

40 years since the First Enlargement

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Draft/ EU LAW AND IRELAND: ON THE MEASUREMENT OF LEGAL EVOLUTIONS THROUGH JUDICIAL ACTIVITY?

Dr. Elaine Fahey*

INTRODUCTION

The historical, economic and political changes occurring during four decades of Irish membership of the European Union (EU), do not form a linear account. The legal dimension of this evolving relationship of “Ireland within the EU” could be similarly depicted. Yet how to we know this? How can we accurately or appropriately measure the legal evolution of membership of the EU? At the cusp of forty years of membership of the EU, the Irish Supreme Court sent a particularly controversial preliminary reference to the Court of Justice on aspects of the EU financial crisis measures.¹ It marked the occurrence of somewhat over the sixtieth engagement by the Irish Courts with the Court of Justice in this way, after a veritable explosion of contact in the last decade by a wide range of Irish courts and tribunals preceded by three decades of minimalist interactions.² It also occurred shortly before Ireland would take over the Presidency of the EU at a time of considerable economic hardship and dependence upon its fellow Member States and occurred at a time where Ireland would be placed at the top of the latest Internal Market Scoreboard by the Commission on account of its perfect transposition scores of EU law, measured as a zero percentage deficit.³ The

* **Amsterdam Centre for European Law and Governance (ACELG)**. Email to E.L.Fahey@uva.nl. This paper develops ideas and updates statistics gathered for Fahey *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (Firstlaw: Dublin, 2007) and Fahey *EU Law in Ireland* (Clarus Press: Dublin, 2010), Ch. 1 in particular.

¹ Case 370/12 *Pringle v. Ireland* [2012] ECR I-000.

² At the time of writing, the total number of preliminary references from the Irish courts stood at 69 although the true figure must be adjusted for cases withdrawn, settled or joined.

³ European Commission, 15th Annual Internal Market Scoreboard, 26, 2013.

experience of the Irish legal order and the European project over forty years should be particularly distinctive, in view of the timing of its membership of the EU. The legal consequences of membership were well-known as regards their implications for domestic constitutionalism or at least “well advertised” in scholarship at that time, such as by former President Mary Robinson.⁴ Arguably, however, all accessions taking place after the enunciations of core legal doctrines of EU law can be branded with a similar brush. Yet membership for Ireland occurred at a time of economic and constitutional stagnation at domestic and European level. And membership would eventually see Ireland becoming, temporarily at least, a major economic success story in an enlarged Europe of immense regulatory powers and increasing geographical landmass and later the beneficiary of substantial EU solidarity in times of financial crisis.⁵ EU law would increasingly penetrate all public and private spheres. Ireland would join the Euro-zone, admit new Enlargement citizens as workers after 2004 unlike many other States but would also be part of a veritable separatist group, opting-out of the Schengen Area and availing of the complicated provisions of constitutional differentiation, often on account of its water borders and its relationship with the UK. Several referenda on treaties ranging from the Single European Act to the Fiscal Compact would see the Irish voters as the mostly singular popular “legitimation” of European Treaty developments, with two negative referendum results reversed by later successful polls to alter the earlier result. The genesis of the relationship between Ireland and Europe throughout this period is dramatic and one of change. The legal relationship is arguably then more complex to measure, in light of the peculiar *legal* measurements of judicial activity in EU law, more usually fixated upon preliminary references and caselaw in

⁴ See Robinson “The Irish European Communities Act, 1972” (1973) 10 *Common Market Law Review* 352.

⁵ See Laffan & O’Mahony *Ireland and the EU* (Palgrave: Basingstoke, 2008); Sweeney *The Celtic Tiger: Ireland’s Continuing Economic Miracle* (2nd ed., Oak Tree Press, 1999).

the national courts but not necessarily as a coherent whole, or not usually considered alongside data on direct actions, together with the Internal Market Scoreboard or not as fixated as political science with measurements of acceptance of judgments of the Court of Justice in national law and national courts. Similarly, the legal measurement of the judicial acceptance of EU law focusses upon caselaw less upon individual nuances of judicial appointments, the political engagement of the State in EU affairs or the relationship between Government political parties and their links to groupings in the European Parliament or their links to the Troika Presidency.

THE POLITICO-JUDICIAL CONTEXT

As a matter of law, the possession of a written Constitution which accords express powers of judicial review distinguishes the nature of the Irish legal order substantially from its closest common law counterpart in the EU, the UK. Nonetheless, the Irish judiciary remains overwhelmingly pro-communautaire to the present day and cooperative with core concepts of interactions between national and supranational legal orders more readily than amongst the British judiciary. Some reference, for example, the ease with which the Irish Supreme Court dealt with, for example, interim relief as to the operation of a statute in, which contrasts markedly with the constitutional crisis generated by as much in the UK.⁶ But this theme has a larger political context that is of significance. The relationship of the UK with the EU is often depicted as awkward or troubled, earning itself a reputation as the “EU’s trickiest customer.” This label is not however used by commentators referring to the Irish State when describing its EU credentials despite perhaps many reasons why it could or should be. As to

⁶ *Pesca Valentia Ltd. v. Minister for Fisheries* [1985] IR 193; *Case C-213/89 R. v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433; see Hogan & Whelan, *Ireland and the EU: Constitutional and Statutory Texts and Commentary* (Butterworths: Dublin, 1995).

policy, similar to the UK and throughout many decades of EU membership since accession, Irish concerns expressed in the lead in to the failed adoption of the Constitutional Treaty related to tax harmonization and some aspects of Justice and Home Affairs, and they continue now to be areas of sensitivity, although this position is rarely antagonistic and is usually rooted in the UK policy position. The failures of the Nice I and Lisbon I referenda have been portrayed in a variety of ways. Such portrayals, however, do not posit Euro-scepticism on the part of the Irish State or its people or relate it to Irish-British relations. There are some who suggest that the continued Irish support for British policies in European affairs during the UK Blair Government years was to the detriment of Ireland, at the expense of developing ongoing links and strategic alliances in policy and practices with Continental countries.⁷ Moreover, it was asserted that there had been a continual “drift” by Fianna Fáil, the political party in power continuously for over a decade initially with the Progressive Democrats and later with the Green Party, towards closer association with Britain, entailing that Ireland had become a veritable British satellite. Fianna Fáil only recently joined the Liberal Group in the European Parliament and has come under much criticism for the manner in which it has begun to operate within this political dynamic. Irish-European politics has manifestly not been at the heart of mainstream European politics prior to the most change of Government in Ireland. The current Irish Government led by Fine Gael holds the Troika Presidency of the EU in its complicated post-Lisbon format, which has had an agenda strikingly dominated by the resolution of domestic bank debts, demonstrating the challenges now of recalibrating Ireland within Europe.

⁷ See Fitzgerald “Irish Support for Blair was damaging to our interests” *The Irish Times* (31 October, 2009). Fitzgerald is a former (Fine Gael) Taoiseach (Prime Minister of Ireland).

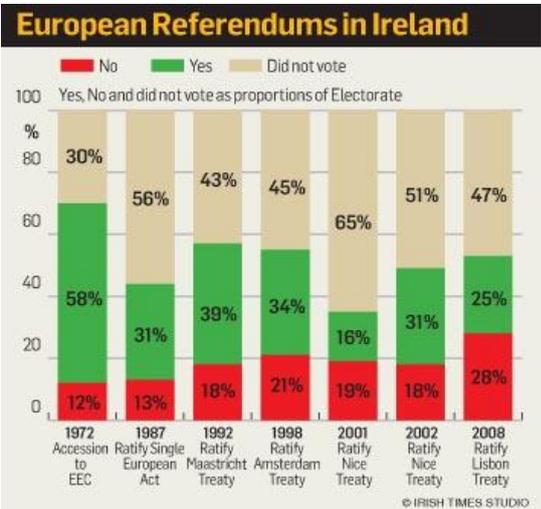
In more recent times, serious reservations expressed over Irish participation, for example in the European arrest warrant, are well-documented, on account of national sovereignty and its common law criminal justice legal order but were never developed further by the State.⁸ In the context of the former Third Pillar, prior to its destruction by the Treaty of Lisbon, Ireland did not accept the jurisdiction of the Court of Justice in certain instances and voluminous judgments, for example, have been delivered by the Irish Supreme Court as to the European arrest warrant, often raising serious substantive and procedural issues as a matter of EU law, in the absence of guidance from the Court of Justice. During the Treaty of Lisbon negotiations, the Irish Minister for Foreign Affairs came under pressure domestically not to opt-out of the Charter of Fundamental Rights and not to position Ireland strategically alongside the UK and Poland, where a more hard-line negotiating stance was apparent, which ultimately did not come to pass. However, the Treaty of Lisbon provided for a generous opt-out opt-in from certain AFSJ matters for Ireland. Ireland featured minimally in public discourse in the UK in recent times on the use of the UK permanent opt out from the AFSJ, despite its implications for the common law *acquis* on the area or the Common Travel Area, evidenced by the common tendency for Ireland to support the UK in direct actions and preliminary references before the Court of Justice.⁹ Nonetheless, Ireland appears to have opted-in since the Treaty of Lisbon to the vast majority of circumstances where it had the benefit of flexibility, without much legal fallout.

PEOPLE OVER PARLIAMENT? THE IRISH REFERENDA ON EUROPEAN AFFAIRS AND THE CONTEXT FOR JUDICIAL ACTIVITY

⁸ O' Mahony & Payne *Negotiating European Issues: National Strategies and Priorities* (OEUE Phase I Occasional Paper 1.2-11.03).

⁹ Albeit it did form part of the call for evidence from the House of Lords sub-committee investigating this question.

The constitutional provisions introduced by way of referendum in order to facilitate the Irish State’s participation in provisions of the Treaties of Amsterdam and Nice and now Lisbon respectively have entailed that there are aspects of membership of the EU that now are mediated through “flexible constitutionalism”, permitting the Oireachtas to sanction participation in diverse areas. Thus a pragmatic approach is adopted as to constitutionalism, providing for an alternative means of protecting sovereignty to a popular referendum, as is usual in other EU States.



Source: *The Irish Times* 27 June, 2008

However, the Supreme Court decision in *Crotty v. An Taoiseach*¹⁰ has entailed that a referendum on European Treaty ratification has been held consistently since that decision, which decided that a Treaty had to be submitted by referendum to the people where a proposed Treaty altered the scope and objectives of the Union such that the initial popular consent to EU membership had been exceeded. The unsuccessful Nice I and Lisbon I referenda aside, the Irish electorate has been broadly in favour of the EU according to

¹⁰ *Crotty v. An Taoiseach* [1987] IR 713.

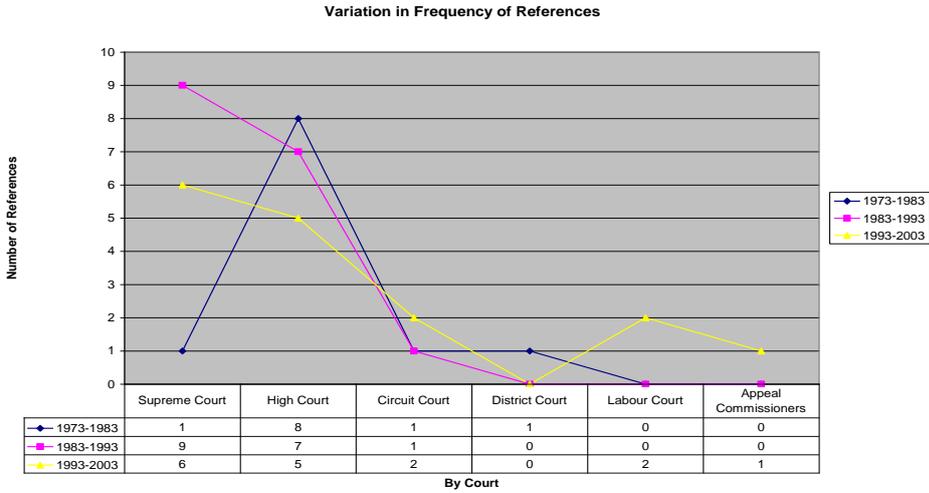
decades of Eurobarometer polls, unlike the British electorate.¹¹ The Third Amendment to the Constitution Bill put to the people so as to accede to the European Economic Community, as it then was, was passed by plebiscite in 1972 by 1,041,890 votes (82.4% of the voting electorate) in favour of the amendment, 211,891 against. The Treaty of Maastricht was passed by 68.7% of the electorate) in 1993, the Treaty of Amsterdam was passed by 61.7% of the voting electorate), the Treaty of Nice was passed on a 2nd successful attempt (the first referendum being unsuccessful) by 63% of the voting electorate.¹² The first Treaty of Lisbon referendum was rejected by 53.4% of the population (862,415) where the turnout was 53.1% (1,614,866), thereby precipitating a constitutional crisis of sorts at national and European level. In the second referendum, the people voted in favour of the Treaty by a final margin of 67.1% to 32.9% (1,816,098 turnout equating to 58% turnout). A high turnout in European-related referenda has been equated with the success thereof until the first failed Treaty of Lisbon referendum.¹³ Most recently, the European Fiscal Compact Treaty was approved in 2012 by a 50% electoral turnout, with 60.3% in favour and 39.3% against. Thus the most recent referenda have challenged common beliefs and perceptions as to Irish-European relations.

¹¹Hogan & Whyte Kelly: *The Irish Constitution* (4th ed., Lexis-Nexis, 2003) para 5.3.45 *et seq*; Hourihane ed. *Ireland and the EU: The First Thirty Years 1973-2002* (Lilliput, 2003) and Costello "Peoples' Vengeances: Ireland's Nice Referenda" (2005) 1 *European Constitutional Law Review* 357.

¹² See also Hourihane ed. *Ireland and the EU: The First Thirty Years 1973-2002* (Lilliput, 2003) and O'Mahony "The Irish Referendum Experience" (1998) 35 *Representation* 225.

¹³Sinnott and Quinlan 'Soft Supporters of the EU need to be inspired to vote Yes to Lisbon Treaty' *The Irish Times*, (30 January, 2008).

LITIGATION STATISTICS ON EU LAW: MEASURING JUDICIAL ACTIVITY



Source: Fahey *Practice and Procedure in Preliminary References to Europe: 30 Years of Article 234 EC Case Law from the Irish Courts* (Firstlaw: Dublin, 2007).

Low rates of preliminary references from the Irish courts (specifically over a thirty year period from the date of accession there were in excess of 40 references), low participation rates as interveners in litigation before the Court of Justice by the Irish State in the same period and a relatively poor compliance rate by the State with implementation of internal market legislation,¹⁴ until recently, have cumulatively characterized Ireland as litigator at European level. The author’s study of this considered the time period from 1973-2003, ie the first three decades of membership, indicated the lowest rate of referral across Member States, considering a diversity of factors including the latter statistics. However, referral and transposition numbers alone do not tell the full story. The last decade has witnessed a dramatic reversal of figures and a very specific engagement by the Supreme Court with the Court of Justice, including references relating to the financial crisis and the impact of the Charter of Fundamental Rights. There appears to be a significant reduction in the number of

¹⁴ Except close to its last Presidency of the EU.

cases where Ireland makes interventions, possibly as a cost-reduction measure. The Irish initiation of litigation as to European issues where it has been outvoted at Council level has been exceptional and miniscule. While it is possible for small Member States in the EU to “punch above their weight” politically, as a matter of policy, Ireland has excluded itself from key EU policies on account of Irish-British relations, for example, as to the Schengen Agreement and the Area of Freedom, Security and Justice (AFSJ). The failure of the State to employ litigation so as to gain influence or to contribute to policy areas from which it is excluded is then notable, instead leaving the UK to exercise a more dominant role in this regard, for example, as to Schengen in recent times. Ultimately, Ireland may not sit well in theoretical terms as regards its exercise of policy preferences in a multi-speed Europe, saying “yes” to Euro-membership and Charter of Fundamental Rights and “no” (to a degree) to Schengen and the AFSJ but it remains more complex to assess in the area of litigation or via an assessment of the relationship between the Court of Justice and its national interlocutors.

Since the composition of the Keane, Murray and Denham Supreme Courts in the early years of the twenty-first century, the Supreme Court has made considerably more preliminary references than the High Court. This alters a trend developing over several decades, whereby the High Court was largely the main referral body in the Irish legal order which could be explained by the presence of three former members of the Court of Justice on the Supreme Court and thereby bringing a wealth of experience to the Supreme Court. This might also, however, be a reason for a reduction in the number of references, on the basis of an adequacy of knowledge within the Court to determine the outcome of proceedings. On the other hand, the Supreme Court, historically, has not had a positive

influence on EU affairs in Ireland, prior to the Keane and Murray Supreme Courts, at least. The legacy of the decision of the Supreme Court in *Crotty v An Taoiseach* from the late 1980s remains a legal and political noose on the nation as regards EU Treaty ratification, which has yet to receive a re-examination by way of challenge to its precedential status. Later, in the mid-1990s, the Supreme Court authorised the legislature to implement EU law by means of secondary or delegated legislation and, since then, the legislature has used secondary legislation frequently to implement important EU legislation, such as the Unfair Consumer Contract Terms Directive or, more recently, the Citizens Rights Directive. Also, the legislature has given unto itself extraordinary powers to implement EU law by way of delegated legislation in the European Communities Act 2007, while only adopting a minimalist role to its new far-reaching obligations in the Treaty of Lisbon. Moreover, the legislature has mis-implemented EU law frequently since accession, the most recent and high-profile example of this being the European arrest warrant, while other examples include the Commercial Agents Directive. The national courts have responded patchily to the actions or inaction of the Irish legislature. As a result, litigants and society at large are adversely affected by such actions or inaction of the legislature. This has had a major bearing upon the operation of EU law in Ireland. The Irish presidency in 2013 has seen a tremendously active stance on the part of the legislature to embrace its functions under the Treaty of Lisbon. The extent to which this will evolve into a more meaningful engagement with European affairs remains to be seen.

CONCLUSION

The genesis of EU law in the Irish courts from 1973 to the present day is far from a linear account, similar to the relationship of Ireland with the EU. As a matter of politics, the

relationship of the State with the EU has a particularly curious legal and political link to the UK. The policy preferences exercised by the Irish State as a small-sized and geographically peripheral State are often difficult to place in theoretical terms. The challenges posed by a written constitution and the sovereign values protected therein form a small, but not necessarily significant, factor in the account of Irish-European relations over a forty year period. This is allied to the fact that certain institutional actors in Ireland have played a disappointing role in EU affairs generally, which has an impact on any cumulative assessment conducted. In many respects, a description of EU law in the Irish legal order over a period of forty years contains many surprising elements. For a jurisdiction joining the then EEC in the midst of economic depression worldwide as well as “EU-sclerosis” and at a time after the enunciation of landmark legal doctrines, it is particularly remarkable that Ireland joined the Community simultaneously with the UK and Denmark, both of which would become the “trickiest” members of the Union in their own way, unlike Ireland, yet with which Ireland would exercise certain common policy preferences. Moreover, Ireland would become a major net beneficiary of EU funds and would then proceed to experience temporarily extraordinary economic growth, followed by a need for significant EU financial assistance in the midst of a very serious domestic economic downturn. The experience of two fractious referenda on the Treaty of Lisbon more recently, the most serious and challenging of all the referenda campaigns held as to European treaties since 1987 in Ireland, affords further reason for reflection at this point in time and the position that EU affairs reached in Irish society during this particular period is worthy of critical assessment. Frequently, the metaphor of the “incoming tide” is employed in the UK to describe the reception of EU law in that jurisdiction, the metaphor having its origins in a colourful judgment of the late Lord Denning. There is no similar metaphor that one can employ

to describe the reception and operation of EU law in Ireland, itself a telling indication of the comfortable zone in which matters European have travelled in Ireland. However, the account of the state of judicial activity in this period through data may not adequately reflect this journey alone.