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REFLECTIONS ON OIREACHTAS PROCEEDINGS AFTER *KERINS v MCGUINNESS & OTHERS*[1] AND *O'BRIEN v CLERK OF DÁIL ÉIREANN*[2]

A. THE ARCADIA ANALOGUE

1. An experienced and widely respected parliamentarian makes a legally privileged statement in Parliament with the deliberate intent and inevitable effect of rendering moot legal proceedings brought by a reviled billionaire. Does the billionaire have any recourse?

2. In posing the question, I am of course referring to the unusual sequence of events that transpired in London in October 2018, in which the protagonists were Lord Peter Hain and Sir Philip Green.

3. Lord Hain was elevated to the House Lords in the Dissolution Honours List in 2015, having previously served in Labour cabinets under Tony Blair and Gordon Brown, in various roles including that of Secretary of State for Northern Ireland. Sir Philip Green has for decades been a leading figure in British fashion retail as Chairman of the Arcadia Group, whose ubiquitous high street brands include Dorothy Perkins, Topshop, Miss Selfridge, and, prior to its controversial demise, BHS.

4. On Tuesday, 23 October 2018, Sir Philip obtained an injunction restraining *The Daily Telegraph* from revealing the fruits of an eight month investigation into allegations of bullying, intimidation and sexual harassment made against the businessman. Having failed in the High Court,[3] Sir Philip obtained the injunction from the Court of Appeal in a decision delivered by Sir Terence Etherton, the Master of the Rolls.[4] The Court had reserved its decision for four weeks following a hearing on 25 September.

5. The essential purpose of the injunction, which was obtained on an interlocutory basis, was to prevent the newspaper from revealing details of confidential non-disclosure agreements with departing employees.

6. The Court of Appeal took the view that the High Court had not given any adequate consideration to "*the important and legitimate role played by non-disclosure agreements*

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[1] [2019] IESC 11. The Judgment is at: http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/1523efdeb5f107c4802583ae0055e938?OpenDocument

[2] [2019] IESC 12. The Judgment is at: http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/2b50a43880a6f1b4802583b40046bc35?OpenDocument

[3] [2018] EWHC 2177 (QB). The decision of Haddon-Cave J in the High Court was delivered on 13 August 2019.

[4] Underhill and Henderson LJJ concurred in the decision.

in the consensual settlement of disputes, both generally but in particular in the employment field."[5]

7. The Court took the view that it was likely that Sir Philip might establish that his right to keep confidential matters that were contractually agreed by departing employees to be confidential would outweigh any public interest in disclosure, and that in circumstances where publication would cause him substantial and irreversible harm, he was entitled to an injunction (including an order restraining the disclosure of his identity) pending the trial of the action. This seems largely unremarkable. After all, what is the point of a non-disclosure agreement, freely entered into by a departing employee, if it cannot be enforced?

8. *The Telegraph* was peeved. The following day, Wednesday, 24 October, *The Telegraph* reported that a "*leading businessman*" had been granted an injunction against the newspaper in order to prevent it from "*revealing alleged sexual harassment and racial abuse of staff*."[6] However, it turned out that help was close at hand. That same afternoon, Lord Hain spoke in the House of Lords and said:

> "*I feel it's my duty under parliamentary privilege to name Philip Green as the individual in question, given that the media have been subject to an injunction preventing publication of the full details of this story which is clearly in the public interest*."

9. On any analysis, this was an extraordinary intervention. Lord Hain expressly justified naming Sir Philip under parliamentary privilege by the very fact that an injunction had been obtained preventing this very thing from occurring. He must have known that the effect of his actions would be to subvert the intent and effect of the decision of the Court of Appeal which was the subject of a reserved decision the previous day.

10. Had Lord Hain even glanced at the first page of the Judgment, never mind read the entire, before staging his dramatic intervention, he would have realised not only that the Court of Appeal had carefully considered the question of the public interest in considering the appropriateness of the injunctive relief it granted, but that the firm of solicitors acting for *The Telegraph* was Gordon Dadds LLP:

11. Two days later it emerged that Lord Hain is a paid adviser to Gordon Dadds LLP. The firm's website carries a statement that describes him as being its "*global and government adviser*".

12. Lord Hain made a statement that day, 26 October, declaring that:

> "*I took the decision to name Sir Philip Green in my personal capacity as an independent member of the House of Lords. I categorically state that I was completely unaware Gordon Dadds were advising the Telegraph regarding this case. Gordon Dadds … played absolutely no part whatsoever in either the sourcing of my information or my independent decision to name Sir Philip. They*

[5] ***ABC & Others v. Telegraph Media Group Limited*** [2018] EWCA Civ 2329, Par. 41.
[6] https://www.telegraph.co.uk/news/2018/10/23/british-metoo-scandal-cannot-revealed/

were completely unaware of my intentions until after I spoke in the House of Lords."

13. Gordon Dadds LLP also denied it had provided any information to Hain. In a statement it said:

> "*Peter Hain is a self-employed consultant who provides occasional advice to the firm relating principally to African affairs. Any suggestion that Gordon Dadds LLP has in any way acted improperly is entirely false. Peter Hain did not obtain any information from Gordon Dadds regarding this case. He has no involvement in the advice that we provide to the Telegraph newspaper, and he had no knowledge of any sensitive information regarding this case*."

14. We can all reflect on the remarkable and unfortunate coincidence that the one parliamentarian out of 650 members of the House of Commons and 800 members of the House of Lords that took it upon himself to deliberately sabotage an Order of the Court of Appeal happened to be on the pay-roll of the solicitors acting for the party that unsuccessfully sought to resist the injunction.

15. Condemnation of Sir Philip, a person long since synonymous with controversy, now that his identity had been revealed, was both immediate and rampant across the media and internet. Charged with, much less convicted of, precisely nothing, he was quickly afforded the status of a British Harvey Weinstein and he involuntarily became the anti-poster boy of the British chapter of the burgeoning *#MeToo* movement which had, earlier in 2018, dispatched several careers in the entertainment industry with impressive speed and none of the cost or inconvenience associated with tiresome legal proceedings involving such passé concepts as due process for the subjects of serious allegations.

16. Condemnation of Lord Hain was confined to the more rareified air of those interested in the separation of powers and the rule of law, or at least, those who read *The Guardian*, these categories being overlapping.

17. Hugh Tomlinson QC, a leading media silk (and standing junior to George Carman QC a couple of decades previously) said:

> "*It's the function of the courts to decide cases after hearing evidence and arguments. It's not the function of parliamentarians to decide cases or decide that the judiciary has got it wrong*.
>
> *If that happens, it's a fundamental threat to the rule of law. They have no idea of what the focus of the cases are. They haven't seen the evidence. This could be an appalling case of bad behaviour or absolutely proper and above the board. Lord Hain has no idea*."

18. Tomlinson suggested that a solution in future might involve the speaker of the Commons or Lords saying that any such comments should be "*removed from the parliamentary record*", depriving the media of the legal protection in reporting it.

19. The former attorney general, Dominic Grieve QC (best known to this audience as an isolated voice of reason on Brexit), also criticised Hain's decision to name Green. "*It was an entirely arrogant decision that had absolutely no regard for judicial process or the rule of law*," he told the BBC, stating that "*Parliamentary privilege is very important, but like any power which is extremely important, it is open to abuse. I can't see – looking at this particular matter – that Peter Hain can argue that he hasn't abused it*."[7]

20. Former Lord Chief Justice, Baron Judge said: "*The consequences are so serious. Whatever we think of Sir Philip... he's entitled to go to a court as much as anybody else*."[8]

21. So what happened to Philip Green's case? He dropped it as it had been rendered worthless by Lord Hain's intervention, but according to newspaper reports he was saddled with *The Daily Telegraph*'s legal costs.[9] However, he trenchantly criticised Hain for his "*outrageous*" conduct and made an official complaint to the House of Lords.[10]

22. Was there to be any sanction for Peter Hain? No, it transpired earlier this year, is the answer. On 9 April, the House of Lords commissioner for standards dismissed a complaint against him, accepting that Hain had decided to take the action on moral grounds, without close examination of the legal circumstances.[11]

23. In short, parliamentary privilege was relied upon by a paid adviser to a law firm acting in highly sensitive litigation to torpedo the law-suit that his firm was defending. Even without that exceptional feature, Lord Hain, a person without any legal qualification or training, assumed for himself the entitlement to *de facto* overturn a decision of the Court of Appeal.

24. My own view is that his actions were an affront to the rule of law and are indefensible on their merits. Lord Hain's conduct – even if you believe in coincidence – was contemptuous in its disregard for the jurisdiction of the Court of Appeal.

25. Reasonable people may differ about the merit of the jurisdiction to grant a so-called "super-injunction" restraining the naming of the individual who has even obtained the injunction, but that is surely no excuse for an experienced parliamentarian abrogating to himself the entitlement to summarily overturn an injunction granted by the Court of Appeal who had reserved judgment for a month after the original hearing in September before delivering their ruling.

B. DENIS O'BRIEN

26. All of this brings me to Denis O'Brien, a wealthy and successful businessman with multiple business interests in this jurisdiction, but best known as a telecoms entrepreneur.

27. On 30 April 2015, Mr. O'Brien was granted short service of a motion seeking an injunction restraining RTÉ from publishing any confidential documentation or information relating to his personal banking arrangements with IBRC.

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[7] https://www.theguardian.com/global/2018/oct/26/parliamentary-privilege-can-be-threat-to-rule-of-law-warns-qc
[8] https://www.bbc.com/news/uk-45999197
[9] https://www.theguardian.com/business/2019/feb/08/philip-green-high-court-action-against-telegraph-dropped
[10] https://www.theguardian.com/business/2018/oct/28/philip-green-identity-not-disclosed-lightly-says-hain
[11] https://www.theguardian.com/business/2019/apr/08/watchdog-dismisses-sir-philip-green-complaint-against-peter-hain

28. Prior to the injunction being heard on 12 May, Deputy Catherine Murphy, during the course of a Dáil debate on the sale by IBRC of Siteserv, Deputy Murphy made various assertions concerning the banking affairs of Mr. O'Brien, despite the acting Ceann Comhairle making a number of interventions requesting Deputy Murphy to refrain from using names.

29. At the hearing before the High Court (Binchy J) on 12 May 2015, Mr. O'Brien conceded that he could no longer pursue relief in respect of the matters which Deputy Murphy had put into the public domain on 6 May.

30. On 20 May, Mr. O'Brien wrote to the Ceann Comhairle regarding the comments which had been made by Deputy Murphy on 6 May 2015. Mr. O'Brien complained that Deputy Murphy "*persisted in making false and inaccurate statements to the Dáil about my personal banking arrangements based on confidential information which she knew to have been stolen*." The letter later stated, "*I also wish to record the fact that no Deputy should be permitted to deliberately abuse parliamentary privilege particularly when the content of such abuse is inaccurate and is based on information or material that a Deputy knows to have been improperly obtained*." Mr. O'Brien requested to be informed of what steps would be taken to ensure that "*no Deputy will be allowed to deliberately and knowingly breach the privilege afforded to them by virtue of the position they hold and their presence in the Dáil chamber*."

31. On 21 May 2015, the High Court, for reasons set out in a judgment granted the injunctive relief sought restraining RTÉ from disclosing confidential information relating to Mr. O'Brien's personal banking arrangements with IBRC.[12] In light of the concession made by Mr. O'Brien on the first day of the hearing, the order excluded those matters put into the public domain by Deputy Murphy on 6 May.

32. On 28 May, during the debate on the Comptroller and Auditor General (Amendment) Bill 2015 in Dáil Éireann, Deputy Murphy again raised the issue of the review of the Siteserv sale to be carried out by the special liquidators and her view that he had an actual or perceived conflict of interest. Deputy Murphy asserted that the scope of the proposed review was not broad enough. She asserted that the former CEO of IBRC made verbal agreements with Mr. O'Brien to allow him to extend the terms of his already expired loans and that the verbal agreement was never escalated to the credit committee for approval. Deputy Murphy further alleged that Mr. O'Brien received extremely favourable interest terms. She almost simultaneously published excerpts from her speech on Twitter over the course of 27 separate tweets. No intervention was made by the Ceann Comhairle during the course of her contribution.

33. A fortnight later, on 10 June 2015, the IBRC commission of investigation was established by the Oireachtas under the Commission of Investigation (Irish Bank Resolution Corporation) Order 2015 passed by Dáil Éireann and Seanad Éireann to investigate transactions of IBRC, including the Siteserv transaction.

[12] ***O'Brien v. Radió Telefis Éireann*** [2015] IEHC 397

34. Catherine Murphy, much like Lord Hain, appears to have acted in a way that was deliberately designed to undermine the function of the High Court. She intervened in the Dáil on 6 May at a time when Mr. O'Brien's injunction application was pending, and she spoke in the Dáil a week after the injunction had been granted. It is impossible to avoid the conclusion that she acted in a manner which deliberately undermined Mr. O'Brien's original injunction application and which set at naught the Order made by the High Court following the injunction hearing.

35. Despite freely making comment in the Dáil about Mr. O'Brien's banking affairs it transpires that Deputy Murphy has a marked reluctance to assist the Commission of Inquiry established (at inordinate expense to the taxpayer) to report into the very matters of concern that she raised.[13]

36. In short, if recent media reports are to be believed, Deputy Murphy having raised serious allegations in parliament about the sale of Siteserv, contributing in no small measure to a degree of public disquiet such that the Government appointed a High Court Judge to lead a Commission of Inquiry to investigate into the matter, is refusing to give any evidence to the Commission herself.[14]

37. A cynic might consider that Deputy Murphy is very unlikely to have encountered a horde of electors from Kildare North trouble troubled by the sale of Siteserv at her constituency clinic in Leixlip and is more likely to have been directed to the story by a party that had his or her own agenda. But because she refuses to cooperate with the Cregan Commission, we may not be able to get to the bottom of this.

38. In passing, it is noteworthy that Deputy Murphy, unlike Lord Hain, has received almost no media criticism for her conduct.

39. Because Mr. O'Brien receives a consistently poor press, and perhaps because he has litigated on too many other occasions for his entitlement to do so to be treated with much sympathy, virtually nobody seems minded to ask her any hard questions about why she thought it was reasonable or appropriate to deploy the weapon of parliamentary privilege in order to drive a coach and four through Mr. O'Brien's constitutional right to litigate an issue that was important to him. RTÉ was well able to fight the freedom of expression corner with taxpayer money and the balance between this interest and Mr. O'Brien's interest in the confidentiality of his financial affairs was carefully considered by Binchy J. in his Judgment, but Deputy Murphy decided in her wisdom to intervene in such a way as to *de facto* overturn the High Court's decision.

40. If it transpires that the Cregan Commission is an expensive exercise that produces little value to the taxpayer, will Deputy Murphy or the person(s) who inspired her spirited contribution to Dáil debates be held accountable? I very much doubt it.

41. Mr. O'Brien's case was, I think, always doomed to fail, and is best understood as an entirely understandable, but properly controlled, expression of public protest at the

[13] *https://www.irishtimes.com/news/ireland/irish-news/siteserv-inquiry-seeks-to-compel-catherine-murphy-to-appear-over-deal-claims-1.3888210*
[14] *https://www.irishtimes.com/news/ireland/irish-news/siteserv-inquiry-seeks-to-compel-catherine-murphy-to-appear-over-deal-claims-1.3888210*

conduct of Deputy Murphy. The reason I am of the view that the case had no prospects of success is that the language of the Constitution in respect of utterances in the Dáil forbids judicial inquiry in clear terms.

42. Articles 15.12 and 15.13 provide in relevant part as follows:

> "*12 All official reports and publications of the Oireachtas or of either House thereof and utterances made in either House wherever published shall be privileged.*
>
> *13 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."*

43. In the Supreme Court, Mr. O'Brien's appeal was actually very narrow. He restricted himself to the argument that his remedy was against the members of the Committee on Procedure and Privileges of Dáil Éireann. His complaint was against the finding of the CPP, communicated to him on 15 June 2015 that Deputy Murphy had not breached standing order 57(3), concerning matters which are *sub judice*, as her utterances were made on the floor of the House in a responsible manner, in good faith and as part of the legislative process, and had not breached parliamentary privilege.

44. The Supreme Court took the orthodox view that the challenge which Mr. O'Brien sought to bring to the decision of the CPP necessarily amounted to an indirect or collateral challenge to utterances made in the Dáil, and as such was impermissible and the proceedings non-justiciable.

45. The Court's observation that Mr. O'Brien was not without rights, and "*that the constitutional rights of citizens do not disappear at the gates of Leinster House*"[15] must have been of limited solace to him. If the facts of this case did not warrant some admonition of Deputy Murphy, one wonders what would.

46. The standing orders in Leinster House may require some revision,[16] and on more substantial issues than dress code and voting from the wrong seat, if parliamentarians are permitted to undermine the workings of the Courts in this way without censure.

C. ANGELA KERINS

47. Angela Kerins may not be in the same financial league as Sir Philip or Mr. O'Brien but she is certainly a person of comparable tenacity. Having begun her career as a nurse and midwife, she had, by the age of 48, assumed the position of Chief Executive of The Rehab Group, a vast organisation with over 3,500 employees and turnover of €183,000,000 by 2014.[17]

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[15] Paragraph 7.3.
[16] Article 15.10 provides that "*Each House shall make its own rules and standing orders, with power to attach penalties for their infringement*…"
[17] https://www.irishtimes.com/news/politics/rehab-group-statement-in-full-1.1694966

48. Irrespective of the similarity of the legal issues raised, Ms. Kerins was a more sympathetic litigant than Mr. O'Brien. She had appeared for seven hours before the Public Accounts Committee (PAC) on 27 February 2014 at which she was subjected to a hostile interrogation during which certain members of PAC outdid each other for soundbites of outrage, which were in broad terms, viscerally critical of her salary and benefits and which strayed into areas that she was not on notice of, despite the fact that Rehab is not a public body, is not audited by the Comptroller and Auditor General and despite Ms. Kerins not being a public sector employee.[18]

49. Shortly after the hearing, Ms. Kerins was hospitalised for 9 days and made an attempt upon her own life.[19]

50. Legally though, her best point was not bound up in the subjective effect of her treatment at the hands of PAC. It was the fact that PAC had been found by the CPP to be acting *ultra vires*. As the Court concluded at Paragraph 10.17:

> "*the cumulative effect of the PAC acting very significantly outside of its terms of reference (and in a manner determined by the CPP to be ultra vires) when coupled with the possibility (if that could be established) that the PAC engaged in an unlawful and unfair process by acting as a whole in a manner which led to a citizen accepting an invitation on one basis but being treated significantly differently on attendance, together with the absence of any action having been taken by the Oireachtas to deal with these matters, would lead to it being appropriate for a court to intervene*."

51. In other words, the Court identifies a confluence of factors that justify intervention, but does not offer any real guidance as to whether the presence or absence of any of them again in the future will be decisive in determining whether the courts have an entitlement to intervene.

52. Thus the Court, whilst clearly finding the views of the CPP that PAC acted *ultra vires* as extremely influential, does not say that this is decisive, or necessary to create a legal entitlement to intervene. On the contrary, the Court contented itself by saying that this factor "*adds significant substance to the argument that a court can appropriately intervene*."[20]

53. *Kerins* is a significant case, as although its findings are heavily caveated, it at least renders a category of claim potentially justiciable that might have been presumed prior to the Court's judgment to be non-justiciable. In this regard, despite a powerful argument on behalf of PAC and the State that the cases in which prior intervention had occurred involved the exercise of power over citizens who are not members of the Houses which enabled those citizens to be required to attend and answer questions (***Re Haughey***[21] and ***Maguire v Ardagh***[22]) or were exercising statutory powers (***Callely v Moylan***[23]) were only

[18] Paragraph 2.4 of the Judgment.
[19] Paragraph 2.10 of the Judgment.
[20] Paragraph 10.8 of the Judgment.
[21] [1971] IR 217
[22] [2002] 1 IR 385
[23] [2014] 4 IR 112

held to be justiciable because the committee in question was exercising statutory powers, the Supreme Court did not accept that that the exercise of a coercive power or statutory power was decisive in conferring jurisdiction upon a court to intervene.[24]

54. Although the ratio of *Kerins* is not easy to identify, some important principles do emerge.

55. Firstly, the fact that PAC is a Committee of the Dáil and the actions of its members did not occur in the actual Dáil chamber conferred no particular advantage upon Ms. Kerins as compared to Mr. O'Brien.[25]

56. Secondly, the way to get around the problem of individual Deputies being afforded privilege by Article 15 is to sue the Houses of the Oireachtas themselves.[26]

57. Thirdly, in circumstances where Ms. Kerins was appealing against a threshold finding of non-justiciability, the judgment makes clear that the question of her entitlement to any remedy beyond declaratory relief is for another day. Certainly, it may well transpire that Ms. Kerins never obtains any remedy beyond something of a merely declaratory nature. Any considered reading of the Judgment suggests that there will be formidable challenges for her, or anybody in a comparable position in the future, to surmount before obtaining any decree for damages. As matters stand, the question of whether Ms. Kerins is entitled to a remedy in damages has been remitted back to the High Court for future determination.

D. CONCLUDING COMMENTS

58. The fairly fundamental, albeit simplistic, question that might be asked, by an inquisitive law student is why did Mr. O'Brien lose and Ms. Kerins (at least partially) win?

59. Perhaps surprisingly, given that the two cases were heard by identically composed Courts and were decided contemporaneously, it is not easy to answer that question. Moreover, it is far from easy, in light of the decision in *Kerins*, to offer a confident view as to when the Superior Courts will be minded to intervene again.

60. The simplest way of distinguishing between the cases seems to be that the complaint of Mr. O'Brien was founded upon comments made by individual members of the Oireachtas which were constitutionally privileged. The case brought by Ms. Kerins was founded upon a criticism of the legality of the actions of PAC as a whole, which had already been condemned as *ultra vires* by CPP, part of the Oireachtas itself.

61. If Mr. O'Brien's case was incapable of being seen as other than a collateral attack on constitutionally privileged speech in the Oireachtas, it is frankly not obvious why that of Ms. Kerins did not fail for precisely the same reason. Could it not be said that at the core of her complaint was what members of the PAC said to her and about her during her seven hour ordeal in February 2014? And if they could have made the same prejudicial and unfair comments in the Dáil chamber without risk of judicial intervention, why should

[24] Paragraph 9.19 of the Judgment.
[25] Paragraph 7.15 of the Judgment.
[26] Paragraph 9.5 of the Judgment.

the courts offer a remedy in circumstances where they showboated at a Committee as distinct from in the Dáil chamber itself?

62. The two decisions are styled as decisions of the Court, both delivered by the Chief Justice on behalf of the Court. This unanimity amongst seven judges, even to the point where no concurrence was delivered by any other judge is in itself a notable feature.[27] Legal scholars in decades to come may find it curious that Clarke CJ and O'Donnell J, to choose but two members of the Court, were able to agree on these issues, despite having found themselves on the opposite side of a predecessor debate as counsel 15 years earlier in *Maguire v. Ardagh*.[28]

63. It is not clear to what extent members of the Court other than Clarke CJ had specific input into the content of either judgment. It is, I believe, relatively clear from the familiar style of prose that the Chief Justice is himself the primary draftsman of both decisions, but it is inevitable that to produce judgments which all seven members of the Court were willing to subscribe to some compromises had to be made. As everybody knows, a camel is a horse designed by committee.

64. Whilst, I may be doing the members of the Court a disservice, the necessary compromises inherent in seeking unanimity amongst seven judges do remind one of the cautionary tale of the characteristics of decisions of Chief Justice Burger in the US Supreme Court in the 1970's when, as vividly described in *The Brethren*[29], many of his important decisions were internally inconsistent and intellectually incoherent as they sewed together the views of different members of the Court in order to broker some form of uneasy consensus. I do not advance that criticism here, but I make the general point that there may be an unavoidable trade-off between unanimity and lucidity of prose.

65. In April this year, the FAI and its erstwhile Chief Executive, John Delaney, appeared before the Oireachtas Committee for Transport, Tourism and Sport to address issues of concern surrounding apparent financial irregularities within the organisation.

66. Mr. Delaney adopted defensive skills of an effectiveness all too rarely seen in Irish football teams during his tenure and parked the bus, thereby frustrating a series of would be interrogators, prominent amongst whom was of course Deputy Catherine Murphy. What you reap, you sow.[30]

67. Professor Gwynn Morgan lamented in *The Irish Times*[31] that Mr. Delaney's silence was "*the fault of the Irish electorate*" for failing to extend the powers of the Oireachtas in a 2011 referendum[32] designed to reverse the effect of *Maguire v. Ardagh*. I see matters very differently. The treatment of Angela Kerins by PAC was a powerful vindication of the

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[27] It is particularly notable in circumstances where the "one judgment rule" historically contained in Article 34.5.5° was deleted by the Thirty-third Amendment of the Constitution in 2013. These cases would not have been covered by that Article in any event.
[28] [2002] 1 IR 385
[29] *The Brethren*, Bob Woodward & Scott Armstrong, Simon & Schuster (1979)
[30] https://www.irishtimes.com/news/crime-and-law/kerins-case-hovers-over-work-of-committee-examining-delaney-1.3856267
[31] https://www.irishtimes.com/opinion/john-delaney-s-silence-is-the-fault-of-the-irish-electorate-1.3857309
[32] The Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiries) Bill 2011 was defeated in a referendum on 27 October 2011 by 928,175 (53.34%) to 812,008 (46.66%).

wisdom of the electorate in declining to vest further investigative power in its politicians. To describe PAC's treatment of Ms. Kerins as that of a kangaroo court (now an orthodox view in more reflective quarters in Leinster House[33]) would perhaps be unkind to kangaroos.

68. The separation of powers is all about achieving a delicate equilibrium, and perhaps our Supreme Court earlier this year achieved just that. *O'Brien* and *Kerins* tell us that the circumstances in which the courts shall intervene in the affairs of the Oireachtas are rare, but incapable of certain future prediction, certainly if the Oireachtas demonstrates an institutional inability to vindicate the constitutional rights of those with whom it engages and in impotence to control the worst excess it its members.

5 November 2019

ROSSA FANNING SC

[33] The three most prominent interrogators of Ms. Kerins were Deputies John McGuinness, Shane Ross and Mary Lou McDonald. Following the judgment, a number of the then members of PAC were critical of how its hearings proceeded and it would be wrong to characterise the members of PAC as being in any way united in defence of the proceedings brought by Ms. Kerins. Senator Gerard Nash (then a Labour Party TD) said: "*Today's judgment comes as no surprise to me. Too many members of that PAC were far more interested in making names for themselves rather than getting down to the details of how public money was spent*." Former Fine Gael TD Áine Collins said: "*I think the Supreme Court judgment is actually the right decision. What happened in 2014 was incorrect. I thought so at the time and I still think so now. I said as much at that meeting*." See: *https://www.irishtimes.com/news/politics/former-pac-members-react-to-kerins-appeal-judgment-1.3808882*