The Position of International Law in Irish Municipal Law (II)

——The Reception of International Law in the Republic of Ireland——

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The issue involved in *Saorstat and Continental Steamship Co. Limited* v. *De Las Morenas* [d] was irreconcilable inconsistency between the protection of individual right based on a contract and the rule of sovereign immunity established in common law as well as in international law. Although Judge O'Byrne concluded that the act of Morenas could not be considered act of sovereignty, he further said as follows: "The immunity of sovereign States and their rulers fom the jurisdiction of the Courts of other States has long been recognised as a principle of international law, and must now be accepted as a part of our municipal law *by reason of Article* 29, *para.* 3, *of our Constitution*, which provides that Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States." [19] Judging from this clear-cut statement, it follows that the generally recognised principle of sovereign immunity has been received through Article 29. 3 of the Constitution into part of Irish municipal law, and that as far as it is so received, Article 29. 3 of the Constitution

necessarily confers rights upon individuals to plead or invoke such international rules in Irish courts. This construction of Article 29. 3 is certainly incompatible with that in the *Ó Laighléis* and in *the State* (*Jennings*) v. *Furlong* cases. It is true that Irish statutes are silent on this point, and so it would not be impossible to argue that, as a result of such silence, an established rule of customary international law (sovereign immunity) should be applied in Irish courts as well as in English courts. But it might be better to think that the rule has already been incorporated into common law, and so it could be applied in Irish courts. At any rate, Judge O'Byrne, deciding that the plaintiff was instituting action not against Spain but against De Las Morenas himself, succeeded in balancing between the protection of the Irish national's rights and the exacting rule of sovereign immunity. Nevertheless, it has to be admitted that his interpretation of Article 29. 3 put forward in this case was misleading. I should think, as in the *Ó Laighléis* and *the State* (*Jennings*) v. *Furlong* cases, that Article 29. 3 of the Constitution does not confer any rights on individuals in view of the verbatim interpretation and the intent of that Article.

I wish to deal with some points affecting the legal nature of the Universal Declaration of Human Rights (1948) before attempting to evaluate the Statement ; for that Declaration was referred to only in the context of J. B. McCartney's formulation but still remains unexamined. The point was shown in the judgment of the *Application of Michael Woods* case ; [6] but, unfortunately, it was not properly dealt with therein. In the Supreme Court it is argued for Woods, *inter alia*, that, since penal servitude is repugnant to Article 4. 1 of the Universal

Declaration of Human Rights, the custody of Woods is unlawful. Judge Ó Dálaigh answers that that Declaration is not part of Irish domestic law.[20] This conclusion is entirely correct, but his reasoning is problematical. He relies on Article 29. 6 of the Constitution and on the judgment of the *Ó Laighléis* case.[21]

It is only too clear that Article 29. 6 of the Constitution is concerned with international agreement, i.e. treaties.

It is admitted that that Declaration is not a treaty and is no more than a declaration of no legal obligation. Therefore, Judge Ó Dálaigh could not have depended upon this Article.

And, indeed, it is argued in the Supreme Court for Ó Laighléis that the detention concerned is contrary to some articles of that Declaration, but the Supreme Court did never refer to this point in its judgment as far as I could make sure. Neither judge Davitt of the High Court nor Judge Maguire C. J. of the Supreme Court gave any opinion about that Declaration in the *Ó Laighléis* case, so that again Judge Ó Dálaigh could not have relied upon the *Ó Laighléis* case for that matter. This is also true of Judge Walsh in the same case (*Application of M. Woods*). The correct view on the legal nature of that Declaration was set forth by Judge Maguire in *the State* (*Duggan*) v. *Tapley* case. According to him,[22] 'this Declaration does not…… purport to be a statement of the existing law of nations. Far from it. The Declaration itself states that it proclaims "a common standard of achievement for all peoples and all nations……." The Declaration, therefore, though of great importance and significance in many ways, is not a guide to discover the existing principles of international, law.' From this viewpoint, it would have been possible in the *Appli-*

cation of M. Woods case to dismiss more easily and more properly such an argument as invoking that Declaration.

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<Critical Evaluation of the Statement>

It would seem that I happened to suggest the answer to the statement in the above-mentioned considerations of the Irish position towards international law and of Article 29. 3, Irish Constitution, but I would like to examine the statement of the Irish members of the Law Enforcement Commission without any preoccupation. This statement consists of four sentences, and it is convenient for discussion to attach No. 1, 2, 3 and 4 to the first, second, third and fourth sentence respectively.

Sentence No. 1 corresponds to Judge O'Byrne's dictum in the *De Las Morenas* case (see above p. 93). Apart from interpretation of Article 29. 3 of the Constitution, what law on earth is 'carried into Irish national law' ? It is difficult to say whether multilateral treaties of law-making nature are included in it, but other treaties, at least, cannot be regarded as giving the 'generally recognised principles of international law'. It is, after all, most proper to think that the generally recognised principle of international law refer to the established rules of customary international law. Then, what it means to carry such rules of international law into Irish national law is that individuals can protect their rights, invoking those international rules in Irish courts, or can seek to get the duties prescribed by those rules enforced in Irish courts. Sentence No. 1 qualifies its own statement by adding 'to the extent set out in the provisions of Aricle 29. 3 of the Constitution'. But would it be possible to think that Article 29. 3 bestows such a

right on individuals?

Sentence No. 2 literally cites Article 29. 3. It must be noted that Ireland accepts the generally recognised principles of international law, i.e. customary international law, as its rules of conduct in its relations *not with individuals but with other States*.

And Sentence No. 3 also must be interpreted in this context. Constitutional provisions of any State are usually express commitments for its nationals or individuals as a whole. But it is not impossible to insert a provision of political import into the constitutions. The Irish Constitution itself includes an article of this nature (Article 2 ; see *K. Boland* v. *An Taoiseach*, *The Irish Reports* [1974] p. 338).[f]

Therefore, it might be said that the 'commitment' embodied in Article 29. 3 is nothing else but a political proclamation of Ireland towards other States in the sense that Ireland intends to observe the generally recognised principles of international law in its foreign or external relations. No State can safely exist in international society without observing the rules of the society. And Article 29. 3 is not so important even in international legal terms as in political terms. It merely reconfirms the fact that, once a State in general comes into being in that society, it is automatically bound by international law.

That is why I propose to look upon Article 29. 3 as political-natured.

Sentence No. 4 gives rise to many difficult problems. I wish to examine the problems by parsing the sentence into four new sentences. In the first place, it must be examined whether 'the courts can intervene to set aside *any executive act* which

contravenes *Article* 29. 3 of the Constitution.' If that Article were to confer rights on individuals, the individuals could plead that Article against the State so that some rule of international law might be applied for them in Irish courts. If it were not to, they could not make any executive act invalid by invoking that Article and the international rules in Irish courts.

The second question is whether 'the courts can intervene to set aside *any executive act* which contravenes *any other constitutional provision*.' So long as a certain provision of the Constitution can be interpreted to give rights to individuals, the courts can positively set aside the unconstitutional executive act. The third question is whether 'the courts can intervene to set aside *any legislative act* which contrvenes *Article* 29. 3'.

Even if individuals were endowed with the right to invoke international law through that Article, the courts could neither apply international law nor set aside the legislative act.

Because, in Ireland, before an Act is finally enacted, its provisions, as contained in the Bill passed by both houses of the Oireachtas, are by the President, under the Provisions of Article 26 of the Constitution, referred to the Supreme Court for a decision whether or not they are repugnant to the Constitution ; and they are by that Court declared to be constitutional unless there is any point to doubt.[23] Such a decision is binding on the Court itself.

Therefore, it seems impossible, or at least extremely difficult, to question *post factum* the constitutionality of legislative Acts in Ireland. And so it goes without saying that the fourth question (whether 'the courts can intervene to set aside *any legislative act* which contravenes *any other constitutional*

provision') must be answered in the negative.

The crucial point is whether or not to interpret Article 29. 3 of the Constitution as conferring the right on individuals to plead the generally recognised principles of international law in Irish courts.

And the insurmountable obstacle to the view affirming individuals' right to invoke international law is the wording of that Article such as "……as its rule of conduct in its relations with other States."

If it were not for this phrase, it would not be difficult to say that Article 29. 3 admits the effect of established rules of international law in Irish domestic law and confers rights on individuals to invoke those rules in Irish courts. For example, Article 98. 2 of the present Constitution of Japan provides that "The treaties concluded by Japan and established law of nations shall be faithfully observed."[24] Professor Takano interprets this Article and says that, since it is needless to say that a State must observe international law, Article 98. 2 confirms the fact, and that, what is more important, it prescribes that individuals and judicial authorities in national sphere must observe and apply international law ; that is, this Article permits national (internal) effect of international law in Japan's municipal law. He goes on to say that this interpretation is surely correct when "international collaboration", which is one of the spirits of the new Constitution, is taken into consideration.[25]

This also corresponds to authoritative interpretation of Article 98. 2 in Japan. It seems that, if there were a phrase similar to Article 29. 3 of the Irish Constitution in Article 98. 2 of the Japanese Constitution, such an interpretation as Professor Taka-

no's would not be tenable. As this example shows, the phrase "as its rule of conduct in its relations with other States" is decisive in Irish Constitution. For this reason and as a result of the examination of Irish cases made above (see pp. 99—101 of this Journal, vol. 5, no. 2), again I have to say, by way of a conclusion, that Article 29. 3 does not permit any effect of international law in Irish law and does not confer any right on individuals.

Notes on Irish Cases

(d) 'Saorstat and Continental Steamship Co., Limited v. De Las Morenas,' *The Irish Reports* [1945] pp. 291—304.

The defendant, Rafael De Las Morenas, a colonel in the Spanish Army, came to Éire as head of a commission appointed by the Spanish Government to purchase horses for the use of the Spanish Army. He entered into a contract with the plaintiffs, the Saorstat and Continental Steamship Co. Ltd., whereby it was agreed that the plaintiffs should reserve, on the defendant's behalf, accommodation aboard one of their vessels for the carriage of a certain number of horses from Dublin to Lisbon. The contract, which was in the form of a booking note addressed to the commission "per"the defendant, provided that the defendant should become liable for dead freight if he failed to tender the horses for shipment when the vessel was ready to load.

In an action for damages for breach of the contract, the defendant entered a conditional appearance, and, on a motion by the plaintiffs to enter judgment in default of defence, he applied by motion to the Court to set aside the proceedings, claiming immunity from the process of the Court on the ground that, as he had entered into the contract as an act of sovereignty on behalf of the Spanish Government, a Sovereign State, the proceedings impleaded that Government, and should be set aside.

Held by Haugh J. that the defendant's motion to set aside he proceedings must be dismissed and that the plaintiffs were entitled to recover damages against the defendant for breach of contract, such damages to be assessed before a Judge without a jury. On appeal:

Held by the Supreme Court that, as the plaintiffs, by their claim, did not seek redress against any person other than the defendant, the Govern-

ment of Spain was not impleaded, and there was no basis for the defendant's claim that the proceedings should be set aside. Accordingly, the appeal against this portion of the judgment of Haugh J. must be dismissed.

Held also by the Supreme Court that, as the defendant could not have filed a defence until the motion to have the proceedings set aside had been disposed of, the judgment entered for the plaintiffs by Haugh J. must be set aside on such terms as, to the Court, might seem just, and the defendant must be given liberty to defend the action.

(e) 'Application of Michael Woods', *The Irish Reports* [1970] pp. 154—168.

The applicant, Michael Woods, had been convicted of breaking and entering an office with intent to commit a felony therein and had been sentenced to six years penal servitude on foot of that conviction ; on the same occasion he had been convicted of attempting to steal money and for that offence he was sentenced to a concurrent term of three years penal servitude. The applicant was lodged in Mountjoy prison pursuant to a warrant in execution of the sentences and then he was transferred to Portlaoise prison on the authority of an order of the Minister for Justice made under s. 17 (3) of the Criminal Justice Administration Act, 1914. In *habeas corpus* proceedings brought by the applicant in the year 1965, the applicant had challenged on certain grounds the lawfulness of his detention under the warrant and the transfer order and, having considered such grounds, both the High Court and the Supreme Court had then found the applicant's detention to be lawful. In the year 1967 two applications for an order of *habeas corpus* in respect of the same detention of the applicant were made *ex parte* in the High Court by a stranger, acting on behalf of the applicant, on grounds which included some that had been ruled by the Supreme Court in 1965 ; and those applications were refused by the High Court. On appeal it was,

Held by the Supreme Court (Ó Dálaigh C. J., Haugh, Walsh, Budd and FitzGerald JJ.), in dismissing the appeal,

1. that a complaint under Article 40, s. 4, sub-s. 2, of the Constitution which alleged that a person was being detained unlawfully could be made to the High Court by a stranger acting on behalf of that person ;

2. that the decision of the Supreme Court in the appeal of 1965 was final, and conclusive of the lawfulness of the applicant's detention, only

in regard to the particular grounds raised during that appeal and ruled in the judgments then delivered by the Supreme Court ;

3 . that a sentence of penal servitude for the offence of attempting to steal was unlawful ; but that a sentence of penal servitude was not unconstitutional *per se* ;

4 . that the transfer order was regular on its face and it was not necessary that it should be addressed to any person ;

5 . that the reliance of the applicant upon the Universal Declaration of Human Rights was misplaced as that Declaration had not been made part of the domestic law of the State ; *In re Ó Laighléis* [1960] *I.R.* applied.

6 . that, accordingly, no sufficient grounds had been established to justify the Court in assigning solicitor and counsel to the applicant in reliance upon the undertaking of the Attorney General to defray the costs of such assignment.

(f) 'Kelvin Boland v. An Taoiseach', *The Irish Reports* [1974], pp. 338—372.

On the 6—9th December, 1973, a conference was held at Sunningdale in England between the Irish and British governments and the parties involved in the Northern Ireland Executive (designate). During the conference the parties discussed the establishment of a Council of Ireland confined to representatives of the two parts of Ireland, and they decided to commence studying the problems involved so as to identify and, prior to the formal stage of the conference, report on areas of common interest in relation to which a Council of Ireland would take executive decisions.

At the conclusion of the first stage of the conference the parties issued an agreed communiqué which contained at clause 5 a statement by the Irish government to the effect that they fully accepted and solemnly declared that there could be no change in the status of Northern Ireland until a majority of the people of Northern Ireland desired a change in that status ; and a statement by the British government to the effect that it was, and would remain, their policy to support the wishes of the majority of the people of Northern Ireland, that the present status of Northern Ireland was that it was part of the United Kingdom, and that, if in the future the majority of the people of Northern Ireland should indicate a wish to become part of a united Ireland, the British government would support that

wish. Clause 6 of the communiqué stated that the conference had agreed that a formal agreement, incorporating the declarations in clause 5, would be signed at the formal stage of the conference and registered at the United Nations. Clause 20 of the communiqué stated that the conference had agreed that a formal conference would be held early in 1974 at which the parties would meet to consider reports on the studies which had been commissioned, and to sign the agreement reached.

On the 17th December, 1973, the plaintiff, Boland, issued a summons in the High Court in which he claimed that the signing of any agreement, formal or informal, by the Government of Ireland in the terms of the communiqué would be repugnant to the Constitution of Ireland, 1937, and he claimed an injunction restraining the Government of Ireland from implementing any part of the communiqué and from entering into any agreement which would limit the exercise of sovereignty over any portion of the national territory or which would prejudice the right of the parliament and government of Ireland to exercise jurisdiction over the whole of the national territory.

Held by Murnaghan J. and affirmed by the Supreme Court (FitzGerald C.J., O'Keeffe P., Budd, Griffin and Pringle JJ.) that the declaration and other acts of the Governmen of Ireland at the Sunningdale conference owed their existence to an exercise of the executive power of governmet and that, in the circumstances, the Courts had no power under the Constitution to review the conduct or policy of the Government.

〔In passing, no formal stage of the conference followed.〕

Notes

(19) 'Saorstat and Continental Steamship Co. Limited v. De Las Morenas', *The Irish Reports* 〔1945〕 p. 298 (***italics is mine***).

(20) 'Application of Michael Woods', *The Irish Reports* 〔1970〕 p. 161.

(21) *ibid*.p. 161.

(22) *The Irish Reports* 〔1952〕 pp. 82—83.

(23) *The Irish Reports* 〔1960〕 p. 103.

(24) 岩波基本六法 (1972), p. 103.

(25) (***translation is mine***.) 高野雄一『国際法概論』上 〔1969〕 pp. 82—83.

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