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The Impact of the Economic Crisis on  
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# The Impact of the Economic Crisis on the Irish Legal System. Between Austerity and Constitutional Rhetoric \*

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**Summary:** **1.** Introduction. **2.** Setting the Scene: Putting the Bailout in context. **2.1.** Economic crisis and political stagnation. **2.2.** Bailout and reforms. **3.** The first track: Austerity and the Successful Degradation of Economic and Social Rights in Ireland. **3.1.** Austerity and Social rights. **3.2.** Austerity and Worker's Rights. **4.** The second track: the Constitutional Reform. **4.1.** The Constitutional Revision Procedure in a Nutshell. **4.2.** Reform By Way of Convention. **4.3.** The Conventional Allegory: Marriage Equality. **5.** Concluding Remarks.

## 1. Introduction

The Irish economy enjoyed a long period of sustained growth from roughly 1994 onward, with a corresponding growth in wealth creation and employment<sup>1</sup>. Yet, in 2008, Ireland recorded a substantial

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This article takes into account the legal development occurred until March 2016. It is the product of a joint reflection. However, Sections 2. and 3.1. have been written by Delia Ferri and Sections 3.2. and 4. and have been written by Charles O'Sullivan, while Sections 1. and 5. have been written jointly.

<sup>1</sup> PJ O'CONNELL, *Astonishing Success-Economic Growth and the Labour Market in Ireland*, ILO, Geneva, 2000; F. BARRY, *The Celtic Tiger Era: Delayed Convergence or Regional Boom?*, in *Quarterly Economic Commentary*, Economic and

public deficit, which reached 14.3% of GDP in 2009, the highest in the EU, and experienced a rapid deterioration in its public finances, a collapse in the housing market and construction sector, and a liquidity crisis within the banking system<sup>2</sup>. The rate of unemployment rose from just under 5% in January 2007 to more than 15% by January 2012 and unemployment in the construction sector rose by 60% in just four years from 2008 to 2012, all of which led to an unprecedented social crisis<sup>3</sup>. The number of people relying on unemployment benefits rose to 326,000 in January 2009, the highest monthly level since records began in 1967<sup>4</sup>.

Given this context, in 2008, the Irish executive chose to guarantee the value of all personal deposits in Irish banks<sup>5</sup>, before extending this to all debts accrued by national financial institutions. While these steps initially sated the market's fears regarding the Irish economy's stability, the fact that the liabilities of these institutions were more significant than the Government initially anticipated, meant that by 2010, the interest rates being charged on Irish Government bonds had risen to an unsustainable level. Hence, after publicly denying the existence of any plans for outside help, the Irish Minister for Finance and Governor of the Central Bank chose to accept a full EU financial "rescue package" (also known as "bailout" or support scheme) from the "Troika" of the European Commission, the European Central Bank, and the International Monetary Fund (IMF)<sup>6</sup>. Ireland's support scheme amounted to €85 billion over four years from November of 2010 to December of 2013. The European Commission was proscribed the primary role of ensuring Ireland's compliance with an eventual successful exit from the support scheme on behalf of the EU.

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Social Research Institute, Summer (2002), pp. 84-91; S. KINSELLA, *Is Ireland really the role model for austerity?*, in *Cambridge Journal of Economics*, Vol. 36, Issue 1, pp. 223-235.

<sup>2</sup> EUROPEAN COMMISSION, *Ireland's economic crisis: how did it happen and what is being done about it?*, available at [ec.europa.eu/ireland/economy/irelands\\_economic\\_crisis/index\\_en.htm](http://ec.europa.eu/ireland/economy/irelands_economic_crisis/index_en.htm). On the banking crisis see B. CLARKE – N. HARDIMAN, *Crisis in the Irish Banking System*, available at [www.ucd.ie/geary/static/publications/workingpapers/gearywp201203.pdf](http://www.ucd.ie/geary/static/publications/workingpapers/gearywp201203.pdf). See also R. KITCHIN – C. O'CALLAGHAN – M. BOYLE – J. GLEESON, *Placing neoliberalism: the rise and fall of Ireland's Celtic Tiger*, in *Environment and Planning A*, n.6/2012, pp. 1302-1326; E. O'LEARY, *Reflecting on the Celtic Tiger: Before, During and After*, Department of Economics, UCC (2010).

<sup>3</sup> *Inter alia* P. KIRBY – M. MURPHY, *Towards a Second Republic*, Dublin, 2011; G. KELLY – A. NOLAN, *The impact of the crisis on fundamental rights across Member States of the EU- Country report on Ireland*, available at [www.europarl.europa.eu/RegData/etudes/STUD/2015/510016/IPOL\\_STU\(2015\)-510016\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510016/IPOL_STU(2015)-510016_EN.pdf).

<sup>4</sup> G. KELLY – A. NOLAN, *The impact of the crisis on fundamental rights ...*, *op.cit.*

<sup>5</sup> Credit Institutions (Financial Support) Bill 2008 (Act No. 45/2008) (Ir.), available at [www.oireachtas.ie/documents/bills28/bills/2008/4508/b4508d.pdf](http://www.oireachtas.ie/documents/bills28/bills/2008/4508/b4508d.pdf).

<sup>6</sup> R. O'GORMAN, *The Irish "Bail-Out" and Cuts to Social Protection Spending – the Case for a Right to a Subsistence Minimum in EU Law*, in *German Law Journal*, n.4/2014, available at [www.germanlawjournal.net/](http://www.germanlawjournal.net/). See also C. MACMAOLAIN, *Ramifications of the EU/IMF Loan to Ireland for the Financial Services Sector and for Irish Law and Society*, in *European Public Law*, n.3/2011.

Ireland's continued enjoyment of its support scheme was conditional on several factors, including that specific economic and political reforms be carried out. This was first established in a Decision of the Council<sup>7</sup> on the same, before being expanded upon in a series of Memorandums of Understanding (MoUs)<sup>8</sup> signed between the Irish Government and the “Troika”, which outlined in greater detail the range of necessary reforms to be implemented. On the one hand, these reforms focused on bringing the State's overall expenditure in line with its current revenue streams: key austerity measures, mainly introduced through annual budgetary laws, included social protection expenditure reductions, the reduction of public service employment numbers, public service wages and pensions, cuts in expenditure including on goods and services, and a reduction in public capital expenditure<sup>9</sup>. On the other hand, Irish society and the political establishment sought to make a clear symbolic break with its past by proposing wide-ranging constitutional and political reforms. Austerity was therefore to be counterbalanced by wide-ranging structural and rights-based constitutional and political reforms. In May, 2012 the Irish electorate voted in favour of the 30th Amendment to the Constitution of Ireland, which inserted a new Article 29.4.10 within the Irish Constitution (*Bunracht na hEireann*)<sup>10</sup>. This provision allowed the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so called “Stability Treaty”)<sup>11</sup>. The ratification of this Treaty substantially consolidated the Irish commitment to overcome the financial crisis. Further to a period of severe “austerity” measures, in December 2013,

<sup>7</sup> Council Implementing Decision 2011/77, On Granting Union Financial Assistance to Ireland, 2011 O.J L30/34.

<sup>8</sup> The Troika and the Irish authorities agree 12 separate *memoranda* of understanding and the Troika would carry out 12 Review Missions to Ireland.

<sup>9</sup> The MoUs contained a more specific figure of €750 million in savings resulting from overall reforms in the welfare system including reform of unemployment and social assistance benefits.

<sup>10</sup> As outcome of the Irish Supreme Court in *Crotty (Crotty v. An Taoiseach & Others* [1987] 1 IR 713), every subsequent amendment of the European Treaties has to be put to the Irish electorate and, once passed, has resulted in new articles being added to the Irish Constitution (for a more detailed account see *ex multis*: M. FORED – D. LEONARD, *Constitutional law of Ireland*, Dublin, 2013, pp. 229 *et seq.* Ireland's relationship with the EU is constitutionally provided for across Articles 29.4.2 – 29.4.9. On the EU referendum see J. O'MAHONY, *Ireland's EU Referendum Experience*, in *Irish Political Studies*, n.4/2009, pp. 429-446. For a more general overview see also B. LAFFAN – J. O'MAHONY, *Ireland in the European Union*, Basingstoke, 2009. The referendum on the Stability Treaty saw the addition of Article 29.4.10 into the Constitution. The provision reads as follows: “The State may ratify the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union done at Brussels on the 2nd day of March 2012. No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State that are necessitated by the obligations of the State under that Treaty or prevents laws enacted, acts done or measures adopted by bodies competent under that Treaty from having the force of law in the State”.

<sup>11</sup> Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Bill 2012. The Stability Treaty, otherwise known as the Fiscal Compact or Fiscal Compact Treaty, is an intergovernmental treaty that has now been signed and ratified by 25 states. It is a stricter application and interpretation of the previous Stability and Growth Pact signed by all EU Member States, and imposes fines on a signatory state where they do not maintain a “balanced budget”. Although it is an intergovernmental treaty, its purpose, form, and requirements arise from EU law. On the Stability Treaty see *ex pluribus* S. PEERS, *The Stability Treaty: Permanent Austerity or Gesture Politics?*, in *European Constitutional Law Review*, n.8/2012, pp. 404-441.

Ireland became the first European country to formally exit the EU/IMF bailout programme<sup>12</sup>. After two years, the Irish economy has certainly seen a marked improvement by some measurements. However, a full recovery has not yet been achieved<sup>13</sup>.

In light of these circumstances, this chapter discusses the main reform measures introduced in Ireland as a consequence of the economic crisis. First, it discusses in a general fashion the reform process initiated after 2009, with a particular emphasis on the role played by the Irish executive within this process, in order to establish the overarching socio-legal context. The chapter highlights the economic, social and political reforms undertaken, with a particular emphasis on the coalition government in power between 2011 and February of 2016 due to its almost singular role in shaping this period. It goes on to address the main austerity measures and their impact in terms of social rights. It first considers social rights in a general fashion, before examining workers' rights in particular, and how these shed light on the overall changes made to social rights during this period. Then the chapter critically examines the Constitutional Convention, its purpose and operation, as well as its most notable success: the Marriage Equality referendum. Finally, the advancement of civil rights in Ireland during this period is discussed. It is ultimately argued that the reforms advanced raised unique questions, with perhaps the most significant being to what extent have these reforms focused on issues of representation and identity politics at the expense of substantive issues of equality. This contribution also attempts to investigate whether the Irish government has held unnecessary referendums on civil rights in order to not only protect itself politically, but to put forward the appearance of substantive change, whilst undermining or ignoring fundamental social rights. Ultimately, the contribution argues that, whilst austerity measures were successfully implemented from 2009 onwards, the political and constitutional changes made failed to address either the substantive or procedural deficiencies highlighted by Irish society at large.

## **2. Setting the Scene: Putting the Bailout in Context**

### **2.1. Economic Crisis, Political Stagnation and Executive Dominance**

From an economic perspective, it is difficult to attribute the harsh economic crisis that Ireland experienced to any one particular cause or prevailing issue. The reality is that the contributing factors were numerous, and date back to the early part of the decade, if not before. However, one of the largest failures was a property market bubble which developed in the early 2000s, financed by the domestic

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<sup>12</sup> J. ZARROLI, *Ireland exits bailout program, but economy still on the mend*, 15 December 2013, Press Release, available at [www.npr.org/2013/12/16/251410113/ireland-exits-bailout-program-but-economy-still-on-the-mend](http://www.npr.org/2013/12/16/251410113/ireland-exits-bailout-program-but-economy-still-on-the-mend).

<sup>13</sup> J. FITZGERALD, *Ireland's Recovery from Crisis*, in *CESifo Forum* n.15(2)/2014, pp. 8-13, available at [www.cesifo-group.de/ifoHome/infoservice/News/2014/04/news-20140414-CESifo-Forum-2-2014.html](http://www.cesifo-group.de/ifoHome/infoservice/News/2014/04/news-20140414-CESifo-Forum-2-2014.html).

financial sector. In particular, since 2002 a “degree of speculation crept into the housing market”<sup>14</sup>. As a consequence of a sizeable number of people purchasing houses as an investment strategy, the link between asset prices and their value became disconnected. Individuals underestimated the risk involved in entering the property market, and the demand for housing as well as loan approvals rose dramatically. Thus, in connection to the property boom, the financial sector adopted a very “relaxed” strategy in how it issued and approved mortgages. The over-lending to property developers, persons buying ancillary homes for investment purposes and those buying a “family home” caused an increase in indebtedness “mainly for asset purchase[s]” within the financial sector, and left the sector vulnerable to the large risk of default in the event of a negative shock to the economy<sup>15</sup>. The collapse of the US financial firm Lehman Brothers and the international crisis made it apparent that Irish banks risked insolvency<sup>16</sup>. Thus, as outlined above, the Irish government, through the Credit Institutions (Financial Support) Bill 2008<sup>17</sup>, guaranteed deposit-holders and bondholders. In November 2009, the Irish government established the National Asset Management Agency (NAMA)<sup>18</sup> to purchase all development-related loans from the banks. These measures effectively socialized the crippling financial losses of the private sector, resulting in an enormous public debt liability<sup>19</sup>.

Undoubtedly the property bubble was at the heart of the Irish financial crisis. When this bubble finally burst, it inflicted ever increasing damage to both the financial sector and the Irish economy as a whole, and was in turn worsened by the international financial crisis. However, as noted by Larkin, the crisis was more generally the result of “shortsighted policies related to banking, housing and taxation”, and was deeply linked to the peculiar political culture within Ireland<sup>20</sup>. More pragmatically, Hardiman and Dellepiane note that “[t]he main source of the Irish banks’ problems was their over-exposure to property-based loans and the close personal as well as financial links between bankers, property developers, builders, and politicians, especially in the dominant *Fianna Fáil* party”. It is apparent that the absence of

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<sup>14</sup> K.P.V. O’SULLIVAN – T. KENNEDY, *What caused the Irish banking crisis?*, in *Journal of Financial Regulation and Compliance*, n.3/2010.

<sup>15</sup> S. DELLEPIANE – N. HARDINMAN, *Governing the Irish Economy: A Triple Crisis*, available at [www.ucd.ie/geary/static/publications/workingpapers/gearywp201103.pdf](http://www.ucd.ie/geary/static/publications/workingpapers/gearywp201103.pdf).

<sup>16</sup> S. DELLEPIANE – N. HARDINMAN, *Governing the Irish Economy*, *op.cit.*

<sup>17</sup> See *supra* ft. 5.

<sup>18</sup> National Asset Management Agency Act 2009 (Act No. 34/2009) (Ir.), available at [www.irishstatutebook.ie/eli/2009/act/34/enacted/en/pdf](http://www.irishstatutebook.ie/eli/2009/act/34/enacted/en/pdf). The National Asset Management Agency Act 2009 (the NAMA Act) was passed into law on 22 November 2009 and came into operation on 21 December 2009.

<sup>19</sup> C. MACMAOLAIN, *Ramifications of the EU/IMF Loan to Ireland for the Financial Services Sector and for Irish Law and Society*, in *European Public Law*, n.17(3)/2011.

<sup>20</sup> C. LARKIN, *The Irish Exit - A Warning for Europe* (June 5, 2014), available at [ssrn.com/abstract=2588443](http://ssrn.com/abstract=2588443) or [dx.doi.org/10.2139/ssrn.2588443](https://doi.org/10.2139/ssrn.2588443). See also N. HARDIMAN, *Bringing Domestic Institutions back into an Understanding of Ireland's Economic Crisis*, in *Irish Studies in International Affairs*, n.21/2010.

traditional left and right parties,<sup>21</sup> and the large-scale dominance of *Fianna Fáil* (FF), who successfully positioned itself as a catch-all party even prior to achieving full independence<sup>22</sup>, has certainly contributed to a peculiar form of political stagnation. Any changes made to the social and political platforms of the governing party was largely internal, a situation quite analogous to the Italian experience where Fabbrini notes that “alteration(s) (were made) at the margins of the coalition (in favour of a more rightist or leftist orientated centre parties)”<sup>23</sup>.

From a legal perspective, the fact that *Fianna Fáil* was in power almost continuously between 1932 and 2011, and that it went on to enjoy electoral support of between 40% and 50% from the 1930s until the 2008 financial crisis<sup>24</sup>, has led to what Siaroff calls as a “fusion of the executive and legislature”<sup>25</sup>. Although, Ireland follows a traditional tripartite model of government based on the separation of powers, and can be classified as a parliamentary democracy<sup>26</sup>, with a ceremonial head of State, a “cabinet dominance over both the legislature and the policy process” is quite evident<sup>27</sup>. In the same vein, Morgan notes that “private members’ bills”, *i.e.* bills that are brought to parliament by a non-government parliamentarian for general approval, were only accepted and passed into law in 6 instances between 1937 to 1988, and all of these arising in the 1950s<sup>28</sup>. All other laws and the “shortsighted policies” that caused the crisis and tried to solve it originated from the executive. The *longa manus* of the executive is also quite

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<sup>21</sup> Maintaining the *status quo* has been a prevailing idea within the Irish political sphere and through this, the way in which laws come into being. Both *Fianna Fáil* (FF) and *Fine Gael* (FG) evolved from within the structures of *Sinn Féin* (SF), diverging merely in how they viewed the Anglo-Irish Treaty. The Labour Party equally failed to capitalise on setting the agenda for any such social and political revolution.

<sup>22</sup> P. MAIR – M. MARSH, *Political Parties in Electoral Markets in Post-War Ireland*, in P. MAIR – W. C. MÜLLER – F. PLASSER (eds.), *Political Parties and Electoral Change: Party Responses to Electoral Market*, London, 2004, p. 235.

<sup>23</sup> S. FABBRINI, *Political Change Without Institutional Transformation: What Can We Learn from the Italian Crisis of the 1990s?*, in *International Political Science Review* n.2/2000, April 2000, p. 179.

<sup>24</sup> With the electoral weakness of the left, FF demonstrated the ability to capitalise on the emerging median voter, quickly positioning itself as the catch-all party. See J. COAKLEY – M. GALLAGHER, *Politics in the Republic of Ireland*, 4th Edition, Oxon, 2009, at Figure 2.1

<sup>25</sup> A. SIAROFF, *Varieties of Parliamentarianism in the Advanced Industrial Democracies*, in *International Political Science Review*, n.4/2003, 457.

<sup>26</sup> Some scholars have classified Ireland as a semi-presidential system (R. ELGIE, *Semi-presidentialism: Concepts, Consequences and Contesting Explanations*, in *Political Studies Review*, n.2(3)/2004) its constitutional structure is that of a parliamentary democracy, with a ceremonial head of state (the President), with the executive branch chosen based on the composition of the lower house of parliament (the *Dáil*), which is directly elected using the PRSTV (proportional representation by single-transferable vote) electoral system. The upper house of parliament or Senate (the *Seanad*), is elected using a variety of electoral procedures but none of which are based on universal suffrage. These two house of parliament combined and the parliamentary structure itself are formally referred to as the houses of the *Oireachtas* or simply the *Oireachtas*. The Irish judiciary is elected by the executive but is functionally and procedurally independent, in line with the judiciaries of democratic states more generally. See L. MEZZETTI, *The Irish Form of Government: A Merely Apparent Semi-Presidentialism*, in G.F. FERRARI – J. O'DOWD (eds.), *75 years of the Constitution of Ireland: An Irish-Italian Dialogue*, Dublin, 2014.

<sup>27</sup> A. SIAROFF, *Varieties of Parliamentarianism in the Advanced Industrial Democracies*, cit.

<sup>28</sup> D.G. MORGAN, *Constitutional Law of Ireland*, 2nd Edition, Dublin, 1990, p. 103 and 231.

evident in the activity of the NAMA. Whilst this was established as a statutory body corporate and its powers, functions and governance arrangements derive from the NAMA Act 2009<sup>29</sup>, the Minister of Finance has issued several written guidelines and directions, which are binding, to NAMA.

## 2.2. The Bailout and the Reform Process

The IMF-EU package, negotiated by the government of *Fianna Fail* and the Green Party, allowed Ireland to receive a loan under certain conditions. First, the measures required by the MoUs entailed “fiscal consolidation”: taxes were to be raised, carbon, property and water taxes were to be introduced, whilst personal income tax bands and credits were to be lowered. Secondly, and most notably for the purpose of this analysis, as already highlighted above, public expenditure, including social protection expenditure and numbers of public sector workers, was to be reduced. These budgetary cuts were to go hand in hand with a more comprehensive structural reform of the labour market, including legislative changes to remove restrictions to trade and competition in sheltered sectors, including the legal and medical professions. Thirdly, in the MoUs the Troika and the Irish Government agreed on a series of financial sector reforms to be carried out, including a reorganisation of the banking sector, with smaller banks being merged with larger “pillar” banks.

When the *Fine Gael* (FG) and Labour Party (Labour)<sup>30</sup> coalition came into power in 2011<sup>31</sup>, they carefully adhered to the terms previously negotiated into the MoUs. It is potentially arguable that this was an unavoidable choice, with a renegotiation of these conditions being difficult, if not impossible. However, it should be noted that the bailout programme gave the government room to manoeuvre in how it sought to achieve these reductions in public expenditure, and that how such social and economic cuts were to be implemented was ultimately in the hands of the Irish executive. It was of course the government that gave effect to the MoUs by translating them into further concrete economic and financial policies. The FG and Labour coalition government put forward its interpretation of the necessary cuts in public expenditure, through a reduction in the national minimum wage, cuts in social welfare payments, a reduction in overall public service staff numbers, a reformed pension scheme for new entrants to the public service, substantive pay cuts, reform of the welfare system and the introduction of water metering. Key fiscal and austerity measures were adopted by means of the governmental budgets (passed by

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<sup>29</sup> See *supra* ft. 18.

<sup>30</sup> B. FARRELL, *Labour and the Irish Political Party System: A Suggested Approach to Analysis*, in *Economic and Social Journal*, n.(4)(1)/1970, p. 487.

<sup>31</sup> On the decline of *Fianna Fail* and on the 2011 election see M. MARSHA – S. MIKHAYLOV, *Economic voting in a crisis: The Irish election of 2011*, in *Electoral studies*, 2012.



legislative means through parliament), which are, by their very nature, managed by the government<sup>32</sup>. Notably, with regards to social welfare, in the Budgets of 2010 and 2011, all working age social welfare payments including the maternity benefit, and the One Parent Family Payment (OPFP) were cut<sup>33</sup>. Reductions in the overall reimbursement cost of drugs and medicines provided through the public health system were also introduced. The 2012 Budget also cut social assistance entitlements related to disability and carer's allowances. The Rent Supplement (RS), a support measure for low income tenants in the private sector, was reduced together with the capital budget for social housing construction. Austerity measures were backed by Finance Acts, which must be passed by the *Oireachtas* within four months of the Budget, but whose content is largely tied to the government's design<sup>34</sup>. Other acts (again executive driven), complemented the spending cuts adopted through the budget. The Financial Emergency Measures in the Public Interest Act 2010<sup>35</sup> introduced severe cut in public sector pensions. The subsequent Financial Emergency Measures in the Public Interest (Amendment) Act 2011<sup>36</sup> provided for the reduction of judicial pay and pensions, further reduced the pay of members of the Government (already cut in 2010). The Social Welfare and Pensions Act 2011<sup>37</sup> introduced the first changes to the pension schemes. Then, the Public Service Pensions (Single Scheme and other Provisions) Act 2012<sup>38</sup> introduced a new single pension scheme for all new entrants to the public service and, in particular, raised the minimum pension age to 66 as well as making certain changes affecting existing public service pension arrangements. In the same vein, the Financial Emergency Measures in the Public Interest Act 2013<sup>39</sup> provided for a reduction in remuneration for public servants earning more than €65,000, and a further reduction in public service pensions. The Act also provided for a suspension of incremental remuneration progression until 2016 for all public servants<sup>40</sup>.

However, the FG and Labour coalition government did seek to break with the policies of their predecessors by initiating a process of wide-ranging constitutional reforms. During the 2010 electoral campaign, FG focused more on structural issues of representation and the way in which democracy is executed, whilst Labour proposed a Constitutional Convention which would draft and adopt an entirely

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<sup>32</sup> In March 2009, an emergency budget imposed pay cuts for all public servants. The subsequent December 2009 budget again cut public sector pay. The subsequent budgets followed on this line.

<sup>33</sup> See at [www.budget.gov.ie/Budgets/2010/Summary.aspx#SocialWelfare](http://www.budget.gov.ie/Budgets/2010/Summary.aspx#SocialWelfare), and [www.budget.gov.ie/Budgets/2011/2011.aspx](http://www.budget.gov.ie/Budgets/2011/2011.aspx).

<sup>34</sup> Art. 28 IC.

<sup>35</sup> (Act No. 38/2010) (Ir.), available at [www.irishstatutebook.ie/eli/2010/act/38/enacted/en/html](http://www.irishstatutebook.ie/eli/2010/act/38/enacted/en/html).

<sup>36</sup> (Act No. 39/2011) (Ir.), available at [www.irishstatutebook.ie/pdf/2011/en.act.2011.0039.pdf](http://www.irishstatutebook.ie/pdf/2011/en.act.2011.0039.pdf).

<sup>37</sup> (Act No. 9/2011) (Ir.), available at [www.irishstatutebook.ie/eli/2011/act/9/enacted/en/pdf](http://www.irishstatutebook.ie/eli/2011/act/9/enacted/en/pdf).

<sup>38</sup> (Act No. 9/2011) (Ir.), available at [www.irishstatutebook.ie/eli/2012/act/37/enacted/en/html](http://www.irishstatutebook.ie/eli/2012/act/37/enacted/en/html).

<sup>39</sup> (Act No. 18/2013) (Ir.), available at [www.oireachtas.ie/documents/bills28/acts/2013/a1813.pdf](http://www.oireachtas.ie/documents/bills28/acts/2013/a1813.pdf).

<sup>40</sup> These applied unless public servants were covered by a collective agreement modifying the terms of the incremental suspension which has been registered with the Labour Relations Commission.



new constitutional text for the Irish people, bringing about a “Second Republic”<sup>41</sup>. It outlined that “Labour will ask a people’s convention to draw up a new Constitution setting out the aspirations, the values and the rules that Irish people want to live by now”<sup>42</sup>. The underlying assumption was that this new constitution would not only directly engage with society at large, but specifically engage a select number of citizens in choosing a new, normative direction on behalf of wider society. The inevitable compromise reached within their combined “Programme for Government”<sup>43</sup> when both parties entered government together, sought to strike a balance between these two otherwise competing objectives. Structural issues would be put to popular plebiscite, whilst a Constitutional Convention would examine discreet social issues, with the outcomes being referred back to the executive branch with the possibility for further referendums. Since constitutional amendment represents perhaps the most symbolically or normatively significant method of law reform available within a nation state, it is not surprising that both FG and the Labour adopted this particular symbolism, as the normative values of the state in turn provide the framework within which legislative acts are interpreted and signals the way in which society views itself.

Overall, the reform process in Ireland was twin-tracked: on the one hand, budget cuts and austerity measures were to be implemented, whilst on the other, constitutional reforms would be proposed and put to popular plebiscite. These two “components” were viewed as two sides of the same coin. The whole process would however be entirely “executive driven”. The conditions laid down in the MoUs had been agreed by the executive, and then implemented by the executive itself. Beside these austerity measures, the constitutional reform process was to mark a political shift following the economic crisis of 2008-2010. As it will be discussed further in Section 4, the Constitutional Convention was a “creation” of the government and its task were kept quite limited and solidly controlled by the executive.

All in all, the financial collapse and the subsequent bailout functioned as a catalyst for both austerity measures and constitutional change, with the latter’s final result however being far more modest than originally envisaged.

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<sup>41</sup> Labour Manifesto 2011, *One Ireland: Jobs, Reform, Fairness*, (2011) [www.labour.ie/download/pdf/labour\\_election\\_manifesto\\_2011.pdf](http://www.labour.ie/download/pdf/labour_election_manifesto_2011.pdf).

<sup>42</sup> *Ibid.*

<sup>43</sup> Available at [www.citizeninformationboard.ie/publications/relate/relate\\_2011\\_03.pdf](http://www.citizeninformationboard.ie/publications/relate/relate_2011_03.pdf).

### 3. The First Track: Austerity and the Successful Degradation of Economic and Social Rights in Ireland

#### 3.1. Austerity and Social Rights

The category of so called “social rights” is very broad and quite blurred. A common element of social rights however is that these either directly necessitate State intervention, and more particularly economic redistribution or the State acting to redress structural imbalances in favour of social institutions (e.g. the promotion of organised labour organisations).

The Irish Constitution (*Bunreacht na hÉireann* - IC) does include several implicit or explicit mentions of such rights existing, in Articles 42<sup>44</sup>, 43<sup>45</sup>, and 44<sup>46</sup>. In addition, the Preamble to the Constitution refers to the State being founded on the principles of “justice, prudence and charity”<sup>47</sup>. Whilst charity might imply that redistribution should take place within the private sphere, *i.e.* driven by philanthropy and charitable donations rather than through the centralised role of the State as an intermediary, these three principles combined arguably necessitate the State engaging in some form of redistributive acts<sup>48</sup>. It is of course somewhat unreasonable to assume that personal charity alone can ensure the wellbeing of all citizens, and in particular, those suffering from some form of social and/or economic exclusion<sup>49</sup>.

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<sup>44</sup> Article 42 deals with the right to education, and Art. 42(3)(2) necessitates that the State ensure children receive a minimum level of education (moral, intellectual and social). Section 4 of Article 42 specifically necessitates that the State provide free primary education to all children, and whilst Article 42 is overall balanced against the rights of parents as the primary educators of society, this does not diminish that overall the State is obligated to provide social rights of a particular kind.

<sup>45</sup> Article 43 deals with the right to private property. Whilst it does adopt a primarily Lockean/liberal view of private property as being inviolable, Section 2, subsections (1) and (2) both qualify this right as being subject to the exigencies of the common good and in particular, social justice. Therefore whilst it might lean towards one specific constitutional tradition in its overall construction, Article 43 does allow for, if not necessitate that redistribution take place.

<sup>46</sup> Whilst Article 44 deals primarily with the right to non-discrimination on religious grounds, Section 2, Subsection 4 allows the State to redistribute or allocate monies to denominational schools so that children can be educated in line with their faith, and on the understanding that the right to hold religious beliefs does not always correspond with the right to practice or preserve, which may require positive discrimination of one kind or another.

<sup>47</sup> The Preamble of the Constitution is of course non-judicable, but can and has often been used in interpreting the positive obligations with regards to social rights and in discovering additional rights which are not expressly contained within the Constitutional text (the “unenumerated rights”).

<sup>48</sup> Article 45(1) of the Irish Constitution also explicitly mentions charity in establishing the social policy objectives of the State in a normative sense. These objectives are couched in redistributive terms, or in placing an emphasis on the State to provide for citizens which further supports this same interpretation.

<sup>49</sup> It should further be noted that following independence, there was a rhetorical emphasis placed upon social rights and the potential development of the welfare state which would suggest that charity alone was insufficient and not the intent of these provisions. “[T]he social system at present [...] is not anything like what it ought to be [...] It ought to be our constant endeavour to try to remedy it.” (M. MOYNIHAN (ed.), *Speeches and statements by Eamon de Valera 1917-73*, Dublin and New York, 1980, p. 326); and “mak[ing] the resources and wealth of Ireland subservient to the needs and welfare of all the people of Ireland” (*Memorandum regarding constitution of Fianna Fáil*, 9 Nov. 1926 (U.C.D. Archives, *MacEntee Papers*, P 67/443)) This of course did not necessarily translate into the actual social welfare system created after this point.

Further, Article 45.1 IC establishes that the State should “strive to promote the welfare of the whole people”, with subsection 2 outlining general instruments which can make this possible. In spite of this framework, social rights have never been the core of political action. As noted by Nolan, “[l]ow taxes, the reliance on non-state actors to deliver ESR-related goods and services, and the adoption of a market-based model to healthcare, including heavy reliance on private health insurance were key features of Celtic Tiger Ireland (and beyond)”<sup>50</sup>. In addition, the Superior Courts<sup>51</sup> have been extremely reticent to establish, or even engage with of any such rights in a substantive sense. *Scanlon*<sup>52</sup> for example, established that there is no constitutional right to social welfare, effectively relegating the determination of social welfare claims to the legal interpretation of entitlements under the relevant acts themselves. *Sinnott*<sup>53</sup>, *TD*<sup>54</sup>, and *O’Reilly*<sup>55</sup> simply serve as three further examples where even in a general sense, the Courts were somewhat unwilling to engage in any kind of redistributive measures, or to hold the government to account in realizing these nascent social rights provisions within the constitution itself. For example, in *Sinnott*, the Supreme Court overturned the High Court’s earlier decision, which had granted the right to primary education on the basis of need rather than age, and confirmed that the right to primary education ends at 18 years of age. The Court therefore interpreted Ar. 42 IC quite strictly in that instance. Having determined that the obligation to provide education was owed only to those under 18 years of age, the Court claimed that only in “rare and exceptional” circumstances can the Court make a mandatory order to protect constitutional rights such as this<sup>56</sup>.

In all three of these cases, the Superior Courts withdrew itself, through the invocation of the separation of powers, and avoided engaging in matters of distributive justice. This method of interpreting the Constitution may be based on a particular interpretation of the opening paragraph of Article 45 IC, which establishes that “social policy” is the sole remit of the *Oireachtas* in its legislative capacity. It therefore establishes that the objectives contained within it, most of which clearly place an emphasis on the

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<sup>50</sup> A. NOLAN, *Welfare Rights in Crisis in the Eurozone: Ireland*, in C. KILPATRICK – B. DE WITTE (eds.), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights’ Challenges*, in *EUI Working papers*, 2014.

<sup>51</sup> The Superior Courts is an umbrella term used to refer to both the High Court and Supreme Court, who are capable of adjudicating on constitutional matters. Although the Court of Appeals is also capable of doing so, it is a recent constitutional innovation and has yet to play a central role in the development of Ireland’s constitutional precedent at this time.

<sup>52</sup> *Minister for Social, Community and Family Affairs v Scanlon* [2001] IESC 1, at 17.

<sup>53</sup> *Sinnott v Minister for Education* [2001] 2 IR 545.

<sup>54</sup> *TD v Minister for Education* [2001] 4 IR 259.

<sup>55</sup> *O’Reilly v Limerick Corporation* [1989] I.L.R.M. 181.

<sup>56</sup> On *Sinnott* see S. QUINLIVAN – M. KEYES, *Official Indifference And Persistent Procrastination: An Analysis Of Sinnott*, in *Judicial Studies Institute Journal*, 2002, available at [www.jsijournal.ie/html/Volume%202%20No.%202/2%5B2%5D\\_Quinlivan&Keys\\_An%20Analysis%20of%20Sinnott.pdf](http://www.jsijournal.ie/html/Volume%202%20No.%202/2%5B2%5D_Quinlivan&Keys_An%20Analysis%20of%20Sinnott.pdf).

protection of social rights, are non-judicable before the Irish courts. This constitutes an exclusionary zone within which the judiciary must arguably refrain from acting and limits the extent to which they can determine and enforce social rights themselves by necessitating specific forms of state intervention. Yet this inevitably gives rise to a liminal space within which the judiciary can reasonably define the limits of the *Oireachtas*, and by extension the executive's (as both are functionally fused in many respects) discretion in implementing social policy mechanisms and their specific relationship with the existing rights within the Constitutional text without violating the intent of Article 45. In this respect, the judiciary could distinguish between the protection of a specific social right, and the mechanism through which the *Oireachtas* gives this right effect. For example, recognising that there is a general right to education contained within the Constitutional text, or even that there may be specific obligations in providing educational services to marginalised/vulnerable groups does not necessitate that a particular policy or mechanism be implemented. It does of course lead to the potential restriction of the policy choices and mechanisms available, but without directing the *Oireachtas* or executive to adopt specific measures or unduly restricting the choices available to them. Instead however, the judiciary has been predisposed in many instances to simply recuse itself from even engaging with such distinctions, and thus allows the *Oireachtas* and executive a large remit in defining the bounds of a constitutional right *as well as* the mechanisms through which it is enforced.

In this context, the most substantive changes in social welfare, namely the cut to various social benefits and entitlements by the Irish executive during the crisis, have had a disproportionate impact on an already fragile system of protection. The austerity measures described above had a serious impact on the most vulnerable in society<sup>57</sup>: those under 25, single parents, and low-income multi-parent families with children<sup>58</sup>. Both of the latter would lead to a double-retrenchment of social welfare provision for single/lone parents in particular, most of whom are women<sup>59</sup>. An analysis of governmental statistics, for example, places lone/single mothers at 186,284 and lone fathers at 29,031 in 2011<sup>60</sup>. Barry and Conroy note that these lone parent households are 35% more likely to fall into poverty as a result of the constant cuts to their social welfare entitlements and the desire to drive those with children over the age of seven

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<sup>57</sup> Finally, when the ESRI reviewed their initial findings which argued that the distribution of social welfare cuts were affecting higher wage brackets/socio-economic groupings disproportionately for relative or real incomes, they found that the lowest 10% had experienced an 18.4 point cut to the same, whereas the next largest group, the top 10% only experienced an 11.4 point cut. See T. CALLAN – B. NOLAN – C. KEANE – M. SAVAGE – J. WALSH, *Crisis, Response and Distributional Impact: The Case of Ireland*, in *ESRI Working Paper*, n.456/2013, p. 9.

<sup>58</sup> R. HICK, *From Celtic Tiger to Crisis: Progress, Problems and Prospects for Social Security in Ireland*, in *Social Policy and Administration*, n.4/2014.

<sup>59</sup> [www.oneparent.ie/CSO-Statistics-On-Lone-Parent-Families-2011.pdf](http://www.oneparent.ie/CSO-Statistics-On-Lone-Parent-Families-2011.pdf), (accessed 13/08/2015).

<sup>60</sup> *Ibid.*

towards paid-employment<sup>61</sup>. Mary Murphy has further highlighted that the social consequences of the Irish economic and social crisis have been severe, but that this has again been especially pronounced for women, particularly those who are in additionally marginalised groups<sup>62</sup>. In a general sense, the level of material deprivation across Irish society approached 23% in 2010, with almost 8% of the population suffering from severe material deprivation<sup>63</sup>. Finally, when the ESRI reviewed their initial findings which argued that the distribution of social welfare cuts were affecting higher wage brackets/socio-economic groupings disproportionately for relative or real incomes, they found that the lowest 10% had experienced an 18.4 point cut to the same, whereas the next largest group, the top 10% only experienced an 11.4 point cut<sup>64</sup>. That these very groups would be targeted in any way, let alone so disproportionately given their relatively vulnerability arguably contrasts with the Constitution and the obligations it either sets out or infers<sup>65</sup>.

There have been thus far been relatively few judicial cases challenging governmental changes that have materially affected social rights during or arising from the crisis. It those that have been brought before the Courts however, the judiciary has invoked the principle of separation of powers and, as has always been the case in matters of social policy, has shaped precedent to ensure that the government enjoys the widest remit in relation to economic and social concerns. The famous “post-crisis” case of *J. & J.*<sup>66</sup> provides a notable example. The case concerned a group of pharmacists who had negotiated certain services to and on behalf of the government in return for certain rates of remuneration. With a deepening economic recession affecting the country, the executive sought to cut these rates of remuneration below a certain threshold in order to meet its cost cutting objectives. The issue remained however that the pharmacists in question believed that these new rates and conditions were inadequate, and would risk the very viability of their business. With this in mind, they argued that their constitutional right to earn a livelihood was at risk, and that the government should be held to account. The High Court however, in protecting the government’s right to act unilaterally, held that this was not a constitutional case, as the rates of remuneration should be dealt with under contract law. Whilst this might seem adequate in other circumstances, where the necessary cuts would likely lead to their insolvency, a constitutional issue has

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<sup>61</sup> U. BARRY – P. CONROY, *Ireland in Crisis 2008-2012: Women, austerity and inequality*, National Women’s Council of Ireland (NWC) and Think Tank on Social Change (TASC) (October 2012).

<sup>62</sup> M.P. MURPHY, *Gendering the Narrative of the Irish Crisis*, in *Irish Political Studies*, n.30:2/2015.

<sup>63</sup> IRISH CENTRAL STATISTICS OFFICE, *Survey on Income and Living Conditions (SILC): Preliminary Results 2010* (2011) at [www.cso.ie](http://www.cso.ie), (accessed 21/08/2015).

<sup>64</sup> T. CALLAN – B. NOLAN – C. KEANE – M. SAVAGE – J. WALSH, *Crisis, Response and Distributional Impact: The Case of Ireland*, cit.

<sup>65</sup> U. BARRY – P. CONROY, *Ireland in Crisis 2008-2012: Women, austerity and inequality*, cit.

<sup>66</sup> *J. & J. Haire & Co. Ltd v Minister for Health*, HC, 17 December 2009.

indeed been raised. Yet the Court sought to ensure that the government was not constrained by any judicial authority in this respect, due to their extreme reticence at engaging with and recognising any kind of economic or social rights accruing to citizens. This line of reasoning was reaffirmed in *McKenzie*<sup>67</sup>, which questioned the right of the executive to make cuts to the budget of the Irish Defence Forces unilaterally and without consultation from the Permanent Defence Forces' union<sup>68</sup>. The Court ultimately decided that there was no inherent right to consultation, and that such cuts were completely legitimate. In *Hall v Minister for Finance*<sup>69</sup>, the High Court further dismissed a challenge by a private citizen to procedures adopted by the Minister for Finance to support financial institutions.

Looking beyond the level of self-restraint on the part of the Irish Superior Courts in reviewing measures implemented by the executive that impact on social rights claims, it is undeniable that the very nature of the MoUs and the levels of austerity they mandate is also problematic in allowing social rights to be vindicated. In addition, as O'Donovan argues, these austerity-led “rescue packages” would risk violating the EU Charter of Fundamental Rights and its more progressive social measures<sup>70</sup>. Initially, the *Pringle*<sup>71</sup> case found that treaties or agreements signed outside the main EU structures are not subject to the Charter based on a strict reading of Article 50(1). Therefore even treaties such as the Treaty Establishing the European Stability Mechanism is outside the purview of the Charter as it is a treaty between Member States, and not with the EU itself. Treaties or agreements such as the Irish bailout package would likely never invoke the Charter, as it is even more removed from the structures of the Union. Recently however, *Ledra Advertising Ltd*<sup>72</sup> saw the CJEU refine this principle. Whilst such agreements might fall outside of the EU's competences, it is possible for a Union citizen to bring an action against the Commission or Central Bank for a violation of their fundamental rights, including those within the Charter based on non-contractual liability. Consequently, where there has been a serious breach of a right and that breach can be imputable to the conduct of either the Commission or the ECB, a citizen may be rewarded with damages. Unfortunately however, bringing an action based for example on the derogation of social rights

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<sup>67</sup> *McKenzie v Minister for Finance & Ors* [2010] IEHC 461, 30 November 2010.

<sup>68</sup> These changes were communicated to the Defence Forces via circular and implemented via “Defence Force Regulation S.3 Amendments - Amendment 343 of 2009” and “Defence Force Regulation S.3 Amendments - Amendment 344 of 2009”.

<sup>69</sup> [2013] IEHC 39.

<sup>70</sup> D. O'DONOVAN, *The Insulation of Austerity: The Charter of Fundamental Rights and European Union Institutions*, 16 May 2013, at [humanrights.ie/uncategorized/the-insulation-of-austerity-the-charter-of-fundamental-rights-and-european-union-institutions/](http://humanrights.ie/uncategorized/the-insulation-of-austerity-the-charter-of-fundamental-rights-and-european-union-institutions/), (accessed 18/08/2015).

<sup>71</sup> Case C-370/12, *Pringle v. Ireland*, 27 November 2012 not yet published. On this case see *ex multis* B. DE WITTE – T. BEUKERS, *The European Court of Justice Approves the Creation of the European Stability Mechanism outside the EU Legal Order: Pringle*, in *Common Market Law Review*, n.50/2013, p. 805.

<sup>72</sup> Joined Cases C-8/15 P to C-10/15 *Ledra Advertising Ltd, Andreas Eleftheriou, Eleni Eleftheriou, Lilia Papachristofi, Christos Theophilou, and Eleni Theophilou v European Commission and European Central Bank* ECLI:EU:C:2016:701.

as a result of austerity implemented based on a MoU would face significant hurdles. Firstly, the requirement that the breach of a right be directly imputable to the EU's institutions may be extremely hard to establish. A MoU may necessitate austerity, but the way in which it is imposed is primarily a matter for the relevant Member State. Establishing responsibility is therefore highly problematic. Secondly, *Ledra* itself dealt with the potential breach of the right to property as proscribed in Article 17(1) of the Charter, and the Court found that no violation had occurred. The Court also argued that some violations may be proportionate, and proving a serious violation has occurred may be equally arduous. Finally, non-contractual liability may not be a suitable avenue for such challenges, as it can be procedurally burdensome, and the potential reward of damages would not have the same implications as, for example, an action for annulment. Inevitably, the consequences of this new judgment is that in principle austerity may be challenged, but the chances of success are low and the rewards are limited.

### 3.2. Austerity and Worker's Rights

Social Partnership, was a key feature of the Celtic Tiger period<sup>73</sup>. It took the form of tripartite agreements made between the executive, the main representatives of business employers (The Irish Business and Employers Confederation (IBEC) and the Construction Industry Federation (CIF) usually), and the Irish Congress of Trade Unions (ICTU) which acts as an umbrella organisation for the majority of the trade unions active within Ireland. Since 1987 when social partnership was formulated, seven such agreements have been made, including but not limited to: The Programme for Competitiveness and Work (PCW, 1993-1996); Partnership 2000 (P2000, 1996-2000); The Programme for Prosperity and Fairness (PPF, 2000-2003); and Sustaining Progress (SP, 2003-2006). Until the arrival of the economic crisis in 2008, there had long been peace between the executive, trade unions and employers' representatives, as each sought to ensure continued prosperity and stability through the enforcement of the corporatist agreements made between them. As Arrighi *et al.* note, the interests of capital or employers are naturally at odds with those of society<sup>74</sup>, as they rarely, if ever, seek to achieve social objectives. Instead, they simply seek to ensure that their maximum profit is made off their initial investment<sup>75</sup>.

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<sup>73</sup> T. REIDY, *After six years of austerity, Ireland's coalition government has little room to manoeuvre*, in *EUROPP Blog*, LSE (8th May 2013) at [blogs.lse.ac.uk/europpblog/2013/05/08/ireland-coalition-austerity/](https://blogs.lse.ac.uk/europpblog/2013/05/08/ireland-coalition-austerity/), (accessed 28.08/2015).

<sup>74</sup> G. ARRIGHI – TK HOPKINS – I WALLERSTEIN, *Anti-Systemic Movements*, New York, 1989, p. 3.

<sup>75</sup> During this period, trade unions were in reality experiencing a steady decline. Whereas in the 1980s union membership accounted for up to 62% of the workforce, by 2007 this had declined to 31%, half of its previous high. Although much of this can be attributed to the sharp increase in the number of non-unionised international corporations situating within Ireland during the Celtic Tiger, the increased use of human resources and the individualisation of employment law were also contributing factors. See *The Irish Times*, "Membership down to 31% of workers, notes CSO" (25th January 2010).

However social partnership inevitably ended almost immediately after the crisis impacted on the Irish economy. In 2008, the government/executive acted unilaterally to enforce cuts and changes in conditions on public sector employers in the annual budget without the agreement of ICTU. In December of 2009, IBEC pulled out of further negotiations with ICTU on further pay freezes to be implemented, believing that further agreements would be made on a case by case, or enterprise by enterprise basis<sup>76</sup>. This is not surprising, and Doherty notes that this process was completely voluntary and based upon mutual trust rather than any overt legality (although agreements reached could become legally binding if passed by the houses of the *Oireachtas*)<sup>77</sup>. He further argues that the process was based more on conciliation than actual compromise<sup>78</sup>. as the outcomes were still determined by the executive itself and it similarly retained the ability to ignore them if it chose to do so. Unions in particular, as represented by ICTU, merely worked within the parameters of what was permissible to achieve any measure that might be beneficial to their constituents. This seems to go hand in hand with the “supremacy” of the executive as outlined in the preceding sections. Whilst neither expressly deals with social partnership per se, both go towards the unquestioned view that the executive should have a wide prerogative to act unilaterally in the economic and social policy fields, as well as the weak bargaining position of any party attempting to engage in discourse with the executive.

Yet despite this increasing vulnerability as social partnership disintegrated as a policy-making structure and the weakness of trade unions under Irish law, the Superior Courts in two separate decisions eroded their position even further. *John Grace Fried Chicken Ltd*<sup>79</sup> firstly found joint labour committees (JLCs), *i.e.* committees which sought to make sectoral labour agreements and functioned as a smaller form of social partnership, to constitute an unconstitutional delegation of power away from the *Oireachtas* under Article 15.2.1 IC. The executive then sought to reformulate the way in which JLCs created such agreements within the Industrial Relations (Amendment) Act 2012<sup>80</sup>, which was part of the reform of the labour market envisaged in the MoUs. However, a further application to the Supreme Court struck down the relevant section of the Industrial Relations Act 1946 in its entirety. These decisions create a dichotomy where a large degree of autonomy is afforded to the executive in acting on behalf of the legislature, but

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<sup>76</sup> See *Industrial Relations News*, n.1/2010, p. 3. See also A. KERR, *Social Rights In Crisis In the Eurozone. Work Rights in Ireland*, in C. KILPATRICK – B. DE WITTE, *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges*, in *EUI Working papers*, 2014.

<sup>77</sup> M. DOHERTY, *It Must Have Been Love... But it's Over Now: The Crisis and Collapse of Social Partnership in Ireland*, in *Transfer: European Review of Labour and Research*, n.3/2011), p. 374. See also M. DOHERTY, *Austerità e diritti del lavoro in Europa: una filastrocca irlandese?*, in *Rivista giuridica del lavoro e della previdenza sociale*, n. 3/2015.

<sup>78</sup> *Ibid*, 376.

<sup>79</sup> *John Grace Fried Chicken Ltd v Catering Joint Labour Committee* [2011] IEHC 277; [2011] 3 I.R. 211.

<sup>80</sup> (Act No. 32/2012) (Ir.), available at [www.irishstatutebook.ie/eli/2012/act/32/enacted/en/pdf](http://www.irishstatutebook.ie/eli/2012/act/32/enacted/en/pdf).

not to trade unions in enforcing reasonable working conditions and pay agreements on a sectoral basis when their method of doing so at a societal level, social partnership, is no longer available to them in any meaningful way. Whilst the most recent Industrial Relations (Amendment) Act 2015<sup>81</sup> has created a system within such agreements can be registered once more, it remains possible that this too might be deemed constitutionally questionable if the same argument can be put forward.

#### 4. The second track: the Constitutional Reform

##### 4.1 . The Constitutional Amendment Procedure in a Nutshell

Before discussing the specific process of constitutional reform initiated in 2010, it is worth recalling the main features of the constitutional revision in Ireland. The procedure for constitutional amendment in Ireland is laid down in Article 46 IC. It necessitates a referendum be held where substantive changes are to be made to the formal written text, after having been passed by both houses (the *Dáil* and the *Seanad*) of the Irish parliament (the *Oireachtas*). Any amendment of any kind to the formal text, be it a repeal, variation or alteration to the Irish Constitution necessitates the holding of this popular referendum or plebiscite. In particular, Art. 46(2) IC requires this process be initiated by the *Dáil*, the lower chamber of Ireland's bicameral parliamentary structure, before being endorsed by a majority vote of both houses and then put before the public in the form of a popular referendum. The formal Bill put to referendum must be marked as “An Act to Amend the Constitution”<sup>82</sup> and must contain no other proposals<sup>83</sup>. As Ryan observes, “[b]ecause the Government As Ryan observes, “[b]ecause the Government usually has majority support in the *Dáil*, it is practically impossible to initiate a constitutional amendment without Government support”<sup>84</sup>.

Casey believes that “since 25 June 1941 the constitution has been a rigid one”<sup>85</sup>, with few substantive amendments being made over time. Numerically speaking, this might not necessarily appear to be the case, as between 1937, when the Constitution was enacted and 2011, when FG and the Labour Party took office, 28 amendments had been attempted by the executive<sup>86</sup>. However, whilst it might appear

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<sup>81</sup> (Act No. 27/2015) (Ir.), available at [www.djei.ie/en/Legislation/Legislation-Files/Industrial-Relations-Amendment-Act-2015.pdf](http://www.djei.ie/en/Legislation/Legislation-Files/Industrial-Relations-Amendment-Act-2015.pdf).

<sup>82</sup> *Ibid*, Article 46.3 IC.

<sup>83</sup> Article 46.4 IC.

<sup>84</sup> F. RYAN, *Ireland's Marriage Referendum: A Constitutional Perspective*, in DPCEOnline, n. 2/2015.

<sup>85</sup> J. CASEY, *Changing the Constitution: Amendment and Judicial Review*, in B. FARRELL, *De Valera's Constitution and Ours*, Dublin, 1988, p. 153.

<sup>86</sup> The Department of the Environment, Community and Local Government, *Referendum Results 1937 – 2013*, available on line at [www.environment.ie/](http://www.environment.ie/). In a small number of cases more than one proposed amendment has used the same numbering, meaning that the total number of proposed amendments is in fact slightly higher than the formal 28 in this instance allows for.

numerically significant, it does not hold true when viewed from a substantive perspective. The first two Amendments were passed using the transitory provisions of the constitution, meaning that no referendum was necessitated<sup>87</sup>. They dealt with the definition of emergency powers during times of war (whilst reaffirming state neutrality)<sup>88</sup>, and structural changes in order to tighten the key provisions already in place, rendering them purely procedural in nature<sup>89</sup>. Five further referendum have been held on the issue of abortion (with many dealing with ancillary issues raised by their predecessors)<sup>90</sup>. O'Mahony however believes that the initial prohibition on abortion introduced in the first of these amendments was entirely unnecessary<sup>91</sup> due to the presumption of the right to life of the unborn being established in *McGee*<sup>92</sup>, *G v An Bord Uchtála*<sup>93</sup>, *Norris*<sup>94</sup>, and *Finn*<sup>95</sup>. Seven referendum have been held on altering the voting system or voting regulation<sup>96</sup>, two on divorce<sup>97</sup>, with a further eight referendum<sup>98</sup> on EU Treaties. In the case of *Crotty*<sup>99</sup>, which questioned the ratification of the Single European Act through ordinary legislation, it was held by the Irish Supreme Court that constitutional amendments in this regard were only necessary where significant changes were being made to the EU Treaties. Without discussing these cases in detail, this form of constitutional amendment demonstrates a propensity for repetition and executive control rather than a real impetus for structural change.

#### 4.2. Reform By Way of Convention

As mentioned above, the 2011 general election saw both of the eventual coalition partners make a concerted effort to signal a normative shift away from the values which might have contributed to the Irish economy's downfall. The Labour Party in particular, went so far as to suggest in its manifesto that it would instigate a new constitutional convention, through which the public would propose and later adopt an entirely new constitutional text. The Convention would provide an explicit remit for political reform in all of the areas altered and which had been supported by the wider public through a referendum.

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<sup>87</sup> M. FORDE, *Constitutional Law in Ireland*, Dublin, 1987, p. 9.

<sup>88</sup> First Amendment of the Constitution Act, 1939 [www.irishstatutebook.ie/1939/en/act/cam/0001/index.html](http://www.irishstatutebook.ie/1939/en/act/cam/0001/index.html).

<sup>89</sup> Second Amendment of the Constitution Act, 1941 [www.irishstatutebook.ie/1941/en/act/cam/0002/index.html](http://www.irishstatutebook.ie/1941/en/act/cam/0002/index.html).

<sup>90</sup> The 8th, 12th, 13th, 14th and 25th amendments found in n12 at 34, 44, 46, 48, and 68.

<sup>91</sup> C. O'MAHONY, *Repealing the Eighth Amendment: As Simple as it Sounds?*, in [constitutionproject.ie/?p=380](http://constitutionproject.ie/?p=380).

<sup>92</sup> *McGee v. A.G. & Anor* [1973] IESC 2; [1974] IR 284 (19 December 1973), 312.

<sup>93</sup> *G v An Bord Uchtála* [1980] IR 32, 69.

<sup>94</sup> *Norris v. A.G.* [1983] IESC 3; [1984] IR 36 (22 April 1983), 103.

<sup>95</sup> *Finn v Attorney General* [1983] IR 154, 160.

<sup>96</sup> The 3rd, 4th, 7th, 9th and 20th amendments, found in n12 at 18, 20, 22, 26, 32, 36, 60. The 3rd and 4th have been used for more than one referendum in terms of numbering.

<sup>97</sup> The 10th and 15th amendments, *ibid* at 38 and 50.

<sup>98</sup> The 3rd, 10th, 11th, 18th, 24th, 26th, 28th, *ibid* at 24, 40, 42, 56, 66, 70, 74, 76. The 28th amendment was run as two referenda using the same numbering.

<sup>99</sup> *Crotty v An Taoiseach* [1987] IESC 4, [1987] IR 713.

This type of constitutional convention is far more symbolically important. It creates a “constitutional moment”<sup>100</sup> whereby the public consciously engage in deliberation, and through the battling of opposing normative or ideological forces, reach a consensus on what society’s values will be going forward<sup>101</sup>. *Fine Gael* by contrast placed a much larger emphasis on structural reform, arguing that parliamentary committees should have more power devolved to them by the executive, that these committees should have constitutional standing and that women should enjoy a greater degree of representation in parliament<sup>102</sup>. Its only explicit and entirely constitutional reforms in line with the promises made by the Labour were a Citizens Assembly dealing exclusively with electoral reform, and a “Constitutional Day” to be held within 12 months of taking office where a series of constitutional reforms would all be voted upon<sup>103</sup>. FG’s Citizens Assembly therefore varied significantly in so far as its remit for outlining any potential reforms were limited solely to the area of electoral law, meaning that they adopted a heavily controlled, top-down, executive-driven model of constitutional reform versus that of the Labour Party. Its composition however was to include 100 members of the general public<sup>104</sup>, whereas the Labour Party’s was to be comprised of 90 members: 30 from the general public, 30 elected representatives, and 30 from civil society organisations. Both therefore involved some degree of “steering” on the part of the executive, with FG focused on controlling the initial remit, and the Labour Party focused on input during the process itself, as well as in which civil society organisations would be invited to take part.

The eventual compromise reached within the Programme for Government made once both parties agreed to form a governing coalition, leaned heavily in favour of FG’s manifesto proposal for a Citizens Assembly, rather than on the wider, loftier ambitions of the Labour Party’s Constitutional Convention. Although it adopted the moniker of a Constitutional Convention, its scope was limited to several specific areas: a review of the electoral system, a reduction in the length of the presidential term of office and when its election would be held, a provision for same-sex marriage/marriage equality, removing patriarchal provisions regarding a women’s role in the family home<sup>105</sup>, removing blasphemy from the Constitution<sup>106</sup>, a possible reduction in the voting age, and, time permitting, any other matters deemed

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<sup>100</sup> M.W. MCCONNELL, *The Forgotten Constitutional Moment*, in *Constitutional Commentary*, n.11/1994, pp. 115-144. McConnell in outlining the theory argues that constitutional moments can also be defined more by their collaborative capacity and do not necessarily involve formal constitutional adaptation, yet the formal adoption of a new constitutional text is the clearest example of such a constitutional moment for illustrative purposes.

<sup>101</sup> A. PRZEWORSKI, *Democracy as a Contingent Outcome of Conflict*, in J. ELSTER – R. SLGSTAD (eds.), *Constitutionalism and Democracy: Studies in Rationality and Social Change*, Cambridge, 1988, p. 66.

<sup>102</sup> *Fine Gael* Manifesto (2011), 62-63.

<sup>103</sup> *Ibid*, 62.

<sup>104</sup> *Ibid*.

<sup>105</sup> Articles 41.2.1 and 41.2.2 IC.

<sup>106</sup> Article 40.6.1.i IC.

significant by the Convention<sup>107</sup>. This form of agenda setting allows for a large degree of executive control before the Convention has even had the opportunity to deliberate, as they are functionally limited to handling specific measures, and additional issues only where these specific measures have been addressed and sufficient time remains.

Its creation was subsequently ratified by parliamentary motion in July 2012<sup>108</sup>. The ultimate form adopted was again, more in line with FG's proposal due not only to its discreet and clearly delineated remit, but also in its 100 person composition<sup>109</sup>. These 100 individuals, however, were further broken down into an individual chairperson chosen by the executive, 66 randomly chosen citizens, an individual representative of each of the parties in the Northern Ireland Assembly, and representatives from both houses of parliament<sup>110</sup>. Although it utilised a deliberative model, whereby each participant would be involved in the overall process before a consensus was reached, it also necessitated that specific recommendations be made within two months of the first public deliberation, and general recommendations no later than one year from the same<sup>111</sup>. This again, goes towards the level of control placed upon it by the executive and practical, temporal constraints imposed in reaching any findings, making it difficult, albeit not impossible, for the Convention to invoke the final provision to deliberate on any other matters that it deemed of significant importance from a constitutional perspective. In order to compensate for this short timeframe, the Convention adopted a very concise procedure during its meetings. The Convention's chairperson outlined this as follows: "each meeting had three components: presentation by experts of papers which had been circulated in advance; debate between groups advocating on either side of an issue; and roundtable discussions involving facilitators and notetakers. On Sunday morning the members considered again the discussions of the previous day and voted on a ballot paper which reflected the details of the debate"<sup>112</sup>. Again, that this process culminates within a two-day period, and the allocation of preferences towards or against a potential reform does not necessarily equal a deliberative model. Whilst voters within the Convention may have been able to add additional detail to their ballot, it leans more on the aggregation of votes than on substantive debate. This invariably makes it easier for the executive to act on these preferences, but also ensures a greater degree of control, as the initial agenda-setting in terms of the Convention's remit does not lead to a vast multiplicity of outcomes, or complex suggestions for reform. Instead, the executive is able to interpret these preferences to some degree, and

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<sup>107</sup> Programme for Government, 2011-2016, p. 17, available at [www.taoiseach.gov.ie](http://www.taoiseach.gov.ie).

<sup>108</sup> Constitutional Convention: Motion, Tuesday, 10 July 2012, *Dáil Éireann*, Debate Vol. 772, No. 1.

<sup>109</sup> Constitutional Convention, Terms of Reference [www.constitution.ie/Documents/Terms\\_of\\_Reference.pdf](http://www.constitution.ie/Documents/Terms_of_Reference.pdf).

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> T. ARNOLD, *Inside the Convention on the Constitution, Opinion: A world first for constitutional change proposals*, in *The Irish Times* 01/04/2014.

argue that any alterations are made merely to reflect the realities of the constitutional text. In this way, they are potentially “filling in the blanks”, but blanks that are by design placed there due to the system put in place by the executive at first instance.

The clearest example of this is that the Convention dealt with the potential alteration of the electoral system for parliamentary elections of the *Dáil*, the lower house. This has previously been put to referendum on two separate occasions, with a further five referendums on ancillary issues dealing with extending the voting franchise, etc. Whilst both of these referenda were held relatively early on in the history of the Irish state, it has also been examined by the Constitutional Review Group of 1996<sup>113</sup>, with the presumption remaining that the electoral system has popular support and requires careful consideration before any amendments be carried out<sup>114</sup>. Arguably, the short timeframe allotted to the Convention on the determining the issue does not match this criteria. The 7th Report reiterated even more clearly that no such change was necessary or desirable<sup>115</sup>. Similarly, the reduction in the voting age by 1 year, from 18 years of age to 17, follows this established pattern of holding referendums on technical aspects of voting. Whilst it might also enfranchise and politicise a new segment of society, the proposed change is also unlikely to be of any great significance electorally speaking, if it even reaches a referendum. In relation to the constitutional provision relating to a woman’s life in the family home which was also to be considered by the Convention, the 1996 Review Group quite plainly suggest that this be deleted from the constitutional text due to its unnecessary nature in the formal text<sup>116</sup>. The Tenth Review held that if it were to be retained, the provision should at least be made gender-neutral, and even that the socio-economic nature of this right might be used to help better provide for families<sup>117</sup>. Finally, in relation to the constitutional prohibition on blasphemy, both the 1996 and 2008 Joint Committee on the Constitution looking expressly at this issue both deemed it to be inappropriate and worthy of removal<sup>118</sup>. The only issue arising since the 2008 was the 2009 Defamation Act<sup>119</sup>, which sought to provide a legislative basis for the prohibition on blasphemy, but this does not alter that its removal has been endorsed on two separate occasions by previous constitutional review groups, one immediately preceding its enactment. All of these measures contribute again to the view that the executive engaged in a form of

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<sup>113</sup> Constitutional Review Group, *Report of the Constitutional Review Group 1996*, Articles 14 - 27, Elections to *Dáil Éireann*.

<sup>114</sup> *Ibid*, Conclusion, Recommendation.

<sup>115</sup> All-Party *Oireachtas* Committee Seventh, *Progress Report: Parliament*, 2002, p. 29.

<sup>116</sup> n.48, Articles 40-44, *The Family, Conclusion, Recommendations*.

<sup>117</sup> All-Party *Oireachtas* Committee Tenth, *Progress Report: The Family*, 2006, A107.

<sup>118</sup> Houses of the *Oireachtas*, *Joint Committee on the Constitution, First Report*, Article 40.6.1.i - *Freedom of Expression*, July 2008.

<sup>119</sup> (Act No. 31/2009) (Ir.), available at [www.irishstatutebook.ie/2009/en/act/pub/0031/](http://www.irishstatutebook.ie/2009/en/act/pub/0031/).

agenda-setting that delegated already settled, or substantively unimportant issues to the Constitutional Convention for determination.

In the final recommendations, it must also be noted that the majority of participants believed the period of time allotted to be too short, and would have enjoyed more time to engage with the intricacies of the problems discussed<sup>120</sup>. Further, 100% of the participants noted that a second convention should be held, although only after the original recommendations had been considered by the executive<sup>121</sup>, as it is the prerogative of the executive to deem any findings worthy of bringing forward for referendum. In this respect, this is also an additional check on the power of the Convention to make any lasting findings in a practical sense, as the executive is free to ignore those which do not fit with their legislative agenda. Comparatively speaking, such Citizens' Assemblies have been utilised across the world, with the nearest comparators to Ireland being utilised in Canada: once in British Columbia, and once in Ontario. Both of these expressly dealt with the issue of electoral reform as the original FG manifesto outlined. Although it is not possible for the purposes of this analysis to engage with these two examples in any significant way, sufficed to say, Pal notes that similar procedural issues raised in the Canadian context severely limit the potential scope and likely transformative effect stemming from such Citizens' Assemblies<sup>122</sup>. From an Irish perspective, a Constitutional Convention should ensure that the Constitution is brought closer to the ordinary citizen, as envisaged by Article 46 IC. Yet despite the promises made in both the FG and Labour Party election manifestos, neither is willing to release its control as the executive on what ultimately goes to popular plebiscite.

### **4.3. A Conventional Allegory: Marriage Equality**

Despite the numerous recommendations made by the Constitutional Convention to the executive, and its airing of additional issues deemed of constitutional importance, only one potentially substantive issue has been put to referendum: the same-sex marriage, or marriage equality referendum. From a more general perspective, this is far from unexpected, as the remaining specifically enunciated issues that were put to the Convention had either been put to referendum already, or had already had recommendations made by other appointed bodies. Similarly, there is also cause to believe that the issue of marriage equality did not necessitate constitutional amendment at first instance, but was politically determined. Further,

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<sup>120</sup> The Convention on the Constitution, *Ninth Report of the Convention on the Constitution: Conclusions and final recommendations*, 2.2, timeframe [www.constitution.ie/AttachmentDownload.aspx?mid=55f2ba29-aab8-e311-a7ce-005056a32ee4](http://www.constitution.ie/AttachmentDownload.aspx?mid=55f2ba29-aab8-e311-a7ce-005056a32ee4), (accessed 04/05/2015).

<sup>121</sup> *Ibid*, 2.2.

<sup>122</sup> M. PAL, *The Promise and Limits of Citizens' Assemblies: Deliberation, Institutions, and the Law of Democracy*, in *Queen's Law Journal*, n.38(1)/2012, p. 259.

the executive expressly noted that no further referendums would be held before the 2016 general election, other than the Marriage Equality Referendum and the secondary referendum on reducing the age restriction on presidential candidates from 35 to 21<sup>123</sup>. Whilst the latter<sup>124</sup> was also an issue proposed by the Convention<sup>125</sup>, the lack of debate generated on it and support given to it by the executive quickly led to it being named the “forgotten”<sup>126</sup> and “invisible”<sup>127</sup> referendum. It was also an ancillary issue raised during the debate on the office of the presidency, meaning that it was in no way substantive, merely a procedural hurdle to running for that particular elected office. Due to this lack of debate, it was also resoundingly defeated at the polls with over 70% of all voters voting against it<sup>128</sup>, demonstrating an overall lack of support from within the executive to ensure its passage. By contrast the Marriage Equality referendum passed by a margin of 62% voting in favour of the provision, making it the first sovereign nation state to pass such a measure by popular plebiscite<sup>129</sup>. However, as with the previously mentioned referendums on citizenship and abortion, it is difficult to determine if a constitutional amendment<sup>130</sup> was even necessary. Both O’Mahony<sup>131</sup> and Daly<sup>132</sup> note that this is not the case, with Daly in particular succinctly emphasising that the drive to constitutionalise this issue rests so where between political pragmatism, and the need to ensure consensus on the issue by remitting it to the Constitutional Convention<sup>133</sup>.

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<sup>123</sup> RTE News, *Taoiseach rules out blasphemy referendum*, 12 January 2015 [www.rte.ie/news/2015/0112/671900-news-in-brief/](http://www.rte.ie/news/2015/0112/671900-news-in-brief/), (accessed 06/05/2015).

<sup>124</sup> Thirty-fifth Amendment of the Constitution (Age of Eligibility for Election to the Office of President) Bill 2015.

<sup>125</sup> Report of the Convention on the Constitution: Statements, Thursday, 18 July 2013, *Dáil Éireann Debate Vol. 812 No. 2*.

<sup>126</sup> M. MINIHAN, *Presidential age vote destined to be forgotten referendum, Analysis: Voters take their cue from unenthusiastic, distracted politicians*, in *The Irish Times*, 23 May 2015, [www.irishtimes.com/news/politics/presidential-age-vote-destined-to-be-forgotten-referendum-1.2223745](http://www.irishtimes.com/news/politics/presidential-age-vote-destined-to-be-forgotten-referendum-1.2223745), (accessed 23/05/2015).

<sup>127</sup> L. COURTNEY, *Ignoring the needs of our youth in an invisible referendum*, 15 May 2015, [www.independent.ie/opinion/comment/ignoring-the-needs-of-our-youth-in-an-invisible-referendum-31224098.html](http://www.independent.ie/opinion/comment/ignoring-the-needs-of-our-youth-in-an-invisible-referendum-31224098.html), (accessed 17/05/2015).

<sup>128</sup> Referendum Ireland, *Thirty-fifth Amendment of the Constitution (Age of Eligibility for Election to the Office of President) Bill 2015*, [www.referendum.ie/results-summary.php?ref=11](http://www.referendum.ie/results-summary.php?ref=11), (accessed 02/06/2015).

<sup>129</sup> BBC News, *Huge Republic of Ireland vote for gay marriage*, 23 May 2015, [www.bbc.co.uk/news/world-europe-32858501](http://www.bbc.co.uk/news/world-europe-32858501), (accessed 23/05/2015).

<sup>130</sup> Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015.

<sup>131</sup> C. O’MAHONY, *Is a referendum needed to introduce same-sex marriage? Experience from other countries shows there are many ways to achieve marriage equality, and the referendum is rarely one of them*, in *The Irish Times* 24/03/2014, [www.irishtimes.com/news/crime-and-law/is-a-referendum-needed-to-introduce-same-sex-marriage-1.1733657](http://www.irishtimes.com/news/crime-and-law/is-a-referendum-needed-to-introduce-same-sex-marriage-1.1733657), (accessed 02/06/2015).

<sup>132</sup> E. DALY, *Same-sex marriage doesn’t need a referendum*, in *Human Rights in Ireland*, 15/07/2012, [humanrights.ie/civil-liberties/same-sex-marriage-doesnt-need-a-referendum/](http://humanrights.ie/civil-liberties/same-sex-marriage-doesnt-need-a-referendum/), (accessed 03/05/2015).

<sup>133</sup> Ryan adopts a more nuanced vision. See F. RYAN, *Ireland’s Marriage Referendum: A Constitutional Perspective*, cit. On these issues see also F. DE LONDRAS, *A Referendum on Marriage: Social Costs and Political Choices*, in *Human*

The most recent case of *Zappone*<sup>134</sup>, whereby a lesbian couple who had married in a Canadian civil ceremony argued that the Irish tax code discriminated against them based on their marital status by not recognising the same, had in reality alluded to the Courts' likely decision on this issue if the executive were to proceed ordinary legislation. It recognised that the then current interpretation of marriage within the Irish constitution was limited to opposite-sex couples, but the Court went further in arguing that this definition is capable of evolution, based on the prevailing values of modern society established within *McGee*<sup>135</sup>. Whilst the Court reaffirmed that the contemporary conception was predicated on opposite-sex couples, it arguably allowed this issue to be dealt with through legislation extending marital franchise sub-constitutionally to same-sex couples as this would not only signal a shift in the prevailing values per *McGee*. but also that it would even benefit from the presumption of constitutionality that affixes to any new legislation passed by both houses of parliament similar to the Civil Partnership Act 2010.<sup>136</sup> Even if a challenge were made against such legislation, the overriding tests for derogations against the institution against marriage arise in the cases of *Murphy*<sup>137</sup> and *MhicMathúna*<sup>138</sup>. The tests set out in both, require that any alterations to the constitutional interpretation of marriage must not penalise those in existing marriages, or induce someone to not marry in the future. Neither of these tests would be violated by the legislative extension of the right to marry to same-sex couples, as the extension of this same right does not impact on opposite-sex couples in either way. In this respect, whilst it might diverge from the constitutional view of marriage as being between opposite-sex couples, it does nothing to negatively impact on that right to make such a legislative act unconstitutional. Therefore the largest inducement to hold a referendum on this issue is that it firstly shifts the burden from the executive in legislating for the right to the public in supporting it via the referendum mechanism, and that it validates the holding the Constitutional Convention itself. Both are purely political factors adopted by the executive, again demonstrating the executive-driven nature of constitutional reform, and the propensity to hold referendums on purely political, not constitutional grounds.

## 5. Concluding Remarks

Following on from a severe and long-lasting economic crisis, the Irish economy has shown signs of recovery, and of overall growth. At the time of the writing of this contribution, FG has returned to power

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*Rights in Ireland blog*, 11 November 2013, [humanrights.ie/gender-sexuality-and-the-law/a-referendum-on-marriage-social-costs-and-political-choices/](http://humanrights.ie/gender-sexuality-and-the-law/a-referendum-on-marriage-social-costs-and-political-choices/).

<sup>134</sup> *Zappone & Anor -v- Revenue Commissioners & Ors* [2006] IEHC 404.

<sup>135</sup> *McGee v. Attorney General* [1974] I.R. 284.

<sup>136</sup> Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

<sup>137</sup> *Murphy v Attorney General* [1982] IR 241.

<sup>138</sup> *MhicMathúna v Ireland* [1995] 1 IR 484.

in the form of a significantly reduced minority coalition government<sup>139</sup>. The FG-Labour coalition lost 27 and 30 seats respectively, with Labour in particular retaining a mere 7 of 157 seats in the *Dáil*<sup>40</sup>. Their new coalition partners are the Independent Alliance, a somewhat loose grouping of right-wing parliamentarians, and FF, who have refused to enter government directly with FG due to their historical and supposed ideological differences, but without whom FG would not be able to achieve their political agenda<sup>141</sup>. Despite these significant electoral losses, Ireland has thus been heralded as the success story, the shining example that proves that austerity is the right way to go, and that governments who have instigated such policies can remain in power, albeit in a far reduced capacity. In addition, although, other EU countries, *in primis* Italy, have undergone a process of constitutional reform, Ireland has been certainly the first (and the only one) to call a Constitutional Convention. The Irish executive not only successfully navigated through its bailout package, but also succeeded in advancing civil rights through the “Marriage Equality” referendum. However, the twin-tracked approach to exiting the crisis led by the executive has a dark side which is not possible to ignore.

First, the austerity agenda made the executive substantially stronger, without any formal change to its constitutional procedures. In reality, it diminished the already minimal possibility for the legislature, affected parties or civil society at large to interfere in any way. The Irish courts have also retrenched even further away from the rhetoric of social rights, by granting an ever wide margin of appreciation to the executive in implementing a highly unequal, austerity agenda. This chapter attempts to show how the supremacy of the executive was consolidated not only externally by the Troika, but also internally by the Irish courts. Ireland has always had the potential from a constitutional perspective to give effect to economic and social rights, as many such rights are inferred if not overtly referred to within the constitutional text itself. Yet the Superior Courts in interpreting these rights has leaned heavily on a specific interpretation of Article 45 IC, which gives an almost exclusive right to determine the bounds of social rights to the legislative branch, and due to the fusion of the legislative and executive branches, the executive. With regards to labour rights, newly emergent precedent from the courts have inevitably reduced the bargaining power of the labour force and trade unions in combatting such austerity to the benefit of government. In particular, with the breakdown of social partnership, the Courts have adopted a rather critical approach to agreements between employers and trade unions at a time of a great need,

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<sup>139</sup> M. GALLAGHER, *Irish Election 26 February 2016*, Trinity College Dublin, [www.tcd.ie/Political\\_Science/staff/michael\\_gallagher/Election2016.php](http://www.tcd.ie/Political_Science/staff/michael_gallagher/Election2016.php), (accessed 22/09/2016).

<sup>140</sup> *Ibid.*

<sup>141</sup> F. KELLY, *The full document: Fine Gael-Fianna Fáil deal for government*, in *The Irish Times* 3 May 2016, [www.irishtimes.com/news/politics/the-full-document-fine-gael-fianna-fail-deal-for-government-1.2633572](http://www.irishtimes.com/news/politics/the-full-document-fine-gael-fianna-fail-deal-for-government-1.2633572), (accessed 01/09/2016).

and allowed the executive to act unilaterally on economic matters by eschewing any requirement for them to engage with stakeholders. The judgments discussed above expand the exclusionary zone for non-governmental or non-executive parties to in any way shape public policy, making it even more difficult for trade unions to exercise their own social right against government and organised capital for redistributive purposes. This view was somewhat reiterated in *Collins v Minister for Finance & Ors*<sup>142</sup>, where a parliamentarian challenged the executive's issuance of promissory notes to banks as a guarantee at the start of the crisis. The plaintiff questioned the Minister's ability to do so without parliamentary approval, and the Court was quick to quash the motion based on its ability to "either sap[ping] the ability of the State to borrow money on international capital markets or, at least, introducing a new risk premium which would have to be reflected in more elevated bond yields in respect of Irish sovereign debt"<sup>143</sup>.

The executive has been equally reluctant to give to the courts the task of creating a redistributive State to it. It has for example yet to introduce a bill for the amendment of the constitution based on the Constitutional Convention's recommendation that such rights be acknowledged and made judicable within the constitutional text. It had previous under the auspices of the Constitutional Review Group, argued against the inclusion of such rights<sup>144</sup>.

Secondly, the Constitutional Convention proposed by the previous FG/Labour Party coalition sought to instigate wide-ranging constitutional reform, and also the inclusion of ordinary citizens within a deliberative, democratic model. The reality however was the executive retained its top-down, control based model of this new process, by directing it to consider already settled or deliberated upon constitutional questions, and in ensuring that the Marriage Equality referendum was the only issue to be effectively put to referendum. In this way, the actual reality of constitutional reform using the Convention model differs greatly from the rhetorical flourishes made under its auspices. Constitutional reform in Ireland has followed a distinct pattern of repetition and politicisation. Repetition in that the majority of amendments proposed and referendums held are on identical, or ancillary questions to common themes such as abortion, electoral reform, or the EU. The political nature stems from the level of executive control over the entire process of calling a referendum under Article 46 IC and the number of referendums held on issues which do not necessarily require constitutional amendment, but where it is politically advantageous to do so. In particular, it appears that the Irish government chose not to put issues ratified before the Constitutional Convention such as socio-economic rights to popular plebiscite. Whilst issues such as the above mentioned marriage equality (*i.e.* constitutionalising the right to marry

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<sup>142</sup> [2013] IEHC 530, 26 November 2013.

<sup>143</sup> (para 122).

<sup>144</sup> Constitution Review Group, *Report of the Constitution Review Group*, (Dublin: Stationery Office, 1996).

regardless of gender), although substantive to those involved, arguably did not require utilising the constitutional referendum mechanism. This issue also arises with the “Children’s Rights Referendum” which sought to extend constitutional protections to non-traditional families. The overall blurred picture of the Irish bailout and reform process reveals the advancement of civil rights, and the dramatic contraction of social rights predicted in the Constitution, with the weakest and most vulnerable bearing the highest burden in terms of their relative position and personal capital. The austerity agenda came at the expense of the already weak Irish welfare state and those that need it most as it retrenches even further from where it was prior to the economic crisis.

Of course it is difficult to suggest that civil rights changes such as this do not carry some kind of cost, be it in the actual administration and campaigning for such a constitutional amendment, or in actually implementing them. The key difference here, is that firstly, such rights do not necessarily necessitate that economic and social redistribution take place as these rights are based almost exclusively on “identity politics”. These are fundamental issues such as race, sexuality and gender which would otherwise exacerbate social and economic deprivation, but have instead become an apolitical way of ensuring progress without substantive change to existing hierarchies (be they social or economic in nature). In Robin’s estimation, this is due to the political right’s propensity to assume the language of its ideological opposite in order to secure electoral victory<sup>145</sup>. This has in turn led to the left itself consolidating around the same type of discourse even further where it proves successful. That both FG and Labour can both mutually agree on issues such as marriage equality when they supposedly sit on opposing sides of the ideological divide, demonstrates that these issues have little, if anything to do with substantive social rights or economic redistribution. It instead arguably supports Robin’s thesis that politics is now predicated on the politics of difference, so long as it is not due to economic disparities. In this respect, marriage is highly instructive as it in fact creates a private, exclusionary sphere away from government intervention for the persons contracting to marry. It further implies that long-term familial wealth is maintained within this private sphere, as its primary distribution/redistribution is chosen based on individual preference using inheritance laws to facilitate the same<sup>146</sup>. Feminists have also long argued that marriage is based upon the social subjugation of women to men, and that while the institution itself has changed in many ways, this hierarchy has remained<sup>147</sup>. Women are presumed to assume certain obligations socially or culturally which the existence of marriage reinforces. Extending the right to marry therefore

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<sup>145</sup> It forms one of the central theses of C. ROBIN, *The Reactionary Mind: Conservatism from Edmund Burke to Sarah Palin*, Oxford, 2011.

<sup>146</sup> M. BARRETT – M. MCINTOSH, *The Anti-Social Family*, 2nd ed., New York, 2015, pp. 59-66.

<sup>147</sup> *Ibid*, 25. Although many other feminists do not agree that marriage automatically implies servility or subjugation as also noted here on 26, 30.

does not address this structural, social imbalance in any way. In addition, the executive has specifically sought to limit the potential redistribution it might have to engage with, therefore reducing the perceived cost of this new civil right. In June of 2015 the Public Service Reform Minister Brendan Howlin stated that public or civil servants who take part in either a civil partnership or marriage under the 2015 Bill will not enjoy equal rights to pension benefits as their opposite-sex counterparts due to financial concerns over the extra pressure it would place on the executive at present<sup>148</sup>. This means that the limited cost of providing true equality of treatment in this particular sphere is still too expensive for an executive more interested in symbolism and maintaining or exacerbating existing hierarchies than in crafting substantive rights. Instead, the cost was borne by the subjects of the Marriage Equality referendum, as a recent survey found that LGBTI people were subjected to often extreme emotional and psychological distress, with the majority unprepared to repeat the experience<sup>149</sup>. Thus, the cost of even the more progressive measures enacted by the coalition government continued to fall on the already marginalised.

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<sup>148</sup> S. ROGERS, *Same-Sex Spouses Denied Pension Equality*, in *The Irish Examiner*, 24th June 2015.

<sup>149</sup> S. DANE – L. SHORT – G. HEALY, *Swimming with Sharks: The negative social and psychological impacts of Ireland's marriage equality referendum 'NO' campaign*, 2016, at [espace.library.uq.edu.au/view/UQ:408120](http://espace.library.uq.edu.au/view/UQ:408120), (accessed 08/10/2016).