
Shared Economic Sovereignty: Beneficial or Not and Who Decides?

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The shattering of neoliberal illusions has fostered the insight that the financial markets – indeed, more generally, the functional systems of world society whose influence permeates national boundaries – are giving rise to problems that individual states, or coalitions of states, are no longer able to master... the international community of states must develop into a cosmopolitan community of states and world citizens.

(Habermas, 2012, p. xi).

Man is a social animal who defines himself in his relationship with others. Interdependence is intrinsic to our being – between people, nations, polities of all kinds. What we strive against is not interdependence, but inequalities in our relationships, domination of one by another.

(Irish Times, 2013).

I Introduction

The focus of this paper is on two specific questions. First does entering into international treaties enhance effective freedom of action for a government and if so promote the sovereign or greatest good? Second with whom does the decision to enter such agreements reside, the government of the day or the electorate via a referendum? I will argue in relation to the first question that international treaties can, and very often do, substantially enhance the sovereign good of each participating state. I will also argue, following *Pringle* (Supreme Court, 2012) in particular, that the signing of such treaties is wholly within the rights of the elected government of the day, subject to the proviso that any further extension of the *objectives* of the treaty in question must come back for approval by the Irish government.

My interest in such matters arises from *part* of a Supreme Court Judgment in 1987 (hereafter referred to as *Crotty*) and the implications of this Judgment, in particular for economic management at a European level. This is the subject matter of Section II. Following this the main part of the paper, Section III, will examine the issue of economic sovereignty, especially in the context of significant spill-over effects (negative and positive) between nations. Immanuel Kant over 250 years ago talked about the need to restrict some individual freedoms to ensure a greater collective freedom and hence common good. So it is with nations I will argue, thereby providing the rationale for all types of international agreements, but especially in the economic/ financial domains.

The key issue looked at in Section IV is the extent to which the government of the day can take the decision to enter such agreements/treaties without recourse to a *mandatory* referendum. This depends crucially on how various clauses in the Irish Constitution related to sovereignty are interpreted. The discussion on this started with *Crotty* in 1987 and was only resumed to a significant extent in *Pringle* 2012. It is with the latter that Section IV is concerned and following this Section V concludes the paper.

II Background: Crotty Judgement and Sovereignty

The Supreme Court Judgment in the Crotty (1987) case with regard to its interpretation of sovereignty appears to have caused shock waves at the time and has reverberated on Irish political life since.¹

In particular the recommendations of many Attorneys General have been to advise the government of the day that a referendum *had* to be held on almost every EU Treaty change even if the current interpretation of economic sovereignty, which I will address below, suggests that many of these Treaty changes were in fact sovereignty-enhancing (not diminishing) for the Irish state and its people.² This in my opinion had three potentially very serious consequences.

First, it means that Ireland's veto in relation to EU Treaty changes, which gives us the 'power' if necessary to block the wishes of 26 other democratically-elected legislatures (representing 99 per cent of the EU population), had to be exercised not through the democratically-elected Irish Parliament but via the vagaries of what was perceived as a *mandatory* popular referendum, the outcome of which has sometimes little to do with the question on the ballot paper.

Second, the implication of this is that Ireland could have exited the euro zone or indeed the EU, almost by default, even though over four-fifths or even more of our democratically-elected representatives did not wish this outcome.

Third, this may have seriously constrained necessary and often urgent developments at an EU level, as in the case of the euro zone crisis. How often have we heard that part of the 'problem' is that some change may have to be put to a referendum in Ireland?³ In other words the power of the veto, when it is exercised through referenda, could threaten the basis of the financial stability that Ireland and the rest of the euro zone so badly need if the sovereign good in each member state, including Ireland, is to be protected and in a timely manner.

Given the consequences outlined above it is surprising perhaps that the *Crotty* decision relating to sovereignty could not have been explicitly revisited until *Pringle* (Supreme Court, 2012). This is especially so given three factors. First the relevant part of the *Crotty* Judgment was opposed by two of the five judges at the time and the approach adopted in it had prior to the appeal been rejected in the High Court. Second, the judgment in question has been challenged subsequently by many legal experts, some vehemently so (see Barrett, 2009, and references

1 It is only this part of the judgment that is of concern for the later discussion.

2 The application of *Crotty* has given rise to eight Referenda on six different European Treaties. The reasons why a referendum is deemed to be necessary by an Attorney General are never made public and as such this does not help in the issues being discussed in this paper (Barrett, 2012).

3 For example, most recently it was stated that treaty change to deal with the euro crisis is 'fraught with political landmines in several countries' arising in particular from the perceived need to hold referenda in France and Ireland (Spiegel and Peel, 2013).

therein, and Sutherland, 1988 and 2013). Third, the intervening years have seen major changes in global and EU integration, leading to a reassessment of the concept of sovereignty, by both economists and more recently by lawyers concerned with international economic law.

The *Crotty* Judgment though was revisited in *Pringle* and at some length. This has led to a belief by some that a more nuanced interpretation of the meaning of sovereignty has now emerged, a topic I will return later in the paper.

III Economic Sovereignty

Spill-over Effects in Economics⁴

The German philosopher Immanuel Kant (1724-1804) of course never used the term spill-over effect beloved of economists but in fact this is what he was implicitly referring to in his writings over two centuries ago. He held that the state given these implicit spill-over effects is not an impediment to freedom but is the means by which freedom is secured.

State action that is a hindrance to freedom can, when properly directed, support and maintain freedom if the state action is aimed at hindering actions which themselves would hinder the freedom of others.

He argued further that

Given a subject's action that would limit the freedom of another subject, the state may hinder the first subject to defend the second by "hindering a hindrance to freedom". Such state coercion is compatible with the maximal freedom demanded in the principle of right because it does not reduce freedom but instead provides the necessary background conditions needed to secure freedom.

(See *Stanford Encyclopedia of Philosophy*, 2012).

All that is left for me to do is to put this argument in a modern economics setting and crucially to extend its logic, in the context of a heavily globalised world, to nations.

It has been clear for a long time that individuals by co-operating enhance not diminish their freedom of action. Let us take the simplest example of all, a stop sign or traffic light. As individuals we cannot drive as we wish without endangering the lives of others and vice versa. As such we pool decision making to avoid what economists call spill-over effects, namely the

⁴ This section draws heavily on O'Hagan (2013).

consequences for the individual of other peoples' actions and likewise the consequences for them of that person's actions.⁵

In these circumstances we do not cede individual freedom of action as Kant states, because without this pooling of decision-making we would not be able in the first place to risk driving on the roads and hence the counterfactual to not pooling decision-making is in fact an almost total loss of individual freedom compared to what results from such sharing of common rules. As Vattel (1916) over a hundred years ago put it more eloquently and in a more general context.

*The end of the natural society established among men in general is that they should mutually assist one another to advance their own perfection and that of their condition; and Nations, too, since they may be required as so many free persons living together in a state of nature, are bound mutually to advance this human society.*⁶

(Quoted in Raustiala, 2003, pp 845-46).

And so as correctly noted by Vattel, it is with nations, unless we wish to pursue a policy of total autarky, or self-sufficiency, in economic terms.⁷ But even here we are not protected from the actions of other countries. We cannot stop the wind blowing harmful particles across the Irish sea; we cannot counteract the fact that rogue states, criminals, illegal immigrants and terrorists do not respect national boundaries and hence that their activity is international in nature; we cannot prevent the adverse consequences of the actions of others generating global warming; and without extreme restrictions on the freedoms of our own citizens we cannot cut ourselves off from 'interference' via electronic means and satellites from the ideas and influence of others outside our shores.

A policy of total economic autarky of course has never been pursued in Ireland, even in the 1930s. The Irish economy would revert to the economic conditions of the middle ages in months without imported energy supplies and other vital imports such as steel and machinery. If we want for example to go on any trips outside Ireland we must be able to pay for them by earning money via other means from these countries. The lessons of the 1930s demonstrated that a policy of even limited autarky leads nowhere and that Ireland must engage in the international economy if living standards are not to revert to some dark age of a millennium or more ago.

5 Spill-over effects can be both negative *and* positive (for example a neighbour with a nice garden) but the emphasis for the purposes of this paper is on the negative.

6 A similar sentiment was expressed thousands of years prior to this when Socrates (469-399 B.C.) declared that he was 'not an Athenian nor a Greek, but a citizen of the world'.

7 Much further back, Isocrates (436-338 BC) addressed the same issue but with a rather different objective, namely his dominant political idea to form a confederation of Greek city states to wage war on Persia. To bring about the 'concord' for such a union he noted that 'concord doesn't only suppose that one doesn't encroach on the others' freedom, but that one accepts a number of restrictions for a general advantage' (see Romilly, 1992, p. 10).

However, just with for example football, if we want to participate in the international game we must have common rules of engagement: imagine for example the chaos of two football teams adopting different rules with regard to off-side, permissible tackles, use of the hand, and/or number of players allowed. We need also common rules with regard to transfer of players, pitch size and markings, stadium safety, choice of referee, shirt colours and markings, and so on. The FAI in this instance pools its decision making with others, for the benefit of all; the alternative is no international football at all.

And so it is with the 'game' of international economic exchange. We need agreed rules with regard to freedom of movement of goods, services, capital and people.⁸ Such a game can take place without a common currency, but exchange rate instability and currency wars can often make the adoption of a common currency a necessary condition for the smooth functioning of exchange between countries. A small country in particular usually has to join such a currency union, de jure as with Ireland and the euro, or de facto as with sterling prior to 1979.

Once adopted though, a common currency can impose spill-over effects on others without the imposition of commonly-agreed rules. Just like we need agreement on traffic light colours and rules for individuals, we need commonly agreed rules in a currency union to prevent spill-over and contagion from one country to another, be it Ireland or some other member country of the currency union. The logic is almost identical.

Without such commonly-agreed rules as Kant stated we *cede* not gain freedom of action. The alternative is chaos in the currency union, the possible break-up of the union and the return to the vagaries of international financial markets. Relying on financial markets and the assessments of rating agencies too involves a significant loss of freedom of action.⁹ Too often the counterfactual in this debate is the myth of some self-regulating alternative, free from all external surveillance or control. In reality freedom of action can be hugely curtailed unless a country observes the conditions that the international financial market place dictates. These diktats are often only implicit and the withdrawal of funding at acceptable rates of interest consequent on breach of the relevant rules immediate and with little warning.

Every action with another person or outside agency involves interdependency. If you borrow from a bank or friend you must meet the conditions of that borrowing and the creditor takes the risk that you may renege on the loan thereby creating for both parties some interdependency. There is an unavoidable interdependency between an individual and his/her closest neighbours: what you do has an impact on them and vice versa. The individual is not free for example to burn rubbish in his/her garden. This is to protect a much more important

8 For a classic case study of the benefits of internationally-agreed rules for business, see *Economist* (2013).

9 See Donovan and Mottiar (2012) for a salutary warning that while the return to financial markets in Ireland may involve less explicit loss of self-determination but perhaps just as much implicit control than as with the Troika.

freedom, namely the freedom to enjoy the pleasure of his/her back garden free from severely polluting smoke fumes.

Thus the notion of individual or state absolute self government is a mirage. It is simply a question of the degree of self-government that your situation allows without running the risk of significant two-way negative spill-over effects.

Thus pooled government decision-making can very often be much superior in terms of benefits to all of personal or individual state decision making. The crucial question of course is when this is the case. What we know for certain is that the greater the interdependency between nations the more this will apply.

Interpretation of Economic Sovereignty by Lawyers

In most cases there will be little point in asking if a State is sovereign, or if a particular act or situation is compatible with the sovereignty of the State. The question will be... does this action or situation deprive the State of any practical freedom of action to which it is legally entitled. These questions can be asked, and answered, without using the term 'sovereignty'.

(Lowe, 2008, p 80, p. 82)

There is much dispute about the definition of sovereignty in legal circles (see for example Raustiala, 2003, Brown and Wells, 2008, Jackson, 2008, Lowe, 2008, and Shan et al, 2008). The traditional Westphalian concept of sovereignty as 'the monopoly of power' for the nation state or sovereign probably never existed in reality but even if it ever did its time has long since passed. Others quoted in above references relate sovereignty to the principle of non-interference on the nation-state level, although as alluded to above such a degree of sovereignty can never exist. Others have suggested the complete elimination of the concept of sovereignty as it has no real meaning in a globalised, interdependent world.

As such, John H. Jackson, one of the leading legal authorities in the world on the issue,¹⁰ invites us to think of sovereignty in *relative* terms, in the context of the proper allocation of government legal decision-making powers. Where decision making is made at a higher level than the nation state and is done so because it promotes the sovereign good in so doing, then there is in his opinion no breach of sovereignty. As he states:

To cope with the challenges of instant communication, and faster and cheaper transportation, combined with weapons of vast and/or mass destruction, the world will have to develop something considerably better than either the historical and discredited Westphalian concept of sovereignty, or the current, but highly criticized, versions of sovereignty still often articulated.

(Jackson, 2008, p. 25).

Clearly the answer to the question of where decisions should be made, without infringing this concept of relative sovereignty, will differ with different circumstances. In the case of small road repairs or commercial rates the decision may be best made at local government level in Ireland in fact; educational standards and budget allocations at national level; and food safety standards, and the rules in general for an integrated European market that works in a way that creates more wealth for Europeans, at an EU or euro zone level. This is at the heart of the principle of subsidiarity used in the EU: the idea of keeping decisions as close to the people as possible. One of the greatest barriers to this though is the existence of the spill-over effects discussed above.¹¹

Thus in deciding whether or not to proceed with some international treaty the key issue is does it enhance or diminish a state's practical *overall* freedom of action to enhance the well-being of people in that nation, namely the sovereign good? In other words as pointed out in the Lowe¹² quotation above, it is the balance of practical, realistic implications of the decision not the decision per se that matters.

Sovereignty-enhancing Arguments for International Institutions

Perhaps the best recent illustration of the sovereignty-enhancing argument in the legal literature can be found in Raustiala (2003),¹³ in what is a *tour de force* in terms of coverage, discussion and elucidation of the material covered in a large literature relating to this topic.

International institutions such as those of the EU face three criticisms he argues, the threat they pose to sovereignty, their lack of accountability and legitimacy and a democratic deficit in governance. These charges are distinct, albeit related.¹⁴ As such, I wish only to consider the first of these issues, namely are international institutions of the EU overall sovereignty-enhancing?

Raustiala takes up the concept of sovereignty as espoused by Jackson, namely that sovereignty reduces to what level – global, regional, national, sub-national – the power to decide ought to be vested. Thus the correct balance between for example local and central government is just as much a policy issue as that between the national government and international institutions. So the real issue then is whether or not the pooling of decision-making for a nation is worthwhile in terms of promoting the sovereign good?

11 Related to the *vertical* separation of powers discussed above, Jackson (2008) also talks about the *horizontal* allocation of power in a country, whereby the judiciary and the central bank for example can act independently of the legislature and in fact are expressly mandated to so do for the sovereign good. Thus the debate is not confined solely to external relations but this issue is outside the confines of the present paper.

12 QC and Chichele Professor of Public International Law at the University of Oxford.

13 Professor UCLA School of Law and Program on Global Studies.

14 Such issues as he rightly points out arise at national level also. For example, Central Banks and the judiciary are not accountable under any democratic mechanism, by design, in their delegated spheres of influence. p. 866)

In relation then to the sovereignty-strengthening argument of such pooling of decision making, he quotes extensively from two leading proponents of this concept

The largest and most powerful states can sometimes get their way through sheer exertion of will, but even they cannot achieve their principal purposes – security, economic well-being, and a decent level of amenity for their citizen – without help and cooperation of many other participants in the system.... It is (clear) that, for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in good standing in the regimes that make up the substance of international life.

(Chayes¹⁵ and Chayes, 1995, p. 27, quoted in Raustiala, 2003, p. 858)

The logic of this argument is that international institutions, especially at EU level, are in fact the medium through which economic freedom is created or practised rather than a restraint upon it. Indeed, without entering into international agreements then the Government in fact could be failing to discharge its responsibility to protect the sovereign good.

IV Sovereignty Enhancing: Who Decides?

The issues in relation to sovereignty raised in *Crotty* were considered at some depth in *Pringle* (Supreme Court, 2012). The Judgments by Clarke J. and O'Donnell J. in *Pringle* are of particular interest as they both address the issue of sovereignty and their interpretation of this term as expressed in the Constitution. Both show a keen awareness of the issues raised above, in particular the difficulties of defining the term in the context of an increasingly globalised world and both provide pragmatic and balanced discussions on the issue. As such, it is possible that the need for a *mandatory* referendum to ratify future EU treaty changes has been considerably lessened, with reliance instead to be placed much more on the democratically-elected Irish Parliament in deciding such matters.¹⁶

Neither judge is in any doubt that the Irish government has the power to ratify international treaties, including those at an EU level, without recourse to a referendum.

The overall position is quite clear. The Government enjoys a wide discretion, under Art. 29.4, to enter into international treaties subject only to the obligation to obtain the approval of the Dáil, if there is a commitment to financial expenditure, or that of the Oireachtas, if it is considered necessary to change domestic Irish law so as to comply with obligations undertaken by the treaty concerned. (Clarke J. 4.25)

15 Former President of the *Harvard Law Review*.

16 This is a view with which Regan (2013) and Sutherland (2013) concur. For example both judges argue that the *Crotty* Judgment did not consider the move to majority voting on many issues, and hence the loss of Ireland's veto power in these cases, to be in breach of the Constitution. This O'Donnell J. uses to indicate the over-simplistic interpretation of aspects of the *Crotty* Judgment.

Clarke J. then articulates the key limit to such discretion.

The limit on the discretion which the Government holds arises where the relevant treaty involves Ireland in committing itself to undefined policies not specified in the treaty and in circumstances where those policies, which Ireland will be required to support, are to be determined not by the Government but by institutions or bodies specified in the treaty. (Clarke J. 4.25)

The key issue then is when this point is reached and that of course leaves much room for discussion and hence uncertainty. O'Donnell argues for example in relation to *Crotty* that 'the issue which divided the Court was not whether the creation of a European wide foreign policy (the key area of dispute, under Title III of the SEA) would be an alienation of Irish sovereignty, but rather whether such a development had occurred' (13).

The wording in Clarke J. is clear, though, it must involve a commitment to *undefined* policies *and* where such policies subsequently are to be determined not by the Government. The corollary of this then seems clear: where policies arising from the Treaty change are defined there is no need for a referendum. There is also possibly no need for a referendum even where there are commitments to undefined policies but where the ultimate decision on these undefined policies must have the subsequent approval of the Irish parliament.

It seems to me that because of the much more nuanced discussions in both Clarke J. and O'Donnell J. that the boundary has been pushed out significantly and that the discretion of the Government to commit to international treaties is a lot more expansive than previously thought. As Clarke J. states, 'Very many international treaties involve an acceptance, at the level of international law, that Contracting States will be bound by certain obligations' (4.26). He went on to argue that 'there are many circumstances in which both the Government and the Oireachtas may come under significant *practical political pressure* (my italics), either domestically or internationally, to adopt certain measures. That is the way of the world' (5.15)

O'Donnell J. argues forcefully also in a similar vein:

It is indeed in the nature of international relations, and expressly contemplated by the Constitution, that states will make treaties, enter into trade agreements, form alliances, join groups and assist in the setting up of international bodies with agreed mandates and which on occasion may have adjudicative functions.... It is the decision to enter into an agreement or alliance which is the exercise of sovereignty. (O'Donnell, J. 14)

He also makes the important point, which arises in relation to Article 6 of the Constitution, namely why is it that the Power of the People is invoked so much in relation to EU treaties but not to other areas of vital national interest, as discussed earlier.

As a matter of history, Irish Governments have expended very considerable sums indeed in, for example, the education and health sectors, pursuant to departmental circulars, and without even the benefit of legislation still less the approval of the People in referenda. In more recent times, Governments have made decisions involving both the expenditure and borrowing of enormous sums of money. In none of these cases has it been suggested that the approval of the People in a referendum is required. Under the Constitution, Governments are expected, and required, to make decisions which on occasion may be momentous, including indeed the declaration of war, albeit in that case with the agreement of Dáil Éireann. (O'Donnell J. 21)

Indeed if too narrow an interpretation of Article 6 applied then we would end up with a wholly plebiscitary and not a representative democracy. In a representative democracy the powers vested in the government *does* derive from the people but through elections where each and every person has an equal right to vote. Nowhere can I see that Article 6 must be interpreted as this power *having* to derive from a direct plebiscite. That it appears to me to apply only in the case of a change to the text of the Constitution.

V Concluding Comments

To summarise, the key messages of this paper might be posited as follows.

- There is little doubt that by entering into international agreements/treaties the state potentially enhances not diminishes its freedom of action in pursuit of the sovereign good
- It is also clear that sovereign power or freedom of action is one of degree only, depending on the size of a country and its interdependency with the international economy.
- For a small country like Ireland very often international treaties can greatly enhance the state's freedom of action, especially vis-a-vis the larger economic powers.
- A small country in particular usually has to join a currency union, de jure as with Ireland and the euro, or de facto as with sterling prior to 1979. In the case of the former though Ireland has a position and hence a voice on the Board of the ECB.
- The *Pringle* Judgment has made it clear that the democratically-elected government of the day has the right to enter into such agreements without recourse to a *mandatory* referendum.
- Too narrow an interpretation of the Constitution could in fact require the government of the day to hold a referendum on all major expenditure and taxation decisions and any international agreement, bilateral or otherwise, it wanted to enter into.
- It appears that in the light of greatly increased globalisation in particular a much too restrictive interpretation of Crotty had applied in the past, something that had put at risk Ireland's involvement in the European Union, with potentially very serious economic consequences. It also may have acted as a brake on necessary European action, especially in dealing with the currency crisis.
- As such, in future where judicial activism with such major political and economic

consequences as with aspects of *Crotty* has to be exercised, the Supreme Court should perhaps have to take more account of the sovereign good as expressed by the views of the democratically-elected body politic and consider the views of other experts.¹⁷

- By all means let the Government call *voluntary* referenda from time to time, not just in relation to EU treaties but also in relation to other major economic decisions. Such referenda though should *not* be mandatory except where there is an unambiguous conflict with the Constitution

We should not forget the ideals underlying Irish entry into the EU over forty years ago and expressed in the White Paper of 1972 on EEC membership. While this perhaps overstates the case and does not address the major accountability and democratic-deficit problems that can result from such international agreements, it does capture the spirit and essence of the benefits that international agreements can confer on a small country like Ireland.

Membership of the European Communities will afford an unprecedented opportunity to liberate ourselves from the present limitations on the exercise of our sovereignty... We see membership as an expansion of our sovereignty, of that power to make choices and take decisions in our own interest.

(1972 White Paper on EEC membership, quoted in Cox, 2013)

It also reminds us that no matter what the current difficulties in the euro zone we should never lose sight of the goal of international co-operation and integration, namely dealing with the inevitable huge interdependency between nations in the modern world. This interdependency, not just in the economics/finance area but also in terms of climate change, illegal immigration and trafficking of people, and most seriously the threat of terrorism or military aggression, will not go away by abandoning the ideal of extensive European co-operation. To do so would be as delusional as abandoning democracy because it has deficiencies. All systems have defects and the challenge as with democracies is not to abandon them for some even more flawed systems but to make good these deficiencies as best possible.

¹⁷ Indeed one of the Supreme Court judges took this very position as his reason for rejecting the appeal which was the basis of the *Crotty* case (see Cox, 2013). This leads to the question raised by the Minister for Justice earlier this year (Shatter 2013), namely should the possibility of a system be considered that would allow the Supreme Court to revisit decisions where new information, not available or considered at the time of the original decision, becomes available subsequently.

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