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STUDIA TERRITORIALIA IV

WHERE IS THE HEART OF CELTIC TIGER: IRISH SOVEREIGNTY AND THE EUROPEAN INTEGRATION

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1. Concepts of Irish Sovereignty

Constitution of the Republic of Ireland refers to sovereignty in two articles:

- Article 1 says that "the Irish nation hereby affirms its inalienable, indefensible and sovereign right to choose its own form of government, to determine its relations with other nations and to develop its life, political, economic and cultural".
- Article 5 characterises Ireland as "sovereign, independent, democratic state".

Both Irish constitutional doctrine and jurisprudence distinguish between internal and external sovereignty. The Irish state is fully sovereign only in the external sphere. Judge Finlay[1] formulated the essence of external sovereignty as situation when: state is not subject to any power but those chosen by the nation/people in the constitution and the state is not responsible to any external institution for its behaviour. In contrast to the external sovereignty, the Irish state derived form traditional British doctrine of internal sovereignty as formulated in the phase "King/Queen can do no wrong". In Judge Finlay's opinion the position

[1] Crotty v. An Taoiseach, podrobněji v samostatné podkapitole věnované tomuto případu.

of the Irish state is not above the law/constitution but is bound by the constitutional limitations. The sovereignty which Article 5 refers to, is the internal sovereignty.

Diarmuid Phelan[2] finds four basic concepts of sovereignty in the Irish constitution (1937) :

- Irish natural constitutional law.
- Sovereignty of the Irish state – State sovereignty.
- Sovereignty of the Irish nation – popular sovereignty.
- Common good.

The potential inconsistency between concepts of state sovereignty, popular sovereignty and principle of protection of the common good has initiated tension in the Irish constitutional debate.

1.1. State sovereignty

The state sovereignty is the concept traditionally used in both international and Community law. In the Irish constitutional discourse, the external concept of the state sovereignty is emphasised. The intensive debate was focused on the denial of impact of special British-Irish relations to the sovereignty of Ireland. Another sovereignty related issue was the separation of Irish state from the Commonwealth structures.

The territorial aspect of the Irish state sovereignty is specific in the question whether the sovereign rights of the Irish state applies to the territory of the Northern Ireland. The Articles 2 and 3 of the Constitution 1937 describe the national territory (which is probably the term identical with the state territory) as the whole area of the Irish island, i.e. the Northern Ireland included. Article 3 expresses the expectancy of the unification of the whole national territory under jurisdiction of Dublin regime. However, the very same constitutional article limits the territorial and material applicability of the Dublin-regime norms to the territory which is actually subject to the Dublin regime governance – which excludes the Northern Ireland from the applicability of the Dublin-regime legal norms, albeit temporarily[3].

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[2] Phelan, Diarmuid R.: Revolt or Revolution (Constitutional Boundaries of the European Community), Sweet and Maxwell, Dublin 1997, 303.

[3] Chubb, Basil: THE GOVERNMENT AND POLITICS OF IRELAND, Longman 1998 (3. ed), 42–52.

1.2. Popular sovereignty

The Irish constitutional doctrine considers the Irish people (or nation) to be the body which the ultimate internal sovereignty is vested in. The leading-case for definition of the principle of popular sovereignty is Byrne v. Ireland, where the Supreme Court held that "state is created by the people and shall follow the Constitution which has been adopted by the people and ... the people are the supreme authority in the ultimate instance."[4]. Analogous line of argumentation followed the consequent case-law of Irish judiciary.[5]

Popular sovereignty is the basic source which the Irish state and Irish administration derives its authority from. Even the popular sovereignty is not unlimited according the interpretation of some constitutional scholars. In their opinion, there are two catalogues of limitation of the popular sovereignty in Ireland. The first one, is the requirement of the common good. The second limitation is the catalogue of basic rights contained in the Irish natural constitutional law (the term Irish constitutional tradition is used there too).

1.3. Common good

Reference to "common good" in the Irish Constitution can be trace back to Christian political philosophy and tomism in particular. The common good includes not only common good of the whole population of Ireland, but the "common good" shall respect the interest of smaller groups and communities – such as self-governing associations, municipalities and family. The position of the Catholic Church in relation to the "common good" is unclear in the Irish constitutional doctrine. The concept of "common good" can therefore be used by minorities as the shield against the tyranny of majority which claims to be the holder of popular sovereignty. The principle of "common good" can be the doctrinal source for debate on the super-rigid or super-constitutional norms, which are not subject to standards constitution-amendment procedures[6].

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[4] Byrne v. Ireland (1972).
[5] Webb v. Ireland (1988), McKenna v. An Taoiseach (1995).
[6] For critique of this opinion, see Hogan G.: The Irish Supreme Court: Major Developments 1995–96, (1997) 3 European Public Law 3, 182–4.

Attempts to create parallels between the concept of "common good" (which is essential in the Irish system) and principle of subsidiarity (which is particularly important in the EC law) appeared[7]. Main source of such analogies are, however, in the common origin of both principles in the Christian philosophy, more than the material similarity thereof.

2. International relations, international law and Irish legal system

Ireland is an example of state with dualistic approach to the international law. The Constitution authorises the government to exercise the external relations of the state, including signature of international treaties. No international treaty becomes the part of Irish legal system until/unless the Parliament (Oirechtas) determines so.

As regards the customary law, the reference in the Irish Constitution is limited to the acceptance of generally recognised rules of the international law and alliance to the principle of peaceful solution of international disputes.

Dualism traditionally excluded/marginalised the direct applicability of extra-Irish legal sources within the territory of the Irish state[8]. Irish judiciary follows the dualistic model even towards international instruments of human rights protection, such as European Convention on Human Rights, which was ratified by Ireland in 1953. The Irish courts expressed in a consistent line of case law an opinion that the international human rights treaties do not form a part of Irish legal system irrespective of their importance or beneficial content. The same position is kept towards the case-law of international human rights tribunals – their decisions have neither binding effect in Ireland nor the effect of precedent. However, the use of an international treaty as the interpretation tool before an Irish court has been accepted.

The only exception from the abovementioned rule is the European Community law (EC law). Direct applicability of the EC law within Irish

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[7] Phelan, str. 308.

[8] The only "quasi-direct" applicability of international treaty appears in the situation when Irish legal norm explicitly refers to a material regulation in an international treaty of foreign legal order.

territory is based on the explicit constitutional authorisation and supplementary Irish legislation analogous to the European Communities Act in the United Kingdom.

3. Membership of Ireland in the European Union in the Irish constitution

3.1. Constitutional amendments initiated by the Irish accession to the EEC

In 1973 when Ireland joined the EEC, the Irish legislators have chosen one of the most simple formulations of the constitutional basis of the participation in the project of the European integration (if one leaves aside the possibility to ignore the European integration in the constitutional text at all). On June 8, 1972, the constitutional article No. 29 which regulates the external relations of the Irish republic, was amended. A new "European" paragraphs which were added stated :

The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957).

No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the Communities, or prevent laws enacted, acts done or measures adopted by the Communities or by the institutions thereof, from having the force of law in the State.

In 1992, during the process of ratification of the Maastricht Treaty, the second paragraph was amended (and re-numbered) in order to include also acts of the EU and special agencies within the EU.

3.2. Constitutional amendments initiated by Single European Act, Maastricht Treaty and Amsterdam Treaty

The Single European Act was signed by Ireland at the Luxembourg summit in December 1985. The ratification procedure was complicated by the judicial intervention in case Crotty v. An Taoiseach (discussed bellow) and referendum held on May 26, 1986. The Constitution have reflected

the act of ratification of the Single European Act by its 10th amendment from 1937. The amendment come into force on June 22, 1987 and included single one sentence in the Article 29.4.:

The State may ratify the Single European Act (signed on behalf of the Member States of the Communities at Luxembourg on the 17th day of February, 1986, and at the Hague on the 28th day of February, 1986).

Maastricht and Amsterdam treaties ratification followed the pattern used in case of Single European Act. Ireland was authorised to "*ratify the Treaty on European Union signed at Maastricht on the 7th day of February, 1992 ... (to) become a member of that Union*" *by the 11th constitutional amendment from July 16, 1992.* "The 18th constitution amendment from June 3, 1998 created a constitutional basis for ratification of the Amsterdam treaty by simple stating that: (Irish) s*tate may ratify the Treaty of Amsterdam amending the Treaty on European Union, Treaties establishing the European Communities and certain related Acts signed at Amsterdam on 2nd day of October, 1997.*"

The Irish acceptance of the acquis communautaire was not unconditional. Ireland has negotiated for an important opt-out from the general obligations of the EU member states in the area of visa, asylum and immigration policy. Additionally, Ireland has not become member of the Schengen system and opposed the incorporation of the Schengen acquis into the EU structures by the Amsterdam Treaty. Reluctance of Ireland to join the Schengen structures depends predominantly on the existence of Irish-British common travel area. If the United Kingdom derives from its opposition to the EU-wide abolition of border passport controls, Ireland would follow it. Therefore, the Irish state has left open the constitutional possibility of joining Chapter IV of TEC (visa, asylum and immigration policy) in the article No. 29.4.6.[9] The Irish Constitution requires the consent of both chambers of Oisterach for such step. The same structure of future-oriented openness in this issue is contained in the EC law.

Additionally, the Irish Constitution contains explicit authorisation to ratify the Agreement on the Community patent from 1989.

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[9] Art. 29.4.6.: The State may exercise the options or discretions provided by or under Articles 1.11., 2.5. and 2.15. of the Treaty referred to in subsection 5 (Amsterdam Treaty) of this section and the second and fourth Protocols set out in the said Treaty but any such exercise shall be subject to the prior approval of both Houses of Oireachtas.

3.3 European Communities Act 1972

The constitutional regulation of the EU membership does not, however, ensure that Ireland shall perform all its obligations according to the Community law. Ireland had to ensure that, in spite of tradition of dualist approach to the external legal sources, Irish institutions will respect and enforce the EC law including its specifics of principles of priority and direct effect.

Consistency between Irish and Community legal order shall be ensured/secured by the constitutional article No. 29.4.7. which declared all acts of the Irish state "necessitated" by the EEC (now EU) membership are considered to be compatible with the Irish constitutional system[10]. Then, the Constitution guarantied the EC secondary legislation (such as e. g. directives and regulations) the legal strength of a law in within the Irish territory.

Formulation used in the Constitution remains only little doubts that principle of priority and of direct effect of the EC law in Ireland is accepted – which is supported even by case-law of the Supreme Court[11]. However, the Irish constitution does not solve all potential problems of the interpretation and application. First, the scope of the meaning of the "necessitated" is unclear. Secondly, the question of inconsistency between an older EC norm and more recent Irish norm is not solved. From the position of the EC law, even older Community norm should take priority over every Irish law and the date of its adoption should not have any importance. In contrast to the EC position, some member states applied the doctrine which used principle "lex posteriori derogat priori" for the conflict between EC secondary norm and domestic laws.

A certain "cook-book" or "manual" for Irish administration and judiciary is the European Community Act from 1972 which was also described as "vehicle of the implementation of the EC law"[12] . This Act is a relatively short piece of legislation containing (it its current version) seven

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[10] No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevent laws enacted, acts done or measures adopted by the European Union or by the Communities or by the institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.

[11] Pigs and Bacon Commission v. Mc Carren (1982).

[12] Byrne, McCutcheon: The Irish Legal System, Butterworths (3rd ed.) 1998, 252.

articles. The most analysed part of the Act is the provision which gives individual ministers power to make regulations in order to incorporate EC law into Irish legal system. The ministerial regulation developed itself into an effective system of safeguarding Irish obligations according to the EC/EU membership, albeit the democratic character of the system was questioned before courts.[13] Even one of the proposals for amendment of the Czech Constitution contained analogous mechanism. According to the mechanism proposed, the Czech government should have power to adopt regulations with legal force of law which approximate Czech law to the Community one. However, this proposal has not survived the debate in the Czech Parliament.

4. Position of Irish Judiciary

4.1. Constitution Review in Ireland

Irish Constitution permits a review of compatibility of "normal" law/acts with the Constitution. However, there is no special judicial or administrative institution with such a task, analogous the Constitutional Court in Germany or Constitutional Council in France. In Ireland, the competence of constitutional review is vested in any High Court. The appellate body against a decision of the High Court is the Supreme Court in Dublin, whose decision is ultimate. The competence of the Irish judiciary has form of both concrete review (i. e. the court decides on the compatibility of the law which should be applied in the case before the court) and abstract review (the court decides on compatibility even in case of no actual controversy). The right to initiate the abstract review is limited to the President who can ask the Supreme Court for the review in the period between the adoption of law by the Irish Parliament and the signature of law by the President as the final formal step before the act enters into force.

Irish Constitution does not explicitly regulate the right to review the compatibility of international treaties with the Constitution. This gap has been filled by the Supreme Court which repeatedly declared that such a competence exists. Therefore, the Supreme Court can declare an international treaty (including EC/EU founding treaties) to be unconstitutional and to block the ratification procedure. The logic of the Supreme Cour-

[13] Meager v. Ministry of Agriculture (1994).

t's argumentation follows the fact that the judiciary could review the Irish law which would implement the treaty into the Irish domestic law –then the court should have the same competence even before the implementation which could save time and money of the Irish state.

4.2. Crotty v. An Taoiseach

In contrary to Germany and France where the most intensive judicial controversy was initiated by the ratification of the Maastricht Treaty, the "fifteen minutes of glory" of the Irish Supreme Court appeared to be in connection with the ratification of the Single European Act in 1987. The leading case in this field is Crotty v. An Taoiseach.[14]

Ireland has signed the Single European Act (SEA) on February 17, 1986 without any formal reservation or interpretative declaration. In order to compatibilise Irish legal system for the post-SEA European Communities, the Oireachtas (Irish Parliament) amended the European Communities Acts. Yet before the end of the year the constitutional validity of this new norm was attacked by Mr. Crotty before the High Court. Crotty claimed the incompatibility of the new act with the Irish constitutional system including the "European" constitutional article No. 29.4.3. As reaction to the action of Mr. Crotty, the High Court issued a preliminary measure which prevented the Irish government to finalise the ratification of the Single European Act in the Oireachtas.

The structure of the Crotty v. An Taoiseach case is as follows:

The applicant, Mr. Crotty, claimed that the new Irish European legislation exceeds the authorisation given in the constitutional article No. 29.4.3. In Crotty's interpretation, the constitutional authorisation was frozen in the date of its adoption, i.e. the Constitution gives the Irish state right to join the EC in the situation of 1973 only. Irish participation in the legal and institutional novelties of SEA (expansion of the qualified majority voting in the Council, legal basis for the Tribunal of First Instance or new EC policies) has no constitutional basis and violates the sovereignty of the Irish state. Therefore – in Crotty's interpretation – any change of the primary law requires a constitutional amendment.

The High Court (and the Supreme Court subsequently) refused interpretation of Irish sovereignty a la Crotty. Member of the Court, Judge

[14] Taoiseach = Prime Minister.

Finlay, held that *"the authorisation given to the Irish state in the Constitution allows not only the accession to the EC as they were in 1973 as well to all its amendments unless the amendments do alter the scope or objectives in the significant way."* Further, the Supreme Court states that the European integration is a dynamic body and this dynamics is predicted by the article No. 29.4.3.

Task for the Supreme Court was then, to decide whether the Single European Act remained in the limits which do not alter the scope or objectives of the European integration in significant way. The Court held that the vast majority of the SEA fulfilled such a test and did not require any constitutional amendment. The situation changed, however, in the review of the Political Co-operation which was a new mechanism of the co-ordination of external relations of the EC member states, formalised by the SEA. The Supreme Court decided with the very most narrow majority (3:2) and found the Political co-operation outside the scope of authorisation given by the Constitution. By the participation in the Political co-operation scheme, Ireland would accept obligations limiting its freedom in the sphere of international relations. According to the Supreme Court, this would violate the characteristics of Ireland as "sovereign, independent and democratic state" (Art. 5) and the constitutional principle that the Irish government shall act "according the requirement of common good" (art. 6).

Therefore, the ratification of the Single European Act required an amendment of Irish constitution which had been preceded by the referendum. The constitutional conformity with post-SEA European Community membership has been restored by the simplest possible method – a sentence allowing the ratification of SEA has been added to the wording of the constitutional article 29.

Ratification of Maastricht and Amsterdam Treaties in Ireland was not accompanied by judicial intervention analogous to that in Crotty v. An Taoiseach. In both cases, it was the government itself which initiated the constitutional amendments reflecting the development of project of the European integration.

4.3. Other judicial decisions relevant for the Ireland – EC/EU relations

Protection of unborn life is a sacrosanct of the Irish constitutional and political tradition. In the scale of possible approaches to the abortion issue, Ireland is situated on the very extreme protectionist position. In practice,

the abortion is prohibited in Ireland even in such extreme situations as the pregnancy caused by rape or pregnancy creating a serious medical risk for mother. Protection of unborn life and ban on abortions has even the constitutional basis in Ireland. In 1983–1992, Irish constitution contained article No. 40.3.3 which stated :

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

Importance of the abortion for the Irish participation in the project of the European integration was reflected even in the EU primary law. The Protocol No. 17 to the Maastricht declares that : *"nothing (in this Treaties) does not influence application of the article 40.3.3. of the Constitution of the Republic of Ireland within the territory of Ireland."*

In spite of the special protocol, the ban on abortion in Ireland have created a potential conflict between the Irish constitutional principle and the requirements of the acquis communautaire. The conflict is not concentrated in the very existence of the ban on abortion itself but in the prohibition of two collateral activities: right to travel and right to information.

Relatively common practice to travel to other EU states where abortion is legal medical activity, has developed in the Irish society. The Irish constitutional doctrine, however, did not consider this right to be unlimited. Constitutional limits of this practise were analysed to its very extreme in two leading cases of the 90's. In the *Attorney General v. X case* (1992), the High Court prevented a pregnant 14-year-old rape victim from leaving Ireland to have an abortion in England. In appeal, the Supreme Court overturned this decision and allowed the girl to leave Ireland, ruling that *"if it is established . . . that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible"*. Reviewing facts of the case, the Supreme Court concluded that there a substantial risk of suicide existed if the girl's pregnancy not being terminated. In absence of such a risk, right of unborn child would prevail over the autonomy of the girl's decision in spite of the circumstances of the case. The same logic was followed by the Irish judiciary in the *Attorney General v. C Case* (1998) where the right of a 13 year old girl, pregnant as a result of rape, to leave Ireland for the United Kingdom in order to undergo a legal abortion there. The Irish court granted right to leave

the country since there was a substantial risk of girl's suicide. The "C case" differed from the "X case" in the fact that the court gave preference the risk to Miss C life in spite of fact that the girl's father – an extreme anti-abortionist attempted to prevent her from leaving the country.

Due to the results of both cases, there was no place for the European Court of Justice to decide on the compatibility of the Irish practice and the principle of freedom to receive services which is in the very core of the EC law. Different situation appeared in case of Irish ban on dissemination of information of the abortion-providing facilities abroad. Series of action before Irish courts was taken against institutions (e.g. Dublin Well Woman, Open Door Counselling) which distributed information on the possibility to undergo an abortion abroad. The Irish Supreme court supported Irish ban on such information campaign since it should violate the right to life of unborn as contained in the article 40.3.3 of the Irish Constitution. When this cases were reviewed by the European Court of Justice, the supreme EC judicial authority declared itself to be incompetent. Even if the information campaign was a service, there was no financial link with the medical institution providing services. Therefore, the service remained outside the regulatory effect of the Community law[15]. However, the same issue was reviewed later by the European Court of Human Rights in Strasbourg which declared an incompatibility of the Irish ban and freedom to information guaranteed in the European Convention on Human Rights[16].

Both the decision of the European Court of Human Rights and intensive debate in the Irish society have initiated shifts in the constitutional doctrine. In 1992, three referenda related to the abortion were held in Ireland. They resulted in two constitutional amendments which enlarged the constitutional article 40.3.3. by two new paragraphs moderating the unconditional protection of unborn life[17] :

"Subsection 3 of this section (Article 40.3.3) shall not limit freedom to travel between the State and another state."

and

"Subsection 3 of this section (Article 40.3.3) shall not limit freedom to obtain or make available, in the State, subject to conditions as may be

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[15] Society for the Protection of Unborn Children v. Grogan (C–159/90, judgement from October 4, 1991).

[16] Open Doors Counselling v. Ireland (1992).

[17] 13th and 14th amendment of the Constitution from December 3 and December 23, 1992.

laid down by law, information relating to services lawfully available in another state."

Constitutional provision on the information issue has been further elaborated by the "Regulation of Information Services outside the State for Termination of Pregnancies Act" in 1995. The Act enabled registered medical practitioners to provide pregnant women with advice on possibility to travel abroad to medical facilities where abortion is legal. The constitutionality of the Act has been confirmed by the Supreme Court.

Third referendum proposal intended to incorporate a more moderate approach to the protection of unborn life by amending the constitutional test in the following way: "It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction." However, the proposal was defeated in the referendum and had no effect on the constitutional practice.

5. Treaty of Nice

The last constitutional change connected with the EU membership is currently in the process of relative turbulence. The Irish government intended to amend the Constitution in the way analogous to amendments after Single European Act, Maastricht Treaty and Amsterdam Treaty. In the complex of three referenda (Nice Treaty, International Criminal Court and abolition of the death penalty), the Irish population (or its segment which participated in the referendum) rejected the ratification of the Treaty of Nice and the relevant constitutional amendment.

Rejection of the ratification of the ES/EU primary law treaty is an unique experience of the Irish constitutional law, albeit not in the history of other member states. Therefore, three options are generally open:

- Ireland will not ratify the Treaty of Nice
- There will be another referendum (and consequent constitutional amendment) on the same issue while the Treaty remains unchanged. The more elaborated information campaign from the Irish government as well as higher number of Irish voters are expected then.

- There will be another referendum (and consequent constitutional amendment) while the Treaty of Nice being partially renegotiated with Ireland receiving special opt-outs. This situation would be similar to the procedure of ratification of Maastricht Treaty in Denmark in 1992–93.

6. Conclusion

Inter-relationship between Irish sovereignty and Irish membership in the European Union seems to have Janus-face. The "pro-European" face of the Celtic tiger reflects the constitutional authorisation of the EU membership without any explicit reservations and/or limits as well as flexible method of implementation of acquis communautaire by ministerial regulations. The more traditional and nation-oriented face of the Celtic tiger contains the unclear and cryptic references to "common good" and "shared values of the Irish nation." As so far, the most express emanation of the traditional approach to sovereignty has been the restrictions in the abortion issue. After Nice, the neutrality issue may become the second one.

From the procedural point of view, Ireland has not provided example of an the intensive conflict between the governmental branches analogous to tensions between the Bundestag and the Constitutional Court in Germany. Instead, Ireland shows rather co-operative approach of legislature, executive and judiciary to the EU participation where small "family-quarrels" (such as ratification of the Single European Act) are solved without great tension. After Nice, the direct intervention of the Irish voters may become the phenomenon which makes this harmony more questionable again.

Concluding, Irish constitutional regulation of sovereignty and the European integration combines abstract and concrete approaches. Irish Constitution permits the ratification of concrete catalogue of European treaties. Further, it contains mechanism ensuring that the Irish domestic institutions could register, apply and enforce the whole complex of Irish obligations under Community law. On the other hand, Irish constitutional system does not sign a bianco cheque to Brussels. The combination of international negotiation (special declarations and opt-outs for Ireland) and judicial interpretation ensures that areas which are extremely important for Irish self-identification, remain outside the EU intervention.

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