitate the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) was signed into law by President Michael D. Higgins on 27 June 2012.

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to reflect on some of the issues relating to these ‘European clauses’ in the Irish Constitution, paying particular regard to those that have arisen more recently.

The core of Article 29.4’s European-related provisions remain the accession provisions in Article 29.4.3° and 5° (which constitutionally facilitate membership) and the immunity clause now found in now Article 29.4.6°, precluding constitutional invalidation of certain European-related laws, acts and measures and it is to these that it is proposed to turn to first before looking at the other relevant aspects of Article 29.4.

1. A Question of Accession - Subsections 3° and 5°

As has already been noted Article 29.4.3° originally provided that the State might become a member of the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community. This provision was removed from the Constitution in 2009, but its successors are Article 29.4.3° and 29.4.5°, which now provide respectively that

“3° The State may become a member of the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957)”

and that

“5° The State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007 (“Treaty of Lisbon”), and may be a member of the European Union established by virtue of that Treaty.

These subsections – analogously to the role their predecessor, the original Article 29.4.3° had in relation to the original Treaties - facilitated rather than effected Irish entry to the new European Union created by the Treaty of Lisbon. (Actual accession to the new Union was effected by the process of ratification, culminating in the depositing of the instrument of Irish ratification of the Treaty of Lisbon with the Italian government on 23 October 2009, and the entry into force of the Treaty on 1 December 2009.)

By far the most significant ruling in relation to Article 29.4.3° and 29.4.5° (or more precisely, their predecessor, the then Article 29.4.3°) was delivered in 1987 by the Supreme Court in Crotty v. An Taoiseach. The first part of its judgment related to the constitutionality of legislation designed to incorporate the provisions of the Single European Act into Irish law. The Supreme Court held in the single judgment required in relation to this particular issue that there was no unconstitutionality involved in adopting the incorporating legislation because, inter alia, the amendments effected by the Single European Act did not go beyond the essential scope or

10 Namely, the European Communities (Amendment) Act, 1986
11 Such a single judgment was constitutionally required by Article 34.4.5° of the Irish Constitution, which provides that "the decision of the Supreme Court on a question as to the validity of a law having regard to the provisions of this Constitution shall be pronounced by such one of the judges of that Court as that Court shall direct, and no other opinion on such question, whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed."
objectives of the original treaties. Finlay C.J. (who delivered the ruling of the Court) formulated this test in the following terms:

“it is the opinion of the Court that the first sentence in Article 29, s. 4, sub-s. 3 of the Constitution must be construed as an authorisation given to the State not only to join the Communities as they stood in 1973, but also to join in amendments of the Treaties so long as such amendments do not alter the essential scope or objectives of the Communities. To hold that the first sentence of Article 29, s. 4, sub-s. 3 does not authorise any form of amendment to the Treaties after 1973 without a further amendment of the Constitution would be too narrow a construction; to construe it as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the Treaties would be too broad.”

The closing paragraphs of the same judgment elaborated slightly on this test by indicating that particular proposals contained in the Single European Act did not go beyond the existing constitutional authorisation in that they had not been shown to “alter the essential character of the Communities. Nor has it been shown that they create a threat to fundamental constitutional rights.” (The clear implication was that if they had, then the Article 29.4.3° licence to join the Communities would not have extended to them.)

The Crotty approach to amending Treaties thus turns largely on the question of whether a particular amending Treaty alters the essential scope or objectives of the existing Treaties. If it does, then Crotty establishes that the existing constitutional authorisations to join Euratom and the Union (and the authorisation to ratify the Fiscal Stability Treaty found in Article Article 29.4.10°) will not extend to permitting the ratification of the relevant amending Treaty. Crotty thus renders a constitutional amendment necessary in Ireland whenever the Government wishes the State to ratify a Treaty which in the view of the Irish courts would go beyond the essential scope or objectives of the existing Treaties - at least should such permission be constitutionally necessary by virtue of what would otherwise be an unconstitutionality inherent in that Treaty’s ratification.

If the approach adopted by the Court by setting up this 'essential scope or objectives' test Crotty is far from the most permissive one that could have been imagined, it is nonetheless true that the Court at least applied it reasonably liberally. Hence Finlay C.J. observed on behalf of the Court (regarding amendments found in the Single European Act) that

“neither the proposed changes from unanimity to qualified majority, nor the identification of topics which while now separately stated, are within the original aims and objectives of the EEC, bring these proposed amendments outside the scope of the authorisation contained in Article 29, s. 4, sub-s. 3 of the Constitution.”

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14 Now found, as we have seen, respectively in Articles 29.4.3° and 5° of the Irish Constitution.
15 A point which should only be of interest if such permission is constitutionally necessary by virtue of what would otherwise be an unconstitutionality inherent in the amending treaty’s ratification.
16 It is also that case that with the expansion in the scope and objectives of the Treaties over time, the Crotty test should allow more scope for Treaty amendment than was the case in 1987.
17 [1987] I.R. 713 at 770. The Chief Justice also cautioned however that as far as Ireland was concerned, “it does not follow that all other decisions of the Council which now require unanimity could, without a further amendment of the Constitution, be changed to decisions requiring less than unanimity.”
Similarly, the power given by the Single European Act to the Council to attach to the European Court of Justice a Court of First Instance with limited jurisdiction and subject to appeal on questions of law was deemed to be within the existing constitutional authorisation: according to the Supreme Court, this did “not affect in any material way the extent to which the judicial power has already been ceded to the European Court.” The power to adopt health and safety measures by qualified majority vote was also to be regarded as authorised “since the existing Treaty contains various provisions dealing with the approximation of laws in general, with freedom for the provision of services in the Member States, with working conditions and with the prevention of occupational accidents and diseases.”

Notwithstanding the fact that the Supreme Court in Crotty demonstrated how it expected the ‘essential scope or objectives’ test to be applied, such a broadly-worded test was bound to, and did, give rise to a great deal of uncertainty on each subsequent occasion a new amending treaty was agreed. In the event, the application of Crotty has now given rise to seven referendums on five different European treaties.

The reasons why a referendum is deemed to be necessary by an Attorney General in his or her advice to the government are never made public, and thus the public is never officially made aware of the reasons why its direct involvement is deemed to be required. However, it may be said that a referendum seemed clearly necessary under the Crotty test in relation to the Maastricht Treaty, given its establishment of the European Union with competences in areas which previously had very little European involvement such as justice and home affairs, a common foreign and security policy and economic and monetary union.

A referendum also seems to have been necessary for the Lisbon Treaty, since this latter Treaty involved for example, the establishment of a new European Union with legal personality replacing both the earlier European Community and the European Union. It also involved the giving of new powers being conferred by Protocol on national parliaments at European level giving the Dáil and Seanad a role in foreign policy (constitutionally a function of the government). It also involved the giving of the same legal value as the Treaties to the Charter of Fundamental Rights of the European Union.

The authors of JM Kelly: The Irish Constitution have opined that the Crotty test had earlier also made a referendum necessary in relation to the Amsterdam Treaty because of the ‘communitarisation’ of certain competences in the justice and home affairs area – an argument which has some force given the significance attached by the Supreme Court in Crotty to the issue of the cession of judicial power - but are far less clear that Crotty rendered a referendum necessary in relation to the Nice Treaty (which involved adjustments to the institutions in order to facilitate the large-scale enlargement of the Union in 2004 and 2007).
There is of course more to the *Crotty* case. A somewhat unconvincing-looking application of Article 5 of the Constitution by a 3-2 majority of the Supreme Court led to a finding on unconstitutionality regarding Title III of the Single European Act (regarded by the Supreme Court as devoid of any protection under the accession clause of the then Article 29.4.3°) led to a referendum regarding the Single European Act. Analysis of this part of the decision would take us too far beyond the scope of the present article - but it is worth noting that this part of the ruling was likely a significant factor in the conclusion that it was necessity to hold a referendum in relation to what is now Article 29.4.10° (concerning the Fiscal Stability Treaty), which is analysed in the text below.

23 Notwithstanding the finding of the Supreme Court in *Crotty*, the Single European Act vies with the Nice Treaty as the Treaty in relation to which a vote has been held but in relation to which the case for a referendum has nonetheless been the most constitutionally dubious. For some concerns regarding the *Crotty* case, see G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence” (2009) 5 European Constitutional Law Review 32. See in somewhat more detail, “A Road Less Travelled - Reflections on the Supreme Court Rulings in Crotty, Coughlan and McKenna (No. 2),” Institute of International and European Affairs, January 2011 (available online at http://www.iiea.com/publications/a-road-less-travelled-reflections-on-the-supreme-court-rulings-in-crotty-coughlan-and-mckenna-no2). See also for a recent interesting paper on the implications of the reasoning in this part of the *Crotty* case, D. Fennelly, “Crotty’s Long Shadow: the European Union, the United Nations and the Changing Framework of Ireland’s International Relations”, paper presented to conference The Irish Constitution: Past, Present and Future, Honourable Society of the Kings Inn, Dublin, 28-29 June 2012. For a more favourable reading of this part of the case compare G. Hogan and A. Whelan, *Ireland and the European Union: Constitutional and Statutory Texts and Commentary* (Sweet and Maxwell, London, 1995) at 42-49.

24 A recent update on this case-law – and one that spared the necessity for a referendum which would probably have added yet another subsection to Article 29.4 – came with the Supreme Court ruling delivered on 31 July 2012 by Denham C.J. in *Pringle v. Government of Ireland and others* [2012] IESC 47, in which the Court expressed its opinion that

> “on the first issue considered as a matter of urgency, the Court is of the opinion that the ESM Treaty does not involve a transfer of sovereignty so as to make it incompatible with the Constitution, when applying the principles set out in *Crotty v. An Taoiseach* [1987] I.R. 713, such that a referendum amending the Constitution is necessary to permit the State to ratify the ESM Treaty on behalf of Ireland. The decision of the Court will be to treat the ESM Treaty as one which does not involve any impermissible transfer of powers from the Executive, but rather as an agreement to pursue a defined policy of the Government. Judgments will be delivered at a later date.”

25 Among other matters.

ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or institutions thereof, or

iii bodies competent under the treaties referred to in this section,

from having the force of law in the State.”

Already at the time of Ireland’s accession to the Treaty of Rome, such a provision was needed to avoid a string of articles in the Constitution colliding meteorite-like into the new European legal order. Among articles which have been persuasively identified as having offered potential to do so were Article 6 (confining governmental powers to the organs of the Irish State); Article 15.2.1° (vesting sole and exclusive law-making power in the Oireachtas); Article 28.2 (providing that the executive power of the state be exercised by or on the authority of the government); Article 34.1 (requiring justice to be administered by judges appointed in the manner provided by the Constitution); and Article 34.3.1° (providing for a High Court with full original jurisdiction).27 Ominously, Henchy J. (writing extra-judicially in 1977) opined that the approximation and harmonious development of economic activities envisaged by the Treaty of Rome was “incompatible with the sovereignty of the Irish people which was so explicitly stated in the Constitution”28 - an implicit linking of Article 5 of the Constitution to European affairs which he was to return to fatefully in his judgment as part of the Supreme Court majority in Crotty v. An Taoiseach,29 where he held Part III of the Single European Act unconstitutional for infringing this very article. Henchy J. – who seemed rather unenthused by the developments of 1972 - also threw Article 1 of the Constitution into the equation, opining that

“the right of the Irish people to control the institutions of government and to develop the life of the nation along the lines of ‘its own genius and traditions’, which was declared by the Constitution to be inalienable, has now in fact been alienated, at least in part and, according to one theory, irreversibly.”30

Of course, it was not only the new legal order itself which – at least from the domestic Irish legal perspective - needed to be rescued from constitutional missiles, but also Irish laws, acts and measures rendered necessary by membership - to which the unrestrained application of Article 34.3.2° (which expressly includes in the jurisdiction of the High Court jurisdiction to question the constitutional validity of any law) could also present potential difficulties.

The extensive shield of immunity conferred by the two clauses of what is now Article 29.4.6° constituted a major limitation on the reach of the Constitution – and one which has obviously increased in breadth as the European Union, whose laws acts and measures Article 29.4.6° protects, has spread its activities in the last two and a half decades into policy areas wider than those engaged in it in 1973.

27 See e.g., B. McMahon and F. Murphy, European Community Law in Ireland (Butterworth (Ireland), Dublin, 1989), pp. 264-265; Hogan and Whyte, n. 23, p. 515.

28 S. Henchy n. 7 at 21. Note also the observation in the judgment delivered by Fennelly J. in the Supreme Court ruling in Maher v. Minister for Agriculture and Food that the legislative capacity of the Council, and increasingly the European Parliament as co-legislator ‘seriously encroaches on the legislative sovereignty of the State’ ([2001] I.R. 139 at 248).(Emphasis added.)


30 Henchy n. 7 at 25.
Article 29.4.6° itself (or more precisely its similarly worded predecessor) was given its most radical interpretation by Walsh J. in *Campus Oil v. Minister for Industry and Energy* when he interpreted its effect as being that an article of the European Community Treaty had become part of Irish law, qualifying and altering the interpretation to be given to Article 34 of the Irish Constitution - in effect, effectively scheduling the Treaties like some kind of gigantic new protocol to the text of the Constitution. As an interpretation of Article 29.4.6°, this has been (arguably correctly) criticised as unnecessarily over-broad. Subsequently, however, the European Court of Justice would formulate its principle of harmonious interpretation, which “requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by EU law”. This does not so far appear to have been applied to a national provision at constitutional level, but the just-quoted language of the Court appears broad enough to suggest that this might some day happen in an appropriate case, thereby ironically yielding a result not unlike that envisaged by Walsh J. in *Campus Oil* (*Campus Oil* itself would not, however, have been such an appropriate case. The immunity created by Article 29.4.6° meant that Article 34 of the Irish Constitution did not have to be interpreted in any particular way in order to avoid producing a result contrary to EU law. Article 34 of the Irish Constitution could simply have been disapplied in accordance with Article 29.4.6° of the Constitution, in this way yielding to European Union law, rather than being moulded in any particular way by it.)

The first limb of Article 29.4.6° has been the focus of the most judicial attention. This provides a shield of immunity for laws, acts or measures “necessitated by the obligations of membership of the European Union”. A number of observations can be made about this. The first is that the reference is to the obligations of membership - not the obligations of European Union law. Phelan – correctly, in this writer’s view - considers this latter issue “partly a political question”. There has been some academic dispute as to whether the question of whether a law, act or measure is necessitated by Union membership is a question of Irish law or of European law. It seems appropriate – and consistent with the approach of the Supreme Court in *Meagher v Minister for Agriculture* - to regard the concept of “necessitated by the obligations of membership of the European Union” as being (a) a test determined by Irish law (b) which is broader than but nonetheless to be expected to include anything deemed a requirement of European Union law by the European Court of Justice. Temple Lang’s belief (shared by Hogan and Whelan) that the original ‘necessitated’ clause was a *renvoi* from the Constitution of Ireland to the constitutional law of the Community (now Union) arguably has some truth to it: Irish law should indeed, it is submitted, be expected to deem anything required by European Union law to be something necessitated by the obligations of membership. However, it arguably does not encapsulate either the breadth of Article 29.4.6° (which could be greater than merely what European law requires)

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32 The predecessor of the present Article 267 TFEU.
33 Hogan and Whyte n. 23, at 515. See also D. O’Keeffe, “Preliminary Deference: The Supreme Court and Community Law” (1983) 5 DULJ 286.
34 Case C-239/09 Seydiland Vereinigte Agrarbetriebe GmbH & Co. KG v. BVVG Bodenverwertungs- und -verwaltungs GmbH, judgment of the Court of Justice of 16 December 2010 at para. 50 thereof. See also paras. 60-62 of the ruling of the Court of Justice in Case C-12/08 Mono Car Styling SA (in liquidation) v. Odemis and Others [2009] ECR I-6653.
36 A view defended by Phelan, n. 36, at 338 to 349.
38 See Hogan and Whelan n. 23 at 30.
40 It has also, as we shall see in the text below, garnered considerable judicial support.
or ultimately its nature – which is Irish, not European Union, law, even if European Union law may offer conclusive evidence of some of what Irish law (in the shape of the ‘necessitated’ clause) ought to be deemed to require.

The question of when laws, acts or measures will be regarded as ‘necessitated’ is obviously a significant one – the more stringent the approach taken by the Irish Courts to the concept, the more tightly drawn is this particular potential choke chain on the reception of European Union law into the Irish legal system. Notwithstanding the importance of the issue, the Irish Courts have experienced difficulty in producing an entirely satisfactory test for determining what is “necessitated”, and there has been a lack of consistency in particular in the Supreme Court’s approach to this issue.

The first case we need to deal with in which the meaning of the ‘necessitated’ clause arose was the High Court ruling of Barrington J. at the interlocutory stage in Crotty v. An Taoiseach. Here, Barrington J. described the significance of the ‘necessitated’ clause as being that “the Constitution could not now be invoked to invalidate any measure which the State was directed by the institutions of the EEC to take arising out of the exercise of their powers” - seemingly drawing a link between the requirements of European Union law and the applicability of the ‘necessitated’ clause.

The ruling of the three-man High Court which delivered the plenary ruling in that case (with the single judgment given by Barrington J.) dwelt somewhat longer on what is now the Article 29.4.6° immunity clause (of which, as we have seen, the ‘necessitated’ clause forms the first branch). According to Barrington J.,

“the immunity conferred by the second sentence of the Third Amendment would appear to apply to legislative and administrative measures taken in the day-to-day running of the Community....Put another way, there are some acts of the institutions of the Community which are directly enforceable in all the Member States whereas others require legislative or administrative action by the Member States to procure their enforcement. It is these matters which are referred to in the [immunity clause]... It is these matters alone which are given immunity from constitutional challenge by the [immunity clause]. But such of these matters as are acts of the institutions of the Communities derive their status in domestic law from the European Communities Act, 1972. If the [immunity clause] is the canopy over their heads, the Act of 1972 is the perch on which they stand.”

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41 Gallagher n. 40 at 131.
45 [1987] I.R. 713 at 758. (Emphasis added.) The thinking underlying this rejection of any idea to treaties of the application of the immunity clause was explained by Barrington J. in the following terms: “Had the Oireachtas not passed the European Communities Act, 1972, Ireland might still have been a member of the Community in international law but it would have been in breach of its obligations in international law under the Treaty of Rome and under the Treaty of Accession. This however would not have been a matter in relation to which the domestic courts of this country would have had any competence because the Treaty would not have been part of the domestic law. The immunity from constitutional challenge conferred by [the second limb of the immunity clause] on laws enacted, acts done, or measures adopted by the Community or its institutions would therefore have been meaningless as these laws, acts or measures would not have been part of the domestic law of this country.
To make them part of the domestic law of this country the European Communities Act, 1972, was necessary. This Act cannot therefore have been passed by virtue of [the immunity clause] but by virtue of the licence to join the European Community contained in the first sentence of the Third Amendment.”
The Supreme Court appeared to take a similar view of the non-application of the immunity clause to treaties: when the case arrived before it on appeal, it paused only to note the irrelevance of the ‘necessitated’ clause to the question of the constitutionality of the Single European Act - a treaty which amended the original Treaty of Rome – with Finlay C.J. (who gave the single judgment of the Court in this respect) holding that “it is clear and was not otherwise contended by the defendants that the ratification by the State of the SEA...would not constitute ‘an act necessitated by the obligations of membership of the Communities’”. For the Supreme Court and the High Court alike then, insofar as the constitutionality of the SEA (or legislation implementing it in Irish law) rested on Article 29.4 at all, it rested on the accession clause, not the immunity clause.

In three High Court cases decided shortly after Crotty, more focus was brought to bear on the exact nature of the licence for action provided by the ‘necessitated’ clause. In Lawlor v. Minister for Agriculture, Murphy J. stated

“it seems to me that the word necessitated in this context must extend to and include acts or measures which are consequent upon membership of the Community and are in general fulfilment of the obligations of such membership and even where there may be a choice of degree or discretion vested in the State as to the particular manner in which it would meet the general spirit of its obligations of membership.”

These words have sometimes been read as if Murphy J. was arguing that any measure which was merely consequent on membership should also be regarded as necessitated. However, as Carroll J. subsequently correctly pointed out in her High Court decision in Maher v. Minister for Agriculture and Food, Murphy J. did not make this argument in Lawlor. Rather, he took the view that acts which were in general fulfilment of membership obligations would fall under the ‘necessitated’ clause even if not required to be enacted in all their parts. Murphy J. himself clearly regarded such an approach as having its limits. Hence, six months after his ruling in Lawlor the same judge observed in Greene v. Minister for Agriculture, that “there must be a point at which the discretion exercised by the State or the national authority is so far-reaching or so detached from the result to be achieved by the directive that it cannot be said to have been necessitated by it”.

Overall, this may be regarded as having involved taking a moderately liberal approach to ‘necessitated’, viewing it as encompassing laws acts or measures in a penumbra going beyond – but not too far beyond - the strict requirements of European Union law. An alternative (and broader-seeming) reasonableness-based version of the same kind of ‘penumbra’ approach can be seen in the ruling of Lynch J. in Condon v. Minister for Agriculture, where that judge held - speaking of domestic measures implementing a scheme envisaged by a European-level regulation - that

46 The interlocutory ruling in Crotty v An Taoiseach was delivered on 24 December 1986, the plenary ruling on 12 February 1987 and the Supreme Court ruling on 18 February 1987. As regards the High Court rulings discussed in the text below, Lawlor v. Minister for Agriculture was decided on 2 October 1987, Greene v Minister for Agriculture on 14 April 1989 and Condon v. Minister for Agriculture was delivered on 12 October 1990.
48 For which we may now read ‘Union’.
51 Compare Hogan and Whyte, n. 23 at 522-523.
52 See also Phelan, at n. 36 above, p. 342.
“insofar as such details of implementation are reasonable they must be regarded as necessitated by the obligations of membership of the Communities and cannot therefore be unconstitutional. If however the details of the implementation were unreasonable or unfair then they could hardly be said to be necessitated by the obligations of membership of the Communities and they would be open to constitutional challenge.”

Although the decisions have attracted some criticism, they are far from being without merit. As Whelan proposed, in assessing the measures implementing EU law secondary legislation, the courts

“should proceed with some caution, and with a certain deference to the decisions of the other branches of government - one must, after all, be mindful of the comity that ought to exist between the great organs of state.”

Kenny J. remarked in Ryan v. Attorney General that the presumption of constitutionality applies with particular force to legislation in which the Oireachtas seeks to reconcile personal rights with the claims of the common good. A similarly protective view should arguably be taken of efforts taken by the Oireachtas or, more commonly, by the Government, to reconcile the obligations of EC membership with those imposed by the Constitution – but equally, efforts should be taken to ensure that it is sought by those great organs of state to effect such a reconciliation.

These decisions had the merit of leaving the government the kind of room for manoeuvre in implementing European law the creation of which, one suspects, motivated the drafting of the immunity clause in the first place.

In subsequent cases, focus shifted firmly to the form of domestic law instrument used to implement European Union law measures. Meagher v. Minister for Agriculture involved a challenge both to (i) s. 3 of the European Communities Act, 1972 (which permits statutory instruments to set aside primary legislation in order to implement Community (now European Union law) and also (ii) certain statutory instruments which had been adopted thereunder. In the High Court, Johnson J. took the view that conferring on a minister a power such as that given in s. 3(2) to make regulations for the purposes of amending or repealing primary legislation transgressed Article 15 of the Constitution – thereby effectively outlawing the primary means used to implement European Community law in Ireland. On appeal the Supreme Court reversed this finding of unconstitutionality. The grounds on which it did so are of interest. According to the Court (the single judgment of which in this regard was delivered by Finlay C.J.):

“the power of regulation-making...contained in s. 3 is prima facie a power which is part of the necessary machinery which became a duty of the State upon its joining the Community and therefore necessitated by that membership.

The Court is satisfied that, having regard to the number of Community laws, acts done and measures adopted which either have to be facilitated in their direct application to
the law of the State or have to be implemented by appropriate action into the law of the
State, the obligation of membership would necessitate facilitating of these activities, in
some instances, at least, and possibly in a great majority of instances, by the making of
ministerial regulation rather than legislation of the Oireachtas."62

This part of Meagher is of significance as an authority that the 'necessitated' test does not involve
a mere renvoi to the substance of EU law without more. As far as the Supreme Court was
concerned, the obligations of membership included factors that went beyond the substantive
obligations of the European legal order: questions of practical possibility entered the equation – and the question of 'necessitated' was also related to the means by which European-level
regulations were implemented.

As regards the separate issue of whether the statutory instruments which were at issue in this
case were valid, the Supreme Court delivered two judgments both of which – although in some
respects contradictory - were agreed with by all three remaining Supreme Court judges, the
result of which is that each may be taken to represent the opinion of four out of the five judges
on the Court. The most interesting aspect of the judgment of Blayney J. was his observation that
in meeting the State's treaty obligation to implement European directives, the State was obliged
to choose a method of implementation and

"provided the method it chooses is appropriate for the purpose of satisfying the obligation of
the State and the measures it incorporates do not go beyond what is required to implement
the directive, it is correctly categorised as being necessitated by the directive. In any instance
where the method was not appropriate, or its measures went beyond what was required, it
would not be necessitated and would be open to constitutional challenge."63

Thus for Blayney J., the question of whether the use of a statutory instrument was necessitated
seemed to depend on its appropriateness. According to Denham J., too, "the term “necessitated”
is relevant to the choice of method" for implementing European-level directives.64 However,
Denham J’s test for the validity of statutory instruments was different to that of Blayney J.
According to Denham J., in choosing how to implement directives “the Minister must balance
the relevant Articles of the Constitution, which in this case are Article 15, s. 2 and [the
'necessitated' clause]".65 Applying the same test used to determine whether delegated legislation
was permissible in an entirely domestic law scenario,66 Denham J. reasoned that

"... the test is whether the ministerial regulations under s. 3 of the Act of 1972 are more
than the mere giving effect to principles and policies of the said Act and the directives
which are part of domestic law as to the result to be achieved.
If the regulations contained material exceeding the policies and principles of the directives
then they are not authorised by the directives and would not be valid under s. 3 unless the
material was incidental, supplementary or consequential."67

Thus for Blayney J., as long as a statutory instrument implementing a European directive was
appropriate, it would be regarded as necessitated. For Denham J. as long as a statutory instrument

which implemented a European directive contained no material\textsuperscript{68} exceeding the policies and principles of the directive, it would be regarded as necessitated (and hence \textit{intra vires} s. 3 of the 1972 Act\textsuperscript{69}).

Two observations may be made in relation to \textit{Meagher}. The first is that both Blayney J.'s and Denham J.'s rulings plainly saw the 'necessitated' question as being relevant to the means used in Irish law to implement EU law obligations. This seemed appropriate. For if Article 29.4.6\textsuperscript{o} were seen as providing no relief at all in relation to methods of transposition of European Union law (and – vitally - no compensating change of interpretation were made of any other provision of the Constitution), then serious questions would arise as to whether the Irish legislative system was capable of bearing the strain that implementing European Union law would put on it. A second observation, however, is that it is far from clear that the application of an unexpanded \textit{Cityview} test in this context would be an \textit{adequately} liberal approach. The sheer volume of European Union legislation may mean that ministers need \textit{more} scope for statutory instruments in implementing it than they require at national level. The \textit{Cityview} test – confining ministerial action to the mere implementation of principles and policies may thus be over-restrictive – although it has to be said that it seems considerably better than giving no increased scope at all for the use of statutory instruments.

The \textit{Meagher} case was followed by the High Court and Supreme Court rulings in \textit{Maher v. Minister for Agriculture and Food}.\textsuperscript{70} At issue here was a ‘use it or lose it’ rule that had been introduced in relation to milk quotas by a statutory instrument implementing Community regulations - a statutory instrument which was now claimed by the applicants to have violated the Constitution, its use not having been necessitated. The applicants’ challenge to the regulations was rejected both in the High Court and (unanimously) by the Supreme Court. In the High Court, Carroll J., applying the approach that had been used in \textit{Meagher}, concluded that

“When in my view, the Regulations of 2000, even though they involved the making of choices within the framework of the principles and policies of the milk quota scheme, were necessitated by the obligations of membership of the European Union. Precisely because those choices were within the principles and policies of the milk quota scheme, it can equally well be viewed as permitted secondary legislation which is not contrary to Article 15.2.1 of the Constitution.”\textsuperscript{71}

The Supreme Court in \textit{Maher} adopted a rather different approach to matters to the course which had been taken by them in \textit{Meagher}, however. Keane C.J.’s approach in \textit{Maher} was reflective of the one taken in all of the Supreme Court judgments in this case. In addressing the issue of whether proceeding by way of a statutory instrument “was in conflict with the exclusive legislative role of the Oireachtas under Article [15.2.1°] and was not necessitated by the obligations of membership”,\textsuperscript{72} Keane C.J. observed there were two routes by which a conclusion could be reached on this issue:

\begin{itemize}
  \item [68] Other than incidental, supplementary or consequential material.
  \item [69] \cite{1994} 1 I.R.329 at 366.
  \item [70] \cite{2001} 2 I.R. 139 at 147.
  \item [71] Carroll J. also analysed whether there had been a breach of the property rights provisions of the Constitution., She decided there had not, concluding rather colourfully that
  \begin{quote}
  “the purpose of the creation of the milk quota system was to regulate and restructure milk production within the union. It was not for the creation of a new form of landlordism which would allow the owner of a quota to live off the rent obtained therefrom without producing a single gallon of milk.” (See \cite{2001} 2 I.R. 139 at 157.)
  \end{quote}
  \item [72] \cite{2001} 2 I.R. 139 at 181.
\end{itemize}
“one can initially decide whether the making of the regulation in the form of a statutory instrument rather than an Act of the Oireachtas was ‘necessitated’ by the obligations of membership. If it was, then it is clearly unnecessary to consider whether it is in conflict with Article 15.2 or, for that matter the Articles guaranteeing the private property rights of the applicants. Alternatively, one can determine first whether it violates either Article 15.1 or the private property rights or both of them. If the latter course were adopted, and the conclusion were reached that no breach of the Constitution had been established, it would be unnecessary to consider whether enactment in the form of a regulation rather than by an Act was necessitated by the obligations of membership.”

Although the second of the two routes seems the more intellectually arduous of the two, it was the route taken by all of the Supreme Court judges in Maher. Hogan and Whyte cite Maher as authority for the proposition that the method of transposition of Community (now Union) legislation could never be ‘necessitated’ for the purposes of what is now Article 29.4.6° - a conclusion, which as has been seen, could not have been drawn from the judgments in the earlier Meagher case. It is worthwhile for present purposes to consider the various judgments on the point. Although Keane CJ’s judgment in Maher is not without signs of ambivalence in this respect, he did reach the following conclusion:

“it is almost beyond argument that the choice of a statutory instrument as a vehicle for the detailed rules rather than an Act was not in any sense necessitated by the obligations of Community membership. There would appear to be no difference in principle between the obligation on a member state to implement a directive and the corresponding obligation under a regulation, such as the European Communities Regulation in the present case, to adopt detailed rules for the implementation of specified parts of the regulation. In each case, while the member state is obliged to implement the directive or the specified part of the regulation, the choice of form and method for implementation is clearly a matter for the member state.”

Although the conclusion seems emphatic, the reasoning, it is submitted, is unconvincing, since Keane C.J. appeared to interpret the obligations of Community membership as meaning the same thing as the obligations of Community law – an interpretation not in accord with the Supreme Court’s own earlier ruling in Meagher, and one which has been emphatically rejected as an approach e.g., by Phelan.
In her judgment in *Maher* (a judgment with which Murphy J. agreed\(^\text{79}\)), Denham J. also embarked down Keane C.J.’s ‘second route’, observing that “the kernel of this case is the delegated legislation...The question is whether this was a breach of Article 15.2.1° of the Constitution of Ireland. A decision on this matter determines the major issue.”\(^\text{80}\) However, Denham J. showed far more ambiguity than did Keane C.J. as regards whether the choice of *mode* of implementation could ever be necessitated. True, she declared that “Community law does not determine the mode of implementation of the milk quota scheme within the national state. Ireland has the choice of mode of implementation. That choice falls to be made in accordance with Irish public law.”\(^\text{81}\) However, Denham J. also noted that the relevant ‘Irish public law’ she was referring to was to be found in the Constitution - and expressly quoted the ‘necessitated clause’ in that context.\(^\text{82}\)

Fennelly J.’s judgment in *Maher* (with which Murray J.\(^\text{83}\) concurred insofar as concerned its analysis as to the permissibility of recourse to statutory instruments) showed less ambiguity.

As in the other judgments so far examined, Fennelly J. took Keane C.J.’s ‘second route’, thus focusing first on issues other than the scope of the ‘necessitated clause’.\(^\text{84}\) When Fennelly J. did come to the issue of ‘necessity’, he appeared to take a similar view of its meaning, observing that “the issue of ‘necessity’ is appropriately considered by reference to the content, not the form, of the instrument.”\(^\text{85}\) It is respectfully submitted, however, that just like Keane C.J., Fennelly J. proceeded in reaching this particular conclusion on an incorrect basis – since he referred solely to the demands of European Community law, rather than to the more broadly-couched concept referred to in the ‘necessitated’ clause itself of the obligations of *membership* – an approach different to that of the Supreme Court in *Meagher*,\(^\text{86}\) and arguably not supported by the most convincing academic analysis. Well-founded or not, however, the argued-for irrelevance of the necessitated clause to the form of the implementing measure *in this case* at least was the majority view of the Court, representing as it did the views of at least three of the Supreme Court judges in this case – Keane C.J., Fennelly J. and Murray J.

For Fennelly J., in assessing the legitimacy of the use of statutory instruments in the context of the milk quota scheme, “the essential question is whether the [Minister] was in breach of Article 15.2.1 of the Constitution. If he was, the Regulations of 2000\(^\text{87}\) will be invalid *since unlike those...*
involved in Meagher v. Minister for Agriculture, they are not ‘necessitated’.\(^8\)\(^8\) The last clause of this comment is interesting, since (Fennelly J’s earlier comments notwithstanding) it appears to imply that where the \textit{substance} of national legal provisions \textit{is} required by European Union law,\(^8\)\(^9\) that a more liberal approach could be taken to the use of statutory instruments in implementing it - and this by virtue of the ‘necessitated’ provision.

At the very least, where the substance of an impugned statutory instrument was \textit{not} required by European Union law, however, the view of Fennelly J. was that the question of whether the use of a statutory instrument was legitimate was properly determined by reference to Article 15.2.1\(^o\), not the ‘necessitated’ clause. This shift away from the ‘necessitated’ clause (as compared to the ruling in \textit{Meagher}) and towards a reading of Article 15.2.1\(^o\) in apparent isolation from the former provision is of interest, since it means that some of the constitutional burden of facilitating Ireland’s membership of the European Union is now no longer carried by the amendments of Article 29.4 specifically designed to facilitate that membership, but rather is carried exclusively by a modified construction of Article 15.2.1\(^o\) - which applies, at a minimum, where the statutory instrument at issue is not regarded as necessitated.

Building on the views of the Court in \textit{Meagher v. Minister for Agriculture}, and in particular on the ruling of Denham J. in that case,\(^9\)\(^0\) Fennelly J. identified the test of whether recourse to a statutory instrument would be precluded as being “whether the scope of the discretion conferred by Community law in regulations which become part of national law was so independent of principles and policies laid down by those Community regulations, as to place the State in conflict with Article 15.2.1\(^o\) of the Constitution”.

This is a modified form of the test laid down by the Supreme Court in \textit{Cityview Press v. An Chomhairle Oiliúna}, where what was being tested for was whether recourse to a statutory instrument was in a purely domestic context, and where the Supreme Court had identified the test as being “whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself.”\(^9\)\(^1\)

There appear to be two differences between the old \textit{Cityview} test and this new test. The first (rather obviously) was the substitution of the European law measure for the parent statute. The second – less obvious – was the stretching of the \textit{Cityview} language into the more elastic test put forward by Fennelly J. in the italicised words above – which seemed to require not only independence but a considerable degree of independence from the principles and policies of Community regulations before implementing legislation would be held to have violated Article 15.2.1\(^o\). Elasticity was fully evident in the application of the modified test. By any stretch of the imagination, the statutory instruments involved the exercise of considerable discretion by the minister. Their adoption involved availing of the discretion conferred by Community law not to apply provisions of Community law regarding the transfer of milk quotas by breaking the link between transfer of land and milk quotas subject to various exceptions of entirely Irish

\(^{88}\) [2001] 2 IR 139 at 254-5. Emphasis added. Note also the stress by Fennelly J. put on this distinction between the Meagher case and the Maher case at p. 253.

\(^{89}\) Which is how Fennelly J. and Keane C.J. interpreted the concept of ‘necessitated’.

\(^{90}\) See [2001] 2 IR 139 at 254.

\(^{91}\) [1980] IR 381 at 399.
provenance (e.g., the creation of exceptions for certain defined family transactions). So widely was Fennelly J. prepared to interpret the room for national action that he rejected the idea that the creation of such exceptions constituted separate legislative choices and even deemed it “probably not necessary to give separate consideration to the exceptions. They consist of modifications to the departure from the link of land and milk quota.” He cited, however, treaty provisions and rulings of the European Court of Justice to show that rules favouring family transactions accorded with (remarkably broadly conceived) Community law aims. The decision of the minister to allow temporary transfers of quotas for only one further year and to a highly restricted category of persons (those who had already used the facility in the last three years) was held to be justified by reference to a rule in Community law entitling national authorities to determine to what extent transfer operations may be renewed.

Fennelly J’s liberal approach to the ‘principles and policies’ of the relevant European regulations carries the imprimatur of the entire Supreme Court: it was agreed to by Keane J., Murray J., and Denham J. (and thus implicitly also by Murphy J. who agreed entirely with Denham J.’s ruling). This is significant, because the breadth or narrowness of the principles and policies test is key to determining the scope of the licence possessed by the State to implement European Union law by way of statutory instrument. Moreover, it seems appropriate that such a broad approach be taken. The freedom from constitutional interference evidently sought to be attained for the European Union in adopting the immunity clause now found in Article 29.4.6° arguably ought to translate into a broad freedom of operation for the State in a situation in which the State is engaged in implementing regulations and directives and in which it constitutes in a very real sense the ‘hands’ of the European Union.

It arguably also forms part of the comity that ought to exist between the great organs of state - a comity shown earlier in cases like Greene, Lawless and Conlon via a broad interpretation of the concept of ‘necessitated’, but apparently operating in the different context of Article 15.2.1° post-Maher (i) insofar as the choice of means of implementation of European Union obligations are concerned; (ii) at least where the substantive content of the statutory instrument challenged is not a requirement of European Union law.

The subsequent High Court ruling in Sam McCauley Chemists v. The Pharmaceutical Society of Ireland, showed a welcome and continued judicial resistance to the idea of excessively restricting executive freedom to implement European Union law via an overly narrow approach to the principles and policies test. The case concerned the implementation of a Community directive which obliged Ireland to recognise pharmacy qualifications from other member states
- but which also provided that they ‘need not’ do so with respect to pharmacies in operation for less than three years. Ireland duly implemented the directive with a 1991 statutory instrument (which amended the Pharmacy Act 1962) and did so in such a way as to exclude pharmacies in operation for less than three years from the new relaxation of the rules. In a challenge brought by just such a pharmacy to the validity of the 1991 statutory instrument, McCracken J. declined to view the choice not to give such pharmacies the benefit of the new more relaxed rules as the exercise of a principle or policy taken outside the scope of Article 15.2.1°. He observed:

“in one sense, of course, it could be said that there was a policy decision not to extend recognition of other qualifications to new pharmacies. However, this was not a decision which was in any way implemented in the statutory instrument. It is a decision not to change the existing law any further than was required by the Directive. Decisions not to change law are made by government every day and do not require legislation, primary or secondary, to give force to such decisions. If a policy decision was made not to extend recognition any further than was necessary, that decision does not require the making of a law for the State within the meaning of Article 15.2 of the Constitution, and therefore that Article has no relevance.

Accordingly, as the only new law which was made or brought into effect by the Regulations was law required by virtue of the policy decision of the Council of Ministers as set out in the Directive, it is protected by [the ‘necessitated’ clause] as being necessitated by the obligations of membership of the European Union. The plaintiff is not entitled to the relief sought.”

A number of features are of interest in this ruling. The first is that it appears that the exercise of a policy choice left open by European legislation not to change the law will not give rise to constitutional problems in relation to Article 15.2.1°. Although such a choice involves a policy decision in one sense, semble that it is not one of a kind that has any relevance to Article 15.2.1°.

The second point of interest is that unlike the Supreme Court in Maher, McCracken J. viewed the ‘necessitated’ clause as being necessary to his decision in this case, which, it will be recalled was to uphold the use of the 1991 statutory instrument to amend statute law. He specifically referred to the rulings of both Blayney J. and Denham J. in Meagher in doing so. Thus the case in favour of the ‘necessitated’ clause being irrelevant to methods of transposition of European Union law does not yet appear to be one which has met universal judicial acceptance. It may be that this difference between the rulings in Maher and in Sam McCauley Chemists results from of the failure of the Supreme Court in Maher to distinguish its new approach from the course which had been taken in the earlier Supreme Court decision in Meagher. Or it may be because - in contrast with the domestic measure at issue in Maher (at least if one adopts the view of Fennelly J. in that case) - the substance of the measure in Sam McCauley Chemists was necessitated.

McCracken J’s judgment was ultimately upheld on appeal by the Supreme Court - although not before a question was referred to the European Court of Justice to which that Court replied...
that a Member State which complied merely with the minimal level of recognition of diplomas laid down by the directive was not exercising any discretion conferred by that directive.\textsuperscript{108}

A subsequent important footnote to the landmark decisions in \textit{Meagher} and \textit{Maher} – at least insofar as concerns the ‘necessitated’ issue - was provided by the ruling in the Supreme Court ruling in \textit{Browne v Attorney General},\textsuperscript{109} the facts of which concerned a prosecution of a fisherman for offences relating to drift net fishing. The indictable offences concerned had been introduced by statutory instrument in Irish law and in implementation of Council regulations. But the twist in this particular tale was that rather than introduce them under the European Communities Act, 1972 – an unappealing option, since the creation of indictable offences by statutory instrument adopted under the 1972 Act was then prohibited – the Minister for Marine and Natural Resources had instead created the relevant offences in regulations adopted under s. 223A the Fisheries (Consolidation) Act 1959. In the High Court, Kearns J. found that the Minister had acted \textit{ultra vires} in adopting this course.\textsuperscript{110} The appeal against this finding was unanimously rejected by the Supreme Court. Keane C.J. (with whose judgment three other judges agreed \textsuperscript{111}) held that under the 1972 Act, (a) no power was provided for the creation of indictable offences, and (b) s. 223A of the 1959 Act gave no indication that statutory instruments could be used to give effect to principles and policies that had never been considered by the Oireachtas.\textsuperscript{112} As far as Keane C.J. was concerned,

\begin{quote}
“while there was some discussion in the course of the written and oral submissions as to whether the creation of an indictable offence was “necessitated” by the obligations of our membership of the Communities within the meaning of [the ‘necessitated’ clause] ...it seems to me that that issue does not arise in this case.\textsuperscript{113} Either the Order of 1993 was \textit{intra vires} s. 223A of the Act of 1959 or it was not. If it was within the power of the [Minister] to make such a regulation ... it is not material whether the making of the regulation in that form was “necessitated” by the obligations of the State as a member of the Communities. If, on the other hand, the order was \textit{ultra vires} s. 223A and could only have been validly made by the [Minister] under s. 3 of the Act of 1972, it follows that it was of no effect and it is again unnecessary to consider the issue as to whether it was “necessitated” in constitutional terms by our membership of the communities. For the reasons I have given, I am satisfied that the making of the order was \textit{ultra vires} s. 223A of the Act of 1959.”\textsuperscript{114}
\end{quote}

For Keane C.J., the issue of whether the creation of an indictable offence was ‘necessitated’ was, therefore, irrelevant. Denham J., who delivered the only other judgment in the case, did not deal with the ‘necessitated’ issue.\textsuperscript{115} Instead, she merely noted that

\begin{footnotes}
\item[108] Case C-221/05 Judgment of the Court (Third Chamber) of 13 July 2006 [2006] ECR I-6869. The answer to the question of why the Supreme Court felt that securing the answer to such a question of European law actually merited a reference to the European Court of Justice in the first place in a case that seemed to turn on issues of Irish constitutional law is not entirely clear. The Court of Justice observed that the Supreme Court “considers that, on the assumption that the measure implementing Directive 85/433 constitutes the exercise of a discretion based on purely national-law considerations, in so far as it excludes from its scope work by certain pharmacists, that court would be compelled to hold that it was not permissible to amend the Pharmacy Act, 1962, by statutory instrument, in view of the terms in which Article 15 of the Constitution of Ireland is couched. The 1991 Regulations would thus be invalid.” (See para. 19 of the ruling of the Court of Justice.) This hardly seems an adequate explanation for the perceived need for a reference, however.
\item[109] Unreported High Court decision, 6 March 2002.
\item[110] Murray J., McGuinness J. and Hardiman J.
\item[111] In order, as Keane C.J. put it, “to circumvent the prohibition on the creation of indictable offences in the 1972 Act” (See [2003] 3 I.R. 205 at 220.)
\item[112] Curiously, Denham J. stated in her judgment that “when oral submissions were made to the court it was stated that the ‘necessitated by the obligations of membership of the Community’ argument was not being advanced.” (2003] 3 I.R. 205 at 228).
\item[113] [2003] 3 I.R. 205 at 221.
\item[114] See note 114 above.
\end{footnotes}
“the offence in issue is created in Community law which gives member states some choice as to the penalty. The penalty created in Ireland should meet the requirements of the Community Regulations. However, the choice, while remaining within the principles and policies of the Community law, is required to be implemented in Ireland. In enabling that choice the second respondent is required to comply with Irish public law, which includes s. 3 of the European Communities Act 1972 and the Constitution. I am satisfied that the second respondent did not comply with Irish law.”

Keane C.J.’s judgment in particular in this case is of interest in that it seems to indicate that whether or not the substance of a measure is necessitated, full compliance with all Irish constitutional procedural rules will be required – a conclusion which was not necessarily clear from the Maher ruling (in particular the judgment of Fennelly J. in that case, which stressed the non-necessitated nature of the substance of the statutory instrument at issue there).

3. Subsection 4° - A New Commitment of Uncertain Legal Effect

Subsection 4° was added to the text of Article 29.4 by the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009. According to the new Article 29.4.4°

“Ireland affirms its commitment to the European Union within which the member states of that Union work together to promote peace, shared values and the well-being of their peoples.”

The idea of this provision, according to Minister for Foreign Affairs, Micheál Martin TD in the second stage debates on the 2009 Bill was to include in the constitutional text

“a short statement of our commitment to the Union “within which the member states... work together to promote peace, shared values and the well-being of their peoples”. This reflects our highly positive experience of membership going back to 1973. It is in keeping with the values set out in Article 29.1, which affirms Ireland’s devotion to peace and friendly co-operation among nations founded on international justice and morality.”

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117 [2001] 2 IR 139 at pp. 253 and 254-5. Not quite two years later (in 2005) the Supreme Court was confronted with a case with remarkably similar facts in Kennedy v. The Attorney General and the Minister for the Marine and Natural Resources [2007] 2 IR 45. This also involved a prosecution of a fisherman for alleged breaches of licence conditions imposed under the Mackerel (Licensing) Order 1999 (namely, failure to give the required four hours notice of an intention to land mackerel at a port, and the landing such mackerel at a non-designated port). The 1999 Order had been adopted under s. 223A of the Fisheries (Consolidation) Act 1959 (i.e., the same provision which had been at issue in Browne). On this occasion, however, the implications of the Constitutional ‘necessitated’ clause were not considered by the Supreme Court. Instead, European Community law merely arose in the context of the Supreme Court’s consideration of whether the statutory instrument was intra vires s. 223A of the 1959 Act or not – in other words, it arose in the context of the interpretation of the 1959 Act. Denham J (in whose judgment Murray CJ, Hardiman J, McCracken J concurred) held that the 1999 Order “essentially...serves the principles and policies of Community measures” and that “in the scheme of Irish fisheries legislation it could not have been intended by the Oireachtas that s. 223A would be used to implement Community law, in light of the clear words of s. 224B” [which explicitly envisaged being used for such purposes]. (See [2007] 2 IR 45 at 59.). Fennelly J. dissented from this conclusion, taking a narrower view both of the scope of Community law and of the (i) s. 224B– pointing out that “there is no Community instrument requiring the State to adopt the rules contained in the Order of 1999” and opining that the supposed alternative legal basis for the regulations Article 224B could not have been used as the legal basis of the 1999 Order. (See [2007] 2 IR 45 at 67-68.) It might of course be argued that the view of the majority in Kennedy provides implicit support for the view that the “necessitated” clause in Article 29.4.6° provides no shield for what would otherwise be ultra vires action – which was the very point made by Keane J. in Browne and the very reason why Browne is of interest for present purposes. In reality, however, consideration of the “necessitated” clause does not feature in any form in the judgments of any of the judges and the case is thus of less interest for present purposes than is Browne.

What if any legal effect the commitment to the Union thus expressed in Article 29.4.4° will have awaits elucidation in the Courts. The case-law concerning Article 29.1 – the existing Constitutional provision which the Minister considered the new sub-section to be “in keeping with” - indicated that that provision confers no rights on individuals. On the other hand, the wording of that section is pitched more at the level of international relations between states. A commitment to promote “peace, shared values and the well-being” of the peoples of the member states might conceivably be more open to eventual judicial deployment.

4. Exercising Discretions - Subsections 7° and 8°

Notwithstanding the recommendations of two separate Oireachtas Sub-Committees, recent Irish governments have yet to see their way to empowering the Oireachtas in a manner similar to that of other member state parliaments in the European affairs policy field - namely, via the introduction either of a mandate system (following the model of the Danish parliament in this regard) or a scrutiny reserve system (along the lines of the system used in the United Kingdom parliament), thereby enhancing the parliamentary accountability imposed on members of the Irish Government representing the State either in the Council of the European Union or the European Council. However, by virtue of the operation of Article 29.4.7° and 29.4.8°, a limited form of mandate system has already been introduced at respectively, the levels of primary and secondary European Union law. In relation to the questions concerned, the State is permitted to reach the decisions in question only when permission to do so is granted by the Oireachtas.

Although the present form of both Article 29.4.7° and 29.4.8° dates only from 2009, the presence in Article 29.4 of requirements of the kind now seen in these subsections is over a decade older: the amendment effected to Article 29.4 in 1998 adopted in order to facilitate ratification of Treaty of Amsterdam already provided for the subjecting of the exercise by the State of options or discretions provided for under an amending Treaty to a requirement of prior approval by the Oireachtas.

The reasons for the introduction of such a prior approval process may be seen as twofold. In the first place, the original version of the Article 29.4 constitutional immunity clause envisaged laws, acts and measures which were ‘necessitated’ by the obligations of membership. Beginning at Amsterdam, however, with the emergence of the possibility for closer cooperation between a subset of member states, and thus the possibility that the process of further integration within

119 In re Ó Láighléis [1960] I.R. 93, Maguire C.J. noted that Article 29.1 clearly referred only to relations between states and conferred no rights on individuals. Barrington J. in The State (Galland) v. Governor of Mountjoy Prison [1987] I.R. 201 noted that the provision was “not the concern of the private citizen”. More recently Kearns J. held in Hogan v. Ireland [2003] 2 I.R. 468 at 512 “that the provisions of Article 29.1 to 29.3 are to be seen... as statements of principle or guidelines rather than binding rules on the executive”. Note to similar effect regarding Article 29, the Supreme Court ruling in Kavanagh v Governor of Mountjoy Prison [2002] 3 I.R. 97, although this case focused on sections 2 and 3 of Article 29, rather than section 1.


121 Note that Article 29.4.7° and 29.4.8° were cited – although somewhat peripherally – in argument in the case of Doherty v. Referendum Commission [2012] IEHC 211 (High Court) (judgment delivered by Hogan J. on 6 June, 2012), without however the Court finding it necessary to express a definitive view on the argument made in relation to them. (See paras. 62-63 of the ruling of Hogan J.).

122 The Eighteenth Amendment of the Constitution Act, 1998, subsequent to its being passed by both Houses of the Oireachtas, was approved by the electorate in a referendum held on 22 May 1998 by 932,632 votes (62% of valid votes cast) to 578,070 (38% of valid votes cast) on a turnout of 1,543,930 (56%). It was signed into law by President Mary McAleese on 3 June, 1998.
the Union might in certain circumstances be a voluntary choice rather than a necessity, (once agreed upon) for all member states, the constitutional facilitation of such participation in the relevant policy areas became necessary. A second justification for the new approval process seems to have been the desire to provided extra democratic legitimacy in relation to such enhanced integration over and above that provided by the amendment of the Constitution in order to facilitate the ratification of the Lisbon Treaty (and later the Nice and Lisbon Treaties).²²³

A total of five options or discretions were made subject to this requirement of prior approval at the time of the Amsterdam Treaty amendment (relating to, respectively justice and home affairs cooperation; the establishment of closer cooperation between some member states; the broad field of visas, asylum, immigration and other policies related to free movement of persons; the Schengen Protocol; and the Protocol on the position of the United Kingdom and Ireland).²²⁴ Subsequently, the amendment effected to Article 29.4 by section 1 of the Twenty-Sixth Amendment of the Constitution Act, 2002, so as to facilitate ratification of Treaty of Nice made the exercise of a further six options or discretions subject to prior approval of both Houses of the Oireachtas. (All of these, however, related merely to new provisions the Nice Treaty made concerning enhanced cooperation between member states).²²⁶ Subsequently reforms effected by the Treaty of Lisbon superseded certain options or discretions in the field of free movement and justice and home affairs redundant. Consequently, s. 1 of the Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009 – adopted to facilitate ratification of the Lisbon Treaty amended Article 29.4 so as to reduce the number of options or discretions requiring approval of the Houses of the Oireachtas to three. Hence, what is now subsection 7° of Article 29.4 now provides merely as follows:

“7° The State may exercise the options or discretions—

  i to which Article 20 of the Treaty on European Union relating to enhanced cooperation applies,

  ii under Protocol No. 19 on the Schengen acquis integrated into the framework of the European Union annexed to that treaty and to the Treaty on the Functioning of the European Union (formerly known as the Treaty establishing the European Community), and

  iii under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, so annexed, including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State,

but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.”

²²³ See more generally, Hogan and Whyte, n. 23 at 518 and 529–530.
²²⁴ These being the options or discretions provided by or under Articles 1.11, 2.5 and 2.15 of the Amsterdam Treaty.
²²⁵ The Twenty-Sixth Amendment of the Constitution Act, 2002, subsequent to its being passed by both Houses of the Oireachtas, was approved by the electorate in a referendum held on 19 October 2002 by 906,317 votes (63% of valid votes cast) to 534,887 (37% of valid votes cast) on a turnout of 1,446,588 (49%). It was signed into law by President McAleese on 7 November, 2002.
²²⁶ Namely, the options or discretions provided by or under Articles 1.6, 1.9, 1.11, 1.12, 1.13 and 2.1 of the Treaty of Nice. It should be noted that what was termed ‘closer’ cooperation in the Amsterdam Treaty was subsequently renamed ‘enhanced’ cooperation by the Nice Treaty.
²²⁷ The Twenty-Eighth Amendment of the Constitution (Treaty of Lisbon) Act 2009, subsequent to its being passed by both Houses of the Oireachtas, was approved by the electorate in a referendum held on 2 October 2009 by 1,214,268 votes (67%) to 594,606 (33%) on a turnout of 1,816,098 (59%). It was signed into law by President McAleese on 15 October, 2009.
However, at the same moment, the adoption of certain measures of secondary European Union legislation was made subject to this requirement for the first time. Hence the following new subsection was inserted in Article 29.4:

8° The State may agree to the decisions, regulations or other acts—

i under the Treaty on European Union and the Treaty on the Functioning of the European Union authorising the Council of the European Union to act other than by unanimity,

ii under those treaties authorising the adoption of the ordinary legislative procedure, and

iii under subparagraph (d) of Article 82.2, the third subparagraph of Article 83.1 and paragraphs 1 and 4 of Article 86 of the Treaty on the Functioning of the European Union, relating to the area of freedom, security and justice,

but the agreement to any such decision, regulation or act shall be subject to the prior approval of both Houses of the Oireachtas."

The measures relate to the operation of so-called passerelles – simplified switches to majority voting and co-decision between the European Parliament and the Council at EU level, as well as the adoption of certain rules in the justice and home affairs area.

The Supreme Court judgment in *Iqbal v. Minister for Justice*\(^{128}\) shows that a broad judicial interpretation will be given to the licence provided by the Houses of the Oireachtas under these provisions. Hence the Court took the view that it would only invalidate an opt-in to the adoption of a proposed measure if there had been "such significant departure from the approved text as to warrant the conclusion that the constitutionally necessary prior approval had not been given."\(^{129}\)

Other issues still remain to be judicially elucidated concerning these provisions – for example, the precise point in time at which an option or discretion is regarded as being exercised by the state.\(^{130}\)

In the wake of the restructurings designed to facilitate the Nice and Lisbon Treaties, the overall structure of Sections 7° and 8° of Articles 29.4 may be summarised as follows:

\textit{i. A Requirement of Approval of Opting into Enhanced Cooperation}

By virtue of Article 29.4.7°,\(^{131}\) any exercise by the State of options or discretions under Article 20 TEU is made subject to the prior approval of both Houses of the Oireachtas. This particular Treaty article provides for member states engaging in ‘enhanced cooperation’ - in other words, closer integration - with one another.


\(^{129}\) [2008] 4 I.R. 362 at p. 377. Clear disregard by the Oireachtas of its constitutional duties would be needed in order to see its opt-in invalidated by the Courts. In *Iqbal*, differences between the Framework Decision on the European Arrest Warrant and the draft proposal the Houses had approved did not invalidate that approval, which was held to include any reasonable and usual drafting changes.

\(^{130}\) Hogan and Whyte, n. 23 at 532 have additionally questioned whether the state must submit all covered proposals to the Houses of the Oireachtas (the most likely-seeming interpretation) or merely those which would otherwise be constitutionally problematic. See generally Hogan and Whyte, n. 23 at 531 to 532.

\(^{131}\) See para. (i) thereof.
ii. A Requirement of Approval of Opting into Schengen Protocol Provisions or Proposals

Also under Article 29.4.7°, any exercise by the State of options or discretions under Protocol (No 19) on the Schengen Acquis Integrated into the Framework of the European Union\(^\text{132}\) is made subject to the prior approval of both houses of the Oireachtas.\(^\text{133}\)

Under the Schengen Protocol, Ireland may at any time request to take part in some or all of the provisions of the Schengen acquis, a request which the Council of Ministers is required to decide on by unanimity.\(^\text{134}\) Proposals to build upon the Schengen acquis are subject to a more liberal regime, involving a prima facie right to accede.\(^\text{135}\)

iii. A Requirement of Approval of Any Exercise of Options under Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice

Article 29.4.7° also provides\(^\text{136}\) that any exercise by the State of options or discretions under Protocol (No 21) on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice is made subject to the prior approval of both Houses of the Oireachtas. This includes Ireland’s option under that Protocol to choose that the Protocol itself shall, in whole or in part, cease to apply to the State.\(^\text{137}\)

This requires some further explanation. Protocol (No. 21) - originally designed to protect the common travel area with the United Kingdom, but now (i.e., since the coming into force of the Lisbon Treaty) serving a seemingly broader agenda - provides for the prima facie exclusion of Ireland from provisions of the area of freedom, security and justice. It provides, inter alia, that “none of the provisions of Title V of Part Three of the Treaty on the Functioning of the European Union [viz., the Treaty Title concerning the area of freedom, security and justice], no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title, and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable in the United Kingdom or Ireland”\(^\text{138}\)

Provision is made in the Protocol (a) that Ireland may notify\(^\text{139}\) within three months after a proposal or initiative has been presented to the Council pursuant to Title V, that it wishes to take part in the adoption and application of the proposed measure, whereupon it shall be entitled to do so; (b) that Ireland may at any time after the adoption of a measure under Title V notify its intention that it wishes to accept that measure (although its ability to do so is conditional on unanimous agreement of the member states who have accepted)\(^\text{140}\); and (c) that Ireland may

\(^{132}\) Now annexed by the High Contracting Parties at Lisbon to the Treaty on European Union and to the Treaty on the Functioning of the European Union
\(^{133}\) See para. (ii) thereof.
\(^{134}\) Article 4 of the Protocol.
\(^{135}\) Article 5 of the Protocol. Compare, however, the limitations which apply to this more liberal regime under the judgment of the Court of Justice in Case C-137/05 United Kingdom v Council of the European Union [2007] ECR I-11593.
\(^{136}\) See para. (iii) thereof.
\(^{137}\) Under Article 8 of the Protocol, Ireland may notify the Council in writing that it no longer wishes to be covered by the terms of this Protocol, in which case, the normal treaty provisions will apply to Ireland. This is further discussed in the text below.
\(^{138}\) Article 2 of the Protocol.
\(^{139}\) Namely, to the President of the Council in writing.
\(^{140}\) Namely, to the Council and to the Commission.
notify the Council in writing that it no longer wishes to be covered by the terms of this Protocol, in which case, the provisions of Title V will then apply to Ireland.\footnote{142 See Article 8 of the Protocol.}

During the period of the last (30th) Dáil, the Article 29.4.7°(iii) procedure was triggered whenever the Department of Justice, following consultations with the Office of the Attorney General, indicated that an opt-in motion under Title V should be considered by the Joint Committee on Justice, Defence and Women’s Rights.\footnote{143 On these occasions, briefings were prepared for the Joint Committee by the Library and Research Services Committee team. (See Annual Report 2010, p. 37.\textcopyright{}available online at the time of writing at http://www.oireachtas.ie/documents/publications/Annual_Report_2010_revised.pdf)} Motions were then - nominally - considered by the full Houses: in reality, such motions were simply adopted without any debate at all taking place beyond that which had already occurred in the Joint Committee.\footnote{144 See e.g., motion regarding Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision of 14 December 2010, adopted in Seanad without debate.} This continues to be the practice in the present Dáil.\footnote{145 See most recently the motion approved without debate by the Dáil on 14 June 2012 to take part in the adoption and application of the EU Directive on Confiscation of Proceeds of Crime. See Vol. 768 Dáil Debates 8. The relevant excerpt is also to be found at http://debates.oireachtas.ie/dail/2012/06/14/00008.asp}

Surprisingly, the reasons for Ireland having such an ‘opt-out with an opt-in’ arrangement at European Union level as regards justice and home affairs provisions have never been made clear. It may well have been driven by the frequent need to subject major amending treaties to a referendum process in Ireland. The policy area of justice and home affairs field was memorably – and aptly - described by one Department of Justice official to this writer as “the dog that didn’t bark” in either Lisbon Treaty referendum.\footnote{146 Interviewed 7 February 2011.} In other words, the Lisbon Treaty opt-out-with-an-opt-in served the politically valuable (perhaps even necessary) purpose of defusing the justice and home affairs area as a potential source of difficulty in securing referendum approval for ratification of the Treaty of Lisbon. Whether it serves the broader interests of the country in any way other than this is less clear, although this is not an issue that need detain us further in this article.

What is eminently clear, however, is that the intention stated by Ireland (in a Declaration made at the time the original form of what is now Protocol (No 21) was adopted at Amsterdam) that it would take part in the adoption of measures on visas, asylum, immigration and other policies related to free movement of persons “to the maximum extent compatible with the maintenance of its Common Travel Area with the United Kingdom” was never adhered to.\footnote{147 Declaration by Ireland on Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Final Act of the 1996 Intergovernmental Conference which agreed the Treaty of Amsterdam, according to which Ireland declared “...that it intends to exercise its right under Article 3 of the Protocol on the position of the United Kingdom and Ireland to take part in the adoption of measures pursuant to Title IIIa of the Treaty establishing the European Community [Note: this covered visas, asylum, immigration and other policies related to free movement of persons] to the maximum extent compatible with the maintenance of its Common Travel Area with the United Kingdom. Ireland recalls that its participation in the Protocol on the application of certain aspects of Article 7a of the Treaty establishing the European Community [Note: this referred to the Protocol on the position of the United Kingdom and Ireland] reflects its wish to maintain its Common Travel Area with the United Kingdom in order to maximise freedom of movement into and out of Ireland.”} Instead, (a) Ireland subsequently adopted a pick-and-choose approach to what it opted into, and (b), as has been seen, the scope of the opt-out under Protocol (No 21) was then dramatically increased at Lisbon to cover all provisions concerning the area of freedom, security and justice.\footnote{148 i.e., provisions relating to Title V of Part Three of the Treaty on the Functioning of the European Union.}

The 2011 programme for government contains a commitment to “enhance the Irish role in EU judicial and home affairs cooperation.”\footnote{149 See Government for National Recovery 2011-2016 (available online at http://www.socialjustice.ie/sites/default/files/files/Government%20Docs\%20eto/2011-03-06\%20Programme%20for%20Government%202011-2016.pdf) at p. 58.} However, it is unclear whether this means that Ireland will notify that it no longer wishes to be covered by the terms of this Protocol. Should the
Government wish to take this step, Article 29.4.7° will require the prior approval of both Houses of the Oireachtas.

iv. A Requirement of Approval of Participation by the Irish State in Certain Specified Forms of Cooperation in the Justice and Home Affairs Field

Under Article 29.4.8° - and over and above the general Article 29.4.7° commitment concerning any exercise by the State of options or discretions under the United Kingdom and Ireland Protocol - the prior approval of both Houses of the Oireachtas is required\(^\text{150}\) for the Irish State’s agreement to certain specified forms of cooperation in the justice and home affairs field, namely:

(a) the establishment by directive of minimum rules on specific aspects of criminal procedure (under Art. 82(2)TFEU);\(^\text{151}\)

(b) the establishment by directive of minimum rules concerning the definition of criminal offences (under Art. 83(1) TFEU);\(^\text{152}\)

(c) the establishment by regulation of a European Public Prosecutor’s Office (under Article 86(1) TFEU);\(^\text{153}\) and

(d) the extension of the powers of the Office of the European Public Prosecutor to include certain serious crimes (under Article 86(4) TFEU).\(^\text{154}\)

Once again, the existence of these requirements reflects the particularly conservative approach which is being taken in Ireland in relation to justice and home affairs cooperation.

v. A Requirement of Approval of Any Use of a Passerelle

Under Article 29.4.8° the agreement by the Irish State to any decision\(^\text{155}\) (a) authorising the Council of the European Union to act other than by unanimity,\(^\text{156}\) or (b) authorising the adoption of the ordinary legislative procedure (meaning co-decision on legislation by the Council and the European Parliament)\(^\text{157}\) - in other words, the deployment of a so-called passerelle - is made subject to the prior approval of both Houses of the Oireachtas.

In practice, the invariable absence of debate in plenary sessions of either House on motions for Article 29.4.7° or 8°-related resolutions deprives the impact of both constitutional sub-sections of much real impact in the lives of most Oireachtas members. In reality, consideraton given to Article 29.4.7° and 8°-related recommendations tends to be confined to Oireachtas Committees (notably the Joint Oireachtas Committee on Justice, Defence and Equality insofar as concerns justice and home affairs-related decisions). The Government can be confident that Oireachtas approval for Article 29.4.7° and 8° motions will be forthcoming: this writer has been unable to

\(^{150}\) See para. (iii) thereof.

\(^{151}\) Such directives must be agreed by unanimity by the Council under Article 82(2)(d) TFEU.

\(^{152}\) Note that the ordinary legislative procedure (co-decision) applies in adopting such directives.

\(^{153}\) Such regulations must be agreed by unanimity by the Council under Article 86(1) TFEU.

\(^{154}\) Any such extending decision must be agreed by unanimity by the European Council under Article 86(4) TFEU.

\(^{155}\) Taken either under the Treaty on European Union or the Treaty on the Functioning of the European Union.

\(^{156}\) See Article 29.4.8° (i).

\(^{157}\) See Article 29.4.8° (ii).
trace a single occasion on which prior approval has ever been withheld by either House of the Oireachtas of an executive decision that the state engage in an action at European Union level listed in Article 29.4.7° or 8°.158

The various Constitutional rules in Article 29.4.7° and 8° requiring ex ante approval by both Houses of the Oireachtas to the taking of various steps by Ireland at European Union level, should not be seen in isolation. Statutory provisions also seek to impose accountability on the Government in relation to European policy-related decisions: although their impact cannot be said to be very great. Hence, for example, s. 2(5) of the European Union (Scrutiny) Act, 2002 – a statute which, it is worth recalling, formed part of the then Government’s response to the defeat of the referendum to amend Article 29.4 so as to facilitate the ratification of the Treaty of Nice - requires that every Government Minister make a report to each House of the Oireachtas not less than twice yearly in relation to measures, proposed measures and other developments concerning the European Union in relation to which he or she performs functions.159 Secondly, under s. 5 of the European Communities Act 1972 (as substituted by s. 4 of the same 2002 Act) the Government has been obliged to make a report to each House of the Oireachtas on developments in the European Union each year since 2003.160

At least one ‘soft law’ rule also exists, imposing accountability on the part of the Government before the Dáil in relation to a European policy-related decision: namely the ‘triple lock’ rule which derives from the 2002 Seville Declaration— in political practice, as binding as any legal rule. This Declaration is further examined below in the text below. Just like the statutory rules which have just been mentioned, this rule of political practice too derives its existence from the process of amendment of Article 29.4, since, once again, it formed part of the successful Government strategy designed to secure the amendment of Article 29.4 after defeat in the initial referendum designed to facilitate ratification of the Treaty of Nice.161

5. Protecting Neutrality? Subsection 9°

The Twenty-Sixth Amendment of the Constitution Act, 2002 which was signed into law on 7 November, 2002 was adopted in order to facilitate ratification of the Treaty of Nice.162 Its approval by the electorate in referendum on 19 October of that year had represented the second bite of that particular cherry, since the earlier Twenty-fourth Amendment of the Constitution of Ireland Bill, 2001 (also designed to facilitate ratification of the Nice Treaty) had been defeated

158 Research on this point included interviews carried out by author with two long-standing Oireachtas staff members on 17 July 2012.
159 An obsolete reference to the ‘Communities’ is also found in this provision. In this writer’s experience, the value of such reports is limited, however. In the first place, when discussed in an Oireachtas committee meeting at all during the lifetime of the last Dáil, they were usually delivered by officials rather than by the Minister him- or herself, lessening or even eliminating the ability of Oireachtas members to impose any real political accountability. Secondly, during the 30th Dáil, the reports were generally received by the Joint Oireachtas Committee on European Scrutiny rather than by the House in plenary session which facilitated discussion but simultaneously limited awareness of the report to a relatively small sub-category of Oireachtas members. Thirdly, in practice, much of what is found in the reports is retrospective, providing little by way of political meat for discussion by Oireachtas members. Fourthly, the reports frequently arrive several months late, reducing their value as anything more than a historical record of whatever measures have been undertaken in the European policy field.
160 S. 5 itself refers to the Communities, but this is clearly now obsolete since the coming into force of the Treaty of Lisbon resulted in the termination of the separate existence of the European Community. Again, the usefulness of this step is questionable. The Report of the Joint Sub-Committee on the Review of the Role of the Oireachtas in European Affairs of 7 July, 2010 expressed the Joint Sub-Committee’s belief that “the annual report is historical and therefore its purpose is limited.” The Sub-Committee went on to recommend that there should no longer be a requirement to prepare an annual report. (See respectively Para. 21 of the Report’s conclusions and Recommendation 5 of the Sub-Committee made in the Report.)
161 See text below at n.164
162 See in this regard, n. 126 above.
The second referendum was accompanied by a range of measures designed to secure a positive vote. Some - such as the adoption of the Labour Party-inspired European Union (Scrutiny) Act, 2002 - related to the issue of parliamentary control in the field of European affairs. Others related to the thorny issue of neutrality (it being felt that public concerns relating to this needed to be addressed prior to the putting of a second Nice Treaty referendum to the electorate). Into this latter category fell the ultimately successful proposal - contained in the Twenty-Sixth Amendment of the Constitution Act, 2002 - for the insertion of a new sub-section 9° into Article 29.4 (to accompany the authorisation to ratify the Nice Treaty). In its present form (adjusted to take account of the renumbering of Treaty articles by the Lisbon Treaty) this sub-section provides that

“9° The State shall not adopt a decision taken by the European Council to establish a common defence pursuant to Article 42 of the Treaty on European Union where that common defence would include the State.”

Article 29.4.9° should not be understood as providing any kind of absolute guarantee of Irish neutrality since it poses no obstacle to some other method being used to engage in military alliance (such as an international treaty) whether at European level or otherwise. It does however block off the main route to such an alliance provided for under the Treaties as they presently stand. Even in this regard, however, the limits of the sub-section should be understood. Article 29.4.9° conditionalises recourse by the Irish Government to Article 42 of the Treaty on European Union (which relates to common security and defence policy) rather than ruling it out entirely. Hence Irish agreement to a decision to establish a common defence under Article 42 is not prohibited – merely Irish agreement to such a decision where the common defence would involve this State. Ireland could thus take part in a unanimous decision to establish a common defence – provided only that this decision did not commit Ireland to the common defence thereby established. The possibility of recourse under Articles 42(6) and 46 TEU of permanent structured cooperation in the field of defence should also be noted. The relevance of these provisions to Ireland is, however, not clear, given that it is confined, under Article 42(6) to states “whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions”.164

Notwithstanding all the foregoing, the significance of what is now Article 29.4.9° should not of course be underestimated. It is the locus of the first and to date only visible impression made by Irish neutrality on the text of the Constitution.165

Article 29.4.9° - in this regard, probably like Ireland’s opt-out-with-an-opt-in relationship in the field of justice and home affairs cooperation - is of interest for being an example of the impact which the choice of referendums as a decision-taking mechanism can have on substantive

163 The Twenty-fourth Amendment of the Constitution of Ireland Bill, 2001 was rejected by the electorate in a referendum held on 7 June 2001 by 529,478 votes (54% of valid votes cast) to 453,461 (46% of valid votes cast) on a remarkably poor turnout of 997,826 (35%).
164 (See further on the themes of enhanced cooperation and a multi-speed Europe, J.-C. Piris, The Future of Europe (Cambridge University Press, 2012), chapter 4.)
165 For two cases considering the constitutionality of Shannon airport as a stopover for US military aircraft, see Horgan v. Ireland [2003] 2 I.R. 468 and Dubsky . Government of Ireland [2007] 1 I.R. 63. In the latter case, the provision in Article 15.6.2° of the Constitution that “no military or armed force, other than a military or armed force raised and maintained by the Oireachtas, shall be raised or maintained for any purpose whatsoever” was held by Macken J. to mean only that “there is only one true and official army, namely the Irish army” to pose no legal obstacle to permitting armed or unarmed military or civilian aircraft carrying arms or munitions of war or army personnel, on their way to or from Afghanistan, to overfly Irish airspace or to land and refuel in Ireland. Such a narrow construction of Article 15.6 makes the argument that Article 15.6.2° would pose obstacles to the presence in Ireland of troops from other states in any military alliance with this state less tenable than would otherwise have been the case.
policy. Autrement dit, it is an example of the referendum tail wagging the policy dog. No commitment of the type now found in Article 29.4.9° to refrain from a decision under Article 42 was contained in the draft amendment originally proposed to facilitate ratification of the Lisbon Treaty, provided for in the Twenty-fourth Amendment of the Constitution of Ireland Bill, 2001. It was only the initial failure to secure electoral approval of that Bill which led to the insertion of this sub-section in the Constitution. The history of Article 29.4.9° is of interest as an example of a constitutional provision containing an implicit right to a referendum in certain circumstances (those circumstances being the ratification by the Irish government of a Treaty going beyond the essential scope or objectives of a Treaty covered by the existing Article 29.4 authorisations) being leveraged into an implicit right to a referendum in other circumstances (those circumstances being the adoption of a decision taken by the European Council by unanimity to establish a common defence which would include this country, pursuant to Article 42 of the Treaty on European Union.)

Article 29.4.9° is best understood in its fuller political and legal context - a context which is additionally of interest for present purposes in that - rather like Article 29.4.9° itself - it came about as part of the response of the Irish Government to the initial 'no' vote in the June 2001 referendum regarding a constitutional amendment to Article 29.4 so as to facilitate ratification of the Treaty of Nice. A 'National Declaration by Ireland' was made by the Irish Government at the Seville European Council on 21 June 2002. Para. 6 of this so-called 'Seville Declaration' states that

“...Ireland reiterates that the participation of contingents of the Irish Defence Forces in overseas operations, including those carried out under the European security and defence policy, requires (a) the authorisation of the operation by the Security Council or the General Assembly of the United Nations, (b) the agreement of the Irish Government and (c) the approval of Dáil Éireann, in accordance with Irish law.”

Although the terms of the Seville Declaration are of no legally binding force, the Declaration is nonetheless regarded as politically-binding soft law, and in practice any initial deployment of any more than twelve armed Irish troops abroad is now made subject to a vote of approval in Dáil Éireann. The enduring political impact of the Seville Declaration is correctly seen as deriving directly from Article 29.4, and more particularly the effort to move from the unsuccessful attempt to amend this Article in 2001 towards the successful attempt the following year.


167 The words ‘in accordance with Irish law’ at the end of the Declaration are significant. Note in this regard s.2 of the Defence (Amendment) (No. 2) Act, 1960. According to subsection 1 of this section, a contingent of the Permanent Defence Force may be despatched for service outside the State as part of a particular International United Nations Force if, but only if a resolution has been passed by Dáil Éireann approving of the despatch of a contingent of the Permanent Defence Force for service outside the State as part of that International United Nations Force. However, under subsection 2, a contingent of the Permanent Defence Force may nevertheless be despatched for service outside the State with a particular International United Nations Force without a resolution approving of such despatch having been passed by Dáil Éireann, if, but only if—

(a) that International United Nations Force is unarmed, or
(b) the contingent consists of not more than twelve members of the Permanent Defence Force, and the number of members of the Permanent Defence Force serving outside the State with that International United Nations Force will not, by reason of such despatch, be increased to a number exceeding twelve, or
(c) the contingent is intended to replace, in whole or in part, or reinforce a contingent of the Permanent Defence Force serving outside the State as part of that International United Nations Force and consisting of more than twelve members of the Permanent Defence Force.

The author’s thanks are expressed to Gillian Bourke and Professor Ben Tonra for calling this point to his attention.
The December 2011 European Council was notable for the effective veto exercised by British Prime Minister David Cameron of any possibility of agreement on a mooted new treaty amending either or both of the founding treaties of the European Union.\textsuperscript{168} The idea of the sought-for treaty - which advanced first and foremost by Germany - had been largely, although not exclusively, to entrench enduringly the enforcement of European Union debt and deficit requirements in member states’ own legal systems, thus making them the first line of defence against any breaches of such rules. The seventeen eurozone member states thereupon immediately announced their intention to agree a new “fiscal compact” and on significantly stronger coordination of economic policies in areas of common interest.\textsuperscript{169} After rapidly-conducted negotiations, a (non-European Union) Treaty on Stability, Coordination and Governance in the Economic and Monetary Union was subsequently signed by twenty-five of the twenty-seven European Union member states on 2 March 2012 (the Czech Republic having joined the United Kingdom in opting out).

This new Fiscal Stability Treaty involved a new departure in the process of the development of European integration, not because it involved a non-European Union Treaty to further such integration, but rather because it was envisaged that ratification by less than the full complement of member states would suffice to bring it into force.\textsuperscript{170} Other non-European treaties e.g., the Schengen Agreement and the Schengen Implementation Agreement had dealt with issues at the very heart of European integration, but had required ratification by all contracting parties prior to their entry into force.\textsuperscript{171} Any state failing to ratify the Fiscal Stability Treaty would exclude itself from its application. However, in contrast to the position pertaining in relation to treaties which purported to amend the European Union founding treaties, it would not necessarily prevent the treaty entering into force for other party states.

The recourse to a non-European Union treaty made necessary by the December 2011 British veto had a further consequence. It bypassed the constitutional protection provided in Article 29.4 for treaties amending the existing founding treaties of the European Union insofar as such amending treaties did not exceed the essential scope or objectives of existing Treaties.\textsuperscript{172} In doing so, it rendered the necessity of a constitutional referendum more likely. Indeed, when Taoiseach Enda Kenny announced to the Dáil on 28 February, 2012 that a referendum was to be held on the Fiscal Stability Treaty, the non-application of Article 29.4 was specifically - if implicitly - adverted to by him, when he observed that

\begin{footnotesize}
\textsuperscript{168} See Anon., “EU states strike fiscal deal as Cameron vetos UK adrift”, Irish Times, 9 December 2011; P. Spiegel “UK scuppers Merkel desire for legal clarity”, Financial Times, 9 December 2011. Under Article 48 of the Treaty on European Union, any such treaty must be unanimously agreed and ratified by all member states.
\textsuperscript{170} Article 14(2) of the Treaty provided that it would enter into force on 1 January 2013, provided that twelve contracting parties whose currency was the euro had deposited their instrument of ratification or (alternatively) on the first day of the month following the deposit of the twelfth instrument of ratification by a contracting party whose currency was the euro – whichever date was the earlier.
\textsuperscript{171} See respectively, Article 32 of the (Schengen) Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at the common frontiers and Article 139 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. These treaties formed no part of European Union law until the coming into force of the Treaty of Amsterdam in 1999. The high contracting parties to that Treaty annexed a Protocol integrating the Schengen acquis into the framework of the European Union to the Treaty on European Union and to the Treaty establishing the European Community.
\textsuperscript{172} See in this regard the ruling of the Supreme Court in Crotty v. An Taoiseach [1987] I.R. 713 at 767.
\end{footnotesize}
“throughout the process leading to this new treaty, the Government has consistently said that the final text would be referred to the Attorney General for her advice as to whether a referendum was required to ratify it in Ireland. At this morning’s Cabinet meeting, the Attorney General conveyed her formal advice that, as this treaty is a unique instrument, outside the European Union treaty architecture, on balance, a referendum is required to ratify it.”  

The Attorney General’s advice has not subsequently been published and no further details have been provided as to why a referendum was felt to be necessary. (The gradual watering down of the text of the Fiscal Stability Treaty’s provision in successive drafts made available during negotiations had led many to suspect that no referendum would be held in relation to it.) The restrictive approach taken by the Supreme Court majority in Crotty to the issue of sovereignty makes Article 5 of the Constitution a prime suspect in the search for Constitutional articles felt to require a referendum. It may have been felt that the constitutionally-ordained roles of parliament (Article 15 and following), executive (Article 34 and following) and courts may have been felt to be infringed.

After a hard-fought debate, in which the Government parties (Fine Gael and Labour) joined by Fianna Fáil and some civic society groupings were ranged against Sinn Féin, the hard-left United Left Alliance and independent campaigners (such as millionaire businessman Declan Ganley) on 31 May, 2012, on a turnout of 50.53% of the electorate, the Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Bill 2012 was approved by the electorate by a majority of 955,091 (60.37% of valid votes cast) to 626,907 (39.63% of valid votes cast). It was signed into law by President Michael D. Higgins on 27 June 2012.

Section 1 of the Act inserted the following new subsection into Article 29.4 of the Constitution:

“10° The State may ratify the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union done at Brussels on the 2nd day of March 2012. No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State that are necessitated by the obligations of the State under that Treaty or prevents laws enacted, acts done or measures adopted by bodies competent under that Treaty from having the force of law in the State.”

This latest subsection to be added to Article 29.4 is clearly modelled on the wording of existing subsections 3°, 5° and 6°. The immunity it seeks to confer is thus extended to laws, acts or measures by the State necessitated by the obligations of the State under the Fiscal Stability Treaty and not merely laws, acts or measures adopted by bodies competent under that Treaty from having the force of law in the State.

Art 3(2) of the Fiscal Stability Treaty provides that the budgetary rules set out in Article 3(1) thereof are to take effect in the national law of the contracting parties “through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes”. In deciding how
best to implement the Fiscal Stability Treaty into Irish law, there was reputedly some debate - given the requirement of - as to whether these rules themselves needed to be enshrined in the Constitution. In the end, this did not happen, and constitutional changes were confined to the insertion into the Constitution of the ‘accession and immunity’ clause now constituted by Article 29.4.10°. The assumption has been made therefore that the actual implementation of the Fiscal Stability Treaty’s budgetary rules in ordinary legislation is of sufficient “binding force and permanent character” to suffice for the purposes of the Article 3(2) of the Fiscal Stability Treaty (and indeed that no ruling to the contrary will ever be made by the European Court of Justice under Article 8 of that Treaty). This implementation will take place via the enactment of the Fiscal Responsibility Bill 2012, introduced by the Minister for Finance in the Dáil on 16 July 2012, and the long title of which is a “Bill entitled an Act to make provision for securing that the rules in Article 3 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union take effect in the law of the State in accordance with paragraph 2 of that Article and that the rule in Article 4 of that Treaty takes effect in the State; to make provision in accordance with Article 3 of that Treaty in relation to a medium-term budgetary objective and a correction mechanism; to establish a body to be known as Comhairle Chomhairleach Bhuiséadach na hÉireann or, in the English language, the Irish Fiscal Advisory Council and provide for its functions; and to provide for related matters.”

It is worth noting that the last clause of Article 29.4.6° (a subsection already examined in some respects in the text above) arguably rendered the last sentence of Article 29.4.10° entirely redundant, since under that clause in the former provision, no provision of the Constitution laws enacted, acts done or measures adopted by bodies competent under the treaties referred to in Article 29.4 and the Fiscal Stability Treaty is now a treaty referred to in Article 29.4.

The Fiscal Stability Treaty referendum has given rise to two separate sets of litigation, one decided just before the referendum on the Treaty was held, the other destined to be decided afterwards, neither of which however focused at length on issues of interest for the purposes of this article.

For a favourable media comment on the rapidity with which the case was dealt with at all levels, see Anon., “Pringle Judgment Breaks New Ground”, Irish Times, 4 February 2013. On Pringle generally see V. Borger, The ESM and the European Court’s Predicament in Pringle (2013) 14 German Law Journal 141; and Anon., “Reflections on the state of the Union 50 years after Van Gend en Loos” (2013) 50 Common Market Law Review 351. It should be noted that the Pringle case related primarily to the ESM Treaty (which seeks to establish a permanent bailout mechanism for the eurozone states) rather than to the Fiscal Stability Treaty, with the applicant in Pringle initially asserting that the Fiscal Stability Treaty was dependent on the validity of the ESM Treaty. This claim, however, was not pursued in the High Court proceedings, and Laffoy J., in her ruling, declined to express any view on the attempt by the plaintiff to draw the Fiscal Stability Treaty into arguments in support of his case. (See paras. 21-22 of the ruling of Laffoy J.)
A Concluding Note

The route taken by the Fiscal Stability Treaty – that of a non-European Union Treaty capable of coming into force upon ratification by less than the full complement of all member states of the European Union - may represent the path to the future insofar as European integration is concerned. It appears the most potentially successful route of integration, since it gives no individual state a veto over the destiny of any country other than itself. If this model of integration is indeed again used, there will be two consequences. The first is that the European clauses of Article 29.4 in their present state will provide no constitutional protection for accession to any such treaty (as by definition it will not be an amending treaty capable of falling within the essential scope or objectives of existing treaties, to use the Crotty formula). The second (a corollary of the first) is that the future will then likely see further attempts to amend Article 29.4 in a manner similar to that seen in relation to the Fiscal Stability Treaty in what is now Article 29.4.10°. Indeed given the extent of the ongoing public discussion about the possibility of extending the current arrangements to encompass a banking, fiscal or even political union, even recourse to a ‘standard’ European Union amending treaty may mean we have not seen the final act in the ongoing drama provided by the European clauses in Ireland’s Constitution. In delivering the Supreme Court judgment in Crotty v. An Taoiseach, Finlay C.J. observed that if the aim of a form of European political union were ever achieved it would constitute an alteration in the essential scope and objectives of the treaties to which Ireland could not agree without an amendment of the Constitution. We live in times of change at European level sufficiently radical that the continued accuracy of this assertion may conceivably fall to be considered at some point in the not too distant future.179

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"Why Does Ireland Have All Those European Referendums?" - A Look at Article 29.4 of the Irish Constitution