The Rule of Law Legacy of *Sinn Féin Funds*

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Abstract: The High Court and Supreme Court decisions in Buckley v Attorney General (commonly known as 'the Sinn Féin Funds case'), though celebrated ever since, are significant for an overlooked reason. Although the decision is celebrated for asserting the importance of the separation of powers, this article takes a broader view, arguing that in the early decades of the State's history, a practice here described as 'jurisdiction stripping' presented a serious challenge to the rule of law. The article contends that, in defending the separation of powers, the High Court and Supreme Court decisions in Buckley v Attorney General overcame this challenge to the rule of law and deserve praise for this overlooked success.

Keywords: Rule of Law, Separation of Powers, Jurisdiction Stripping, Ouster Clauses

Introduction

This article considers the wider legacy of the High Court and Supreme Court decisions in *Buckley v Attorney General,*[1] commonly referred to as 'the *Sinn Féin Funds* case.' *Buckley v Attorney General* has rightly been celebrated for decades for its role in upholding the separation of powers.[2] This article, however, argues that this celebrated case was not only pivotal in resisting infringement of the separation of powers in one particular case. In fact, the case and its consequences were also a landmark in the development of the rule of law in Ireland, because it very effectively ended a practice, referred to in this article as 'jurisdiction stripping', which was a significant challenge to

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[1] [1950] IR 67.
[2] Gerard Hogan, 'The Sinn Fein Funds Judgment 50 Years On' (1997) 2 The Bar Review 375; Ronan Keane, 'Across the Cherokee Frontier of Irish Constitutional Jurisprudence. The Sinn Féin Funds Case: *Buckley v Attorney General* (1950)' in Eoin O'Dell (ed), *Leading Cases of the Twentieth Century* (Round Hall Sweet and Maxwell 2000).

the rule of law in the early decades of the State. The article argues that this practice emerged in the 1920s, persisted after the introduction of Bunreacht na hÉireann, and was only meaningfully confronted by the judiciary in *Buckley v Attorney General*.

Given their wide range of potential meanings, the article will first explicate what is meant by 'jurisdiction stripping' and 'the rule of law'. It will then explain how jurisdiction stripping manifested in Ireland following independence and why this practice was detrimental to the rule of law in the early decades of the history of the State. The next section will discuss how this was resisted in *Buckley v Attorney General*, followed by analysis of the long-term impact of the decision. By analysing its impact on subsequent cases and legislation, the article will show how the decision ended jurisdiction stripping in Ireland, and in the process strengthened the rule of law in the State.

Defining 'Jurisdiction Stripping' and 'the Rule of Law'

Jurisdiction Stripping

The term 'jurisdiction stripping,' more commonly associated with debates about the separation of powers in the United States, is used in this article instead of terms such as 'ouster clauses' or 'ouster of jurisdiction,' which are more familiar to public lawyers in Ireland and the United Kingdom. This is because, in my view, the broader remit of the term jurisdiction stripping makes it more appropriate to describe the practice at issue in *Buckley v Attorney General* and earlier cases.

In the UK and Ireland, ouster clauses refer to provisions in legislation which remove (i.e. 'oust') or at least restrict the jurisdiction of courts to review decisions by other bodies,[3] or to regulate the exercise of court jurisdiction generally. While Hogan, Morgan and Daly have doubted the constitutionality of 'full' ouster clauses in Ireland,[4] more limited ouster clauses can be semi-acceptable in Ireland,[5] depending on their

[3] Mark Elliott and Robert Thomas, *Public Law* (4th edn, Oxford University Press 2017) 570.
[4] Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) [11.02] - [11.04].
[5] ibid [11.05] - [11.18].

breadth and effect. Legislative provisions which the Irish courts have regarded as acceptable uses of 'partial ouster clauses'[6] include:

- Time-limitation periods for commencing legal action;[7]
- Stipulations that certain items or actions may be deemed conclusive evidence of some fact;[8] and
- Requirements for substantial grounds.[9]

As Epps and Trammel define it, jurisdiction stripping in the US refers (at the federal level at least) to attempts by Congress to distribute power between courts and other decision-making bodies, or to remove such power entirely.[10] They note that Congress can do so by transferring jurisdiction between courts and tribunals.[11] It is submitted by the present author that this regulation of court jurisdiction is similar to what occurs in the UK and Ireland with ouster clauses. However, the definition of jurisdiction stripping can also include statutes which attempt to decide the outcome of a pending case before the federal courts, whether directly or indirectly. For example, Epps and Trammel's discussion of jurisdiction stripping refers to cases concerning statutes which amended the law as it applied to specific pending or ongoing cases, in order to directly decide the outcome of those cases.[12] In all such cases, the manner in which the US Congress sought to intervene in legal proceedings to decide outcomes has been reminiscent of *Buckley v Attorney General*, and similar earlier Irish decisions.

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[6] Hogan, Morgan and Daly (n 4) [11.05].

[7] ibid [11.05] - [11.11]. Key cases discussed by the authors in this regard include *Brady v Donegal County Council* [1989] ILRM 282; *In Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *Kelly v Leitrim County Council* [2005] IEHC 11, [2005] 2 IR 404.

[8] ibid [11.12] - [11.16]. Key cases discussed in this regard include *Lombard and Ulster Banking Ltd v Amurec Ltd* (1978) 112 ILTR 1 and *Sloan v The Special Criminal Court* [1993] 3 IR 528.

[9] ibid [11.17] - [11.18]. For example, applicants for judicial review must have substantial grounds when applying for leave. Key cases discussed in this regard include *McNamara v An Bord Pleanála (No. 1)* [1995] 2 ILRM 125 and *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* .

[10] Daniel Epps and Alan M Trammell, 'The False Promise of Jurisdiction Stripping' (2023) 123 Columbia Law Review 2077, 2085.

[11] ibid.

[12] These cases include but are not limited to *Ex Parte McArdle* 74 US 506 (1869); *US v Klein* 80 US 128 (1872); *Battaglia v. Gen. Motors Corp.* 169 F.2d 254, 255 (2d Cir. 1948); *Hamdan v Rumsfeld* 548 US 557 (2006); *Boumedienne v Bush* 553 US 723 (2008); *Bank Markazi v Peterson* 578 US 212 (2016); *Patchak v Zinke* 583 US 244 (2018). See Epps and Trammel (n 10) 2092-2149 for discussion of these cases.

As we will see, this article is concerned with illegitimate limitation of court jurisdiction, in a way that compromises judicial independence by deliberately interfering in specific cases, and hence compromising relevant principles of the rule of law in Ireland. For this reason, it is submitted that jurisdiction stripping is the most appropriate term to describe the practice seen in *Buckley v Attorney General* and similar cases, as it can refer to a practice distinct from the ordinary ouster of jurisdiction seen more routinely in Ireland and the UK, and offers more ready comparison with relevant precedents from the United States.

The Rule of Law

Describing the rule of law with precision can be difficult at times, as there are a wide variety of definitions. There can also be a disconnect between scholarly work, some of which views the rule of law as a vague and contested concept,[13] and other perspectives both inside and outside the academy which view it as a concept whose essential principles are defined and shared, at least across the membership of the Council of Europe.[14]

As to the utility of a definition, Krygier argues that the rule of law must be understood fundamentally as a 'cultural achievement',[15] in that the rule of law ultimately consists of a culture in which the exercise of power is 'well-tempered',[16] to achieve the ultimate

[13] Jeremy Waldron, 'The Rule of Law as an Essentially Contested Concept' in Martin Loughlin and Jens Meierhenrich (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021); Robert A Stein, 'What Exactly Is the Rule of Law?' (2019) 57 Houston Law Review 185; Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 312–314; Martin Loughlin, 'The Rule of Law: A Slogan in Search of a Concept' (2024) 16(3) Hague Journal on the Rule of Law 509.

[14] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14(2-3) Hague Journal on the Rule of Law 107; 'Further Strengthening the Rule of Law within the Union: State of Play and Possible next Steps (COM/2019/163 Final)' (2019) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52019DC0163>(last accessed 4 May 2026); 'The Updated Rule of Law Checklist' (Venice Commission of the Council of Europe, 2025) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2025)002-e> last accessed 4 May 2026; Tom Bingham, *The Rule of Law* (Penguin 2011); Jørgen Møller and Svend-Erik Skaaning, 'Systematising Thick and Thin Conceptions of the Rule of Law' (2012) 33 The Justice System Journal 136.

[15] Martin Krygier, 'Well-Tempered Power: "A Cultural Achievement of Universal Significance"' (2024) 16 (3) Hague Journal on the Rule of Law 479.

[16] ibid 487.

goal of preventing its arbitrary use.[17] This is preferable, as Krygier notes, to merely defining the rule of law using laundry lists of features, as these can easily be abused by bad-faith actors to dubiously claim that they do in fact uphold the rule of law.[18]

Another potential difficulty with defining the rule of law, especially for the purpose of analysing historical practices, is that understandings of the rule of law change over time.[19] This is not, however, a significant concern for this article. It is submitted that analysis of the health of the rule of law is an exercise in applying a set of criteria to a given situation, as well as taking account of the overarching cultural factors at play. This analysis can take place regardless of what understanding (if any) influential figures in that situation have of the rule of law concept. As a result, while Irish jurisprudence on the rule of law began after the period in which jurisdiction stripping was relatively common, using relevant contemporary criteria is justified, as this article evaluates the impact of jurisdiction stripping on the rule of law from a contemporary perspective.

So, how is the rule of law understood in an Irish context? Where the health of the rule of law in Ireland has been analysed from an academic standpoint, it has often been evaluated[20] using criteria such as Fuller's eight desiderata[21] of the inner morality of law, and the application of Fuller's desiderata to the administrative state.[22] These desiderata are:

(1) Generality (laws must consist of general rules and not individual directives);[23]

[17] ibid 486-487.
[18] ibid 483-484, 501-504. See also David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 189; Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal globalization and the subversion of liberal democracy* (Oxford University Press 2021).
[19] See, for example, Loughlin's discussion of the evolution of this concept in the legal systems of England, Germany and France in Chapter 11 of *Foundations of Public Law*. Loughlin, 'Rechtsstaat, Rule of Law, l'État de droit', *Foundations of Public Law* (n 13) 299 - 307.
[20] Oran Doyle, 'Administrative Action, the Rule of Law and Unconstitutional Vagueness', in Laura Cahillane, Tom Hickey and James Gallen (eds) *Judges, Politics and the Irish Constitution* (Manchester University Press 2017) 237, 238; Conor Casey, Oran Doyle and David Kenny, 'The Irish State's COVID-19 Response and the Rule of Law: Causes for Concern' (2021) 110 Studies: An Irish Quarterly Review 446, 448–449.
[21] Lon Fuller, *The Morality of Law* (2nd edn, Yale University Press 1969) 46–91.
[22] Doyle (n 20); Conor Casey and David Kenny, 'The Risk and Rewards of Ireland's Leviathan: Rule of Law Values and the Irish Executive's Crisis Response to Covid-19' (2023) 70 The Irish Jurist 242, 258-259.
[23] Fuller (n 21) 46 – 49.

(2) Promulgation (rules must be published and ascertainable by the public);[24]
(3) Non-retroactivity (laws should apply to the future rather than the past);[25]
(4) Clarity (laws must meet a minimum threshold of clarity and comprehensibility);[26]
(5) Consistency (legal rules should not contradict each other);[27]
(6) Possibility of Compliance (laws should be capable of being complied with by those subject to them);[28]
(7) Constancy (there should be limits to how regularly laws are changed);[29] and
(8) Congruence (laws should be applied the way they are written).[30]

It is worth noting that Fuller's principles are also referenced by Collins J as defining the rule of law, along with Bingham's *The Rule of Law*,[31] in *Conway v An Bord Pleanála*.[32] In addition to these principles, it is possible to identify a consistent understanding of the rule of law among the Irish judiciary. The centrality of the doctrine in Irish law was acknowledged by Denham J in *Maguire v Ardagh* who described it as 'a cornerstone of the Irish legal system'.[33]

In addition to the Fuller principles, an independent judiciary is considered by the Irish courts to be crucial for the respect of the rule of law. Murray CJ stated in *Curtin v Dáil Éireann*, that 'an independent judiciary guarantees that the organs of the State conduct themselves in accordance with the rule of law.'[34]

[24] (n 21) 49 – 51.
[25] ibid 51 – 62.
[26] ibid 63 – 65.
[27] ibid 65 – 70.
[28] ibid 70 – 79.
[29] ibid 79 – 81.
[30] Ibid 81 – 91.
[31] Bingham (n 14).
[32] [2024] IESC 34 [9]. O'Donnell CJ also refers to the works of Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) and Suetonius *The Lives of the Twelve Caesars*, at [24]-[25] of his judgment.
[33] [2002] 1 IR 385, 567.
[34] [2006] IESC 14 [96], [2006] 2 IR 556, 617. Similar points about the centrality of an independent judiciary to the rule of law have been echoed by former Attorney General Paul Gallagher SC. See Paul Gallagher, 'Challenges to the Rule of Law in 21st Century Ireland' (2018) 41 Dublin University Law Journal 1, 2–4.

A corollary of this is arguably the right of access to the courts, with Keane CJ emphasising in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill, 1999*:

> It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights.[35]

Hogan J, writing extra-judicially, has also identified several overarching principles in the Irish courts' treatment of the rule of law which are relevant for our purposes.[36] A non-exhaustive list of these includes:

- The principle of legality;[37]
- Prohibition of 'arbitrary or autocratic' behaviour by the executive, even if such powers are conferred by statute.[38]
- Access to the courts.[39]
- Legal certainty.[40]

Most of these principles overlap directly with Fuller's desiderata. For example, the principle of legality to a greater or lesser extent implicates all of Fuller's criteria, as arguably does the principle that law must be certain and accessible. As another example, the principle that the executive cannot constitutionally be given the power

[35] *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* (n 7) 385. This quote was cited approvingly in *Mallak v Minister for Justice* [2012] IESC 59 [46], [2012] 3 IR 297 and echoed in the same judgment at [1] and [52] in relation to the importance of access to the courts.
[36] Gerard Hogan, 'Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country', *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Asser Press 2019) 1336-1337. Aside from the principles discussed in this analysis, Hogan also identifies other principles associated with the rule of law in Ireland but which are less relevant here, namely non-retroactivity of criminal offences, fundamental rights and creation of vague offences. It should be noted that this last point on vagueness overlaps with the principle of legality.
[37] ibid 1336.
[38] ibid 1337; Hogan J cites in that regard *Mallak* (n 35) and *Waterville Fisheries Development Ltd v Aquaculture Licensing Appeals Board (No.2)* [2014] IEHC 381.
[39] Hogan (n 36) 1337; Hogan J cites in that regard *Murphy v Greene* [1990] 2 IR 566; *In Re MJBCH Ltd* [2013] IEHC 256, [2013] 1 IR 407; *Macauley v Minister for Posts and Telegraphs* [1966] IR 345; *Blehein v Minister for Health and Children* [2008] IESC 40, [2009] 1 IR 275.
[40] Hogan (n 36) 1337.

to act in an arbitrary or autocratic fashion invokes points three to eight of the desiderata, as a prohibition on arbitrary executive action requires that laws be prospective, clear and comprehensible, consistent, capable of being complied with, stable and reflected in actual practice by the State, rather than merely theoretical.

From the foregoing analysis, we can therefore identify several key criteria for assessing whether a particular action interferes with the rule of law in Ireland, based on how it is understood in this jurisdiction. These are:

- Independence of the judiciary;
- Ability to benefit from judicial independence through reasonable access to the courts;
- Prohibition of arbitrary action, whether by legislation or executive action;[41] and
- Clarity and stability of legal rules, and corresponding rights and liabilities.[42]

It is submitted that these criteria are also not merely a 'laundry list' of rule of law features, conformity against which can be gamed. In fact, it is contended here that these criteria describe a political and legal culture in which power is restrained by the ability of the judiciary to adjudicate independently, prohibit arbitrary action, and demand clarity and stability of legal rules.

With both jurisdiction stripping and the relevant rule of law criteria defined, it is therefore possible to look at how jurisdiction stripping in Ireland up to and including the decision in *Buckley* impacted on the rule of law, as it is understood in contemporary Ireland.

The Impact of Jurisdiction Stripping on the Rule of Law in Ireland

As Coffey has noted, undermining the jurisdiction of courts was a persistent practice on the part of the legislature from the beginning of the Irish Free State, dating back

[41] It is submitted that legislation is also covered by this principle. Likewise, executive power vested in the Government usually coincides with control of the Oireachtas by the same persons and parties, with the same governing agenda. As will be seen in the cases of jurisdiction stripping analysed later in this article, this can result in arbitrary executive action being effected with the help of enabling legislation.
[42] Hogan (n 36) 1337.

even to the days of the Republican courts during the Civil War period.[43] Arguably, the main motivator for the first notable cases of jurisdiction stripping was frustration by the government of the Irish Free State at appeals being made of Irish Supreme Court decisions to the Judicial Committee of the Privy Council in London, as provided for under the Anglo-Irish Treaty (hereafter 'the Treaty') in 1921.[44]

The first example of this behaviour post-Civil War can be seen, as Coffey notes,[45] in *Lynham v Butler*,[46] which it is submitted here was an example of jurisdiction stripping. In *Lynham*, the original dispute between the parties related to the ability of the defendant to purchase lands from the Irish Land Commission. Section 24 of the Land Act 1923 provided for the vesting of certain interests in lands in the Land Commission, enabling the holders of such interests, which included the defendant, to purchase those lands from the Land Commission at a price set by the Act. The plaintiff disputed the validity of the defendant's interest and brought an action to recover possession of the lands from the defendant. The Supreme Court dismissed an appeal by the plaintiff of a High Court decision that the lands in question were covered by the 1923 Act. The Privy Council's granting of leave to appeal resulted in the passing of the Land Act 1926,[47] the provisions of which precluded any possibility of a successful appeal. In particular, section 2(a) of the Act provided that relevant provisions of the 1923 Act would 'be construed and have effect and be deemed always to have had effect' in such a way as to fatally undermine any appeal to the Privy Council. This is a classic case of jurisdiction stripping, as the Oireachtas legislated to pre-determine an appeal of a specific case to a court with competent jurisdiction, thereby denying one party an impartial adjudication of their dispute.

Jurisdiction stripping was, it is submitted, seen again in the Privy Council decision in *Performing Right Society Ltd v Bray Urban District Council*.[48] On this occasion, the plaintiff appealed an earlier Supreme Court decision, in which it was held that the

[43] Donal Coffey, 'Comparative and Institutional Perspectives on the Exercise of Judicial Power in the Irish Free State' in Eoin Carolan (ed), *Judicial Power in Ireland* (Institute of Public Administration 2018) 26, 32-35.
[44] ibid 34-35.
[45] ibid 33.
[46] [1925] 2 IR 231.
[47] Coffey (n 43) 33.
[48] [1930] IR 509.

Copyright Act 1911 did not continue in force after independence and hence did not protect their intellectual property rights.[49] Here, as Coffey notes,[50] the Copyright (Preservation) Act 1929 was passed in order to render moot the appeal to the Privy Council.[51]

While one could argue that attempts to frustrate the jurisdiction of the Privy Council reflected attempts by the Oireachtas to establish an 'Irish rule of law' by protecting the finality of the jurisdiction of the Irish Supreme Court,[52] it remains the case that following the Treaty, the Privy Council had proper jurisdiction to hear appeals from Ireland until the Oireachtas formally abolished the right of appeal to the Privy Council in 1933.[53] It is submitted, therefore, that any attempts at using legislation to frustrate appeals to the Privy Council were a form of jurisdiction stripping, as they involved attempts to prevent the free and impartial determination of cases by a court with proper jurisdiction over those cases, effectively removing its jurisdiction by directing a particular outcome. As Coffey has argued,[54] these tensions should not be seen as merely part of a struggle between an imperial institution and a dominion government, but also as forming part of a pattern in which the Executive of the Free State was 'not prepared to countenance any meaningful form of judicial review,'[55] or 'any meaningful opposition.'[56]

Likewise, the Land Purchase (Guarantee Fund) Act 1936 conforms to this pattern. The background to this Act, as noted by James Dillon TD in the debate of the first stage of the Bill,[57] was the initiation by local authorities of proceedings to challenge the legality of a funding decision by central government. As noted by Deputy Dillon,[58] the legislation was introduced to undermine these proceedings by changing the legal

[49] [1928] IR 506.
[50] Coffey (n 43) 33–34.
[51] Copyright Preservation Act 1929 s 4.
[52] Coffey (n 43) 34-35.
[53] Constitution (Amendment No. 22) Act 1933, s 1(b).
[54] Coffey (n 43) 35.
[55] ibid.
[56] ibid.
[57] See the contribution of Deputy Dillon during the first reading of the Bill, Dáil Debates (27 November 1935, Vol. 59 No. 9).
[58] ibid.

position the subject of the action to one desired by the Government. This Act was retrospective in effect, as it stipulated that its provisions were to be deemed to apply from 1 April 1932.[59] As with the earlier cases, this amounted to an act of jurisdiction stripping, by virtue of its pre-determination of a specific case already pending in the courts, to achieve the Government's desired outcome.

The Land Purchase (Guarantee Fund) Act 1936 was followed by the Accidental Fires Act 1943. This was alleged in *Buckley v Attorney General* to have been passed in an attempt to stymie pending actions for damages following an accidental industrial fire,[60] and this claim is corroborated by evidence from Dáil Debates on the legislation.[61]

These occasions of jurisdiction stripping had a detrimental impact on the rule of law in Ireland. While they did not occur on a constant basis, involving interference in every other dispute before the courts, jurisdiction stripping did occur at least twice in less than a decade in relation to the Privy Council appeals,[62] and on three other known occasions not connected to the Privy Council prior to *Buckley v Attorney General*. It also occurred within a broader context in which successive governments following the Civil War were reluctant to accept legal restraint on them by courts, and in which there were numerous other autocratic tendencies displayed, with concerning effects on the rule of law.[63] As one anonymous commentator (perhaps somewhat hyperbolically) stated in the 1942 *Northern Ireland Legal Quarterly*:

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[59] Land Purchase (Guarantee Fund) Act 1936, s 2.

[60] Hogan (n 2) 379.

[61] See the contribution of then Minister for Industry and Commerce, Seán Lemass TD, at the second reading of the Bill, Dáil Debates (24 March 1943, Vol. 89 No. 11).

[62] A third dispute between the Irish government and the Privy Council, relating to *Wigg and Cochrane v Attorney General of Ireland* [1927] UKPC 45, is not discussed here for the sake of brevity and clarity. See Thomas Mohr, 'Lord Cave, the British Empire and Irish Independence - A Test of Judicial Integrity' (2012) 12 Commonwealth Law Journal 229.

[63] These include the restriction of civil liberties, including the establishment of military tribunals under the Public Safety Acts 1923 to 1933. They also include frequent amendment of the Constitution by simple parliamentary majority, to enable measures such as the Public Safety Acts, or to secure short-term political advantage. See *R (O'Brien) v The Military Governor of the Military Internment Camp* [1924] 1 IR 32; *The State (Ryan) v Lennon* [1935] IR 170; Laura Cahillane, 'An Insight into the Irish Free State Constitution' (2014) 54 American Journal of Legal History 1; Eoin Daly, 'Reappraising Judicial Supremacy in the Irish Constitutional Tradition', in Cahillane, Hickey and Gallen (eds) (n 20); Oran Doyle, *The Constitution of Ireland - A Contextual Analysis* (1st edn, Hart Publishing 2018) 8-11; Donal Coffey, 'The

> Thus there is no rule of law in Éire, theoretically or in fact. The principle was broken with straight away. Then the fundamental law was flouted and when the Courts struggled to support it a new Constitution was issued. The Executive were given wide powers, but when these were not wide enough they legislated to make legal prohibition ineffective. Finally, to ensure the ineffectiveness of law they established a Court of their own with powers to deal with 'any offence whatsoever.' Is there any more that tyranny can do? So far these powers have been cautiously used, but the powers are there and the rule of law is gone.[64]

Turning to the effect of jurisdiction stripping on specific aspects of the rule of law, its impact on the right of access to the courts, highlighted as noted above by Hogan as a key pillar of the rule of law in Ireland,[65] is obvious. A person cannot be said to have had their right of access to the courts upheld if, having initiated proceedings, legislation is passed to make that outcome impossible. While in such scenarios people may formally have a right of access to the courts by being able to initiate proceedings, being unable to receive any benefit from a judgment in their favour makes a mockery of that right. This issue with access to the courts arises not only in relation to individual cases where access to the courts is prevented, but also from the cumulative effect of litigants being repeatedly deprived of such access.

The impact of jurisdiction stripping on legal certainty and accessibility, also central to the rule of law in Ireland, is considerable. If legal certainty is understood as the quality of predictability and clarity in law, jurisdiction stripping undermines that by creating a situation where individuals cannot predict when considering their legal rights whether their case will be decided according to the law that applies at the time they initiate proceedings, or by a new law passed arbitrarily at a later point to frustrate their case or the judgment they receive. This also impacts on legal accessibility, as the retroactive nature of jurisdiction stripping in these situations creates a situation where the laws applicable to the determination of the issue were not in existence at the time of the

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Need for a New Constitution: Irish Constitutional Change 1932-1935' (2012) 48(2) The Irish Jurist 275, 289-292, 294, 300-302.

[64] Anonymous, 'Law in Eire' (1942) 5(2) Northern Ireland Legal Quarterly 84, 96.

[65] Hogan (n 36) 1337.

act or failure to act which gave rise to the proceedings, or of the determination by the litigant to proceed with an action.

It is also arguable that, given the significant role of the Government in initiating and passing legislation in Ireland, jurisdiction stripping also constitutes a form of arbitrary action by the executive, given the ad hoc way in which jurisdiction stripping is deployed.

Many of these issues for the rule of law were appreciated at the time such jurisdiction stripping legislation was introduced. For example, although he did not specifically reference the rule of law, Senator Ernest Blythe pithily summarised the problematic nature of this practice in relation to the Land Purchase (Guarantee Fund) Act 1936:

> This coming in the middle of litigation has a peculiarly objectionable flavour. It is much more objectionable than if the Government had waited until the courts had given their decision and then frankly reversed it on the basis of the various arguments the Minister has used. I think when the case is at hearing in the courts, when the contest has begun. as it were, for the Minister to step in to alter the rules in his own favour is something that is going to have very many reactions, and is going to tend very seriously to undermine the respect in which the courts ought to be held, and is going to undermine the reputation of the State for fair play.[66]

In light of the problems for the rule of law that jurisdiction stripping creates, it is in some ways remarkable that the judiciary did not push back more against the practice in the 1920s and 1930s. Whatever the reasons for this reticence, as will be seen, the judiciary finally put an end to jurisdiction stripping in *Buckley v Attorney General*.[67]

The *Buckley v Attorney General* Decision

The facts of *Buckley v Attorney General* are well known, but worth summarising briefly. The original dispute at the heart of the matter was the rightful ownership of a sum of £8,663 12s 2d previously held by trustees of what the judgment called the 'Sinn Féin

[66] Seanad Debates (1 January 1936, Vol. 20 No. 22).
[67] *Buckley* (n 1).

Organisation' or the 'Organisation'.[68] As a result of 'the split' of the Organisation due to Treaty negotiations, these funds had been lodged in the High Court by the Trustees of the Organisation in 1924, because of difficulty in determining who should be entitled to them. In 1942, the plaintiffs brought an action against the Attorney General and the personal representative of the last surviving trustee, claiming first, that the funds in question were the property of the extant Sinn Féin Organisation; and secondly, that the funds in question should be paid to them 'or to two of them as honorary treasurers of the Organisation.'[69]

After proceedings were initiated in the High Court, the Oireachtas passed the Sinn Féin Funds Act 1947. The Act provided for the establishment of a Board, *Bord Cistí Sinn Féin*,[70] with authority to establish and manage a trust of funds paid into it.[71] Section 10(1) of the Act provided for a stay to be placed on all further proceedings upon the passage of the Act. Section 10(2) further required that the High Court dismiss the action in question, without costs, on application by the Attorney General. Finally, section 10(4) together with section 11 provided that no other action could be brought in relation to the funds in question, except where required for subsequent payment of the moneys to the Board.

When the Attorney General brought the *ex parte* action contemplated in section 10, the High Court ruled section 10 to be unconstitutional, with the Supreme Court upholding this finding on appeal.[72] Section 10 was found to be unconstitutional on two grounds, the first being the right to property under Article 43, which the Supreme Court found to be the principal ground.[73] The second ground was the finding by the Court that the Act violated the separation of powers which in fact proved over time to be the more consequential ground. In the High Court, Gavan Duffy P stated: 'This Court cannot, in deference to an Act of the Oireachtas, abdicate its proper jurisdiction to administer justice in a cause whereof it is duly seized.'[74]

[68] ibid 67.
[69] ibid.
[70] Sinn Féin Funds Act 1947, s 2.
[71] Sinn Féin Funds Act 1947, s 9.
[72] *Buckley* (n 1) 67-68.
[73] ibid 81.
[74] ibid 70.

While the issue regarding the separation of powers was addressed briefly by the Supreme Court, O'Byrne J made a succinct but landmark statement:

> There is another ground on which, in our view, the Act contravenes the Constitution. We have already referred to the distribution of powers effected by Art 6. The effect of that article and of Arts 34 to 37, inclusive, is to vest in the Courts the exclusive right to determine justiciable controversies between citizens or between a citizen or citizens, as the case may be, and the State. In bringing these proceedings the plaintiffs were exercising a constitutional right, and they were, and are, entitled to have the matter in dispute determined by the judicial organ of the State. The substantial effect of the Act is that the dispute is determined by the Oireachtas, and the Court is required and directed by the Oireachtas to dismiss the plaintiffs' claim without any hearing and without forming any opinion as to the rights of the respective parties to the dispute. In our opinion this is clearly repugnant to the provisions of the Constitution, as being an unwarrantable interference by the Oireachtas with the operations of the Courts in a purely judicial domain. For these reasons we are of opinion that the decision of the President of the High Court was correct. This application will be dismissed.[75]

It is notable that neither the High Court nor Supreme Court judgments made explicit reference to the rule of law. In setting out robust defences of the separation of powers, however, and explaining the danger of the Act to it, they of course addressed many of the specific issues that the practice of jurisdiction stripping poses for the rule of law. For instance, Gavan Duffy P in the High Court, paraphrasing Daniel Webster, stated:

> Justice involves due process of law and that law … is the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial, so that every citizen shall hold his life, liberty, and property and immunities under the protection of the general rules which govern society; arbitrary executions of power under the forms of legislation are thus excluded

[75] ibid 84.

> and no organ of the State can deny to the citizens the equal protection of the law.[76]

Interestingly, as Hogan notes, in advising the Government that the legislation itself was permissible, the Attorney General had felt his position was supported by reference to US case law,[77] and in particular the decision in *Ex Parte McArdle*.[78].

It is clear that the intent and effect of the Sinn Féin Funds Act 1947 was similar to previous instances of jurisdiction stripping in its impact on the rule of law. For that reason, the pushback by the courts is to be lauded. However, to truly understand the long-term benefits of *Buckley v Attorney General* for the rule of law, it is necessary to consider its impact on subsequent case law, and on the behaviour of the executive and legislative branches of government.

Assessing the Impact of Buckley v Attorney General

The decision in *Buckley v Attorney General* virtually ended jurisdiction stripping and the resulting issues it presented for the rule of law. It did this by (i) allowing the judiciary to be assertive in defining acceptable and unacceptable limitations of their jurisdiction; and (ii) requiring the Oireachtas to exercise greater restraint in their attempts to regulate the jurisdiction of the courts. To see how the decision impacted the rule of law in these ways, these two will now be considered in turn.

Encouraging Judicial Assertiveness

The first major impact of *Buckley v Attorney General* was its encouragement of judicial assertiveness. It would not be true to say that there has been no legislation since 1947 that strayed into the territory of jurisdiction stripping, as will be discussed below. However, what *Buckley v Attorney General* undeniably established is that the Oireachtas could no longer pass legislation to directly settle the outcome of a case which had been initiated, as it had done in decades prior. *Buckley v Attorney General* had further far-reaching consequences in protecting the jurisdiction of the courts in

[76] ibid 70.
[77] See Hogan (n 2) 377-378.
[78] *Ex Parte McArdle* (n 12). It is notable that, as discussed earlier, counsel for the Attorney General referred during the *ex parte* application to there being precedent for such a measure, in an apparent attempt to justify its constitutionality. See Hogan (n 2) 379.

less extreme scenarios, by making the courts more assertive in defending against more subtle encroachments on judicial power, and hence in cementing the rule of law.

This impact can be seen in the precedent it created, developed in subsequent cases, of courts defining more clearly the boundary between legitimate *regulation* of their jurisdiction by the Oireachtas and illegitimate *interference* in their jurisdiction. This has not only had the benefit of striking down legislation which has crossed that boundary, but also in proactively signalling to the Oireachtas what the courts would and would not accept, with attendant benefits in strengthening the rule of law.

It is possible to identify four key principles from *Buckley v Attorney General* and subsequent case law demarcating the boundary between acceptable and unacceptable involvement in the judicial arena. These principles have strengthened the rule of law by clarifying when a particular legislative provision does or does not constitute an improper encroachment on the judicial power. Most of the legislation considered in this line of case law was passed after *Buckley v Attorney General*, but some of it was passed before.

The first and most straightforward principle, beginning with *Buckley v Attorney General*, is prohibition of what Morgan calls *ad hominem* legislation,[79] that is, legislation like the Sinn Féin Funds Act 1947 which is targeted at a specific party or case of which a court is already seised in order to dictate the outcome. As we will see below, blatant attempts at interference in specific cases have hardly been attempted since.

The second principle is that legislation which is not *ad hominem* but changes the law affecting a particular case is acceptable, provided it is passed before a court is seised of a matter.[80] Once a court is seised of a particular matter, legislation which changes the law affecting pending cases is only acceptable if the legislation itself is general in nature rather than targeted.[81] For example, in *The State (Divito) v Arklow Urban District Council*,[82] at issue was an application for the issue of a gaming licence under the

[79] David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell 1997) 136–138, 145-147.
[80] ibid 138–142.
[81] ibid 139-141.
[82] [1986] ILRM 123.

Gaming and Lotteries Act 1956. In this case, Arklow UDC had revoked, amended and re-issued a previous resolution which brought into force in its area Part III of the 1956 Act, which related to Licensing of Amusement Halls and Funfairs. The effect of this action was to disentitle the applicant to a gaming licence under the Act. The Council did this after a notice by the applicant of intention to apply for a gaming licence under the Act was published, but crucially, did so before the application was issued in the District Court. The Court found that this was acceptable and not a breach of the separation of powers. Likewise, in *Re Camillo*,[83] which concerned the same legislative provision, it was held that a revocation of a resolution before the hearing of a Circuit Court appeal was acceptable, provided it was of general effect, rather than targeted at a specific case.[84]

Similarly, in *Minister for Justice v Tobin*,[85] the appellant successfully challenged a second attempt at extradition to Hungary, where the first attempt to extradite him had failed based on interpretation by the Court of extradition legislation. Subsequent legislation changed the extradition criteria, resulting in the second extradition proceedings which were the subject matter of the case. The Supreme Court, in allowing the extradition, held that the subsequent legislative amendments were not an unconstitutional interference due to their generality, noting that the Oireachtas did not demonstrate any 'clear intention' that the appellant's rights as a result of the previous court proceedings were to be interfered with.[86] This line of case law protects a key principle of the rule of law by prohibiting legislation which, as in pre-*Buckley v Attorney General* cases, deprives parties of the substance of access to the courts, as well as compromising legal certainty.[87]

The third principle of post-*Buckley v Attorney General* case law is the prohibition of unwarranted legislative interferences in the judicial domain, that is in relation to how judges decide cases. This has several aspects, the most important of which relates to

83 [1988] IR 104.

84 See Morgan (n 79) 139 – 141; Gerard Hogan, Gerry Whyte, David Kenny and Rachael Walsh, *Kelly: The Irish Constitution* (5th edn, Bloomsbury Professional 2018) [6.1.71].

85 [2012] IESC 37, [2012] 4 IR 147.

86 ibid [448], [451].

87 The importance of this line of case law for protecting against arbitrary executive action, and thus the rule of law, was also highlighted in *Gorman v Minister for the Environment and Local Government* [2001] 2 IR 414 (discussed further below).

how the courts have defined an unwarranted interference. In *Gorman*,[88] before considering *Maher v Attorney General*,[89] the Court restated the test in *Buckley* as to what constitutes an unwarranted interference as:

> (a) whether the substantial effect of the legislation or executive action was such that the justiciable controversy was determined by the legislator or executive and
>
> (b) whether the court was required or directed by the legislator or executive to dismiss the plaintiff's claim or appeal without any hearing and without forming any opinion as to the rights of the respective parties to the dispute.[90]

This definition underpins key requirements for the rule of law in Ireland by not only protecting judicial independence, but also protecting against arbitrary executive action.

The prohibition of unwarranted interference has been particularly important in cases concerning due process in criminal justice.[91] One of the earliest examples of this prohibition in relation to criminal cases is *State (C) v Minister for Justice*.[92] In *C*, the Supreme Court held, 'the exercise of the judicial power of the State is confined by the Constitution to the Courts' and that 'the doing of any act or the taking of any step by any non-judicial authority in the State, which interferes with, restricts or prevents the District Court from deciding the particular case before it in accordance with the law applicable to it, is an infringement of the judicial power.'[93] Another key case is *Maher v Attorney General*,[94] which considered section 44(2)(a) of the Road Traffic Act 1968.[95] In *Maher*, FitzGerald CJ held that this provision was an 'invalid infringement of the

[88] ibid.
[89] [1973] IR 140.
[90] *Gorman* (n 87) 421.
[91] The independence of the courts in relation to criminal trials is considered comprehensively in Hogan et al (n 84) 979-810.
[92] [1967] IR 106. Delany has noted the similar vein of this decision to the *Buckley v Attorney General*. See Hilary Delany, 'Interference by the Legislature in the Judicial Domain' (2003) 21 Irish Law Times 272, 272.
[93] ibid 122.
[94] *Maher* (n 89).
[95] Section 44(2)(a) provided that a certificate (issued under section 43(3) of the Act) stating a particular blood-alcohol concentration based on a sample taken from a person would be conclusive evidence of that person's blood alcohol level at the time the sample was taken.

judicial power,'[96] as it precluded judges or courts from determining 'all the essential ingredients' of the offence it related to.[97]

The State (O'Rourke) v Kelly, on the other hand, provides an example of a statutory procedural provision which was not an unwarranted interference, by establishing that it is permissible for legislation to direct a court to make a particular order if satisfied that certain criteria and evidence are established, provided the court is still free to decide whether it is in fact so satisfied.[98] *O'Rourke* concerned the constitutionality of section 62(3) of the Housing Act 1966, which required a District Judge to issue a warrant to a housing authority where satisfied that a demand referenced in section 62(1) of the Act had been made. This requirement to decide in a particular way was constitutionally acceptable because, according to O'Higgins CJ, the court was only required to make the order following the establishment of specified matters.[99] O'Higgins CJ stated that 'it is only when the provisions … have been complied with and the demand duly made to the satisfaction of the District Justice that he must issue the warrant.'[100] In his view, such a provision was 'within the competence of the Oireachtas',[101] and hence the section was constitutionally acceptable.[102] This would seem to be a reasonable decision, as it still prevents the legislature or executive from deciding the substantive aspects of a case, hence protecting access to an independent judiciary and courts, and protecting against arbitrary actions.

Similar to *O'Rourke*, the Court in *The State (McEldowney) v Kelleher* confirmed that it is acceptable for legislation to direct particular orders or decisions by courts once particular points have been proved, but only if the court retains discretion to determine whether those proofs have actually in fact been established.[103] *McEldowney* considered the constitutionality of section 13(4) of the Street and House to House Collections Act 1962, which governed appeals to denials of collection permits. It was found that the effect of section 13(4) of that Act was to require a District Judge to disallow an appeal

[96] *Maher* (n 89) 146.
[97] ibid.
[98] [1983] IR 58.
[99] ibid 61.
[100] ibid.
[101] ibid 61.
[102] ibid.
[103] [1983] IR 289.

by someone denied a collection permit if a Garda Chief Superintendent gave certain evidence on oath, namely that there were reasonable grounds for believing that the proceeds of a collection would be used to benefit an illegal organisation.[104] Walsh J distinguished the facts in that case from those in *O'Rourke,* noting that,[105] in the present case, section 13(4), in requiring a judge to disallow an appeal, left no discretion to determine whether the grounds were in fact reasonable. Walsh J stated:

> In the opinion of the Court, the present case falls squarely within the principles enunciated in those decisions. The statute creates a justiciable controversy and then purports to compel the court to decide it in a particular way upon a particular statement of opinion being given upon oath as to whether or not a statutory reason for refusing the permit exists, whatever opinion the court may have formed on the issue in question, or might have formed if it had heard any evidence upon it.[106]

Likewise, in *Cashman v Clifford,*[107] Barron J granted a declaration that section 13(5)(a) of the Betting Act 1931 was inconsistent with the Constitution. Though the legislation did not seek to impose a particular decision on the court, the Court found that it did constitute interference with the judicial process by limiting 'the persons who may be heard or adduce evidence.'[108] Here again we see the concern in the post-*Buckley v Attorney General* case law for ensuring access to the courts.

Another important aspect of the prohibition against unwarranted interference in commenced proceedings is that the courts will not tolerate any legislation which, as in *Buckley v Attorney General*, grants the Attorney General as a party to a case the power to block the hearing of the case by the court.[109] This point was reiterated in *Macauley v Minister for Posts and Telegraphs*,[110] and the boundaries of the rule were elucidated in *Fitzgerald v Director of Public Prosecutions*.[111] In the latter case, the Supreme Court

[104] ibid 293, 305.
[105] ibid 306.
[106] ibid 306.
[107] [1989] IR 121.
[108] ibid 124.
[109] Morgan (n 79) 138.
[110] *Macauley* (n 39).
[111] [2003] 3 IR 247.

held that legislation requiring a court not to accept an appeal from law officers such as the Attorney General or the DPP is acceptable. This further strengthens protections for the key rule of law principles of access to the courts and prohibition of arbitrary executive action.

The prohibition of unwarranted interference principle is echoed in jurisprudence by the court in relation to ouster clauses. As discussed earlier in this article, the validity of such clauses depends on their breadth and effect, with partial ouster clauses such as time-limitation periods, substantial grounds requirements and conclusive evidence provisions being found to be acceptable, as they are regulations rather than exclusions of judicial oversight.[112]

The fourth and final key principle is that where a case has already been decided by a court, legislation should not deprive parties of the benefit of the judgment. The implications of this principle in strengthening the rule of law are clear, given its importance in ensuring that parties are genuinely able to benefit from an impartial hearing of their case. Examples of this includes the legislative savers introduced in the wake of *Howard v Commissioners of Public Works in Ireland (No 1)*,[113] and in the *Pine Valley* series of litigation, both discussed further in the next section.[114] As we will see, in both sets of litigation savers were included in legislation enacted in reaction to court decisions, to avoid interfering with the outcomes of specific cases.

From the above principles, we can see that the judiciary have gradually clarified the boundaries of the *Buckley v Attorney General* principles, thereby helping to strike down existing violations of these principles, and signalling the acceptable limits to the other branches of government regulating the courts' jurisdiction. In so doing, they have clarified the difference between acceptable regulation of court jurisdiction and unacceptable jurisdiction stripping. The effect of this can be seen in the responding behaviour of the Oireachtas and the Government, to which we turn next.

[112] See fn 4–9 above.
[113] [1994] 1 IR 101.
[114] See discussion in Keane (n 2) 192–193; Morgan (n 79) 144–145.

Impact on the Oireachtas

Since *Buckley v Attorney General*, there has been no attempt at the kind of blatant jurisdiction stripping seen in *Buckley v Attorney General* and earlier cases, though one might point to *Gorman v Minister for the Environment and Local Government* as a possible partial exception to this general statement.[115] In *Gorman*, the Minister for the Environment introduced Regulations to effect deregulation of taxi licensing.[116] These had been found by Murphy J in the High Court to be *ultra vires* in *Humphrey v Minister for the Environment*.[117] An appeal from the decision in *Humphrey* had been taken to the Supreme Court but, before it was heard, the Minister introduced a second set of Regulations repealing the earlier Regulations. In *Gorman*, Carney J found this repeal to be invalid, being in his view 'an unwarrantable interference arising in the unique circumstances of this case in the applicants' appeal'.[118]

While the actions of the Minister for the Environment in *Gorman* could be seen as of a piece with pre-*Buckley v Attorney General* jurisdiction stripping, it must be noted, as Carney J did, that the interference, while unwarranted, was inadvertent, as 'the Minister of State was concerned that if the appeal succeeded there would be two regimes in place side by side and his repeal of the first Regulations of 2000 was to guard against that situation.'[119] It was, however, a way of quickly dispensing with a legal liability. *Gorman* could arguably be categorised as a partial exception proving the general rule that, as Keane points out, governments since *Buckley v Attorney General* have been 'punctilious in the extreme' when drafting legislation to ensure they do not violate the separation of powers.[120]

Keane is undoubtedly correct on this point. Since *Buckley v Attorney General*, it has become common practice for legislation which has potentially limited access to the courts, or to remedies, to specifically rule out application of its provisions to persons who might be deprived of the benefit of a judgment, where proceedings have already been issued or judgment delivered. By way of example, the Local Government

[115] *Gorman* (n 87).
[116] ibid 414.
[117] [2001] 1 IR 263.
[118] *Gorman* (n 87) 424.
[119] *Gorman* (n 87) 425.
[120] Keane (n 2) 192.

(Planning and Development) Act 1982 was passed as part of what Keane calls the '*Pine Valley* saga.'[121] A set of grants of planning permission had been deemed unlawful by the Supreme Court in *The State (Pine Valley Developments Limited) v Dublin County Council*.[122] Section 6(1) of this Act provided that planning permissions granted prior to 15 March 1977, (before the decision at issue), 'shall not be, and shall not be regarded as ever having been, invalid by reason only of the fact that the development concerned contravened, or would contravene, materially the development plan' of the relevant local authority. Section 6(2) provided:

> if, because of any or all of its provisions, subsection (1) of this section, would, but for this subsection, conflict with a constitutional right of any person, the provisions of that subsection shall be subject to such limitation as is necessary to secure that they do not so conflict but shall be otherwise of full force and effect.

Section 6(2) was found by Lardner J in subsequent litigation to be 'included by the Oireachtas for the purpose of respecting and not interfering with the determination by the Courts of the justiciable controversy' in the earlier decision.[123]

The series of litigation concerning *Howard v Commissioners of Public Works* also saw legislative savers being used to respond to the general implications of the original decision,[124] without, as Hogan et al note, depriving any litigants of 'the fruits of their victory'.[125]

Another example is the Health (Amendment) (No. 2) Bill 2004, the constitutionality of which was considered in *Re Article 26 and the Health Amendment Bill*.[126] While many aspects of the Bill were at issue, the most relevant for this analysis is section 1(b), which amended section 53 of the Health Act 1970 by the insertion of two new subsections, the text of which stated:[127]

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[121] ibid.
[122] ibid; [1984] IR 407.
[123] *Pine Valley Developments Ltd v Minister for the Environment* [1987] IR 23, 46.
[124] *Howard* (n 113).
[125] Hogan et al (n 84) [6.1.184].
[126] [2005] IESC 7, [2005] 1 IR 105.
[127] Health Amendment No. 2 Bill 2004, s 1(b).

> (5) Subject to subsection (6), it is hereby declared that the imposition and payment of a relevant charge is, and always has been, lawful.
>
> (6) Subsection (5) shall not apply in the case of a relevant charge which is the subject of civil proceedings—
>
> > (a) instituted on or before 14 December 2004, and
> >
> > (b) for the recovery of the relevant charge.

In light of this wording, the Supreme Court noted in *Re Article 26 and the Health Amendment Bill* that the 'obvious purpose' of section 1(b) was 'to avoid any unconstitutionality which would arise from legislative interference with existing litigation,' based on the *Buckley v Attorney General* principles.[128]

Section 3 of the Landlord and Tenant (Ground Rents) Act 2005 inserted a saver in the below terms,[129] which has been acknowledged as a type of saver commonly used to avoid running afoul of the principles in *Buckley v Attorney General*.[130] It provides:

> The amendment of section 4 of the Act of 1978 effected by section 2 of this Act shall not apply to—
>
> > (a) an application to the Registrar of Titles under Part III of the Act of 1978 *made before the passing of this Act*,
> >
> > (b) a notice of intention to acquire a fee simple under section 4 of the Act of 1967 *served before the passing of this Act*… (emphasis added)

It is submitted that the fact that there have been no subsequent controversies on this specific point is testament to the clarity and effect of *Buckley v Attorney General*. As the above examples of legislative drafting show, the decision can be said to have undeniably ended the kind of blatant undermining of the separation of powers, and the interference in judicial processes which was a major weakness in the rule of law in Ireland in the State's first generation of existence. As a result of this, blatant jurisdiction

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[128] *Health Amendment Bill* (n 126) [80].
[129] Landlord and Tenant (Ground Rents) Act 2005, s 3.
[130] Siobhán Stack SC, 'Applicability of Landlord and Tenant Acts to the State' [2019] 1 Conveyancing and Property Law Journal 9, 11.

stripping no longer poses the same challenge highlighted earlier for the right of access to the courts, or indeed legal certainty and accessibility. It also indicates a refraining by successive Governments from engaging in the kind of arbitrary executive action which jurisdiction stripping arguably is in an executive dominated, Westminster-style parliamentary system such as Ireland. Combined with the clarity provided by the courts in later decisions, this underlines the long-term effects of *Buckley v Attorney General* in strengthening the rule of law, by effectively ending jurisdiction stripping in Ireland, and hence the rule of law issues it raised.

Conclusion

This article began by defining 'jurisdiction stripping', in addition to 'the rule of law' in an Irish context. It then showed how jurisdiction stripping is distinct from ordinary regulation and indeed ouster of jurisdiction, and how it presented a real challenge to the rule of law in Ireland in the early decades of the State's history. This is evident from its compromising of judicial independence, access to courts, legal certainty and legal predictability, in addition to constituting arbitrary action by the executive.

The decision of *Buckley v Attorney General* can be said to have thrown down a gauntlet to the Oireachtas and the Government. This assertion of the judiciary's independence sent a very clear message to the other branches of government about what would be tolerated in regulating the proper jurisdiction of the courts. It is submitted that in doing so, *Buckley v Attorney General* not only set an important precedent for judicial independence (which it is most often praised for) but that the decision, and subsequent rulings, through development of jurisprudence on what constitutes infringement of the judicial power, significantly changed the behaviour of the Oireachtas by making it extremely cautious about encroaching on that power. In so doing, the decision greatly strengthened the rule of law in Ireland. That is indeed worth celebrating.