

## CONSTITUTIONAL AMENDMENT IN IRELAND

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### Abstract

Although, in Ireland, a referendum is the only formal method of amendment, the chapter outlines the important role of informal amendment, by judicial interpretation and organic law. It also stresses the limited role that partisan politics have played in formal constitutional change in Ireland. Another feature is that a striking number of Amendments have arisen from the need to accommodate major EU developments. Noting that there is little appetite to change the amendment process, de Londras & Morgan conclude that the Irish system largely succeeds in promoting popular sovereignty and encompasses an important and dynamic relationship between courts, parliament and the People.

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Given the amount of popular and political attention currently being visited on the topic in Ireland, this is an opportune time for us to consider the normally arcane question of constitutional reform. This attention is largely driven by the country's recent fall from economic grace and the public reaction to it. The first part of this reaction was to remove from power (by a huge margin) the party that had formed the Government for 61 of the 79 years since it first came to office in 1932 (Fianna Fáil). In the general election leading to that party's removal, substantial attention was paid to constitutional reform although the calls for constitutional change might fairly be described as more persistent than coherent at times.<sup>2</sup> The central elements of the clamour for constitutional change focus on more efficient control and accountability of public bodies, and the slimming down of the public sector and its emoluments. To some extent, these calls for change have emerged from non-Constitutional experts, such as newspaper columns, and have tended to attach blame for Ireland's current

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<sup>2</sup> Cf. *King Lear* (2.4.305-9): I will do such things/What they are, yet I know not: but they shall be/The terrors of the earth.

economic straits to constitutional structures, or fundamentally misunderstand the Constitution.<sup>3</sup> Notwithstanding that, the mood for constitutional change was seized on by political parties and fed into the establishment of some ‘popular’ initiatives to debate and propose social change, including constitutional change. Preparations are currently under way for the establishment of a Constitutional Convention through which a range of individuals would draft a new constitution to be put before the People during 2016, the centenary of the Easter Rising against British Rule.

A notable absentee in this debate has been any call for change to the amending process itself. As we shall see, the major feature of formal constitutional change (which is partly a response to the ease with which the post-Independence (1922) Constitution could be amended) is a referendum of all qualified voters and it is probable that, in these anti-politician times, this exactly suits the popular mood.

Part of the push for constitutional change is undoubtedly connected to the fact that Ireland’s constitutions (the original Constitution being in 1922 and its skeleton substantially retained in the present 1937 Constitution) were largely early Westminster (British) export models. In other words, in many respects, the form of Government established in the Constitution is nearly a century old and much of the updating that has occurred in the constitutional structuring of Government has, in reality, been the product of two informal methods of constitutional change (judicial interpretation and organic law) considered in Part III and is not reflected in the constitutional text. As a result, there is a feeling that the text of the constitution is somewhat outmoded, both in terms of Governmental structure and statements of social values.

In outline terms, Ireland has a non-executive head of state, the President, who has certain functions as ‘Guardian of the Constitution’, which she exercises on her own discretion. The executive power of the state is exercised by the ‘Government’, which consists of the Prime Minister (Taoiseach) and 14 other members. The detailed administration of the executive function is carried out by the Departments of State, which are headed by members of the Government. The Government is responsible to, and may be removed by, the Dáil, which is the lower house of the Parliament

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<sup>3</sup> F. de Londras, “De Valera’s Constitution Continues to Serve Us Well”, *The Irish Times*, 12 May 2010.

(Oireachtas) and is elected by universal suffrage. However, the Government is not responsible to the Senate, or upper house. Finally, the judicial branch of Government is housed in a system of general (rather than specialised) courts. Although there is no formal constitutional court, as we shall see, the ‘superior courts’ (i.e. the High Court and, on appeal, the Supreme Court) operate a strong system of judicial review of laws and administrative actions under the principle of constitutional supremacy.

## **I. History and Evolution of Constitutional Amendment in Ireland**

Between 1937 and 2011, 32 proposed amendments have been put to the people, of which 23 have been approved.<sup>4</sup> (There were also two ‘running-in’ amendments achieved without referendum under Article 51 of the Constitution when it was possible to amend without a referendum.) In line with the way in which the rate of change has accelerated in the post-modern world, the pace of constitutional amendment has also increased exponentially. No successful amendments were put to the people until 1972 (although, as we shall see, three amendments were unsuccessfully proposed to the People). Then, during the 1972-1996 period (1996 being the year in which the Constitutional Review Group, explained below, commenced work), 18 proposals to amend the Constitution were put to the people. From 1996 to the end of 2011, there have been 11 more. So far as subject matter is concerned, they may be classified into the following six groups:

### **1. The European Union**

Eight of the proposals relate to the European Community, or Union. First, in 1972, a constitutional amendment was held to enable the State to join the then EEC. In addition, as considered in substantial detail in Part V, a referendum is now held whenever substantial changes to the treaties are being undertaken at European level. Indeed, on two occasions the Irish people have been presented with ‘repeat referenda’ on the same proposed treaty change (the Nice Treaty and the Lisbon Treaty).

### **2. Northern Ireland**

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<sup>4</sup> For a full overview see Department of the Environment, Community & Local Government, *Referendum Results: 1937-2011* (2011), <http://www.environ.ie/en/LocalGovernment/Voting/Referenda/>.

Two amendments have (directly or indirectly) concerned Northern Ireland. This region, which remains a province of the United Kingdom, was partitioned from the southern two-thirds of the island, which became independent in 1921. Articles 2 and 3 of the 1937 Constitution had originally staked a territorial claim over the six counties that make up Northern Ireland. When, in 1998-1999, a compromise was reached on the status of Northern Ireland between Ireland and the United Kingdom these Articles were substantially amended to read that ‘a united Ireland shall be brought about only by peaceful means through the consent of a majority of the people, democratically expressed in both jurisdictions ...’ In addition, the remodelled Article 2 conferred an automatic right to citizenship on anyone born on the island, including those born in Northern Ireland. The 2004 citizenship referendum, considered in the next paragraph, partially rowed back on that change, by confining automatic citizenship to those born on the island of Ireland with “at least one parent who is an Irish citizen or entitled to be an Irish citizen”.<sup>5</sup>

### 3. Human Rights

Three amendments concerned the field of human rights. Two of these were enacted to allow for furtherance of international policy, namely prohibition of the death penalty (2001) and ratification of the Rome Statute of the International Criminal Court (2001). A further amendment reversed Supreme Court decisions,<sup>6</sup> which had stipulated that it would be unconstitutional to refuse an accused person bail, on the basis that it was suspected that the accused might commit an offence while on bail.

### 4. Voting

Seven Referenda have concerned matters of electoral regulation and voting. The first three of these (all of which were unsuccessful) would have made a most fundamental change. Two (in 1959 and 1968 – effectively the same proposal) would have replaced the current single transferrable vote system with a ‘first past the post’ system for parliamentary elections that would have had serious implications given the historical

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<sup>5</sup> Article 9.2.1.

<sup>6</sup> *The People (Attorney General) v O’Callaghan* [1966] IR 501; *Ryan v Director of Public Prosecutions* [1989] IR 399.

dominance of one political party in the state.<sup>7</sup> The third (again, 1968) would have permitted greater representation per resident in rural than urban areas and would also have had the effect of favouring the Government party. This would, in substance, have reversed the decision of the High Court in *O'Donovan v Attorney General*.<sup>8</sup> The remaining four referenda in this category were not controversial as between the parties or otherwise and passed by a large majority: lowering the voting age for Parliamentary, Presidential and Local Authority elections (1972); permitting the extension of University representation in the Seanad (Upper House) to allow the graduates of new Universities to vote<sup>9</sup> (1979); extending voting rights in parliamentary elections to certain non-citizens (in practice the British who are resident in this State) (1984) and effectively reversing *Re. Art. 26 and the Electoral (Amendment) Bill* 1983 [1984, IR 268]; and both recognising the local Government system and requiring local elections at least once every five years (1998).

## 5. Religious and Moral Matters

There have been eight referenda on what might be broadly called religions and/or moral-sexual matters, five of which were passed. The first of these, held in 1972, removed the provisions providing a “special position” to the Roman Catholic Church in Ireland and was relatively uncontroversial. The remaining seven all relate to abortion or divorce. In its original form, the Constitution banned the possibility of divorce. The first attempt to introduce divorce by referendum in 1986 was unsuccessful but a later proposed amendment in 1995 succeeded. In 1983 the Constitution was amended to protect the life of the unborn, but following the finding in *Attorney General v X*<sup>10</sup> that some abortion was still permitted, further referenda followed. In 1992 two amendments to allow for freedom of travel for abortion and free availability of information relating to abortion succeeded, but two more proposals that attempted to restrict abortion to narrower parameters than that recognised by the Supreme Court in *X* were defeated in 1992 and 2002 respectively.

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<sup>7</sup> With the exception of the last (2011) General Election, there is one party (Fianna Fáil) which has fairly consistently commanded the support of mid-40s per cent of the popular vote (in contrast to the arrangement in Britain, where there happens to be two big parties who share, alternatively, the uncovenanted bonus in terms of parliamentary seats, which is the inevitable result of ‘first past the post’). The imposition of ‘first past the post’ in Ireland would have created a dominant party vote.

<sup>8</sup> [1961] IR 114.

<sup>9</sup> In fact, even today, the necessary organic legislation to implement this change has not been enacted by the legislature, despite the huge increase in new University places.

<sup>10</sup> [1992] 1 IR 1.

## 6. Institutions of Government

There have been only four amendments to modernise the institutions of Government. The first of these reversed careless *obiter dictum* from the Supreme Court in *M v An Bord Uchtála*<sup>11</sup> which suggested that adoption orders issued by the Adoption Board might violate the Separation of Powers under Article 34.1 (1979). The other stemmed from another Supreme Court ruling, to the effect that collective Government (*aka* cabinet) responsibility required confidentiality.<sup>12</sup> The Constitution was amended so that a public inquiry was no longer barred from inquiring whether a particular topic had been discussed at a Government meeting. Finally, in 2011 one Amendment was passed, allowing for judicial remuneration to be reduced in line with that of others paid from the public purse; and another, reversing a Supreme Court decision (*Maguire v Ardagh* [2002] 1 IR 385) that limited the capacity of parliamentary inquiries to make findings, was rejected.

Two general points emerge from this list of Amendments. The first is that a substantial proportion of the Amendments (on one count, eight out of 32<sup>13</sup>) were regarded as necessary in order to reverse statements of law resulting from unpopular judicial interpretations *or* because of a judicial decision making it clear that a desired course of action would be possible *only* following a successful referendum to amend the Constitution. Secondly, a surprisingly small number of Amendments related to institutional changes in regard to central Government. We return to these features below.

## II. Informal Methods of Constitutional Change

In Ireland there are two main mechanisms for informal methods of constitutional change: judicial interpretation and organic law.

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<sup>11</sup> [1977] IR 287

<sup>12</sup> *Attorney General v Hamilton (No. 1)* [1993] 2 IR 50.

<sup>13</sup> The cases have been identified earlier in this Part. Specifically, there was one on human rights (bail); two on elections; one on abortion; and four on institutions of government. As regards the latter category, there was no decided case in respect of the unconstitutionality of reducing judicial remuneration; but the Attorney General's advice was to the effect that such a change, without an Amendment, would have been constitutionally suspect. The two instances in which an Amendment to reverse judicial decisions failed are those on representation of rural voters and parliamentary inquiries.

(a) *Judicial ‘interpretation’ of the Constitution*

The ultimate arbiter of the meaning of the constitutional text in Ireland is the Supreme Court. Partly because of the inertia of the legislature in addressing and updating the socio-economic aspects of the legal system up to the 1990s, many developments that came about through either legislation, or even by way of constitutional amendment, in other jurisdictions were in fact driven by constitutional litigation in Ireland. There are two contrasting aspects to this. First, we have already noted that judicial interpretations of the Constitution have sometimes been removed by means of a subsequent formal constitutional amendment uprooting them. But, in other cases, the Irish political branches have accepted significant judicial development of the Constitution. Without delving too deeply into general constitutional law, the following doctrines may be mentioned as significant elements of the *acquis constitutionnel*.<sup>14</sup>

First, substantial ‘unenumerated personal rights’ have been deduced from Article 40.3.1 of the Constitution.<sup>15</sup> These have given rise to about twenty aspects of protection of the person and personality, including rights to privacy,<sup>16</sup> to bodily integrity,<sup>17</sup> and to freedom from torture.<sup>18</sup> In large part, these rights were devised or discovered in litigation taken to challenge the constitutionality of older and outmoded legislation. Second, although the separation of powers is never expressly mentioned in the constitutional text, the three organs of Government and their exclusive functions are outlined and from these constitutional capsules the courts have woven a comprehensive separated powers doctrine that now functions as the spine of the Irish constitutional order.<sup>19</sup> Third, and as considered further below, it was a Supreme Court decision that has resulted in Ireland needing a constitutional amendment before the state can ratify major developments to the foundation treaties of the European

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<sup>14</sup> G. Hogan, “The Constitution, Property Rights and Proportionality” (1997) 32(1) *Ir Jur* 373.

<sup>15</sup> Article 40.3.1 provides “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”. The development of this provision is analogous to the development of the concept of privacy in US constitutional jurisprudence. **EDITORS: IT MAY BE APPROPRIATE TO CROSS CITE TO OTHER CHAPTERS HERE—PLEASE DO SO IF DESIRED.**

<sup>16</sup> *McGee v. A.G. & Anor* [1974] IR 284.

<sup>17</sup> *Ibid.*

<sup>18</sup> *The State (C) v Frawley* [1976] IR 365.

<sup>19</sup> D. Gwynn Morgan *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell, 1997).

Union.<sup>20</sup> Fourth, the prohibition of extra generous parliamentary representation for rural areas, prohibited by the High Court and subsequently rejected by the people in a referendum, has had immense consequences for the balance of political power in Ireland.<sup>21</sup>

This *acquis constitutionnel* comprises more than mere case law; together with the basic text, it is “the accumulated sense of legal tradition and case-law, together with legal methodology and reasoning...which really counts”<sup>22</sup> when determining what the Constitution requires, permits and prohibits. In that sense it is, of course, at the heart of Governmental decision-making and of the advice given by the Attorney General on the constitutional (im)permissibility of desired Governmental action.

(b) *Organic Law*

Unless it intends to change something expressly governed by the Constitution, a Government will usually have to decide whether to bring about a desired change through organic law or through constitutional amendment. Generally speaking Irish Governments have not been overly reticent in holding constitutional referenda where constitutionally entrenched systems or principles were candidates for reform.<sup>23</sup> However, there have been numerous occasions when substantial change to governance of the state was introduced by organic law because it did not interfere with existing constitutional provisions, even though constitutional amendment may have been more appropriate given the nature of the changes in question. This has particularly been the case in relation to major changes in the Government apparatus, including legislation: to control political parties: giving independent authority and responsibility to (civil servant) heads of Government departments over (elected) Ministers<sup>24</sup>; vesting the selection of civil servants in a politically neutral body;

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<sup>20</sup> *Crotty v An Taoiseach* [1987] IR 713,

<sup>21</sup> *O'Donovan v Attorney General* [1961] IR 114; *Re Art. 26 and the Electoral (Amendment) Bill*, 1961 [1961] IR 169. It was held that, in any particular constituency, the variations from the national average regarding the inhabitants/representative ratio could not exceed +/- 5%.

<sup>22</sup> G. Hogan, “The Constitution, Property Rights and Proportionality” (1997) 32(1) *Ir Jur* 373.

<sup>23</sup> There are two examples where constitutional concerns have been expressly cited as the reason for not bringing about reform. One relates to the possible expansion of marriage to same-sex couples (currently the subject of constitutional litigation: *Zappone & Anor -v- Revenue Commissioners & Ors* [2006] IEHC 404). The other concerns the reform of the largely political system of judicial appointments, by introducing the Judicial Appointments Advisory Board on the justification that, to go beyond an Advisory Board, would violate Article 35.1 of the Constitution. (This provision states that the judges must be appointed by the President, on the advice of the Government.)

<sup>24</sup> Public Service Management Act 1997

creating an independent office of Director of Public Prosecutions; establishing an independent body to run the courts service; and the proposed law on judicial standards and discipline.<sup>25</sup> These are changes that arguably belong within the constitutional text, as they go to the heart of constitutionalist values of transparency, accountability and maintenance of institutional independence.

There are other situations in which changes introduced by organic law seem to grate against values outlined in the Constitution, creating a dissonance (and possibly even a fatal incompatibility) between the social values stated in legislation and those stated in the Constitution. The primary example is the maintenance of Article 41.2.1 stating that “...by her life within the home, woman gives to the State a support without which the common good cannot be achieved” and Article 41.2.2 providing that “[t]he State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home”. These provisions are clearly out of sync with modern Ireland, but instead removing this outmoded vision from the Constitution itself,<sup>26</sup> we have introduced a wave of legislation that tends to evince a more equal vision of society (including the Employment Equality Act 1998 and the Equality Act 2000) as well as a more socially appropriate framework of family law (including providing some protections for same-sex and unmarried couples in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010). Here, one might think, that although in most instances legislation has managed to provide *de facto* equality, constitutional (and therefore full *de jure*) equality remains unattainable without constitutional change. Moreover, one might even find an argument, based on Article 41.2, that such legislative innovations were unconstitutional. The legislature in such cases has failed to grasp the constitutional thistle of articulating a more equal vision of society in a constitutional referendum campaign, arguably leaving such political ‘hot potatoes’ as gender equality and sexuality to the judiciary to resolve through any litigation that might arise.

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<sup>25</sup> The example of judicial discipline is most germane. In 2000, a constitutional amendment was brought to the Oireachtas, which would have allowed for the introduction of a new, up-to-date, system for disciplining judges but when the Opposition withdrew its support, the Government withdrew the amending Bill and an agreement was reached that a judicial disciplinary system may be enacted by means of a simple organic law which, it is assumed, will be constitutional. As a further example, in 2010 the Government was in no way embarrassed to promise the establishment of an Electoral Commission by organic law (though this did not, in fact, come about).

<sup>26</sup> Although Article 41.2 has been earmarked for amendment, no proposal relating to it has ever been put before the People.

Almost no attention has been paid in Ireland to the question of choosing between organic law and constitutional amendment. The 1996 Report of the Constitution Review Group serves as an exception.<sup>27</sup> Chapter 17 deals with possible ‘New Provisions’ on the Ombudsman, local Government, the Irish Human Rights Commission, and the environment. The Ombudsman and system of local Government were well established, but not constitutionally entrenched. The Committee concluded that “Constitutional guarantee for [the] independence [of the Ombudsman] would reinforce freedom from conflict of interest, from deference to the executive”<sup>28</sup> and a majority recommended recognition of the system of local Government in the Constitution. At the time of preparing the report, the Irish Human Rights Commission had not yet been established,<sup>29</sup> and the majority of the Group preferred that such a Commission should have legislative rather than constitutional status at least until it had ‘bedded in’ over a number of years. Finally in Chapter 17 the majority of the Review Group recommended “inclusion in the Constitution of a duty on the State and public authorities as far as practicable to protect the environment” although “Legislation would remain the chief source of specific provisions aimed at safeguarding the environment”. At the time of writing, the Ombudsman, local Government, the Irish Human Rights Commission and the environment remain established by organic law; though local government was recognised in a Constitutional Amendment in 1998..

The other official discussion of whether a change should be effected by constitutional or organic law centred on the question of the form in which to bring into Irish law the European Convention on Human Rights.<sup>30</sup> Two reasons against constitutional incorporation were given. First it was felt that there might be unnecessary and unhelpful duplication of protections between the Convention text and the fundamental rights guarantees in the Constitution. Any such duplications, overlaps or contradictions could be resolved through judicial ingenuity and clarification if the Convention had sub-constitutional status. But this would have been more problematic if the Convention was contained within the Constitution itself. Second, there was a legitimate concern that constitutional incorporation would make the domestic courts

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<sup>27</sup> See generally <http://www.constitution.ie/constitutional-reviews/crg.asp>.

<sup>28</sup> Report of the Constitution Review Group (1996, Dublin; The Stationary Office), p. 426.

<sup>29</sup> Irish Human Rights Commission Act 2000.

<sup>30</sup> See generally F. de Londras & C. Kelly, *The European Convention on Human Rights Act: Operation, Impact and Analysis* (2010, Dublin; Round Hall, Chapters 1 & 2.

subservient to the European Court of Human Rights in a manner that would be problematic for the governance structure of the state itself *and* for the workings of the Strasbourg Court. The Convention was eventually transposed by the European Convention on Human Rights Act 2003.

One might, of course, ask whether it matters if a change is introduced through constitutional or legislative means. First, does it matter to the Government? The answer seems clearly to be 'yes'. Referenda are costly in both time and money terms. They are also potentially costly in reputational terms. A Government that loses a referendum, or that wins by a lower than expected majority, will generally suffer some reputational damage. Additionally, there is always a risk that voters would use a referendum as an opportunity to 'punish' a Government for reasons quite separate from the subject of the amendment. A further consideration is the consequences that flow from a provision being actually in the Constitution since constitutional entrenchment will normally act as a limitation on a Government's power.

But these considerations see things mainly from the Government's viewpoint. From the different perspective of what is good for a constitutional polity, there are reasons which, in the case of many of these changes, would have militated in favour of making the change by way of amendment rather than organic law. First and straightforwardly, if a change is made by way of organic law, there is the danger that it may be unconstitutional and ultimately be struck down. Second, one might argue that some issues are simply of such central constitutionalist importance, touching as they do on our capacity to properly limit state power by making it transparent, answerable and accountable, that the institutions established to carry out these tasks ought to have their importance recognised (not to mention their existence safeguarded) by a headline in the Constitution. In addition, a constitution is not merely the basic law; it is also a statement of national beliefs, ideals or aspirations. It is a symbol of the state by which the citizens say to themselves and to others 'this is who we are'. If changes are introduced through organic law and not through constitutional amendment, there is a danger of the Constitution becoming divorced from contemporary values and so undeserving of popular respect and support. The family law provisions already discussed are an appropriate exemplar here, encompassing as they do an antiquated constitutional vision of men as breadwinners and women as bread makers that is vastly at odds with contemporary society. In *The*

*State (Burke) v Lennon* Gavan-Duffy J. famously stated: “[T]he Constitution, with its most impressive Preamble, is the Charter of the Irish People and I will not whittle it away”.<sup>31</sup> Does the introduction of legislation focused on equalising gender relations, coupled with concurrent maintenance of an unchanged text, not do precisely that?

A further matter that a Government might take into account is whether an international obligation to which it is committed requires constitutional change. This will, in truth, rarely be the case: indeed, many treaty provisions can be given domestic legislative effect by means of legislation and, of course, the state will frequently ratify an international agreement and be bound to it internationally without ever giving it domestic effect at all. (Ireland’s ‘dualist’ (Article 29.6) nature permits of this.) That said, where what is involved is membership of an international institution that has some capacity to carry out a role which the Constitution has vested in a domestic organ, an amendment may be essential or at least wise, as happened with Ireland’s membership of the International Criminal Court.<sup>32</sup> There may be a different argument, that Ireland’s membership of some international organisations is sufficiently central to our identity as a state that it ought to be ratified by Constitutional amendment. For example, the Constitution declares Ireland’s place among the peace loving nations of the world,<sup>33</sup> the country has a long-standing position of neutrality ensured through the so-called ‘triple lock’,<sup>34</sup> and almost all military activity in which Irish Defence Forces are involved in peacekeeping. Does this not all suggest that membership of the United Nations properly belongs in the Constitution?

### **III. Formal Constitutional Change and Judicial Review of the process**

The process of constitutional change in formal terms is fully prescribed by Article 46 of the Constitution itself:

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<sup>31</sup> [1940] 1 I.R. 136, 155.

<sup>32</sup> Unlike joining the International Court of Justice (through membership of the UN), membership of the ICC required an amendment because it is a subsidiary court (acting where domestic courts are unable or unwilling to do so). When it does act, it has jurisdiction over matters that domestic courts also have jurisdiction over. As a result it may well engage the administration of justice in a manner that invades on domestic courts to some degree. In contrast, the International Court of Justice is a court of consensual jurisdiction.

<sup>33</sup> Article 29.1.

<sup>34</sup> This requires approval by the Cabinet, the Parliament and the UN before Ireland will engage in any military operations.

“1. Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal, in the manner provided by this Article.

2. Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.

3. Every such Bill shall be expressed to be "An Act to amend the Constitution".

4. A Bill containing a proposal or proposals for the amendment of this Constitution shall not contain any other proposal.

5. A Bill containing a proposal for the amendment of this Constitution shall be signed by the President forthwith upon his being satisfied that the provisions of this Article have been complied with in respect thereof and that such proposal has been duly approved by the people in accordance with the provisions of section 1 of Article 47 of this Constitution and shall be duly promulgated by the President as a law.”

When assessed on a rigidity/flexibility scale, Article 46 is decidedly rigid in terms of process but entirely flexible in terms of content. No provisions of the Constitution are immune from amendment. Indeed, this has been confirmed in the High Court where Barrington J. held that ‘By Article 46.1 the people intended to give themselves full power to amend any provision of the Constitution and that this power includes a power to clarify or make more explicit anything already in the Constitution.’<sup>35</sup> The same amending process is required irrespective of the scale of the amendment or the particular provision being amended. There must first be an amending Bill, passed in both Houses. Because of the significance of an amendment, there are various

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<sup>35</sup> *Finn v Minister for the Environment* [1983] IR 154, 163. For discussion of this and other technical points, see Hogan and Whyte (eds.) *J M Kelly: The Irish Constitution* (Lexis Nexis Butterworths, 4<sup>th</sup> ed., 2003, para. 8.1.01-30).

safeguards in Article 46. First, the amending legislation must deal solely with the act of amending the Constitution. Every Bill for amendment must start in the Dáil (the lower House of parliament). Next, the wording of the Bill has to be ratified in a referendum of the people, with the proposal being approved by simple majority of the valid vote. There is no required minimum turnout for a referendum. If the proposal is approved, the Bill is signed and promulgated by the President and the amendment becomes part of the Constitution.

The President has no discretion as to whether to sign an Act amending the Constitution once she is satisfied that Article 46 has been complied with and the proposal has been approved.<sup>36</sup> It is now established that a constitutional amendment cannot itself be unconstitutional,<sup>37</sup> even if it interferes with what might be considered a precept of the natural law.<sup>38</sup> If the proposal is rejected, no amendment may be undertaken, although there is no legal impediment to running proposing precisely the same amendment to the people once again almost immediately and this has, in fact, happened twice (Nice 1 referendum; Lisbon 2 referendum).

A practical difficulty arises from the fact that sometimes a good part of a voter's decision as to whether to support an amendment depends on material which is not in the amendment itself. One example lies in the organic law necessary to implement the amendment. Even if this has already been published before the referendum, a sceptical voter may say: 'I must both see the small print and be sure that this will not be altered after the Amendment has been safely banked.' An attempt to meet this sort of concern was made in the proposed, but rejected, Twenty-fifth Amendment to the Constitution in 2002, concerning Abortion. The Bill providing for the Amendment contained in a Schedule the text of an associated Bill which was to have been put before both Houses of Parliament and, if passed, would have had constitutional status (and so could not have been changed by organic law), albeit not embodied in the text of the Constitution. Prior to the Referendum taking place, the Bill was subject to an unsuccessful challenge in the High Court, in *Morris v Minister for the Environment*.<sup>39</sup>

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<sup>36</sup> In the case of most other bills, the President has a discretion to send the Bill to the Supreme Court for what is known as an Article 26 reference (a process of pre-emptive judicial review to check for constitutionality.)

Bills

<sup>37</sup> *Riordan v Ireland (No 1)* [1999] 4 IR 321.

<sup>38</sup> *Re Art. 26 and the Information (Termination of Pregnancy) Bill 1995* [1995] 1 IR 1.

<sup>39</sup> [2002] 1 IR 326, 337

The main point in the case centred on the words, already quoted in Article 46. The High Court held that the words ‘variation [or] addition’ could embrace free-standing constitutional norms of this nature, since the Constitution did not expressly require that an Amendment must be contained in the body or text of the Constitution. Another practical difficulty arose from the fact that, after being passed, the Nineteenth Amendment of 1999, which was an element in the Northern Ireland peace process, was not to come into effect immediately; but was made conditional on reciprocal steps being taken by the UK Government, with reference to Northern Ireland and these being confirmed by way of the Irish Government’s declaration. The Supreme Court held that this was constitutional, on the basis that ‘[t]he People have a sovereign right to grant or withhold approval to an amendment ... [t]here is no reason therefore why they should not ... give their approval subject to a condition’.<sup>40</sup>

Once the decision to try to achieve a certain end by means of constitutional amendment is taken, a process of drafting that proposed amendment will begin. Traditionally the drafting process has been undertaken by the office of the Attorney General with very little general public consultation.<sup>41</sup> It is sensibly observed that ‘the devil is in the detail’ and there have been many occasions when, even though the principle of an amendment appears to have been accepted, there has been substantial unease with the particular balance which has been adopted in the amendment. In addition, there is the constant concern that the precise meaning of a proposed amendment might not be known until it is the subject of later litigation and judicial interpretation. Doubts of this character were well to the fore in the defeat of the 2011 proposed Amendment regarding parliamentary inquiries, and in particular the meaning of the phrase “It shall be for the House or Houses concerned to determine [at a parliamentary inquiry], with due regard to the principles of fair procedures, the appropriate balance between the rights of persons and the public interest”<sup>42</sup>. Considerable unease arose, with ‘no’ campaigners arguing that this potentially excluded the possibility of judicial review of how one was treated by a parliamentary

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<sup>40</sup> *Riordan v An Taoiseach (No. 2)* [1999] 4 IR 343, 354.

<sup>41</sup> There are exceptions to this. In recent years a long process in regard to a proposed amendment relating to the rights of children has been undertaken, which involved a special parliamentary committee that consulted widely and produced a proposed wording. No referendum has yet been held, however, and the final wording will emanate from the office of the Attorney General and will almost certainly not be the wording proposed by the committee.

<sup>42</sup> Proposed Article 10(4).

enquiry and ‘yes’ campaigners disagreeing but, of course, the ultimate arbiters of meaning—the superior courts—not being able to intervene.

#### **IV. The Influence of Politics on Constitutional Amendment**

While Irish politics is cast along party political lines, this does not tend to hold true for constitutional referenda. Generally speaking, opposition to proposed amendments has come from civil society rather than from political parties. Thus, initiation of the proposed referendum (in parliament) has not generally been characterised by opposition, whereas the conduct of the referendum campaign has tended to be more divided. We shall consider this in Part V. In the present Part, we address the role of the political parties at three stages: the initiation of a proposal, the Oireachtas debate on the wording of the proposal, and the referendum itself.

##### *(i) Initiation*

Constitutional amendments are initiated by Government through proposed legislation to amend the Constitution. As we shall see in Part VI, referendums have tended to be initiated because of the exigencies of EU membership, or to facilitate other international agreements. Others have been held to reverse unpopular, or seemingly unworkable, judicial interpretations. In addition, there have been two general reviews of the Constitution giving rise to recommendations for change. In both cases, Governments have ensured cross-party involvement. This is hardly surprising, since tension may exist, or be suspected, between a Governmental interest in limiting firm restraints on its actions and the public interest in having adequate controls. In addition, Irish people and politicians esteem their Constitution as a symbol of their state and think of it as being above party politics. However, the reports and conclusions of both reviews exercised have not generally resulted in amendment or referenda.

The first of these two general reviews began in 1966. The three political parties in the legislature agreed that ‘an informal committee’ of parliamentarians should be set up to review the Constitution and that group reported in 1967.<sup>43</sup> The report identified 27 matters that ought to be dealt with. Where there was unanimity in the group a change

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<sup>43</sup> *Committee on the Constitution, Interim Report* (1967, Dublin).

was proposed, where no unanimity could be achieved the arguments for and against change were outlined. Although termed an ‘Interim’ report, a final report was never issued, probably because the Government decided to act on only one of the identified issues (the controversial change to the electoral system) and, as noted in Part I, the proposed amendments were rejected by the people.

A further constitutional review was held in 1995-1996 by the Constitutional Review Group. This committee comprised non-political experts (although nominated by political parties) drawn from the fields of public administration, economics, education, political science and sociology. However, the majority of the committee were lawyers. The Group reported on 3 July 1996 and, on the same day, the All-Party Oireachtas (Parliamentary) Committee on the Constitution was established. That Committee has been re-established after every subsequent General Election, with a senior Government back-bencher as Chairperson and the Deputy Chairperson from the principal Opposition Party. Although the recommendations of both general review groups are largely unimplemented, they have (over the past 15 years) worked their way through the CRG’s proposals and have published reports, with recommendations, in respect of almost all aspects of the Constitution. Their reports remain the starting point of most discussions on constitutional change.

A further aspect in the initiation of constitutional referenda in Ireland is the particular position and concern with Northern Ireland. Long regarded as a lost province, various discussions about how the Constitution might be amended to make unification of the island more amenable to Northern Unions has sometimes taken place. For some time it was assumed that there were Catholic and confessional elements in the Irish Constitution (*e.g.* the ban on divorce; the special position of the Catholic Church) that made it unacceptable to the Northern Protestant community. Some reviews suggested that the Constitution might be amended to ameliorate these concerns,<sup>44</sup> but, with the possible exception of the Divorce referendum of 1985, none of these reviews led to any concrete Bill to amend the Constitution.<sup>45</sup> And in the event, when peace came to Northern Ireland, it did so not in the form of Irish unity but of an internal settlement in

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<sup>44</sup> These included: the *Inter-Party Committee on the implications of Irish Unity*, 1972; the *All-Party Committee on Irish Relations*, 1973; the *Constitution Review Body*, 1982; and the *New Ireland Forum*, 1983-84 – only the latter of which, however, produced a report.

<sup>45</sup> For more detail, see the *All-Party Oireachtas Committee on the Constitution: First Progress Report* (Pn. 3795, 1997), Appendix 1.

which the only impact on the Irish Constitution was the removal of the irredentist claim on Northern Ireland.

(ii) *Parliamentary Debate*

At the stage of parliamentary debate of a Bill to amend the Constitution (in which the wording to be put to the People is debated), the major opposition party in the state has usually supported the proposed change. Furthermore, party political motivation has been surprisingly absent as the driving force for an amendment. It is notable, for instance, that, the (Fianna Fáil) Government put forward the measure to reduce the voting age from 21 to 18 in 1972 even though it was generally felt that this would reverse Fianna Fáil dominance and usher in a youthful, socialist voting period in the 1970s. Proposing the change was seen as part of the *zeitgeist* in favour of youth and the proposal had been recommended in the 1967 Report.

There are limited examples of party-political opposition to proposed amendments at debate stage. The first took place at the start of the history of constitutional amendments, when the Government party attempted to change the constitutional governance of the electoral system in three proposals (in 1958, with two in 1969). In each case the Government party would have been advantaged. Although the opposition parties lost the divisions in parliament during debate on the bills to amend the Constitution, they successfully opposed the change (with media support) in the campaigns. Another case of the major Opposition Party opposing an amendment occurred in 1986. The Fine Gael-Labour Government proposed a referendum to remove the prohibition on divorce from the Constitution. Although the proposal was worded in very restrictive terms, Fianna Fáil—the major opposition party—opposed it, together with a number of conservative *ad hoc* anti-divorce groups and the Roman Catholic Church and it was defeated by 63.5% against to 36.5% in favour. Interestingly, when divorce was introduced in Ireland—by means of the Fifteenth Amendment to the Constitution in 1995 (which was passed by a 0.5 per cent majority)—on this occasion, with the opposition Fianna Fáil adopting a neutral stance, although the measure was cast in almost identical terms to that proposed in 1986.

Apart from these instances, the main parties have generally adopted a supportive approach to proposed constitutional change, although there has usually been some

party-based opposition from ‘minor’ political parties. This is particularly notable in relation to the amendments on the European Union, including the two ‘rerun’ amendments relating to the Treaties of Nice and Lisbon. The first Nice Treaty, held in June 2001, saw every major political party (apart from the Green Party and Sinn Féin, who at the time were marginal parties with no history of significant electoral success) supporting the referendum.<sup>46</sup> A similar trend can be seen in relation to the first and second Lisbon Treaty referenda. At the second referendum, the major political parties supported the campaign with (a little) more energy and the information provision improved significantly.

(iii) *The Referendum*

At the referendum stage, each political party has formally taken up the same stance as it did at the parliamentary stage, so that Government and main Opposition parties are usually both pointing in the same direction. However, when it comes to encouraging their supporters to put in groundwork on the campaign, there have been impediments. First, as noted, the regular electors and even members of each party do not necessarily always agree with the party’s stance on a referendum. Secondly, when it comes to expenditure, the party may well decide to preserve its treasure for an election, when the fortune of the party is more significantly engaged. The result of this reticence is that much of the action at the referendum campaign is often left to the Government party and the minor parties or *ad hoc* groups. On at least one recent occasion (the first Lisbon Treaty referendum) when the ‘Yes’ side lost, the principal Opposition party blamed the Government party for failing to put sufficient effort into the campaign.

All of this raises the question of why it is that Irish opposition parties, normally zealous in adhering to the maxim (usually attributed to Lord Randolph Churchill) that ‘the duty of an Opposition is to oppose’, should shrink back when it comes to a constitutional amendment. Three suggestions may be made. One is simply that the Opposition Parties respect the Constitution and know that the voters do so too and, therefore, that it seems prudent not to ‘play politics’ with it. Second, as has been said in a European-wide context, ‘most commonly referendum issues are ones that cut

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<sup>46</sup> For a discussion of the political debate—including and beyond party politics—see J. O’Mahony, “‘Not so Nice’: The treaty of Nice, the International Criminal Court, the Abolition of the Death Penalty—the 2001 Referendum Experience” (2001) 16(1) *Irish Political Studies* 201, 204-206.

across party lines<sup>47</sup> and this is certainly true of Ireland. It is significant too that, in the Irish party political system, there is little ideological difference between the major parties.<sup>48</sup> The result of these factors is that, while the representatives of a party in Parliament may support a bill for an amendment, opinion poll evidence (as well as the results of referenda themselves) shows that it by no means follows that a majority of that party's regular voters will support it at the ensuing referendum.

## V. The Role of the People

There are two stages at which the involvement of the people needs to be considered: the initiation of a proposal for amending the Constitution, and the conduct of the referendum itself.

### (i) *Initiation*

As mentioned, a constitutional amendment is usually initiated by the Government of the day. There is no mechanism by which the people can engage in a formal petitioning mechanism or initiate a referendum process themselves. Of course, a sufficient number of people could put political pressure on the Government or opposition parties to put the possibility of a constitutional referendum on the political agenda. The major<sup>49</sup> example of this is the 1982 abortion amendment. One of the roots of the amendment lay in US developments: a number of Irish intellectuals (supported by the Catholic church, which still carried substantial political sway) noted that *Griswold v Connecticut*<sup>50</sup> (which established a right to use artificial

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<sup>47</sup> Gallagher p. 376. See also Michael Gallagher writing on the Nice Treaty Referendum in *The Irish Independent*, January 11, 2001.

<sup>48</sup> The two largest parties (during almost the entire post-Independence period) – Fianna Fail and Fine Gael – split from the original common trunk because of the Civil War of 1922-23, and throughout the post-Independence period there has been little difference, of a general ideological nature, between them. This is not to say there is no difference at all. In general, Fine Gael—which has spent substantially more time in Opposition than Fianna Fáil—has tended to act in a less opportunistic manner, which may help to explain why amendments were frequently supported by the Opposition.

<sup>49</sup> For a distant example, note that the former provision of the Constitution, Article 44.1.2°, which established a 'special position' for the Catholic Church was, in the circumstances of 1937, a considerable compromise, which was far from acceptable to a minority of Catholics. During the 1940s, a small Catholic organisation, called *Maria Duce*, campaigned vigorously for a strengthening of this Article and, for a while, attracted support, some of its meetings being attended by crowds of thousands of people. In 1949, *Maria Duce* organised a petition urging an amendment to the Constitution. But, without the backing of either a political party or the Hierarchy of Bishops, this campaign petered out. See Chubb, *The Constitution and Constitutional Change in Ireland* (IPA, 1978), pp. 61-62.

<sup>50</sup> 381 U.S. 479 (1965)

contraceptives) had led on to *Roe v Wade*<sup>51</sup> (right to abortion). They asked, rhetorically, whether there was not a danger that *McGee v Ireland*<sup>52</sup> (establishing the right to access artificial contraceptives as part of a right to marital privacy) would lead on to an Irish equivalent of *Wade* and proposed a constitutional amendment to prevent this from happening. This episode occurred at an auspicious time in the Irish political cycle (1981-82), when there were three General Elections during a period of 18 months. At this vulnerable time, the leaders of the two main political parties were fairly readily brought to commit their parties to supporting the necessary amendment in parliament.<sup>53</sup> Although that constitutes an isolated example, as civil society develops in Ireland there are various ways in which non-party politics can and does play a role in Constitutional change in Ireland, especially in the area of social progression and individual rights. The first is through the proposal for an amendment in the first place and, increasingly, non-Governmental organisations (whether concerned with constitutional and rights-based matters generally or established to deal with particular issues) produce studies, reports and proposals for constitutional change, including proposing the wording of possible amendments. As the rate of change accelerates and legal rights become increasingly central to public debate, the Constitution and, where appropriate, the possibility of its amendment moves centre-stage.<sup>54</sup>

(ii) *The Referendum Campaign*

In general, people involved in referenda campaigns are organised as civil society organisations, frequently *ad hoc* but also often in existing bodies like religious groups. These groupings will naturally engage in the activities customary in a political campaign in a modern constitutional polity such as writing opinion or explanatory articles and contributing to radio, television and ‘live’ debates. It is useful here to focus on a number of court challenges, mainly taken by civil society groupings or people closely associated with them, through which certain principles governing

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<sup>51</sup> 410 U.S. 113 (1973).

<sup>52</sup> [1974] IR 284.

<sup>53</sup> This is the merest outline of the histories involved. For fuller detail, see J. Schweppe, *The Unborn Child, Article 40.3.3 and Abortion in Ireland: Twenty-Five Years of Protection?* (2008, Dublin; Liffey press); J. Kingston, A. Whelan & I. Bacik, *Abortion and the Law* (1997, Dublin; Round Hall Sweet & Maxwell).

<sup>54</sup> See, for example, the centrality of constitutional discourse to the movement for marriage equality in Ireland: J. Pillinger & J. Walsh, *Making the Case for Marriage Equality* (2008, Dublin; Marriage Equality).

referendum campaigns have been laid down. In general these principles reach across three areas: the expenditure of public money, the allocation of time to both sides by the public broadcaster, and the process of informing the electorate.

The first matter—relating to the expenditure of public money to support an amendment—came to prominence in the case of *McKenna v An Taoiseach (No. 2)*<sup>55</sup> on the divorce referendum. McKenna claimed that it was unconstitutional for the Dáil to have voted to spend £500,000 on promoting the ‘yes’ arguments and nothing on promoting the ‘no’ arguments. Holding that the requirement of a referendum to change the Constitution could not have been intended to allow for the holding of an unfair referendum, and that the principle of equality laid down in Article 40.1 of the Constitution included the notion of equal treatment of each side, the Supreme Court found that it was unconstitutional to spend public money on only one side of an argument. Thus, the principle that both sides should be equally funded—at least in terms of direct public spend on a referendum—was established.<sup>56</sup>

Second, the principle of equal expenditure almost inevitably raised questions about the allocation of air-time to both the ‘yes’ and the ‘no’ campaign, on the public broadcaster. Up until *Coughlan v Broadcasting Complaints Commission*<sup>57</sup>, the broadcaster had used the same formula to allocate time as was used in general elections, *i.e.* by reference to the strength of political party representation in the legislature. (Incidentally, this is an illustration of the point made elsewhere, regarding many people, politicians or otherwise, erroneously thinking of a referendum as a general election in drag.) Since all the parties in the parliament had supported the proposed amendment, the consequence was that the broadcaster allocated 42 minutes to the ‘yes’ campaign but only 10 minutes to the ‘no’ campaign. When this allocation was challenged, based on *McKenna (No. 2)*, the Supreme Court held that equal time is to be allocated to both sides in a referendum campaign.

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<sup>55</sup> [1996] 2 I.R. 10.

<sup>56</sup> In travelling around the country to campaign for a ‘yes’ (or, indeed, a ‘no’) vote, members of the Government will frequently use public resources such as ministerial cars, drivers and so on. The Court did not feel that this violated the Constitution. The case does not seem to place any restrictions on the amounts of private funds that can be spent on a referendum campaign. Nor, on the facts, was it asked to. This remains an important area, no doubt for future litigation.

<sup>57</sup> [2003] I.R. 1.

The final, significant, matter concerns how people are to be informed about proposed constitutional changes on which they will vote in a referendum. An attempt to establish that there is an obligation to provide sufficient explanatory material to the electorate was rejected in *Slattery v An Taoiseach*.<sup>58</sup> However, in the light of *McKenna (No. 2)*, it was clear that any public funds would have to be used to ensure that both sides of the argument came to light. The solution arrived at was to establish the Referendum Commission by the Referendum Act, 1998, as explained in Part VII.

## VI. The Influence of European and International Law

Inasmuch as international or European affairs influence constitutional change in Ireland, one's attention must immediately go to referenda relating to the European Union. As noted in Part II, joining the EEC (as it then was) was approved by referendum in 1972. The case of *Crotty v An Taoiseach*<sup>59</sup> later established the principle that the ratification of membership by means of the original 1972 constitutional amendment did not bring with it an implied constitutional ratification of all treaty changes in the future. This important case constitutes informal amendment of the Constitution as it makes ratification of major changes in the European treaties without a referendum potentially unconstitutional and politically fraught. In *Crotty*, the Supreme Court held that a referendum would be required before Ireland could ratify any new treaty by which the "essential scope or objectives" of the Union would be altered. This finding is limited on its own terms, but the exact parameters of what *Crotty* requires have never been tested. Instead, practically every change to the Treaties (save for the establishment of the Euro) has been put before the Irish electorate and, indeed, those changes have twice been rejected and then accepted on a 'rerun', with some additional safeguards and promises from Brussels.

Whether or not *Crotty* has in fact required all of these referenda on European treaty changes is to some extent an open question as a matter of law. After all, there may be an argument that not every change is one that changes the "essential scope or objectives" of the Union. However, the default position seems to be to put all treaty changes to the People. There are three possible reasons for this. First, the dominant legal reading of *Crotty* sees it as having precluded 'representative democracy', when

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<sup>58</sup> [1993] 1 I.R. 286.

<sup>59</sup> [1987] I.R. 713.

it comes to the ratification of European treaties.<sup>60</sup> The second reason is a pragmatic one; that the Irish Government is now backed into corner, in which they have to hold a referendum because of the possible implications at European-level of ratifying a treaty without a referendum and subsequently having that ratification found unconstitutional if the Supreme Court considers it to have altered the “essential scope or objectives” of the EU. As Barrett writes, “[t]he consequent invalidation of Irish ratification would have unthinkable consequences not alone for Ireland, but for the EU as a whole”.<sup>61</sup> In this respect, whether or not a Treaty change does make such a change to the EU itself is a question for determination as a matter of *domestic law* rather than as a matter of EU law; it is about whether, from the perspective of the scope of the constitutional authority given to the State when the People approved of Ireland joining in the first place, the change pertains to the essential scope or objectives of the Union. The third, reason is that any party in Government that dared to ratify a Treaty without a referendum might fear punishment by the electorate at the next available opportunity, especially given the expectation in the popular mind (after more than twenty years in which *Crotty* has gone unquestioned) that such treaty changes would be put to the People (although it bears noting no general election has yet been significantly swayed by a constitutional matter).

Neither European nor international law has changed the process of constitutional amendment in Ireland, although they have inspired the content of proposed amendments at times. Apart the EU, Ireland has also joined other international organisations and ratified international conventions without any constitutional change being required. This is possible because joining an international organisation is a foreign affairs power that is clearly within the executive function and it is principally only when the membership of such an organisation might undermine the sovereignty of the state in a functional sense that a constitutional amendment might be required. This would be the case most commonly if that international organisation had the capacity to make law that has a direct effect in the domestic affairs of the state or if the organisation had within it a court (or some analogous arbitration mechanism) whose decisions would be binding in Ireland in domestic law terms.

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<sup>60</sup> G. Barrett, “Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland and the Impact of Supreme Court Jurisprudence” (2009) 5 *European Constitutional Law Review* 32.

<sup>61</sup> G. Barrett, “Brief Reflections on the Holding of a Referendum in Ireland on the Treaty of Lisbon: A Response to Rossa Fanning” (April 24, 2008). Available at SSRN: <http://ssrn.com/abstract=1125246>.

This of course reflects the dualist nature of the Irish legal system, laid down by the Constitution, Article 29.3 and 6. As a general matter, the dualist nature of Ireland has been jealously guarded by the courts, in relation to matters that are particularly sensitive within the state; and in relation to attempts to import international decisions in a way that might undermine the domestic judicial function.<sup>62</sup> One might argue that membership of the United Nations is an example of an international or foreign affairs decision that required constitutional amendment especially as Chapter VII resolutions of the Security Council are fully binding on all member states, including Ireland, and—since 2001—have begun to take on a legislative nature inasmuch as they now often require the introduction of criminal offences or other legislative measures.<sup>63</sup> That said, the implementation of these Resolutions tends to be done by all European Union member states together through EU law instruments<sup>64</sup> and, as already mentioned, our Union membership has been authorised by constitutional amendment. Even if Ireland decided to implement the Resolution unilaterally, it would require an Act of the Oireachtas (although one in relation to which the parliament would have relatively little flexibility) and, consequently, the exclusive law-making power reserved by the Constitution to the Oireachtas could be construed as being intact.

## VII. The Role of Experts in Constitutional Revision

Constitutional referenda attract enormous attention in Ireland and are, culturally at least, seen as an important part of popular sovereignty even though voter turnout is increasingly low. Part of the attention that tends to be placed on proposed amendments comes from experts, particularly practising and academic lawyers who are frequently invited to contribute to the media, by way of explanation or comment. With the growth in social media, it is now common also for online *fora* to either invite expert commentary or, indeed, to be established by experts for the purposes of reflecting on and debating particular constitutional matters. In the last four years, for example, three collaborative on-line exercises have been launched in which constitutional matters (among others) are discussed and expertise is disseminated in an easily digestible form: [www.politicalreform.ie](http://www.politicalreform.ie) (run by political scientists),

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<sup>62</sup> F. de Londras, “Dualism, Domestic Courts and the Rule of International Law” in M. Sellers & T. Tomaszewski (eds), *The Rule of Law in Comparative Perspective* (2010, Wien; Springer).

<sup>63</sup> See, e.g., Bianchi, A., “The Security Council’s Anti-Terror Resolutions and Their Implementation by Member States” (2006) 4 *Journal of International Criminal Justice* 1044.

<sup>64</sup> See, e.g., C. Murphy, *EU Counter-Terrorism: Pre-emption & the Rule of Law* (2012, Oxford; Hart Publishing).

[www.irisheconomy.com](http://www.irisheconomy.com) (run by economists and with a minimal focus on constitutional matters), and [www.humanrights.ie](http://www.humanrights.ie) (run by legal academics with a particular interest in the impact of constitutional structures on rights protection and enjoyment). In the context of the Twenty-Ninth and Thirtieth Amendments, 2011, to the Constitution, a dedicated website was established by a private scholar to outline concerns with the proposals ([www.irishreferendums.com](http://www.irishreferendums.com)). It is difficult to tell exactly what impact the input and involvement of experts has on voter turnout and behaviour in referenda, but the various voter sentiment analyses done after the unsuccessful Nice 1 and Lisbon 1 referenda show that a feeling of being uninformed was an important element in voters' decisions to either stay at home or to vote 'no'.<sup>65</sup>

In addition to the involvement of academic experts in referendum campaigns by their contributions to public debate, the Referendum Commission, established by the Referendum Act, 1998, is increasingly becoming seen as an expertise-based contributor to such debates, although one that is decidedly neutral as to the result. The Chairperson of the Commission must be a judge or a former judge (with the other members being the Comptroller and Auditor General, the Ombudsman and the Clerks of each of the two Houses of the legislature).<sup>66</sup> It was previously the case that the Commission would produce a leaflet informing voters of the arguments both for and against proposed amendments, with more elaborate information usually being made available on the website of the Commission. The Commission no longer has that role<sup>67</sup> and in 2011 a university-based group of constitutional scholars independently produced such guides online instead.<sup>68</sup> In the last two referendum campaigns (on Lisbon II and on the 29<sup>th</sup> and 30<sup>th</sup> proposed amendments considered in the same campaign in 2011) the Chairperson appeared on the main morning news show in Ireland ('Morning Ireland') answering questions on the referendum and its meaning. If this were to become a regular feature of constitutional referenda, it would presumably greatly increase the role that legal (and particularly judicial) expertise plays in the process of constitutional change, although presumably a judge who had acted as Chairman of the Commission and given his or her views in this way would

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<sup>65</sup> See, e.g., R. Sinnott, J. Elkins, K. O'Rourke & J. McBride, *Attitudes and Behaviour in the Referendum on the Treaty of Lisbon* (2009, Dublin; Department of Foreign Affairs).

<sup>66</sup> S.2, Referendum Act 1998.

<sup>67</sup> S.1, Referendum Act 2001 *inserting* new s. 3(1), Referendum Act 1998.

<sup>68</sup> UCD Constitutional Studies Group, *Guide to the 29<sup>th</sup> Amendment* ([http://www.ucd.ie/t4cms/Guide\\_to\\_the\\_29th\\_Amendment.pdf](http://www.ucd.ie/t4cms/Guide_to_the_29th_Amendment.pdf)); *Guide to the 30<sup>th</sup> Amendment* ([http://www.ucd.ie/t4cms/Guide\\_to\\_the\\_30th\\_Amendment.pdf](http://www.ucd.ie/t4cms/Guide_to_the_30th_Amendment.pdf)).

recuse him or herself should any question as to the interpretation of the constitutional provision (if the amendment passed) arise in the future.

### **VIII. Criticisms of the Constitutional Amendment Process in Ireland**

The extent to which any system of constitutional change is subject to criticism is dependent, first of all, on what values and processes it is intended to establish as part of the constitutional culture in the state. In Ireland, one reason for referendum is to entrench a culture of popular constitutional sovereignty. In this respect, history is important. Under the 1922 Constitution the British monarch was head of state in Ireland (then a British Dominion), this provision having been insisted upon by the British Government. When the 1937 Constitution was established, one of the few changes from the 1922 Constitution was that the head of state should be a (non-executive) President, elected by universal suffrage. In significant contradistinction from the United Kingdom (where sovereignty resides in the ‘Queen in Parliament’), in Ireland sovereignty does not lie with the President. Rather, Article 6 states that: ‘All powers of Government, legislative executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy ...’ While this by no means signifies that there is direct democracy in Ireland, the popular nature of Irish sovereignty does manifest itself in the fact that the people, by a plebiscite, made the Constitution and have to be involved in the formal amending process. Thus, it is reasonable to say that one benchmark against which the ‘quality’ of the Irish process might be judged is the extent to which it gives expression to popular sovereignty. It is true that the mechanism of constitutional change is not entirely participatory because there is no formal initiative system through which proposals can be crystallised into referenda. However, the fact that the People are formally involved at the referendum stage naturally means that their voice is more likely to be heeded informally at the preliminary stage than would be the case with an organic law. Furthermore, we saw in Part V that public pressure *can* bring about a referendum (as it did with the abortion referendum) and the growth of non-party political processes may yet develop into a more conventionalised participation pathway in terms of proposing referenda.

One might also judge an amendment process by its degree of rigidity/flexibility. As noted in Part III the Irish process is rigid indeed: *all* formal changes must be done by

referendum. The question of whether there a less stringent form of amendment should be available has arisen. But no authoritative person in Ireland has suggested the possibility of removing the requirement of a referendum from the general process of amendment. Moreover, even the suggestion of a non-referendum form of amendment for limited issues has been briskly rejected.<sup>69</sup> At one level, this is because the Irish enjoy their politics and a referendum makes an adequate substitute where an election is not available. To put essentially the same point more seriously, a referendum is a central part of ‘the people’s sovereignty’ and confers legitimacy on any successful amendment. Any suggested change to this would be unpopular and, indeed, would most probably fail at the referendum that would be required to introduce it.

A fundamental question about ‘repeat referenda’ arises here. Is popular sovereignty respected when a referendum on virtually the same amendment is effectively ‘rerun’ shortly after it as rejected? In essence, this is most plainly observable when it comes to the Lisbon and Nice treaty referenda, but it would be a mistake to suggest that the ‘reruns’ were absolute facsimiles of the original referenda. In both cases, some additional assurances and clarifications had been provided at European level to respond to concerns expressed by voters, and voters generally considered themselves to be better informed about the treaties and their implications for Ireland on the second referendum.<sup>70</sup>

Moving to a different and pragmatic basis for assessing a system of constitutional amendment, we can ask to what extent the Irish system has kept out undesirable amendments; while allowing in those that were desirable.<sup>71</sup> To take the first leg of the test: it seems reasonable to assume that amendments that discriminate in favour of the party in Government should be kept out. The major exhibit here comprises the three amendments to the electoral system of 1959 and 1968, which, as already noted, were indisputably proposed for the advantage of the Government Party. These proposals failed and are, in fact, the only clearly partisan amendments to have been attempted.

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<sup>69</sup> Report of the Committee on the Constitution (December 1967) (pages 49-51); Report of the Constitution Review Group, 397405; The All-Party Oireachtas Committee on the Constitution, Sixth Progress Report, The Referendum (2001) (pages 43-44).

<sup>70</sup> R. Sinnott, J. Elkind, K. O’Rourke & J. McBride, *Attitudes and Behaviour in the Referendum on the Treaty of Lisbon* (2009, Dublin; Department of Foreign Affairs); R. Sinnott & J. Elkind, *Attitudes and Behaviour in the Second Referendum on the Treaty of Lisbon* (2010, Dublin; Department of Foreign Affairs).

<sup>71</sup> At first sight, a logical person might object that the present test would necessitate some discussion as to what would constitute a desirable, or undesirable, amendment. In fact, there is no comprehensive discussion of this subject.

Since these proposed Amendments were rejected at the referendum stage, we may conclude that the amendment process worked satisfactorily on this occasion.

It is perhaps more difficult to assess the converse issue of whether the amending process prevented or discouraged desirable Amendments, a subject which has already been discussed in Part II. Two points arise here. The first is whether there have been desirable changes which were not made at all because the need for a constitutional amendment was thought to be too much of a barrier. In fact, there seem to have been relatively few ‘desirable’ changes that were not made at all because of the need for constitutional amendment. The second issue is whether measures that might usefully or properly have been enacted through constitutional amendment were instead introduced by organic legislation, and whether this omission is connected in some way to the amendment process. As to this, we have earlier reviewed the use of organic legislation to establish institutions, regulate behaviour including in the civil service and to introduce civil partnership and equality legislation. In most cases, so far as one can judge, these seem to have been popular and would have been passed at a referendum. However, because of the difficulties attendant on a referendum they were introduced by way of organic law. The consequence has been to leave some of these measures in (at least academic) danger of being struck down and to leave the Constitution with an unfortunate and (misleadingly) out of date appearance.

### **IX. Conclusion: Contemporary Debate on Further Constitutional Revision**

Although, as already noted, there seems not to be any desire for the referendum to be abandoned as the means of constitutional amendment, preparations are currently under way for the establishment of a constitutional convention in Ireland through which a range of people—as yet undefined and unselected—would draft a new constitution to be put before the People. Part of that process might well be to consider whether an additional, and limited, amendment process would be desirable in respect of minor changes; though this would have to be crafted in careful enough terms so as not to undermine the popular sovereignty that the referendum process brings with it.

We have seen in Part II that in fact judicial activity (or perhaps, even, activism) has had an appreciable impact on constitutional change in Ireland, and it seems worthwhile to dwell briefly on this by way of conclusion. In terms of the hierarchy of

sources of amendment, if the judges stamp their interpretation on the Constitution, it must be respected by the Government unless it is reversed by the formal method. The Government can usually be confident of carrying the Houses of the Oireachtas with it, so that, in deciding whether it will go ahead and try to reverse a judicial interpretation, the calculation usually depends on two factors. The first of these is whether it wants to undergo the cost and delay which is inherent in a referendum process. The other consideration is whether it expects that it can carry the popular vote. It is relevant that, on all but two<sup>72</sup> of the occasions on which a judicial interpretation has, in effect, been referred to a referendum for reversal, that amendment has been passed.

In net terms, the superior court judges carry – and have not been afraid to exercise – a good deal of power to amend the Constitution, but that power is provisional as, in line with the idea of popular sovereignty, the People have the last word. When a judgment that acts as an informal constitutional change is handed down, it is as if a draft melody, pencilled on a piece of staff paper, has been composed. The Government then decides, usually in concert with other parties represented in the parliament, whether or not to assemble the orchestra in readiness and, if so, to act the role of conductor by suggesting an alternative melody to the People. But it is the People, in the final event, who decide whether they prefer the judicial composition or that offered by the Government. This may or, more probably, may not have been what was intended when the Constitution was drafted. However, the result suggests that it is quite a successful method by which to manage the difficult task of constitutional amendment, provided that all the players understand—and take seriously—their part in the performance.

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<sup>72</sup> The two instances in which an Amendment to reverse judicial decisions failed are those on representation of rural voters and parliamentary inquiries: see Footnote 13.