

Do we need a referendum?



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The Crotty judgment of 1987 has determined how Ireland deals with European Union treaties but will that apply to the new fiscal compact?

The dramatic European Council meeting in Brussels ten days ago seems finally to have signalled a collective EU will toward resolution of the euro crisis. However, quite apart from the problem between executive and legislative branches noted by Britain's latest lapse into self-imposed and self-defeating isolation, the big challenge ahead will lie in the ratification of the newly-minted fiscal compact.

Although there has been plenty of speculation that referendums would be held in multiple jurisdictions, Ireland might well find itself once again in the unique and lonely position of being the only member state to ask its citizens to vote on the treaty change.

As Lucinda Creighton, the Minister of State with responsibility for European Affairs, suggested immediately after the summit meeting, it is anyone's guess whether such a referendum would succeed.

Prior to the Brussels European Council, there was a broad consensus among constitutional lawyers and political scientists that any Irish decision on approving new eurozone rules could be implemented by the Oireachtas.

However, the seemingly far-reaching implications for sovereignty in approving the fiscal compact will surely outweigh any nervousness about volatile public opinion. In any case, should the government decide to deny the people a referendum, it is almost certain that a constitutional challenge would be brought by Irish eurosceptic groups of one hue or another.

It is unfortunate that the Supreme Court has not been asked to clarify the relationship between the executive and parliamentary authority over EU affairs since the celebrated Crotty case of 1987.

Back then, Raymond Crotty took a case to the High Court arguing that the Irish government's intention to ratify the Single European Act by parliamentary statute was in conflict with the Constitution: Irish sovereignty was threatened by the transfer of key economic competences to the supranational institutions in Brussels.

In a complex and multi-part judgment, the Supreme Court found in Crotty's favour by a majority of three to two.

The problem with the Crotty 'test', however, lies in its ambiguity. In a crucial part of its judgment, the court argued that the state did have the right to ratify amendments to the EU constitutional order, so long as such amendments did not alter the essential scope or objectives of the (European) communities.

The reservations of the court revolved more around the embryonic plans to collectivise European security and defence arrangements than any substantive concern that Irish sovereignty would be trampled by the deepening of economic integration via the Single European Market.

Subsequent to that decision, however, successive Irish governments interpreted the court's position to mean that all future changes to EU treaties had to be decided by popular referendum, rather than parliamentary ratification.

Ireland has thus held seven further referendums on EU treaty change, and the results have demonstrated extreme volatility.

Until recently, the government has insisted that any amendments to the Lisbon Treaty connected to eurozone



Raymond Crotty speaking at a rally at the GPO against the Single European Act in 1987

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reforms would not require a referendum. His reasoning seemed to be that the proposed changes fell far short of what the Crotty case demanded (or was interpreted to demand).

The European Stability Mechanism (ESM) would not alter "the essential scope or objectives" of the EU or at least that was the thinking until the recent summit dramatically changed the terms of the economic framework underpinning the eurozone.

In particular, the strengthening of economic and budgetary surveillance by the European authorities – as well as the new instruments of sanction against those countries which break the rules of the fiscal compact – imply a fundamental change in the nature of sovereignty. In effect, it will make permanent much of the current framework of external oversight (by the troika) of the Irish public finances. Some commentators continue to argue that the Dail might reasonably be entitled to legislate for the fiscal compact without recourse to a referendum.

While this might constitute a more 'efficient' solution to the problem presented by the eurozone's continued existential difficulties, it is far from satisfactory from the point of view of democratic legitimation, given the scale of the recent EU 'penetration' of Irish economic sovereignty.

The fiscal compact does not merely constitute an organic or benign evolutionary development in Ireland's economic relationship with Brussels. In fact, if passed into law, it would constitute the most revolutionary development in the Irish economic landscape in the history of the state.

In effect, it would provide for a

permanent and deeply penetrative supervision of Irish fiscal policy by EU authorities, including a balanced budget amendment and automatic sanctions for transgression which could condemn this country (and others in the eurozone) to lengthy periods of economic stagnation.

A Supreme Court judgment on the fiscal compact is necessary, not only to throw light on these evolving supranational fiscal arrangements.

Just as importantly, it would specify whether the competence to ratify EU treaty changes lies with the Oireachtas or the Irish people.

Such a judgment would help clarify the nature of Ireland's constitutional relationship with the EU, in a context where there have been historically significant economic and political developments far beyond those which the Supreme Court judges of 1987 dealt with (or indeed envisaged) in the Crotty judgment.

The EU has, after all, widened its membership from 12 member states in 1987 to 27 today, with Croatian accession agreed at last week's meeting and scheduled for 2013.

It is arguable that successive enlargements have changed the EU much more radically than, say, the Amsterdam Treaty or the Nice Treaty. And yet Irish voters have never been asked to vote on any new accession.

The scope of the integration process has also considerably deepened over 25 years, so that a very significant portion of domestic policy now emanates from Brussels.

The fiscal compact is thus the latest in a series of supranational economic bargains that can only be understood as a form of

advanced 'Europeanisation' of the domestic legislative landscape.

We should also take note of the practice in other jurisdictions where both the courts and national parliaments play a much more prominent part in EU decision-making. The Danish government is constitutionally obliged to take instruction from the European affairs committee of its national parliament, the Folketinget, when it negotiates with EU partners. Thus Danish MPs have an input into EU policy which their Irish counterparts in the Oireachtas can only dream about.

The balance of power is also much more nuanced in Germany where the constitutional court has been a visible and increasingly assertive actor within the domestic processing of EU affairs, forcing chancellor Merkel's government to provide the Bundestag with important powers of supervision of EU-related legislation, particularly on budgetary matters.

The court, based in Karlsruhe, has been none too reluctant to set down what it considers to be the appropriate limits to EU integration, consistent with the German Basic Law (constitution).

In a landmark ruling in June 2009, the court made Germany's ratification of the Lisbon Treaty conditional on the passage of new legislation giving the Bundestag enhanced powers of scrutiny over European affairs.

Most recently, last September, the court ruled on three lawsuits brought by prominent lawyers and economists against Germany's participation in the EU bailout of Greece and other countries.

Although the court rejected the substantive claim of the litigants, it also banded them a partial victory by insisting

that the Bundestag be given a greater role in any future bailouts and, more generally, in German decision-making on European Union issues.

In the court's view, the Bundestag had lost control over its constitutionally mandated right to determine budget policy, and thus control how German taxpayers' money was spent. The court's decision means that the German government will now have to ask the Bundestag budget committee before it agrees to any future bailout decisions at EU level. The latest Karlsruhe decision thus considerably strengthens the power of Germany's national parliament vis-à-vis the executive.

Because of the absence of the Supreme Court from Ireland's EU engagement over the last 25 years, much of the discussion surrounding options for ratification of the fiscal compact has been taking place in a legal constitutional vacuum.

Therefore, a Supreme Court hearing, brought under Article 26 of the Constitution, could bring much-needed clarity to the debate on how to proceed.

If the Supreme Court were to decide that the fiscal compact requires popular consent, the EU will be faced with the prospect of yet another Irish referendum on Europe.

Thus the prominent part played by Ireland in Europe's extended economic crisis looks set to continue.

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