

# CHAPTER 7

## Judges and Political Processes

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### Comprehension and Analysis: Test Yourself

1. Can you identify the clause expressly ousting the jurisdiction of the courts in Art 15.13 and, with reference to the case law, speak to the relevance of the absence of an express ouster clause in Art 15.10?
2. Can you explain the constitutional functions of the Oireachtas as envisaged by different judges through the relevant case law and how different understandings of those functions might inform different approaches to judicial interference with the exercise by the Oireachtas of its constitutional functions?
3. Can you speak to the relevance of the fact that the applicants in *Abbeylara* had been compelled to attend an Oireachtas committee hearing, whereas the applicant in *Kerins v McGuinness* had not been compelled to attend, but rather had merely accepted an invitation to do so? Can you explain the different approaches taken to this question in *Kerins* by the Divisional High Court and by the Supreme Court, respectively?

### Useful Readings

Nial Fennelly, ‘The Courts and the Doctrine of the Separation of Powers in the Irish Constitution’ in *Judicial Power in Ireland* (Eoin Carolan ed, Institute of Public Administration, Dublin, 2018)

David Prendergast, ‘Article 16 of the Irish Constitution and Judicial Review of Electoral Processes’ in *Judges, Politics and the Irish Constitution* (Laura Cahillane, James Gallen and Tom Hickey ed, Manchester University Press, Manchester, 2017)

Tom Hickey, ‘Judges and the Political Organs of Government in Irish Constitutional Law’ in *The Oxford Handbook of Irish Politics* (David Farrell and Niamh Hardiman ed, Oxford University Press, Oxford, forthcoming, 2020)

Lia O’Hegarty, ‘The Constitutional Parameters of the Work of the Houses’ in *The Houses of the Oireachtas: Parliament in Ireland* (Muiris MacCarthaigh and Maurice Manning ed, Institute of Public Administration, Dublin, 2010)

Brian Murray, 'Judicial Review of Parliamentary Proceedings and Procedures under the Irish Constitution' in *The Irish Constitution: Governance and Values* (Eoin Carolan and Oran Doyle ed, Round Hall, Dublin, 2008)

### Five Key Cases

- *Maguire v Ardagh* [2002] 1 IR 385 (known as *Abbeylara*)
- *McCrystal v Minister for Children* [2012] 2 IR 726
- *Callely v Moylan* [2014] 4 IR 112
- *Kerins v McGuinness* [2019] IESC 11
- *O'Brien v Clerk of Dáil Éireann* [2019] IESC 12

### I. Introduction

[7-01] Where chapter 6 considers the political structure of government as the Constitution envisages it and as its component parts – the executive and the legislature – operate in political practice, this chapter considers how constitutional law regulates certain political processes. It looks at how constitutional norms, as they have been understood and applied in particular cases by the judicial arm of government, empower and constrain the political arms of government. It is thus ancillary to chapter 6, taking a more case law-focused approach to questions concerning the Constitution as it bears on the political structure of government.<sup>1</sup>

[7-02] The chapter is in five sections, including this Introduction. Section II deals with a line of cases in which judges ruled on the scope of the powers of the Oireachtas (parliament). The main case here is that commonly referred to as *Abbeylara*, handed down by the Supreme Court in 2002.<sup>2</sup> In that case, by a 5–2 majority, the judges determined that the Oireachtas did not have an inherent power under the Constitution to carry out an inquiry that might have made findings of fact adverse to the good names of individual gardaí who had brought the case. Section III deals with two related cases in which the Supreme Court handed down judgments in 2019: *Kerins v McGuinness*, which arose following the experience of Angela Kerins, then chief executive of the Rehab Group, at the Dáil Public Accounts Committee (PAC) in early 2014, and *O'Brien v Clerk of Dáil Éireann*, which emerged following a series of statements made by two TDs on the floor of the Dáil in 2015 concerning the banking affairs of the businessperson Denis O'Brien.<sup>3</sup>

[7-03] Section IV turns from judicial rulings on the powers of the Oireachtas to judicial rulings on the powers of Government. In this chapter we deal specifically with the powers of Government in respect to the running of referendum campaigns, focusing in particular on *McKenna v An Taoiseach (No 2)* and *McCrystal v Minister for Children*.<sup>4</sup> We should point out that certain important judgments concerning the powers of Government are left

<sup>1</sup> This chapter also complements, and indeed interacts with, each of the chapters dealing with the individual branches of government: chapter 8 on legislative power, chapter 9 on executive power, and chapter 10 on judicial power.

<sup>2</sup> 'Abbeylara' is the popular name used in reference to *Maguire v Ardagh* [2002] 1 IR 385.

<sup>3</sup> [2019] IESC 11, [2019] IESC 12.

<sup>4</sup> [1995] 2 IR 10, [2012] 2 IR 726. Readers might note that we leave some cases on the referendum campaigns for chapter 5 on referendums and constitutional change – for instance, *Coughlan v Broadcasting Complaints Commission* [2000] 3 IR 1, which is not a case concerning the political arms of government as such.

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to other chapters. *Crotty v An Taoiseach* and *Pringle v Government of Ireland*, for example, are major cases in which judges ruled on the limits of the powers of the executive with respect to entering into international treaties but are left to chapter 9 on executive power.<sup>5</sup> *TD v Minister for Education* is another major case involving judicial engagement with government in respect of what might be thought a ‘political question’ but is dealt with at some length in chapter 9 on judicial power.<sup>6</sup> The quandaries facing judges in those cases very much correspond with those facing judges in the cases addressed in this chapter. Readers might thus consider them in those chapters in light of the analysis presented here. The final section addresses a line of cases on electoral processes; the most notable case here is *Doherty v Government of Ireland*, in which the High Court granted a declaration that there had been an ‘excessive delay’ in the holding of a by-election to fill a Dáil vacancy that had arisen in the Donegal South East constituency.<sup>7</sup> The judgment prompted Brian Cowen’s Government to hold the by-election which, as it happens, was subsequently won by the applicant in the case, Sinn Féin’s Pearse Doherty.

Before advancing, it should be helpful to consider a point concerning the nature of these cases. They generally involve the exercise by judges of their power under the Constitution to authoritatively resolve disputes concerning the extent of the powers of the other arms of government.<sup>8</sup> By extension, they involve the exercise by judges of their power under the Constitution to authoritatively determine the nature and scope of their own power. That is, in determining that something is not within the power of the Oireachtas, for example, the judges are determining that it is within their power to determine that it is not within the power of the Oireachtas. There is something intuitively troubling about an agent having the authority to determine the extent of its own power. It might seem to run counter to the *nemo iudex in causa sua* maxim<sup>9</sup> and to republican ideas around arbitrary power.<sup>10</sup> The arrangement, which is familiar from other systems of judicial supremacy, is typically defended with reference to Alexander Hamilton’s justification elaborated in *Federalist No. 78*: that unlike the other branches, the judicial branch has ‘no influence over either the sword or the purse’, and is thus the ‘least dangerous branch’ and so the one most suited to having this power.<sup>11</sup>

[7–04]

<sup>5</sup> [1987] IR 713, [2012] 3 IR 1. We also consider these cases in the final section of chapter 5 on constitutional change.

<sup>6</sup> [2001] 4 IR 259, at 367. We also consider it in chapter 15 on personal rights. We might note at this juncture that, despite its obvious relevance to themes in this chapter, we do not discuss *Collins v Minister for Finance* [2016] IESC 73 here owing to our doing so in some depth in chapters 8 and 9.

<sup>7</sup> [2011] 2 IR 222.

<sup>8</sup> For interesting analysis, see Nial Fennelly, ‘The Courts and the Doctrine of the Separation of Powers in the Irish Constitution’ in *Judicial Power in Ireland* (Eoin Carolan ed, Institute of Public Administration, Dublin, 2018).

<sup>9</sup> No one should be a judge in his or her own cause.

<sup>10</sup> See Philip Pettit’s work, including Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, Oxford, 1997). For an application of Pettit’s ideas to questions concerning judicial power, see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge, 2007). For an application of Pettit’s ideas to questions concerning Irish Constitution, see Eoin Daly and Tom Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester University Press, Manchester, 2015).

<sup>11</sup> Alexander Hamilton, ‘Federalist No. 78’ in *The Federalist Papers* (Clinton Rossiter ed, New York, 1961).

[7–05] We might also notice that many of these cases involve split courts, with outcomes reached by majority vote (see *Abbeylara*, for instance, or *Callery v Moylan*). In cases where the Supreme Court is unanimous, it is often overturning the decision of a lower court (see *McCrysal v Minister for Children*, for instance, or *Angela Kerins*). The point is that judges routinely disagree in these cases as they do in most hard cases, which tends to suggest that they disagree on questions of deep constitutional principle, including on the nature and extent of their own power. It must be said that when they do intervene in political processes, they tend to tread carefully, making sure to qualify the basis for doing so in great detail (see the Supreme Court judgment in *Angela Kerins*, for example, or the High Court judgment in *Doherty v Government of Ireland*). This suggests that they are conscious of the extent of their own power and of the need to exercise it responsibly and in accordance with established constitutional norms.<sup>12</sup> This is not to say that they are always right. What a constitution means in the context of any case that reaches the appellate courts is invariably something about which there can be reasonable disagreement.

## II. Judges and the Powers of the Oireachtas, Part I

[7–06] Article 6 of the Constitution registers the separation of powers as an ideal of the Irish constitutional order. For the first and only time in the Constitution, it refers to the ‘organs of State’. These ‘organs of State’ then take up most of the text from Art 15 through to the rights provisions towards the end of the document. Article 15 addresses the constitution and powers of the national parliament: the Oireachtas. We set out three sub-articles in particular that come up regularly in the case law addressed in this section and the next. Article 15.10 provides:

*Each House shall make its own rules and standing orders, with power to attach penalties for their infringement, and shall have power to ensure freedom of debate, to protect its official documents and the private papers of its members, and to protect itself and its members against any person or persons interfering with, molesting or attempting to corrupt its members in the exercise of their duties.*

Articles 15.12 provides:

*All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.*

Article 15.13 provides:

*The members of each House of the Oireachtas shall, except in case of treason as defined in this Constitution, felony or breach of the peace, be privileged from arrest in going to and returning from, and while within the precincts of, either House, and shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself.*

<sup>12</sup> See the position articulated by O’Donnell J in *Gilchrist & Rogers v Sunday Newspapers Ltd* [2017] IESC 18, at para 3, for example.

Although these sub-articles have been said to suffer from a ‘conspicuous lack of clarity’,<sup>13</sup> they generally confer immunities and privileges upon the Houses of the Oireachtas. Article 15.13 notably contains an express ouster clause in respect of the jurisdiction of the courts: parliamentarians are immune from litigation with respect to what they say in parliament. Although it doesn’t expressly refer to the idea, it appears to be concerned fundamentally with ensuring uninhibited debate. Article 15.10 is concerned with the internal rules of parliament: it gives each House power to make and to enforce its own rules. It does expressly refer to the idea of ‘freedom of debate’ and also to the value of protecting parliamentarians from being ‘interfered with’ by ‘any’ external person or persons in the ‘exercise of their duties’. It appears to correspond with Art 9 of the UK Bill of Rights 1689, which states that ‘the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament’. It doesn’t contain an express ouster clause with respect to courts, however. [7–07]

### **In Re Haughey**

The first major case in which the courts were called upon to intervene in the internal affairs of the Oireachtas was *In Re Haughey*, in the early 1970s. It emerged from an inquiry run by the Dáil Public Accounts Committee (hereafter PAC) to investigate allegations that public money which had been intended by the Oireachtas to assist in Red Cross humanitarian relief in Northern Ireland had been diverted to buy guns for the IRA.<sup>14</sup> The Dáil had passed a resolution in early December of 1970 directing PAC to examine the matter and report back to the Dáil. Later that month the Oireachtas passed the Committee of Public Accounts (Privilege and Procedure) Act 1970, which conferred upon PAC a power to compel the attendance of witnesses. This Act also provided that if any witness before the committee refused to answer a question to which the committee might legally require an answer, that the committee could certify the offence to the High Court, which in turn, after such an inquiry as it thought proper, could punish the witness as if he had been guilty of contempt of the High Court.<sup>15</sup> [7–08]

In the event, Padraic ‘Jock’ Haughey (brother of Charles Haughey, who by that stage had been Minister for Finance and was later to become Taoiseach) was compelled to attend PAC upon being the subject of very serious allegations. He made a brief statement to the committee and then refused to answer questions. This prompted the chairperson of PAC to certify the matter to the High Court as per the 1970 Act. The High Court subsequently sentenced him to six months’ imprisonment. Haughey challenged that conviction before the Supreme Court. This challenge comprised two parts. The first was to the constitutionality of the Act of 1970. The second was a more general challenge, which included complaints directed against the procedures followed by PAC in its questioning of him. Haughey succeeded on both fronts – and *In re Haughey* is now very familiar to Irish public lawyers primarily in virtue of Ó Dálaigh CJ’s setting out what have since been referred to as the *In Re Haughey* principles of procedural justice.<sup>16</sup> For present purposes, however, the [7–09]

<sup>13</sup> Brian Murray, ‘Judicial Review of Parliamentary Proceedings and Procedures under the Irish Constitution’ in *The Irish Constitution: Governance and Values* (Eoin Carolan and Oran Doyle ed, Round Hall, Dublin, 2008), p 148. On the opaqueness of the wordings, see, for example, David Gwynn Morgan, *Constitutional Law of Ireland* (Round Hall, Dublin, 1985), p 166.

<sup>14</sup> *In Re Haughey* [1971] 1 IR 217.

<sup>15</sup> s 3(4).

<sup>16</sup> See chapter 15.

point to note is that in spite of Art 15.10 the judges did not appear to have any hesitation in reviewing internal procedures of the Oireachtas, including the terms of and authority conferred by particular standing orders. Indeed they found aspects of those proceedings to have been unlawful. Remarkably, the question of justiciability was apparently not argued by counsel for the Oireachtas in *In re Haughey*; Brian Murray suggests that the judges appeared to simply assume the authority.<sup>17</sup>

- [7–10] The judgment brought a halt to parliamentary inquiries in Ireland for quite some time, presumably in part because the *In Re Haughey* principles meant that such inquiries would be expensive, time-consuming and less likely to be effective. They returned with a bang in the form of the DIRT inquiry in 1999, discussed in chapter 6, which investigated allegations that various banks and private and public actors had colluded to facilitate widespread evasion of a particular form of deposit tax.<sup>18</sup> Carried out by a sub-committee of the PAC, the DIRT inquiry enjoyed a new form of compellability power as well as privilege for witnesses and proceedings under the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities) Act 1997. It is seen as perhaps the most significant and effective parliamentary inquiry of all, having identified wrongdoers across a range of institutions both public and private, and leading to settlements with the Revenue Commissioners reaching into the hundreds of millions of euro.

### **The *Abbeylara* Case**

- [7–11] Far from inaugurating an era of Oireachtas inquiries of that kind, the DIRT inquiry was followed shortly afterwards by the judgment in *Maguire v Ardagh*, better known as *Abbeylara*, which effectively killed off such inquiries in Irish public life.<sup>19</sup> *Abbeylara* arose on foot of a tragic episode on 20 April 2000, when members of the Garda Emergency Response Unit shot and killed an armed man with known psychiatric illnesses following a siege at his home in Abbeylara, Co Longford. For such an influential case in the field of inquiries, the case was thus quite distinctive. It had nothing to do with any question of corruption, or abuse of public power, as such. Strictly speaking, it concerned public interest issues such as command and communications in a Garda Emergency Response Unit, although the fact that it concerned a potentially unlawful killing no doubt raised the profile and the stakes. The case was brought by a number of gardaí who had been summoned to appear before a sub-committee of the Oireachtas justice committee set up on foot of resolutions of the Dáil and Seanad to investigate the Garda Commissioner's report into the shooting. Buoyed perhaps by the favourable reaction to the DIRT inquiry, the political actors involved took it on with some gusto, instigating various changes in the terms of reference such that it would actively investigate through witness testimony. *Abbeylara* was essentially a challenge to the powers and the directions made to individual gardaí under the authority granted to that sub-committee by various resolutions of the Houses of the Oireachtas.

<sup>17</sup> Brian Murray, 'Judicial Review of Parliamentary Proceedings and Procedures under the Irish Constitution' in *The Irish Constitution: Governance and Values* (Eoin Carolan and Oran Doyle ed, Round Hall, Dublin, 2008), p 148. On the opaqueness of the wordings, see for example David Gwynn Morgan, *Constitutional Law of Ireland* (Round Hall, Dublin, 1985), p 162.

<sup>18</sup> DIRT refers to Deposit Interest Retention Tax.

<sup>19</sup> [2002] 1 IR 385.

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There was no dispute but that the Constitution did not give express authority to the Oireachtas to conduct an inquiry – there simply is no such provision in the text. The headline question for the judges in *Abbeylara* was thus whether the Oireachtas had an inherent, general power to do so. On that question, by a 5–2 majority, the Supreme Court ruled that it did *not*, but that it could carry out inquiries ‘*relevant to the exercise of its functions*’. This meant that on that aspect of the case the judges’ interpretations of the functions of the Oireachtas – of its role and value in the system of constitutional democracy – were critical to the outcome. We return to that matter momentarily, after dealing first with the justiciability question which again appeared to arise in virtue of Art 15.10 in particular (and which comes up again in *Angela Kerins*, considered below). Could the courts review internal Oireachtas committee proceedings? Could they review the various motions made by the Houses and by the sub-committee in connection with the *Abbeylara* episode? [7–12]

Critically – presumably in large part because of the fact that, following in *In re Haughey*, the justiciability ship had effectively sailed – the issue was not given a great deal of attention in *Abbeylara*. It was not argued at all by counsel for the Attorney General, leaving it to one of the other respondents, Alan Shatter TD (who was a member of the *Abbeylara* sub-committee) to do so.<sup>20</sup> Many of the judges ignored the question in their written judgments. Each of those who did address it ruled against the Oireachtas on the question – including Keane CJ who, as we shall see, dissented on the headline question in the case. McGuinness J was emphatic on this justiciability point in her brief comments on the matter, although also clear as to her rationale. For her, it hinged on the fact that the review in this instance was being sought by persons who were not members of the Oireachtas combined with the fact that the gardaí had been compelled to attend: [7–13]

Can this non-justiciability extend to actions of the Oireachtas, its committees and its members when those actions impinge on the rights of persons who are not members of either House, as contended for by counsel for the sub-committee and Deputy Shatter? More particularly, can non-justiciability extend to a situation where such persons are compelled to attend and give evidence before a committee of either House or a joint committee? Could such non-justiciability extend to a situation where, for instance, the members of a committee were in blatant breach of the standing orders of the House itself and that breach affected the rights of non-members? It seems to me that it could not.<sup>21</sup>

Keane CJ was similarly brief in his comments on the justiciability question, although what he did say was very much picked up by the judges in the more recent *Angela Kerins* case. He noted the absence of an express ouster clause in Art 15.10 while also gesturing at outer limits of the ouster clauses in Arts 15.12 and 15.13. He also presented a distinctive [7–14]

<sup>20</sup> See judgment of McGuinness J, at 628–629. See also Brian Murray, ‘Judicial Review of Parliamentary Proceedings and Procedures under the Irish Constitution’ in *The Irish Constitution: Governance and Values* (Eoin Carolan and Oran Doyle ed, Round Hall, Dublin, 2008), pp 168–169.

<sup>21</sup> See judgment of McGuinness J, at 629.

base of constitutional immunity in this domain, namely the more general separation of powers norm. He commented:

These extensive immunities and privileges, denied to citizens who are not members of the Houses of the Oireachtas, are an important feature of the parliamentary democracy established under the Constitution. Neither these provisions, however, nor any other provision of the Constitution expressly exempt from scrutiny by the courts the actions of the Oireachtas or its individual members save to the extent specified in Article 15.12 and 13.

That is not to say that the courts will accept every invitation to interfere with the conduct by the Oireachtas of its own affairs: such an approach would not be consistent with the separation of powers enjoined by the Constitution.<sup>22</sup>

He elaborated:

Specifically, the courts have made it clear that they will not intervene in the manner in which the House exercises its jurisdiction under Article 15.10 to make its own rules and standing orders and to ensure freedom of debate, where the actions sought to be impugned do not affect the rights of citizens who are not members of the House... It was also held by the former Supreme Court [in a case reported in 1956] that the courts could not intervene in the legislative function itself: their powers to find legislation invalid having regard to the provisions of the Constitution arise only after the enactment of legislation by the Oireachtas...

Different considerations apply however, where, as here, the Oireachtas purports to establish a committee empowered to inquire and make findings on matters which may unarguably affect the good name and reputations of citizens who are not members of either House. An examination by the courts of the manner in which such an inquiry is established in no way trespasses on the exclusive role of the Oireachtas in legislation. Nor does it in any way qualify or dilute the exclusive role of the Oireachtas in regulating its own affairs.<sup>23</sup>

[7–15]

Turning back to the headline question, recall that the judges ruled 5–2 that the Supreme Court ruled that the Oireachtas did not have an inherent general power to conduct an inquiry but that it could carry out inquiries ‘*relevant to the exercise of its functions*’. As mentioned, this appeared to make the judges’ interpretations of the functions of the Oireachtas important to their decision. On this point, it should be instructive to contrast the positions taken on the question by Hardiman J, for the majority, and Keane CJ, who dissented on this matter. In these excerpts the judges are considering the kinds of commissions or committees that a parliament might convene, specifically commissions aimed at canvassing expert opinion in a particular policy domain in the context of a proposed legislative reform. Hardiman J comments:

There is clearly a major distinction in principle between the exercise required to advise on the desirability of legislation on the one hand and that required to establish the truth of controverted facts about a past event, and perhaps to make so grave a finding as that of unlawful killing, on the other. Advising on the desirability of legislation

<sup>22</sup> [2002] 1 IR 385, at 537.

<sup>23</sup> [2002] 1 IR 385, at 537–538.



requires no legal mandate: it can be done by any person but is plainly particularly appropriate to members of the Oireachtas, who have special powers to assist them in doing so. It relates to the future, not to the past and will not in itself affect the rights of any person in respect of past activities. It does not require an unbiased approach: on the contrary, legislation may quite properly arise out of the strong opinions and preconceptions of those elected to office. And it is an intrinsically political function since legislation is a political product. Adjudication on the propriety or otherwise of past events, on the other hand, is not intrinsically a political function.<sup>24</sup>

**[SOME PARAGRAPHS NOT AVAILABLE IN SAMPLE]**

In 2011, the people rejected a constitutional amendment designed to grant the Houses of the Oireachtas the sort of public inquiry precluded by *Abbeylara*, suggesting the people shared the fear of politicians conducting inquiries that may have animated the Supreme Court judgment.<sup>25</sup> The subsequently passed Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 prescribes the sorts of inquiries that may be undertaken by the Houses of the Oireachtas. The Act first allows committees to conduct a ‘record-and-report’ inquiry, i.e. an inquiry that makes no findings of fact in relation to disputed matters. This ensures that an Oireachtas inquiry does not cast aspersions on the reputation of non-members of the Oireachtas. This is the closest to a general public inquiry power, but is clearly limited in nature. Apart from this, the Act allows committees to conduct inquiries that are clearly related to an explicit constitutional function. The experience of the *Oireachtas Committee of Inquiry into the Banking Crisis*, which reported in 2015, is illustrative. Acting on legal advice based on that ruling, it was established as an essentially ‘record and report’ exercise, even though no one doubted at the time of its establishment that a vast range of individual actors in the regulatory, public administration and banking worlds in the relevant period had failed in various ways. In the event, the report of the Oireachtas banking inquiry, which ran to more than 500 pages, did not make an adverse finding against anyone.<sup>26</sup> [7–21]

**Callely v Moylan**

Whereas in *Abbeylara* it was a sub-committee of the Oireachtas justice committee that was in the line of fire, in *Callely v Moylan* it was the Seanad Committee on Members’ Interests.<sup>27</sup> This time the individual firing the shots was a member of the Oireachtas, however, marking a key difference between the two cases. The then Fianna Fáil Senator Ivor Callely sought orders quashing a report of that Seanad committee that had recommended censuring him and suspending him without pay for 20 days on the ground that he had [7–22]

<sup>24</sup> [2002] 1 IR 385, at 658–659.

<sup>25</sup> See further discussion in chapter 5.

<sup>26</sup> For more nuance and detail than space affords us here, see Fiona Donson and Darren O’Donovan, ‘The Final Report of the Oireachtas Banking Inquiry: A Constitutional Perspective,’ Constitution Project UCC blog (26 January 2016) <http://constitutionproject.ie/?p=557> (accessed February 2019).

<sup>27</sup> [2014] 4 IR 112.

been claiming expenses for travel to the Seanad from his holiday home in west Cork, and for overnight stays in Dublin, when in fact his primary place of residence was in Dublin. Callely claimed that the process by which the committee acted had breached his right to fair procedures (*In re Haughey* etc.) and that the report had breached his right to a good name.

[7–23] What might seem on the face of it to be a pesky challenge concerning expenses was in fact a major separation of powers case engaging the constitutional framework generally, and in particular, the three sub-articles set out earlier combined in this instance with Art 15.15, which provides:

The Oireachtas may make provision by law for the payment of allowances to the members of each House thereof in respect of their duties as public representatives and for the grant to them of free travelling and other such facilities (if any) in connection with those duties as the Oireachtas may determine.

[7–24] The main question for the courts then was whether Art 15.10 – or indeed the constitutional framework generally – meant that the proceedings and report of the Committee, as those of an Oireachtas committee addressing internal disciplinary rules made by the Oireachtas for itself and in respect of someone who was himself a member of the Oireachtas, were *impliedly* immune from judicial review. From one vantage point, Senator Callely's lawyers might be thought of as having held the aces. Not only was there the absence of an express ouster clause in Art 15.10, there was also the fact of very well-established constitutional rights to fair procedures and a good name, and an individual whose reputation had been seriously damaged. Add the fact that the case involved an institution acting in what was at least a quasi-judicial capacity. For the Committee's lawyers, on the other hand, there was the fact that Senator Callely was asking judges to quash a report and a resolution of an Oireachtas committee. Whatever about the absence of an express ouster clause in Art 15.10, this was in the context of the fact that the remedies sought effectively required judges to:

- a) quash a report of the Oireachtas when Art 15.12 provides that 'all official reports... of the Oireachtas... shall be privileged'; and
- b) make findings against statements made by members of the Committee in the course of parliamentary proceedings, where Art 15.13 provides that 'utterances in the Oireachtas' are 'not amenable to any court'.

[7–25] The High Court judge had found that it was constitutionally permissible for the judicial arm of government to review, and ultimately to quash, a report of the Oireachtas and/or internal Oireachtas procedures, and had granted the orders that Callely sought. The appeal by the Seanad Committee made for a bench of seven in the Supreme Court, with a 4–3 ruling ultimately finding in favour of the Seanad Committee. On the critical question of justiciability/separation of powers, the main judgment was written jointly by O'Donnell and Clarke JJ, with Denham CJ concurring, and Fennelly J concurring with respect to the broader elements of that justiciability/separation of powers question.<sup>28</sup> O'Donnell and Clarke JJ suggest an account of the separation of powers, but also a kind of methodology for

<sup>28</sup> There was a narrower question at issue in the case concerning whether the Seanad committee, in disciplining Senator Callely, had been acting on foot of its own rules and standing orders or under the terms of general legislation, namely the Ethics in Public Office Act 1995 and the Standards in Public Office Act 2001. This was important in the case but need not detain us here. For a good account of it,

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approaching questions of what it might mean in cases coming before judges, i.e. questions of justiciability. They commented:

The tripartite division of power requires an analysis of what can properly be said to form part of the respective legislative, executive or judicial powers contemplated by Article 6. To some extent that division stems from the inherent nature of those respective powers. However, the express terms of the Constitution provide some further definition of the separate roles of the respective organs of State. In addition it is important to recall, as was pointed out by O'Donnell J in *Pringle v Ireland*...that, as he put it...

'It is perhaps noteworthy, as the late Professor Kelly was wont to observe, that the form of separation of powers adopted in the Irish Constitution was not the hermetically sealed branches of Government posited by Montesquieu, but rather involved points of intersection, interaction and occasional friction between the branches of Government so established. Thus by way of illustration only, the Executive appoint the Judiciary and the courts rely on the Executive to execute their judgments; the courts for their part review the acts of both the Legislature and the Executive for compatibility with the Constitution; and the Executive in turn is accountable to the Dáil and in practice commands it; and the members of the Government are required to be drawn from the Legislature. In the architecture of the 1937 Constitution, the respective branches did not exclude each other entirely.'

Thus there is a separate question which arises once a particular power has been allocated to a specified organ of Government. That question is as to the extent, if any, which the Constitution permits any role for either of the other organs of government in the area concerned.<sup>29</sup>

Thus we see endorsement of a fluid rather than a rigid conception of the separation of powers. But we also see what amounts to a two-step process for assessing what the separation of powers might mean in a given case. The first involves analysis of whether the matter falling for consideration is a matter that can properly be said to form part of the power contemplated for the arm of government in question by Art 6. In *Callely*, this meant inquiring into whether the disciplining of a member of the Oireachtas for breach of internal Oireachtas rules is part of the power contemplated by Art 6 for the Oireachtas, or 'the legislative power'. We see that 'to some extent' the answer to this question will 'stem from the inherent nature' of the power of the arm of government in question, but that the express terms of the Constitution will 'provide some further definition'.

[7-26]

The second step involves analysis of whether the exercise of that power by that arm of government may be subject to some degree of interaction with or scrutiny by another of the arms of government. That is, the arms of government are not hermetically sealed; they interact with one another such that, in some instances, the exercise of a power attaching to one may be subject to a power of scrutiny attaching to another. And whether such a power of scrutiny applies in any given case will require interpretation on the part of judges of the

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and of how the seven judges split on the various questions in *Callely*, see Gerard Hogan *et al*, *Kelly: The Irish Constitution* (5th ed, Bloomsbury, London, 2018), p 356, particularly footnotes 388 and 389.

<sup>29</sup> [2014] 4 IR, at 171-172.

various provisions of the Constitution, the Constitution as a whole, and the relevant jurisprudence, in light of the particular circumstances of that case.

- [7–28] The application of the first step in *Callely* is relatively straightforward for O’Donnell and Clarke JJ, insofar as the words of those provisions in Art 15 make it ‘clear...that the constitutional role of the Oireachtas is not confined solely to law-making’.<sup>30</sup> That is, the question of allowances for travel to and from the Oireachtas ‘is a matter considered sufficiently important to require constitutional expression’ in the form of Art 15.15, while the references to the imposition of penalties for infringement of rules and standing orders in Art 15.10 ‘clearly show that the Houses of the Oireachtas have a disciplinary function’.<sup>31</sup>

[SOME PARAGRAPHS NOT AVAILABLE IN SAMPLE]

### III. Cases Concerning Oireachtas Proceedings, Part II

- [7–34] The issues at the heart of *In Re Haughey*, *Abbeylara* and *Callely v Moylan* returned in different forms in two 2019 rulings of the Supreme Court: *Angela Kerins*<sup>32</sup> and *O’Brien v Clerk of Dáil Éireann*.<sup>33</sup>

#### **The Angela Kerins Case**

- [7–35] *Kerins* arose following the experience of Angela Kerins, then chief executive of the Rehab Group, at the Dáil Public Accounts Committee (PAC) in early 2014. Rehab is a registered charity that receives very significant amounts of public funding for various social and health care that it carries out but it is an independent entity operating in the private sector, and as such was not under the remit of the Comptroller and Auditor General (C&AG), nor had it been audited by him (on the role of PAC and the relevance of the C&AG in that regard, see chapter 6, and also below). Following media attention on the issue of executive pay in the charity sector over a period of months, including on her own, Kerins was invited by the chair of PAC, John McGuinness TD, to attend PAC in January of that year. Although she was under no legal obligation to take up the invitation, she attended, whereupon she was subjected to what she deemed to have been seriously unfair treatment. Her appearance there lasted seven hours, yet she only had one short break, and members of PAC asked her questions about her pension arrangements and other significant matters despite her not having been given advance notice that they would do so. She was also described as ‘stubborn’ with respect to her dealings with PAC; she was told that she was ‘grossly overpaid’; that she applied ‘double standards’ to the pay of Rehab staff as compared to her own; that she was living on ‘another planet’; that she ran Rehab ‘like a personal fiefdom’ that she had ‘no concept of accountability or responsibility in her “public position”’, and so on.<sup>34</sup>

<sup>30</sup> [2014] 4 IR, at 175.

<sup>31</sup> [2014] 4 IR, at 176.

<sup>32</sup> *Kerins v McGuinness* [2017] IEHC 34; [2019] IESC 11.

<sup>33</sup> [2017] IEHC 377; [2019] IESC 12.

<sup>34</sup> See [2019] IESC 11, at para 2.9.

The evidence was that Kerins was significantly traumatised as a result, and she attempted to take her own life a few weeks later, in March.<sup>35</sup> She received further invitations to attend in April, which she declined, whereupon PAC applied under the Oireachtas (Inquiries, Privileges and Procedures) Act 2013 to another Oireachtas Committee, the Committee on Procedure and Privileges (CPP), to seek the power to compel her attendance. That was refused on the ground that, in the CPP's view, PAC would have been acting *ultra vires*, essentially because under the relevant standing order of Dáil Éireann PAC is empowered only to examine an account after a C&AG report on it has been presented to the Dáil. This decision of the CPP implied that the *Oireachtas itself* was of the view that the conduct of PAC in the Kerins episode had been out of bounds – a point which the Supreme Court later set great store by, as we see momentarily. PAC's pursuit of Angela Kerins petered out at that point. [7–36]

*Kerins v McGuinness* was an application subsequently taken by Angela Kerins for declarations including that PAC's activities had been unlawful, as well as for an order removing from the record of the PAC all references to her, and for damages. She was unsuccessful before a Divisional High Court in large part because of what the judges (Kelly P, Noonan and Kennedy JJ) deemed a critical distinction between her application and those brought by Jock Haughey and the gardaí in *Abbeylara*.<sup>36</sup> In each of those instances, those whose reputations were in jeopardy had been compelled to attend Oireachtas inquiries, tending to render the inquiries adjudicative as far as the judges were concerned. That is, the Oireachtas had assumed a jurisdiction, which brought the question of the lawfulness of that jurisdiction into play.<sup>37</sup> Angela Kerins's case was different insofar as she could have simply upped and left the Committee as it proceeded. Thus, in the view of the Divisional High Court, when the parliamentarians had never managed to exercise any of their compellability powers, the judges could hardly subsequently rule that they had breached those powers. And when her *In Re Haughey* procedural rights had not been engaged in the first place – insofar as she could have left the scene – she could hardly now seek a court order declaring that they had been violated. Similarly, in contrast to the protagonists in *In Re Haughey*, *Abbeylara* and indeed *Callely*, the Oireachtas committee in the Kerins episode was not proposing to make any determination with respect to Angela Kerins and, so far as the Divisional High Court was concerned, the words of PAC members were therefore mere 'expressions of opinion... devoid of any legal force'.<sup>38</sup> [7–37]

This focus on the words of TDs during PAC's proceedings reminds us that, as well as the question of jurisdiction or *vires*, *Kerins* also involved questions around the immunities and privileges conferred on the Oireachtas by the sub-articles of Art 15 set out earlier. Kelly P for the Divisional Court understood these immunities in very robust terms, approving Finlay CJ's dicta in *Attorney General v Hamilton (No 2)* to the effect that the sub-articles in question were 'explicit and definite in their terms' and 'constitute a very far-reaching privilege indeed...' which applies even in the face of a 'major invasion of the personal rights of the individual'.<sup>39</sup> He also emphasised the rationale of Arts 15.12 and 15.13, as well as what he saw as their historical pedigree. He described Art 9 of the Bill of Rights 1689 as 'one of the forbears of [7–38]

<sup>35</sup> [2017] IEHC 377, at para 23; [2019] IESC 11, at para 2.10.

<sup>36</sup> [2017] IEHC 377, at paras 67–69, 72–80..

<sup>37</sup> [2017] IEHC 377, at para 80.

<sup>38</sup> [2017] IEHC 377, at para 107.

<sup>39</sup> [2017] IEHC 377, at para 93, quoting Finlay CJ's *Attorney General v Hamilton (No 2)* 3 IR 227, at 270.

Article 15,<sup>40</sup> invoking the notion that the constitutional norms in issue are concerned fundamentally with ensuring that parliamentarians will not be cowed in the exercise of their constitutional function by the threat of litigation: that they can be fearless, rather than cautious, in carrying out their constitutional functions. Kelly P concluded his judgment in the same vein:

For upwards of four centuries [i.e. referencing the Bill of Rights] it has been recognised in common law jurisdictions throughout the world that the courts exercise no function in relation to speech in parliament. This is fundamental to the separation of powers and is a cornerstone of constitutional democracy. The Constitution guarantees freedom of speech in parliament, not to protect parliamentarians, but the democratic process itself. The constitutional order requires that speech in parliament remain unfettered by considerations such as jurisdiction. If members of either House were constrained in their speech in the manner contended for by the applicant, the effective functioning of parliament would be impaired in a manner expressly forbidden in absolute terms by the Constitution. Thus the privilege conferred by Article 15.13 is not merely one that provides a litigation defence as for example, a plea of privilege in a defamation action; rather utterances in parliament are in an area of non-justiciability ordained by the Constitution. For all of these reasons, therefore, the court is of the opinion that this claim must fail.<sup>41</sup>

[7–39]

Whereas a three-judge High Court thus rejected Angela Kerins’s case in 2017, a seven-judge Supreme Court – by way of a single judgment written for the Court by Clarke CJ, and handed down in February 2019 – signalled that it was in principle open to finding in her favour on appeal.<sup>42</sup> (The Court was not satisfied that it had enough detail at that point on the facts of what had transpired to go so far as to formally make a finding that PAC’s actions had been unlawful, inviting further submissions in this respect. These submissions were subsequently made and adjudicated upon, resulting in a further judgment of the Supreme Court in May 2019.<sup>43</sup> In that judgment, which we briefly consider below, the Court made a declaration that PAC had indeed acted unlawfully) The February *Kerins* judgment – which might be thought of as the ‘principal judgment’ in order to distinguish it from the follow-up judgment in May – is thus very significant: the most significant in this domain of constitutional law since *Abbeylara*, handed down in 2002. In a headline sense it appears to soften the immunity enjoyed by the Oireachtas; or, in the mould of *Abbeylara*, to further expand the reach of judges into the domain of the Oireachtas. It appears likely to have some kind of ‘chilling effect’ on how Oireachtas committees do their work: certainly the chairs of committees are more likely to ‘lawyer-up’, and to err on the side of caution, than they would have been had the ruling of the Divisional High Court been upheld.

[7–40]

The importance of the judgment demands that we dig beneath the headline conclusions that might be drawn, though, and consider the deeper constitutional points in what – regardless of one’s take on the various conclusions – is a highly sophisticated interpretation of the relevant precedents and constitutional norms. For convenience, we propose to first consider analysis of five preliminary points that turned out to be pivotal – indeed, taken cumulatively, probably decisive – to the overall decision. We move then to principles

<sup>40</sup> [2017] IEHC 377, at para 85.

<sup>41</sup> [2017] IEHC 377, at para 111–113.

<sup>42</sup> [2019] IESC 11, at para 13.1.

<sup>43</sup> *Kerins v McGuinness* [2019] IESC 42.

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elaborated with respect to the general question of justiciability. Finally we look at how the judges applied those principles to the concrete facts of the Angela Kerins episode.

The first preliminary point concerns the view of the Court with respect to whether the immunities conferred by Arts 15.12 and 15.13 preclude courts from hearing evidence of what has been said in a House of the Oireachtas or at an Oireachtas committee, or from hearing evidence of the contents of documents emanating from them, even for the limited purpose of characterising the actions of the body in question (i.e. as distinct from actually reviewing whether what has been done by the body was lawful).<sup>44</sup> In short, drawing on examples including the fact that the Supreme Court in *In re Haughey* had had regard to transcripts of the PAC's proceedings in the Jock Haughey episode, as had the Court in *Abbeylara* with respect to the transcripts of the relevant sub-committee's proceedings, Clarke CJ concluded that the immunities in the sub-articles did not preclude them from hearing such evidence.<sup>45</sup>

[7-41]

The second preliminary point concerns the relationship of the privileges and immunities in the three sub-articles with those afforded in respect of the Westminster parliament in the UK system, and the relevance of British constitutional history, including the Bill of Rights 1689, in that regard. In summary, Clarke CJ insisted that more care be given to the distinctions between the Irish and UK constitutional arrangements on this question. He points to the fact that most of the privileges and immunities in the UK setting prevail in virtue of constitutional convention, and are thus 'malleable' in a way that the equivalent Irish norms are not.<sup>46</sup> He also points to the breaks in this regard in the transition towards the modern Irish State, via the Government of Ireland Act 1920 initially, and then the equivalent provisions of the Free State Constitution 1922, eventually into what he casts as the specific and more limited immunities and privileges under the sub-articles in Art 15.<sup>47</sup> He lands something of a jab then by insisting that if the immunities do make for an absolute barrier against judicial intervention, 'it is not to be determined by lazy analogy with current or historic practice in the United Kingdom' but 'rather... from what is to be deduced from the text and structure of the Irish Constitution'.<sup>48</sup>

[7-42]

The third preliminary point concerns whether any immunities or privileges that do apply, apply equally in respect of the proceedings of committees as to proceedings on the floors of the two Houses (the Dáil and the Seanad). The conclusion on this point was that yes, at the level of principle, such immunities/privileges do indeed apply in both settings equally: that it is 'ultimately a matter for the Houses of the Oireachtas to decide how they carry out their business'.<sup>49</sup> But this conclusion comes with a critical qualification, whereby committees are cast as in some sense delegates or agents of the Oireachtas, and thus as distinct from the Oireachtas proper (our phrase). Clarke CJ puts the matter as follows (italics added):

[7-43]

Ultimately, it seems to the Court that, *where a committee is entrusted with carrying out a legitimate part of the constitutional function* of a House or Houses of the Oireachtas, then that committee is 'the House' for the purposes of Articles 15.10,

<sup>44</sup> See generally [2019] IESC 11, at paras 8.1–8.17.

<sup>45</sup> See generally [2019] IESC 11, at paras 8.4–8.16.

<sup>46</sup> [2019] IESC 11, at para 8.23.

<sup>47</sup> See generally, [2019] IESC 11, at para 8.20–8.23.

<sup>48</sup> [2019] IESC 11, at para 8.24.

<sup>49</sup> [2019] IESC 11, at para 7.15.

15.12 and 15.13 of the Constitution. It is a part of the House duly entrusted with carrying out the constitutional role of the House and, whatever may be the extent or limits on the privileges and immunities conferred by the relevant Articles, the committee enjoys them to the same extent as the House itself.<sup>50</sup>

[7–44] He later elaborates (*italics again added*):

The underlying principle identified by the Court is that a committee *doing the business of a House* enjoys the same privilege and immunities as the House which entrusted it with doing that business in the first place. But a question potentially arises as to the applicability of that principle in a case *where a committee acts outside the scope of its remit*. In such circumstances the argument that the committee enjoys the same privileges and immunities as the House is undoubtedly weakened, for it is not carrying out a task entrusted to it by the relevant House or Houses but rather has exceeded its remit and is dealing with matters which are, in fact, none of its business. The argument in favour of a committee enjoying the relevant privileges and immunities in those circumstances is undoubtedly weaker.<sup>51</sup>

[7–45] The fourth preliminary point relates closely to this – and we should clarify that Clarke CJ actually presents this point at the heart of his analysis on the key question of justiciability, rather than in any preliminary way.<sup>52</sup> This concerns what entity might properly be sued in court on foot of an allegedly unlawful action of a House of the Oireachtas or of a committee, given that Art 15.13 insists in such clear terms that members of the Oireachtas shall not be amenable to any court in respect of any utterance they make in either House. Clarke CJ concludes that there is no reason in principle as to why any claim that turned out to be justiciable could not be brought against a House of the Oireachtas individually, or against the two Houses collectively, where such a claim could not be brought against any individual member as such.<sup>53</sup> (Note that the first named defendant in this case was John McGuinness TD, and that all of the other members of PAC at the relevant time were also named as defendants. The Court simply indicated that it would consider further submissions on this point.) He clarifies that if a House of the Oireachtas is to be sued on foot of the actions of a committee it must be that ‘the action complained of was, at a minimum, reasonably considered to be an action *of the House*... rather than the action of an individual member or group of members of the Oireachtas’.<sup>54</sup>

[7–46] It is at this juncture that the qualification of the immunity in respect of committee proceedings kicks in (i.e. the previous preliminary point). Clarke CJ points out that the ‘whole reason why this Court has concluded that a committee enjoys the same constitutional privileges as a House, when carrying out the legitimate constitutional work of that House, is because the House has delegated a particular part of its work to the committee concerned’.<sup>55</sup> He continues:

But that cuts both ways. It logically follows that the House must be responsible for what the committee does on its behalf. It follows in turn that a House of the Oireachtas (in this case the Dáil) can be responsible for the actions of one of its committees if that

<sup>50</sup> [2019] IESC 11, at para 7.15.

<sup>51</sup> [2019] IESC 11, at para 7.21.

<sup>52</sup> See generally, [2019] IESC 11, at paras 9.14–9.19.

<sup>53</sup> [2019] IESC 11, at para 9.15.

<sup>54</sup> [2019] IESC 11, at para 9.16 (*italics added*).

<sup>55</sup> [2019] IESC 11, at para 9.17.



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committee acts unlawfully and thereby affecting a citizen. It also follows that, since the jurisdiction of a committee is limited by the terms of delegation to it, it may be possible to determine more readily that a committee has exceeded the bounds of its delegation.<sup>56</sup>

This fifth and final preliminary point – and probably the knock-out blow against the Oireachtas – relates to the fact that Angela Kerins had not been compelled to attend PAC; that she had taken up an invitation and, to that extent, had attended voluntarily, in contrast to the protagonists in *In Re Haughey*, *Abbeylara* and *Callely*. The incursions by the judges into the work of the Oireachtas in those three instances can be read narrowly or broadly. On a narrow reading, the critical thing in each instance was that the committee in question was purporting to exercise coercive powers; in two of the cases, over ordinary citizens (i.e. non-members of the Oireachtas). That is, as per the reading preferred by the Divisional High Court, it was this feature that rendered legitimate the exercise of judicial power that would otherwise have been illegitimate. Clarke CJ pointed out, however, that the judges in those cases had not in fact limited themselves to reviewing whether the use of particular compellability powers by the Oireachtas had been lawful. Rather, they had probed the underlying lawfulness of the business of a committee (*Abbeylara*) and of the procedures it intended to follow (*In Re Haughey*) or had followed (*Callely*).<sup>57</sup> [7–47]

Although this prised open the possibility of justiciability in respect of the Angela Kerins episode – insofar as the line extended beyond cases of coercive power – the question of whether the episode was inside or outside that line remained open. It is in tackling this question that we see the Court focus more attention on three key phrases in Arts 15.12 and 15.13: on ‘privileged’ in the former sub-article, ‘non-amenability’ in the latter, and ‘utterances’ in both. (Clarke CJ suggested that in the circumstances Art 15.10 did not add anything to the immunities already protected by these two later sub-articles.)<sup>58</sup> In respect of the first of those phrases, he distinguishes legal professional privilege – which he appears to conceive of as particularly strong – from ‘the privilege which exists in respect of the reporting of certain types of events, such as fair and accurate reports of court cases’. This latter form of privilege, which he presents as a more qualified form, ‘is designed to prevent people from being sued for what might otherwise be actionable statements such as those which are defamatory’.<sup>59</sup> He then takes the fact that Art 15.12 refers to privilege attaching ‘wherever published’ to imply that it is this more qualified form of privilege with which Art 15.12 is ‘at least principally’ concerned.<sup>60</sup> He continues: [7–48]

That seems to imply that the principal focus of Article 15.12 is to ensure that there can be free debate in the Houses and that those who report on that free debate can themselves be immune from suit. But it does not follow that evidence of what is said in the Houses (or their committees) cannot be used to determine the actions of the House or committee concerned or that the actions of the relevant House or committee are necessarily immune from suit. Like considerations apply in respect of the utterances referred to in Article 15.13. There can be no doubt but that an action seeking to make an individual member of the Houses of the Oireachtas liable for something said in the House or

<sup>56</sup> [2019] IESC 11, at para 9.17.

<sup>57</sup> [2019] IESC 11, at para 9.4.

<sup>58</sup> [2019] IESC 11, at para 9.11.

<sup>59</sup> [2019] IESC 11, at para 9.13.

<sup>60</sup> [2019] IESC 11, at para 9.13.

at a committee would constitute a clear breach of the non-amenability requirements of Article 15.13. But it does not necessarily follow that the actions of a committee cannot be reviewed by a court in order to determine whether those actions are lawful and, in turn, whether those actions may not have unlawfully affected a citizen.<sup>61</sup>

[7–49] Although he doesn't mention it at this juncture, Clarke CJ's preliminary point regarding the distinctiveness of the Irish constitutional provisions – and the apparent casting aside of the British conventions stretching back to the Bill of Rights 1689 – seems relevant to this analysis. That is, where that preliminary point surely has the effect of narrowing the reach of the immunities conferred by these sub-articles – and possibly of softening them as well – this precision on the meaning of relevant phrases in Arts 15.12 and 15.13 must have a similar, and additional, narrowing effect (albeit not necessarily the softening effect in this instance).

[7–50] The upshot is that the question of lawfulness with respect to the Kerins episode is taken to effectively skirt around Arts 15.12 and 15.13 (and Art 15.10, which, as mentioned, had been deemed to add nothing in the circumstances). The meaning of those sub-articles is reined in to the point that they effectively do not apply. Sure, those sub-articles mean that individual members of the Oireachtas should not be the defendants in a case such as this – and the Court does emphasise that the 'full effect needs to be given to the clear prohibitions' in the sub-articles; that making any individual members amenable to a court, even by indirect or 'collateral means', would be in breach (note: keep this phrase in mind in advance of our analysis of *O'Brien v Clerk of Dáil Éireann*); and that there is 'a clear area of non-justiciability which surrounds utterances... or matters which are sufficiently closely connected to such utterances as to enjoy the same privileges and immunities'.<sup>62</sup> The sub-articles also mean that any finding made by a court should not be directed against utterances made in a House or its committees: the Court is at pains to focus on the 'actions' of PAC, rather than utterances uttered in PAC's proceedings, although, as per the first preliminary point, the Court is entitled to consider *utterances in PAC* in the pursuit of characterising the *actions of PAC*.<sup>63</sup> As we see when we move to the application of the principles, however, none of these obstacles renders the Kerins episode necessarily non-justiciable.

[7–51] If the matter thus effectively evades the sub-articles, Clarke CJ considers an apparently distinct ground of immunity: namely the separation of powers norm more generally.<sup>64</sup> Here he attaches particular importance to the fact that Keane CJ, while dissenting as to the particular finding of the Court in *Abbeylara*, had decided the justiciability question in principle *against* the Oireachtas.<sup>65</sup> That is – as we saw earlier in the chapter in our discussion of *Abbeylara* – Keane CJ, like the judges in the majority, had been satisfied that the Court's examination of the manner in which the sub-committee's inquiry had been established 'in no way trespasses on the exclusive role of the Oireachtas in legislation', nor did it 'in any way qualify or dilute the exclusive role of the Oireachtas in regulating its own affairs'.<sup>66</sup> He had added that it could not be inferred from this that 'the courts will accept every invitation to interfere with the conduct by the Oireachtas of its own affairs', insisting

<sup>61</sup> [2019] IESC 11, at paras 9.13–9.14.

<sup>62</sup> [2019] IESC 11, at para 9.21.

<sup>63</sup> See, for example, [2019] IESC 11, at para 9.14.

<sup>64</sup> [2019] IESC 11, at paras 9.22 and 9.25.

<sup>65</sup> See generally [2002] 1 IR 385, at 533–538.

<sup>66</sup> [2002] 1 IR 385, at 538 (per Keane CJ), as quoted at [2019] IESC 11, at para 9.25 (per Clarke CJ).

that ‘such an approach would not be consistent with the separation of powers enjoined by this Constitution’.<sup>67</sup>

This brought Clarke CJ to consider what this more general separation of powers base of immunity might say more broadly with respect to what kinds of actions might fall inside, or outside, the line of immunity. His comments on this point are brief and vague: [7–52]

... It would be inappropriate for the courts to intervene where that which was alleged could be described as technical, insufficiently serious or closely aligned to those areas (such as utterances within the Houses) which are given express constitutional immunity. In reaching an assessment as to whether the relevant boundary has been crossed it is necessary for the Court to have regard to all of the circumstances of the case while affording a very significant margin of appreciation to the Houses as to the manner in which they conduct their business. To do otherwise would be to fail to pay appropriate respect to the separation of powers.<sup>68</sup>

All of this meant that the question was whether the circumstances of the Kerins episode were sufficiently serious, non-technical, and distinct (or perhaps distinguishable) from utterances as to allow for, or to justify, judicial intervention. The Court’s consideration of those concrete circumstances is very important: in part because it is at this juncture that, having surely softened the ground with respect to parliamentary immunity at the preliminary and principles stages (and indeed narrowed its scope), the judges appear to harden it up again, apparently based on things like their appreciation of its general importance in the constitutional order, and their concern for slippery slopes. [7–53]

[SOME PARAGRAPHS NOT AVAILABLE IN SAMPLE]

### **Denis O’Brien v Clerk of Dáil Éireann**

The Supreme Court’s judgment in *Denis O’Brien v Clerk of Dáil Éireann* was handed down in March 2019, one week after the principal judgment in *Angela Kerins*. As will be clear, the cases had a great deal in common. This case emerged following a series of statements made by two TDs on the floor of the Dáil in 2015 concerning particular banking arrangements that the businessperson Denis O’Brien had allegedly agreed with the Irish Bank Resolution Corporation (IBRC), an entity formed out of the merger of two banking institutions that had become state-owned following Government bailouts. The statements were made shortly after O’Brien had managed to get an interlocutory injunction in the High Court restraining RTÉ from publicising much of the information contained in them, prompting O’Brien to claim that they had been designed by the TDs to frustrate orders of the High Court. [7–60]

O’Brien’s lawyers made what Ní Raifeartaigh J in the High Court described as a ‘tactical decision’ to take the action against actors other than the TDs who made the impugned statements, Catherine Murphy and Pearse Doherty.<sup>69</sup> Instead, the action was [7–61]

<sup>67</sup> [2002] 1 IR 385, at 537 (per Keane CJ), as quoted at [2019] IESC 11, at para 9.23 (per Clarke CJ).

<sup>68</sup> [2019] IESC 11, at paras 9.28–9.29.

<sup>69</sup> [2017] IEHC 377, at para 103.

brought against the Clerk of Dáil Éireann and members of the Committee on Procedure and Privileges (CPP) who, following complaints made on behalf of O'Brien, had ruled that the statements did not constitute a breach of the relevant standing order, that the TDs had not abused parliamentary privilege, and that their utterances had been made in a responsible manner, in good faith, and as part of the legislative process.<sup>70</sup> O'Brien also sought reliefs that were merely declaratory in form: including that the 'substantial effect' of the various utterances was 'to determine in whole or in large part the justiciable controversy' then pending before the courts (i.e. in proceedings against RTÉ), and that the utterances had caused a breach of O'Brien's personal rights under Art 40.3.1°.

[7-62] These tactics were apparently aimed at eluding the obstacles contained in Art 15.13, pertaining to justiciability. Counsel for O'Brien argued that Art 15.13 applied to their case, and that Art 15.12 did not: that the latter ('all official reports and publications of the Oireachtas... and utterances made in either House... shall be privileged') concerned documents and not utterances, whereas the former ('The members of each House of the Oireachtas... shall not, in respect of any utterance in either House, be amenable to any court or any authority other than the House itself') concerned members of the Oireachtas in respect of their utterances.<sup>71</sup> The argument was that mere declarations in proceedings against actors other than the TDs who made the utterances would not constitute making those TDs amenable in respect of their utterances.

[7-63] In short, O'Brien's case did not impress Ní Raifeartaigh J. She distinguished the facts from those at play in the *Sinn Féin Funds* case (see chapter 8).<sup>72</sup> Whereas in that instance the legislature, through the enactment of the impugned legislation, had purported to direct the Court as to what conclusion to reach in determining the justiciable controversy before it, in this instance, although the statements rendered the justiciable controversy moot, they did not purport to direct the Court as to how to determine that controversy.<sup>73</sup> Thus there was no invasion of the judicial power to administer justice under Art 34.

[7-64] Neither was she persuaded that Art 15.12 did not apply to utterances, but rather only to documents. They did so apply, and in light of the Irish text ('táid soar ar chúrsaí dlí...') they applied a privilege beyond defamation proceedings, to a degree that that made such utterances 'free from legal proceedings', i.e. whether those proceedings implicated the members uttering the utterances or otherwise. She gave short shrift to the arguments concerning the fact that the remedies sought were merely declaratory, pointing out that such remedies would mean that the Court would be 'reaching a formal legal conclusion as to the utterances in terms of content, effect and motivation of the speakers',<sup>74</sup> and that the effect of any such declaration 'would also be prospective, insofar as it might have a chilling effect on speech more generally'.<sup>75</sup>

[7-65] Ní Raifeartaigh J also considered the exceptional jurisdiction idea referred to in judgments including that in *Callely v Moylan* written jointly by O'Donnell and Clarke JJ, as we considered earlier – that is, that even a non-justiciable zone was not completely beyond

<sup>70</sup> [2019] IESC 12, at para 2.18.

<sup>71</sup> [2017] IEHC 377, at para 40.

<sup>72</sup> *Buckley v Attorney General* [1950] 1 IR 67, considered in [2017] IEHC 377, at paras 43–51.

<sup>73</sup> [2017] IEHC 377, at para 51.

<sup>74</sup> [2017] IEHC 377, at para 106.

<sup>75</sup> [2017] IEHC 377, at para 107.

the bounds of judicial review, insofar as its non-justiciability was itself derived from the Constitution, and so could not be used to ‘subvert the order and values protected by the Constitution’.<sup>76</sup> On this she commented:

... having regard to the terms in which this exceptional jurisdiction has been described, I am not persuaded that the present case would fall within it, even if such a jurisdiction exists with regard to utterances in the Dáil. I take this view with my eyes wide open to the fact that the utterances rendered the court proceedings almost entirely moot; that damage was undoubtedly done to the plaintiff; and that the release of the information appears to have been done in a deliberate and considerate manner by the Deputies in question. This was far from an accidental slip of the tongue on the floor of the House as one could imagine. The exceptional jurisdiction, as described by the Supreme Court, is extremely restricted and would seem to require some grave threat to the democratic order.<sup>77</sup>

As mentioned, the Supreme Court – comprising the same seven judges as in *Kerins* – upheld the High Court ruling. Unlike Ní Raifeartaigh J, the Supreme Court had had the benefit of its own ruling in *Kerins*, while O’Brien’s lawyers had also dropped the first limb of their challenge – that pertaining to the supposed invasion of the judicial power to administer justice under Art 34 – thus confining it to the decision of the CPP in finding as it had in respect of the TDs. Thus the Supreme Court judgment, again written by Clarke CJ, had slightly different emphases. This time the critical preliminary point was the Court’s characterisation of the work of the CPP in considering O’Brien’s complaint concerning the TDs’ utterances. Following our consideration of the Court’s analysis in *Kerins*, it will not be surprising to see that the Court in *O’Brien* conceives of the CPP’s work in this instance as ‘forming part of the constitutional response by the Houses to their obligations to protect the rights of citizens’<sup>78</sup> and as ‘constituting part of the constitutional function of the Houses in complying with their obligation to protect [a citizen’s] rights’.<sup>79</sup> Thus – in apparent contrast to PAC in the *Kerins* episode – the CPP was carrying out a critical constitutional function on behalf of the Dáil and so, following the finding on the related point in *Kerins*, ‘the same privileges and immunities attach to the CPP as would attach to the Dáil were it considering the same matter’.<sup>80</sup>

[7–66]

[SOME PARAGRAPHS NOT AVAILABLE IN SAMPLE]

#### **IV. Cases Concerning the Powers of Government in Referendum Campaigns**

Five years after the judgment in *Crotty v An Taoiseach* (see chapter 9), the Green Party activist Patricia McKenna applied to the courts for an injunction preventing the use of public money by Government to support a ‘Yes’ vote in the Maastricht Treaty referendum. She lost what became known as the *McKenna (No 1)* case, with Costello J insisting that that ‘not every

[7–71]

<sup>76</sup> *Callely v Moylan* [2014] 4 IR 112, at 194, quoted at [2017] IEHC 377, para 82.

<sup>77</sup> [2017] IEHC 377, at para 108.

<sup>78</sup> [2019] IESC 12, at para 9.4.

<sup>79</sup> [2019] IESC 12, at para 9.6.

<sup>80</sup> [2019] IESC 12, at para 9.7.

grievance can be remedied by the courts' and that 'judges must not allow themselves to be led, or indeed voluntarily wander, into areas calling for adjudication on political and non-justiciable issues'.<sup>81</sup> As Costello J saw it, the Dáil had approved the expenditure of this money in accordance with Art 17, such that Ms McKenna's complaint of misconduct by Government was 'a complaint of *political* misconduct on which this court can express no view...' She had 'failed to establish any *constitutional* impropriety in the exercise by the Government of the executive power of government in the conduct of the referendum campaign...'<sup>82</sup>

[7-72] Ms McKenna kept her powder dry until the divorce referendum a few years later. As it happens, she and her party supported the proposal to lift the ban on divorce, but she pressed on nevertheless, apparently on what she and her supporters saw as a point of principle: that Government should not be entitled to use citizens' money to campaign in favour of a particular outcome when citizens, inevitably, would be divided on the question posed in the referendum. It also meant that, were she to be successful, she would have established an important constitutional precedent in her favour before the next referendum to approve a European Treaty. She accordingly challenged the expenditure by Government of £500,000 advocating a 'Yes' vote, despite its again having been approved by the Dáil in accordance with Art 17.<sup>83</sup> In this *McKenna (No 2)* case, Keane J, then in the High Court, followed Costello J's *McKenna (No 1)* ruling, with emphasis on the authority of the political arms under Arts 17 and 28 in particular.

[7-73] This time around Ms McKenna did appeal to the Supreme Court, where she won, (Hamilton CJ, with O'Flaherty, Blayney and Denham JJ, Egan J alone in dissent). Hamilton CJ in particular engaged with the separation of powers question. In doing so, he drew extensively from the positions taken by Walsh and Henchy JJ in *Crotty*, underlining in particular Walsh J's assertion that the Government is a 'creature of the Constitution' that is 'not empowered to act free from [its] restraints', and that 'to the judicial organ alone is given the power conclusively to decide if there has been a breach of constitutional restraints'.<sup>84</sup> Critically, he deemed the Government's actions – that is, its publishing of information related to the referendum and its campaigning for a Yes vote – *not* to be a part of the executive power of the State as envisaged by the Constitution. The thought was that once an amendment bill passed through the Oireachtas, neither organ of government had any essentially constitutional role in the referendum process.<sup>85</sup> This did not necessarily make those actions impermissible: Hamilton CJ suggested that 'many of the legitimate functions of Government are not part of the exercise by the Government of the executive power of the State'.<sup>86</sup> But it appears to have softened the ground for judicial interference: while he deems the publishing of information and the 'Yes' campaigning to be permissible, the expenditure of public funds on that campaigning was not.

[7-74] Like his colleagues in the majority, Hamilton CJ does little to substantiate the grounds for that conclusion, referencing constitutional ideals including democracy, fair

<sup>81</sup> *McKenna v An Taoiseach (No 1)* [1995] 2 IR 1, at 5–6.

<sup>82</sup> [1995] 2 IR 10, at 6 (emphasis in original).

<sup>83</sup> For a contextual account, see Ruadhán MacCormaic, *The Supreme Court* (Penguin, Dublin 2016), pp 263–266.

<sup>84</sup> [1995] 2 IR 10, at 32, quoting Walsh J in *Crotty v An Taoiseach* [1987] 1 IR 713, at 778.

<sup>85</sup> [1995] 2 IR 10, at 41.

<sup>86</sup> [1995] 2 IR 10, at 38.

procedures and equality in broad-brush strokes (see our analysis in chapter 5). He insists, for example, that once the referendum question ‘has been submitted for the decision of the People, the People were and are entitled to reach their decision in a free and democratic manner’.<sup>87</sup> He characterises the impugned action as ‘an interference with the democratic process and the constitutional process for the amendment of the Constitution’ that ‘infringes the concept of equality which is fundamental to the democratic nature of the State’.<sup>88</sup>

The ‘*McKenna* principles’ have applied in every referendum campaign since, generally to the frustration of those in Government office, and to the disapproval of some legal scholars, including Gavin Barrett.<sup>89</sup> The question returned to the Supreme Court in the 2012 *McCrystal v Minister for Children* case, following the expenditure by Government of €1.1 million on an ‘information campaign’ in advance of the ‘Children’s Rights’ referendum.<sup>90</sup> This campaign consisted primarily of a website, a booklet delivered to all households in the State, and print media advertising. Mark McCrystal argued that it crossed the line dividing neutral information and partisan advocacy, thereby breaching the *McKenna* principles. His specific complaints – which we set out in more detail in another context in chapter 5 – included:

[7–75]

- that it used the ‘affecting voices of children... to repeat the message “It’s all about them, but it’s up to you,” including from a Sarah, who according to one of the expert witnesses obtained by McCrystal, said in one of the impugned ads that she was ‘twee and a quatah’.’ (The witness was the prominent journalist and ‘Vote No’ campaigner John Waters.)
- that the website included headings such as ‘Why do we need this referendum?’ and ‘What will change if the referendum is passed?’ – with answers, set out in boxes running down along with page – such as ‘protecting children’, ‘supporting families’, ‘reducing inequalities in adoption’ and ‘recognising children in their own right’.<sup>91</sup>

The High Court upheld the legitimacy of the Government’s information campaign, with Kearns P presenting what might be characterised as a particularly deferential version of the ‘clear disregard’ threshold for judicial intervention in the exercise by Government of its executive functions.<sup>92</sup> (On the ‘clear disregard’ threshold in this context, see the discussion of *Boland v An Taoiseach* in chapter 9.)<sup>93</sup> He suggested that ‘the breach complained of must be blatant and egregious’ before a court could intervene,<sup>94</sup> which calls the famous *Wednesbury* test for unreasonableness in administrative law to mind: that a decision made by a public body in the exercise of its discretion must be ‘so absurd that no sensible person could ever dream that it lay within the powers of the authority’, before a court could strike it down in

[7–76]

<sup>87</sup> [1995] 2 IR 10, at 41–42.

<sup>88</sup> [1995] 2 IR 10, at 42.

<sup>89</sup> See, for example, Gavin Barrett, ‘A Road Less Travelled: Reflections on the Supreme Court Ruling in *Crotty, Coughlan* and *McKenna* (No. 2)’ (2011) *Institute of International and European Affairs* 16–19 [www.iea.com/publications/a-road-less-travelled-reflections-on-the-supreme-court-rulings-in-crotty-coughlan-and-mckenna-no2](http://www.iea.com/publications/a-road-less-travelled-reflections-on-the-supreme-court-rulings-in-crotty-coughlan-and-mckenna-no2) (accessed February 2019).

<sup>90</sup> [2012] 2 IR 726.

<sup>91</sup> See [2012] 2 IR 726, at 804–812.

<sup>92</sup> [2012] 2 IR 726, at 739.

<sup>93</sup> [1974] 1R 338, at 362.

<sup>94</sup> [2012] 2 IR 726, at 739.

judicial review.<sup>95</sup> This had the apparent effect of softening the *McKenna* principles, insofar as it gave scope to Government to venture beyond sterile neutrality in these contexts.

[7-77]

The five Supreme Court judges all held that it was incorrect to require that the material be in blatant and egregious breach of the Constitution: they each insisted that the standard for judicial review of Government action generally (i.e. not only in referendum contexts) on the basis of unconstitutionality was 'clear disregard'. Indeed O'Donnell J observed that it was only 'by setting the hurdle at the height marked "blatant and egregious" that it was possible to conclude that the material in this case did not offend' the *McKenna* principles.<sup>96</sup> The Supreme Court concluded that the material published in relation to the Children's Rights Referendum breached the *McKenna* principles.

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<sup>95</sup> *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. For excellent analysis of *Wednesbury*, see Timothy Endicott, *Administrative Law* (4th ed, Oxford University Press, Oxford, 2018), chapters 2 and 7.

<sup>96</sup> [2012] 2 IR 726, at 819.



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