



AN COINBHINSIÚN AR AN mBUNREACTH  
THE CONVENTION ON THE CONSTITUTION

# **Eighth Report of the Convention on the Constitution**

## **Economic, Social and Cultural (ESC) Rights**

**March, 2014**

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## **1. Chairman's Introduction**

Over the weekend of the 22<sup>nd</sup> and 23<sup>rd</sup> of February, 2014, the Convention on the Constitution held its ninth and final plenary meeting to consider economic, social and cultural rights. This was the second of two topics that the Convention members selected from a number of categories under 'Any Other Amendments', having completed the topics under its terms of reference as set out in the Resolutions of the Houses of the Oireachtas. (Appendix 1)

### Background

Membership of the Constitutional Convention comprises 66 citizens, 33 parliamentarians and an independent Chairman. The 66 citizens were selected randomly by a polling company using the electoral register and on the basis of groups representative of Irish society and generally balanced in terms of gender, age, region, social class and occupational status.

Political parties and groups in Dáil Éireann and Seanad Éireann nominated representatives on the basis of their relative strengths in the Oireachtas. Political parties represented in the Northern Ireland Assembly were invited to nominate one representative each.

The Convention operates on the basis of the following principles; openness, fairness, equality, efficiency and collegiality.

The Convention continuously strives to provide the best possible method of conducting its business in a manner which enhances the experience for Convention members and which demonstrates that this model of deliberative democracy can achieve its ambitious objectives.

Over plenary weekends, the Convention receives a range of papers and presentations from academic and legal experts and advocacy groups, in addition to the written submissions from members of the public.

At each meeting, the Convention aims to spend the greater proportion of its time in deliberations and discussion. This is primarily achieved through participation in round table discussions, supported by facilitators. Great effort is made to ensure that the briefing materials provide an appropriate level of information to enhance the quality of the discussions.

The Convention was given 12 months to complete its task. A short extension to this timeframe - to the end of March, 2014 - was granted in recognition of the Convention's wish to add a plenary meeting to the programme in order to deal with the topics submitted under 'Any Other Amendments'.

For its part, the Government gave an undertaking to respond to the various recommendations of the Constitutional Convention within four months of the publication of

its reports; to arrange a full debate in the Houses of the Oireachtas in each case; and if it accepts a recommendation that the Constitution be amended, to include a timeframe for the holding of the referendum.

### The Ninth Plenary Meeting

'Economic, Social and Cultural Rights' ('ESC rights') was the second of the two topics prioritised by the Convention from the submissions received during 2013 and following an extensive public consultation process. This is a multi-faceted issue involving complex philosophical, political, legal and practical issues dealing with a variety of rights, including housing, education and health. It was a very difficult challenge to design an agenda which could do justice to the breadth of this topic and its implications over the course of a single weekend, particularly for a number of members who were new to the subject. Given these obvious limitations, the Convention went to considerable lengths to ensure to the greatest extent possible, an appropriate level of information and expertise was made available to Convention members along with a balance of views and positions from advocates.

As ever, the Convention members were served well by the members of the ALSG: Prof. David Farrell, Dr. Clodagh Harris, Lia O'Hegarty, Dr. Eoin O'Malley and Dr. Jane Suiter,. The Convention was also indebted to the 'experts', each of whom demonstrated great skill in both imparting knowledge and interacting with Convention members: Dr. Liam Thornton, University College Dublin; Dr. David Fennelly BL; and Prof. Aoife Nolan, University of Nottingham.

The Convention deliberations were also greatly enhanced by the participation of the following persons in a panel discussion: Michael McDowell SC; Mr. Colm O'Gorman, Amnesty International; Ms. Mary Murphy, Irish Human Rights Commission; Mr. Mike Allen, Focus Ireland; and Rossa Fanning BL. Their contributions and insightful interventions were greatly appreciated by Convention members.

The Convention also had a special presentation from four delegates of 'Youthwork Ireland' on the 'mini Convention' they ran on 20<sup>th</sup> April, 2013, that followed the Convention's own eight topics. The Convention members were clearly impressed by what they heard and greatly encouraged by a new generation of constitutionally-minded citizens.

### Recommendations

The results of the ballot were clear with a large majority (85%) of the members favouring changes to the Constitution in order to strengthen the protection of ESC rights. However, a sizeable minority (43%) of Convention members recommended that the issue be referred elsewhere for further consideration of the implications of possible reforms, perhaps reflecting the challenge of tackling the subject in a single weekend. The Convention also recommended that there should be a constitutional provision that the State would progressively realise ESC rights, subject to maximum available resources, and that this duty would be cognisable by the courts, and that the provision would not diminish the level of protection already afforded in the Constitution. The Convention also identified a number of specific rights including housing, social security, rights for those with disabilities, healthcare and language and cultural rights which it recommended should be enumerated in the Constitution.

## Acknowledgments

I would like to congratulate the members for their personal commitment to the Convention and the exemplary manner in which they approached what was a complex and challenging subject.

As already mentioned above, in respect of the Ninth Plenary Meeting I am very grateful to the ALSG, the experts and the panellists. I would also like to thank our interns Mr. Colm Byrne and Mr. Paul Deane. Furthermore I wish to commend the work of the facilitators and note-takers, which through their great skill ensured smooth-flowing table discussions in an impartial and professional manner.

I would like to especially thank 'Youthwork Ireland' for their excellent presentations. Their work impressed the members of the Convention and, I am sure, they will inspire and encourage the youth of Ireland to become more engaged in constitutional issues.

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**Tom Arnold**  
**Chairman**

## 2. Convention Recommendations

### 1. Amendments to the Constitution

1.	Yes	No	No opinion
In principle, should the Constitution be amended to strengthen the protection of Economic, Social and Cultural rights?	85%	15%	
2.	Now	Elsewhere	No opinion
In the event that the Convention votes in favour of reform, does the Convention wish to make recommendations <b>now</b> or refer it <b>elsewhere</b> for further consideration of the implications of possible reforms?	56%	43%	1%

### 3. If the Convention wishes to make recommendations on the issue now, which options are best? (Rank in order of your preference, 1, 2, 3)\*

Option 1: Update Article 45 but keep the first paragraph (“...principles of social policy... for the general guidance of the Oireachtas... not... cognisable by any Court”)	24%
Option 2: Insert provision along the lines that the State shall <u>endeavour to</u> progressively realise ESC rights, subject to maximum available resources, and that this duty is cognisable by the Courts	16%
Option 3: Insert provision that the State shall progressively realise ESC rights, subject to maximum available resources and that this duty is cognisable by the Courts	59%

\*none of the above are intended to diminish the level of protection already afforded in the Constitution

### 4. In the event that the Convention wishes to make recommendations on the issue now, are there specific additional rights that should be enumerated in the Constitution?

	Yes	No	No opinion
Housing	84	8	8
Social security	78	12	10
Essential health care	87	6	7
Rights of people with disabilities	90	3	7
Linguistic and cultural rights	75	15	9
Rights covered in the International Covenant on ESC Rights	80	10	10

### 3. Convention Programme



AN COINBHINSIÚN AR AN mBUNREACHT  
THE CONVENTION ON THE CONSTITUTION

#### The Convention on the Constitution: February 22<sup>nd</sup> – 23<sup>rd</sup> Recommendations to the Houses of the Oireachtas on the inclusion of Economic, Social & Cultural (ESC) Rights in the Constitution

##### Saturday

###### *Expert Presentations*

9.45 a.m. Introduction and background to ESC Rights – *Dr. Liam Thornton (UCD)*

10 a.m. ESC Rights in Irish Constitutional Law – *David Fennelly BL*

10.15 a.m. Q&A

10.30 am Comparison with other countries – *Prof. Aoife Nolan (University of Nottingham)*

10.45 am Q&A

11.15 a.m. Roundtable discussions

1.45 p.m. Plenary session - participants to hear the emerging themes from the discussion at other tables

###### *The case For and Against*

2.30 p.m. **For:** Colm O’Gorman (*Amnesty Ireland*), Mary Murphy, (*Irish Human Rights Commission*)

2.45 p.m. **Against:** Michael McDowell SC

3 p.m. *Panel Discussion:* Colm O’Gorman (*Amnesty International*), Mike Allen (*Focus Ireland*), Michael McDowell SC, Rossa Fanning BL

3.40 p.m. *Summary – Lia O’Hegarty*

4 p.m. Roundtable Discussion

4.45 pm Draft Ballot paper

##### Sunday

10.30 a.m. Summary and Agree ballot paper

11.15 a.m. Reflections from Youthwork Ireland

11.45 p.m. High level summary of the submissions on “Any other Amendments”

12 noon Plenary discussion and Q&A on “Any other Amendments”

12.45 p.m. Announcement of Results of ESC Ballot

1 p.m. **Conclusion**

## 4. Amending the Constitution for ESC Rights

### 4.1 . An Introduction to Economic, Social and Cultural Rights

*Dr Liam Thornton (UCD)*

Economic, social and cultural rights (ESC rights) are protected to varying degrees under international, European and Irish law.

**Economic rights** are those rights that relate to labour and property rights. These rights include: the right to work and to fair conditions of work, including the right to engage in self-employment. The right to join and participate in trade unions and the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. There is also a human right to peaceful enjoyment of private property.

**Social Rights** include: the right to social security; the right to social assistance; the right to an adequate standard of living and rights to adequate food, water, clothing and shelter. The right to the enjoyment of the highest attainable standard of physical and mental health, the right to education and the right to adequate social protection of the *family* are protected.

**Cultural Rights** include the right to participate in the culture of one's communities and to enjoy the benefits of scientific and technological endeavour. Ethnic, religious and/or linguistic minorities have the right to practice their own culture, faith and language.

Not all of the above examples of ESC rights can be neatly categorised into one or other of the groups listed above and some rights may crosscut through all of the categories. The right to provision of adequate housing may include a State having due regard to the cultural norms and practices of a group. For example, individuals may be gypsies or members of the Traveller community and their right to practice a nomadic lifestyle will have to be taken into account by State authorities.

#### A. The Nature of the ESC Rights and Duties

There are three obligations on States who have signed the UN International Covenant on Economic, Social and Cultural Rights (ICESCR). There is a duty to respect, a duty to protect and a duty to fulfil ESC rights.

##### **Respect**

The State must respect the ability of individuals to provide for themselves. States must refrain from engaging in acts or omission that violate ESC rights, such as placing unreasonable limitations on the ability of individuals to take up employment or arbitrary eviction of families from their homes.

##### **Protect**

States have obligations to protect individual's ESC rights, by adopting positive measures that protect right-holders from interference by both state and non-state parties. The obligation to protect includes passing laws that, for example, protect people from exploitative



employment practices or tenancy agreements, and enabling individuals to gain redress where such a violation of ESC rights occur.

### **Fulfil**

The final duty on the State is the obligation to *fulfil*. This includes an obligation to *promote* ESC rights, so States put in place comprehensive legislative and policy reviews so in ensuring individuals are aware of, have access to and can rely upon their ESC rights. An obligation to *facilitate* ESC rights, such as the State adopting legal, economic and/or social policies to strengthen ESC rights. This includes putting in place systems to adjudicate on ESC entitlements. The final duty on States is provision of certain ESC rights i.e. food, shelter, clothing, health care etc.

The main international ESC rights treaty (ICESCR) gives States time to move towards vindicating individuals' ESC rights. ESC rights must be 'progressively realised' to the 'maximum of available resources' in a State. This means that States must work as quickly and effectively as possible towards the full achievement of ESC obligations for all. The State must do this to the 'maximum of available resources', which means the totality of resources available, and not necessarily the total amount of resources that governments wish to make available. Once ESC rights are provided by a State, then any retrogressive measures that dilute, limit or reduce current ESC rights, require exceptionally strong justifications. Under other international and European treaties that protect ESC rights, some ESC rights are immediately enforceable, and there is no progressive realisation qualification in place. For example, the UN Convention to Eliminate All forms of Discrimination Against Women (CEDAW) and UN Convention on the Rights of the Child (CRC) require States to immediately give effect to the ESC rights discussed above.

Two key principles that underpin the enjoyment of economic, social and cultural rights are **equality** and **non-discrimination**. States can distinguish the enjoyment of ESC rights for people, provided any distinctions are *reasonable, legitimate* and *proportionate*. For example, looking at *the right to work*, barring someone from entering certain employment areas because of their race or ethnicity would not be *reasonable, legitimate* and *proportionate* but doing so because they do not meet objective criteria could be reasonable, legitimate and proportionate. As regards the right to an adequate standard of living, limiting certain social supports to individuals on the basis that their income (without direct state support) meets or could reasonably be made meet their needs, may also be reasonable, legitimate and proportionate.

## **B. ESC Rights in Irish Law and Practice**

### **1. ESC Rights in the Constitution**

ESC rights are protected in a limited manner in the Irish Constitution. Article 8 of the Constitution recognises Irish as the first official language, with English recognised as the second official language of the country.

Article 45 of the Irish Constitution is entitled 'Directive Principles of Social Policy'. Article 45 envisages a social order wherein the State protects the welfare 'of the whole people.'

'Justice and charity' inform all the institutions of national life. However, this provision is for the 'general guidance' of the Oireachtas and is not to be cognisable in any court (*but see below*).

Articles 40 to 44 of the Irish Constitution recognise 'Fundamental Rights'. The **express rights** recognised in the Constitution include the right to equality, personal liberty, education, family rights, freedom of expression, peaceful assembly etc. are all protected. Expressly protected ESC rights in the constitution include:

- Right to primary education: This has been interpreted by the Supreme Court to protect (subject to limitations) education up to the age of 18 years.
- Right to protection of private property, subject to the 'principles of social justice' and the 'exigencies of the common good'. For example, compulsory purchase orders are provided under law and individuals can adversely possess property ('squatting').

The Irish courts have also held that there are **implied rights** (unenumerated rights) protected under Articles 40 to 44 of the Irish Constitution. Examples of unenumerated rights include: the right to privacy, the right not to be tortured, right to travel, the right to found a family etc. As with the express rights, limitations on these rights are *usually* provided for. The right to earn a livelihood has been recognised as an implied constitutional right in *Attorney General v Paperlink* (1984). In this case, Mr Justice Costello stated that Article 45 could be considered, when deciding if there was an implied right in the constitution.

Generally, in the arena of ESC rights, the Irish courts have permitted a wide degree of latitude for the government in the implementation of law and policy. In the case of *Ryan v Attorney General*, Mr Justice Kenny stated:

"[w]hen dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the *Oireachtas* has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens..."

It has proven difficult for the Irish courts to develop any jurisprudence on constitutional ESC rights. In the case of *O'Reilly v Limerick Corporation*, Mr Justice Costello rejected the argument that the constitutional rights to dignity and vindication of the person, extend to ordering the state to protect ESC rights of individuals. In the subsequent case of *O'Brien v Wicklow Urban District Council* (1994), Mr Justice Costello stated that the constitutional right to bodily integrity was infringed by the conditions that the O'Brien's were living in.

In the Supreme Court case of *T.D.v Ireland* (2001) Mr Justice Murphy stated that Ireland has no obligation to provide

"any form of socio-economic benefit for any of its citizens, however needy or deserving."

However, in *Re Health (Amendment) (No. 2) Bill 2004*, the Supreme Court did state:

“in a discrete case...the normal discretion of the Oireachtas in the distribution or spending of public monies could be constrained by a constitutional obligation to provide shelter and maintenance for those with exceptional needs.”

Therefore, from a constitutional perspective, the protection of ESC rights is very weak.

## **2. Sub-Constitutional ESC Rights**

The aim here is to highlight that ESC rights are already protected, to a greater or lesser degree and in different ways, in Ireland. What follows is not a systematic evaluation of the adequacy or inadequacy of the ESC rights that are protected under Irish law. This section simply highlights that these rights are protected, to some degree, in Ireland. ESC rights are protected generally by means of legislation, including employment law, housing law, social security and social assistance (social welfare) law. Some ESC rights may be protected by means of administrative practice. It is essential to note, that with sub-constitutional protection of ESC rights, legislation can be easily amended, or administrative practices changed, to reduce or remove particular ESC rights. With legislative protection of ESC rights, in times of perceived crisis, the ESC rights of particularly vulnerable people, the elderly, disabled people, single parents and children growing up in poverty, can be subject to reduction or withdrawal.

**Economic rights:** The right to work is protected for those who are citizens or who have a regularised migration status. Asylum seekers and irregular migrants are prohibited from working. There is legislation on minimum wage and minimum conditions of employment (health and safety law; employee rights legislation). There is a right for individuals to join and participate in a trade union but there is no obligation on the State or employers to recognise trade unions. Irish law provides employees with minimum entitlements as regards holiday pay and work rest periods.

**Social rights:** Those who are habitually resident and have a right to reside in Ireland, if they meet certain legislative criteria, enjoy social security and social assistance payments such as child benefit, jobseekers benefit, disability allowance, rent supplement, supplementary welfare allowance, carers benefit, old age pension (contributory and non-contributory) etc. The rates of these payments are set by the Oireachtas, and may be increased or decreased from year to year and rates of payment may differ between individuals. For example, those aged 25 or under and who are jobseekers, receive a significantly lower amount of jobseekers allowance than those over 25. For those under a certain income threshold, there may be an entitlement to a medical card and/or a GP medical card. Certain social assistance payments exist that could be viewed as protecting the family, including one parent family payment, family income supplement and child benefit. Irish housing law provides a system for determining who is entitled to social housing, although there is not enough social housing to meet overall need. Irish law provides for tenant and landlord protections in terms of their mutual rights and obligations.

**Cultural rights:** The State supports (monetarily or in kind) museums, cultural events and encourages investment in scientific or technological endeavour. The right to practice religion is protected in law, while there are some supports for minority languages, especially the Irish language (which also enjoys constitutional recognition). As regards positive measures to ensure individuals can practice their own culture, the State has in place Traveller accommodation and equality and incitement to hatred legislation.

### **C. Systems and Processes for Adjudicating ESC Rights in Ireland**

At the international/European level, the UN Committee on Economic, Social and Cultural Rights and the European Committee on Social Rights determine whether Ireland is meeting its international obligations on ESC rights under international and European law. These bodies only issue recommendations, their findings are not binding in the way that judgments of national courts or the European Court of Human Rights are. In reality, there is no sanction on the state for failing to meet its international or European ESC obligations.

For some of the ESC rights highlighted above, systems and processes exist for (i) determining entitlement to an ESC right and/or (ii) appeal mechanisms for considering whether an individual should be entitled to an ESC right. Such systems, processes and mechanisms do not exist for all ESC rights in Ireland. The approach of some of these bodies to assessing entitlement or otherwise, may not even refer to ESC rights obligations that exist upon the State. At the domestic level, there are employment rights bodies; social security and social assistance bodies; education bodies; Ombudsman and Commissions (the Office of the Ombudsman, Ombudsman for Children and Irish Human Rights Commission) and, as highlighted above, the courts. Some of these bodies are limited in their powers. The adequacy of some of these mechanisms for protection of ESC rights can be questioned. For example, there are very significant, long running delays in deciding whether individuals are entitled to a social security or social assistance payment. Therefore, while these mechanisms to determine (mainly) legislative ESC rights are in place, there are significant constraints on some of these bodies in determining whether there has been a violation of an individual, family or groups ESC rights.

*[Dr Liam Thornton](#) is a lecturer in law in UCD School of Law. Thanks to Prof Fiona de Londras (Durham), Prof Imelda Maher (UCD), Prof Aoife Nolan, (Nottingham) and Lia O'Hegarty for suggestions, recommendations and comments on earlier drafts of this paper. All views and any errors are mine alone.*

## 4.2 . Economic, Social and Cultural Rights in Irish Constitutional Law

*Dr David Fennelly BL*

### I. Introduction

This paper provides a brief overview of the place of economic, social and cultural rights in Irish constitutional law:

- We will look first at the references to economic, social and cultural rights which are expressly enshrined in the text of the Constitution of Ireland 1937 (“**the Constitution**”).
- We will then examine the fate of economic, social and cultural rights under the Constitution as it has been interpreted and applied by the Irish courts (“**the Courts**”) as being protected by the Constitution.
- Finally, we will consider Ireland’s wider constitutional framework and, in particular, the EU Charter of Fundamental Rights, which includes many economic, social and cultural rights.

### II. The Constitutional Text

#### A. Economic and Social Rights enshrined in the text of the Constitution

The Constitution was drafted, and approved, at a time when economic, social and cultural rights had not achieved the recognition and high profile they now enjoy in regional and international human rights instruments and indeed in other constitutions around the world.

##### 1. Right to Free Primary Education

First, Article 42, on education, acknowledges the Family as the “primary and natural educator of the child” and “guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children”.<sup>1</sup>

Under Article 42.4, the State “shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.” While the text of Article 42.4 is expressed in terms of a duty on the State, as the Supreme Court made clear in the case of *Crowley v. Ireland*, this duty “creates a

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<sup>1</sup> Article 42.2 recognises the freedom of parents to provide this education in their homes or in State schools (Article 42.2). Article 42.3, while preventing the State from obliging parents to send their children to State schools or particular types of school designated by the State “in violation of their conscience and lawful preference”, nonetheless provides that the State, as guardian of the common good shall “require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social”.

corresponding right in those in whose behalf it is imposed to receive what must be provided".<sup>2</sup>

The Courts have thus acknowledged that Article 42.4 embodies a right to free primary education. In the *Sinnott* case, the Supreme Court, however, interpreted this right as being confined to children (that is, persons up to the age of 18 years old) and not adults even where their needs continue to require primary education.<sup>3</sup>

## 2. Right of the Child to Protection by the State in Exceptional Circumstances

The fifth and final paragraph of Article 42 provides that, in exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but "always with due regard for the natural and imprescriptible rights of the child". In a number of cases,<sup>4</sup> the Courts have recognised that the rights of the child in this context go beyond education and include the right to be protected, and to have adequate provision made on their behalf by the State, in those exceptional circumstances where parents have failed in their duties towards the children.<sup>5</sup>

## 3. Right to Form Unions

Article 40.6.1° (iii) of the Constitution protects the right to form a union.<sup>6</sup> However, the Courts have taken the view that this right to form associations and unions does not guarantee a right to join any particular association or union.<sup>7</sup> At the same time, they have clarified that individuals have a right *not* to join associations or unions if they do not so desire and a right not to be coerced into so joining.<sup>8</sup> More broadly, as with all rights under the Constitution, the right is subject to certain limits: it is expressly guaranteed "subject to public order and morality" and to regulation by law "in the public interest".

## 4. Other Rights

While the Constitution also expressly protects the freedoms of expression, assembly and association in Article 40.6, it has little by way of explicit protection of cultural rights. However, Article 8 declares Irish to be the first official language. Drawing on this provision,

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<sup>2</sup> *Crowley v. Ireland* [1980] I.R. 102, at 122.

<sup>3</sup> *Sinnott v. Minister for Education* [2001] 2 IR 545.

<sup>4</sup> *G v An Bord Uchtala* [1980] IR 32; *F.N. v. Minister for Education* [1995] 1 IR 409; *T.D. v. Minister for Education* (see below).

<sup>5</sup> In this regard, note the protection of the rights of the child enshrined in the thirty-first amendment to the Constitution, incorporating an Article 42A, which has yet to come into force pending the challenge to the referendum outcome in the *Jordan* case, currently under appeal to the Supreme Court.

<sup>6</sup> "The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –

...

(iii) The right of the citizens to form associations and unions.

Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right."

<sup>7</sup> *Murphy v. Stewart* [1973] IR 97.

<sup>8</sup> *Educational Company of Ireland v. Fitzpatrick (No. 2)* [1961] IR 345.

combined with the requirements of natural justice, the Courts have recognised the entitlement of a litigant to use their native language and, more particularly in the case of Irish, the right to give evidence in Irish, to conduct cases through Irish and to demand a summons in Irish.<sup>9</sup>

Finally, it should be noted that the right to property – which, while widely accepted as a civil and political right, has important economic and social dimensions – is protected under not one but two provisions of the Constitution: Article 40.3.2° and Article 43, which provisions mutually inform each other.

## **B. Article 45, Directive Principles of Social Policy**

In Article 45 of the Constitution, the drafters set out their broader vision for Irish society and social policy. It begins in general terms, declaring that the State shall “strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life”. It goes on to set out the particular type of social and economic system envisaged in more detail. Of particular interest for present purposes are Article 45(2)(i) and Article 45(4). Article 45(2)(i) provides that the State shall direct its policy towards securing:

*That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.*

Under Article 45(4), the State pledges itself to “safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged”. It also provides that the State “shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength”.

However, what is critical to note in relation to Article 45 is that these directive principles of social policy are “intended for the general guidance of the Oireachtas”:

*The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.*

Thus, it is for Parliament exclusively to apply these principles in the exercise of its legislative function under Article 15. This is not cognisable by any Court. “Cognisable” which, in plain language, means perceptible or clearly identifiable, in legal terminology means within the jurisdiction of a court. Conscious of this express limit to their jurisdiction, the Courts, as we will see in the following section, have been cautious in their reliance on Article 45. Although the principles are expressly envisaged as being for the general guidance of the Oireachtas, a review of the debates of the Houses of the Oireachtas reveals that only a very limited number of occasions have members of the Houses actually made express reference to Article 45.<sup>10</sup>

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<sup>9</sup> See the discussion in Hogan and Whyte (eds), *JM Kelly: the Irish Constitution* (4<sup>th</sup> ed., LexisNexis Butterworths, 2003), at paras. 3.2.137-3.2.153.

<sup>10</sup> This information is based on a search of [debates.oireachtas.ie](http://debates.oireachtas.ie) for the following terms: “directive principles of social policy” (35 references); “the State shall strive to promote the welfare of the whole

### III. The Constitution before the Courts

While the text of the Constitution is the all-important starting point, in order to truly understand the Constitution, it is necessary to explore how the text has been interpreted and applied by the Courts. In addition to the fundamental rights expressly referred to in Articles 40 to 44 of the Constitution, the Courts have recognised that the personal rights protected by the Constitution are not limited to those expressly set out or enumerated in the constitutional text.

Beginning with the right to bodily integrity, recognised in the seminal case of *Ryan v. Attorney General*,<sup>11</sup> the Courts over the following decades proceeded to recognise a range of personal rights which were not explicitly set out in the text of the Constitution, including such important rights as the right to privacy, the right of access to the courts, the right to travel within and without the State, and the right to marry and to procreate. Among these unenumerated rights were a limited number of economic and social rights, in particular labour rights.

#### A. Unenumerated Economic, Social and Cultural Rights

##### 1. The Right to Work

The Courts have recognised that the right to work or to earn a livelihood, while not specifically listed in the Constitution, comprises one of the personal rights protected under Article 40.3.<sup>12</sup> In recognising this right, in *Murtagh Properties Ltd. v. Cleary*, Kenny J. in the High Court took account of the right to an adequate means of livelihood enshrined in Article 45.<sup>13</sup> However, in later cases, the Courts recognised that this right was not without its limits. First, the right to earn a livelihood did not imply a right to receive employment from any particular employer.<sup>14</sup> Secondly, as with the other rights protected under Article 40.3, the

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people” (11 references); “the right to an adequate means of livelihood” (24 references); “reasonable provision for their domestic needs” (28 references); “so distributed amongst private individuals and the various classes as best to subserve the common good” (9 references); “the concentration of the ownership or control of essential commodities in a few individuals to the common detriment” (4 references); “the constant and predominant aim shall be the welfare of the people as a whole” (32 references); “there may be established on the land in economic security as many families as in the circumstances shall be practicable” (10 references); “The State shall favour and, where necessary, supplement private initiative in industry and commerce” (2 references); “the economic interests of the weaker sections of the community” (19 references); “shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused”. These debates include the debates on the text of the Constitution itself.

<sup>11</sup> *Ryan v. Attorney-General* [1965] IR 294.

<sup>12</sup> *Murtagh Properties v. Cleary* [1972] IR 330.

<sup>13</sup> In that case, publicans sought an injunction against a union representative to restrain picketing at pubs which was taking place because, alleged in breach of employment agreements, the pubs had employed part-time bar waitresses. The publicans claimed that the picketing was not protected under the trade disputes legislation because it was designed to compel to infringe the bar waitresses’ constitutional right to earn a livelihood. Granting relief, the Court recognised the right to earn a livelihood without discrimination on the grounds of sex.

<sup>14</sup> *Greally v. Minister for Education (No. 2)* [1999] 1 IR 1.



right to work or to earn a livelihood was subject to the requirements of justice and practicability.<sup>15</sup>

## 2. A Right to Strike?

In addition, while the case law is not without its uncertainty and suggests that any such right would be subject to limitations by reference to other legal and constitutional rights, there is authority to support the view that Article 40.3 encompasses a right to strike.<sup>16</sup>

## 3. Other Rights

Finally, the Courts have recognised a number of other rights which, although primarily civil and political in character, may have a strong socio-economic dimension:

- Thus, for example, the Courts have also recognised a right to legal aid – in the first instance, in criminal matters<sup>17</sup>, but also in civil matters<sup>18</sup> – as an aspect of the unenumerated right of access to the courts.
- So, too, in a number of cases in which the right to bodily integrity was invoked, the Courts have recognised a duty on the State to protect the health of persons held in custody and the right of a prisoner not have his or her health endangered.<sup>19</sup>

## B. The Approach of the Courts to ESC Rights: *O'Reilly, TD*

While the 1970s and 1980s saw the Irish courts recognise a wide array of rights not explicitly enshrined in the text of the Constitution, over time the Courts became increasingly reluctant to recognise additional rights as being protected under Article 40.3 of the Constitution. Judicial creativity ceded to judicial caution. Thus, when litigants began to invoke further unenumerated economic, social and cultural rights, they have met a cooler response. In this paper, I will focus on two important cases.

### 1. *O'Reilly v. Limerick Corporation*<sup>20</sup>

In *O'Reilly*, the plaintiffs were members of the Travelling community in Limerick city and lived in caravans in unofficial sites in conditions of great poverty and deprivation. They sought mandatory injunctions directing Limerick Corporation to provide them with adequate serviced halting sites under housing legislation and also claimed damages for past suffering for breach of their constitutional rights. In making this second claim, the plaintiffs asserted a right “to be provided with a certain minimum standard of basic material conditions to foster or protect his dignity and freedom as a human person” which they said was an unenumerated right under Article 40.3 of the Constitution.

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<sup>15</sup> *Attorney-General v. Paperlink* [1984] ILRM 373.

<sup>16</sup> See the discussion in Hogan and Whyte (eds), *JM Kelly: the Irish Constitution* (4<sup>th</sup> ed., LexisNexis Butterworths, 2003), at paras. 7-3.210-7.3.218.

<sup>17</sup> *The State (Healy) v. Donoghue* [1976] IR 325.

<sup>18</sup> *O'Donoghue v. Legal Aid Board* [2006] 4 IR 204.

<sup>19</sup> *The State (C) v. Frawley* [1976] IR 365; *The State (Richardson) v. The Governor of Mountjoy Prison* [1980] ILRM 82.

<sup>20</sup> *O'Reilly v. Limerick Corporation* [1989] ILRM 181.

The High Court (Costello J.) refused to recognise the right invoked by the plaintiffs. In doing so, the Court emphasised the distinction between distributive justice, on the one hand, and commutative justice, on the other hand. Commutative justice was determining what was just and due from one individual to another individual or entity (including a public authority) from the relationship arising from their dealings with each other; in case of a dispute, this could be determined by a third party decision-maker such as a court which could decide on an appropriate remedy. Distributive justice, by contrast, was concerned with the distribution and allocation of common stock of goods (goods held in common for the benefit of the entire community) including revenue raised by taxation, decisions in relation to which could only be made by reference to the common good and not by reference to any specific individual or organisation. In our system, such decisions – and any disputes arising in relation to them – were to be made by those in authority in a political community. The right invoked by the plaintiffs would bring the Courts into the realm of distributive justice.

Costello J. explained this distinction in a vivid phrase: absent explicit constitutional protection of such a right, the claims of the applicants in this case were such that they should be “advanced in Leinster House rather than in the Four Courts”. In other words, under the separation of powers in the Constitution, it was for the political authorities – and in particular Parliament – and not for the Courts to decide on questions of the distribution of national resources by reference to the common good.

## **2. *T.D. v. Minister for Education*<sup>21</sup>**

In the more recent case of *T.D.*, the applicants were disadvantaged and vulnerable children who needed accommodation and treatment in high support units. While the Minister had formulated a general policy to deal with children with special needs, the Minister had not taken steps to provide for the applicants’ care. When the Minister failed to respond to requests for care in a timely fashion, the applicants’ lawyers brought an application for an injunction directing the Minister to take all steps necessary to implement the Department’s policy forthwith and, in particular, to facilitate the building and opening of twelve specific residences for troubled children. The High Court granted the injunction but this was appealed to the Supreme Court. Two aspects of the case merit particular attention for present purposes.

First, the applicants invoked a right to be placed and maintained in a secure residential accommodation so as to ensure their education, which, while related to the right to education, was not expressly recognised in the Constitution. For the purposes of the case, Keane C.J. was prepared to assume that the right invoked existed and arose from the special position of children under the Constitution. However, while reserving the question for a case in which the issue was fully argued, Keane C.J., along with other members of the Court, expressed “gravest doubts as to whether the courts at any stage should assume the function of declaring what are today described as “socio-economic rights” to be unenumerated rights guaranteed by Article 40”.<sup>22</sup>

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<sup>21</sup> *T.D. v. Minister for Education* [2001] 4 IR 259. Denham J. (as she then was) dissented.

<sup>22</sup> *T.D. v. Minister for Education* [2001] 4 IR 259, at 282.

Second, as in the earlier *Sinnott* case, the form of relief sought by the applicants – mandatory injunctions compelling the Government to act, as opposed to declaratory relief or damages – formed a central element of the Supreme Court’s decision. The Supreme Court allowed the appeal on the basis that, insofar as the High Court purported to force the Government to implement a particular policy which extended beyond the particular needs of the applicant, it had acted in breach of the doctrine of separation of powers. Approving the judgment in *O’Reilly*, the Supreme Court held that the order of the High Court had involved the court in determining the policy the executive should follow in dealing with a particular social problem. In their individual judgments, the members of the majority (Denham J. dissenting) set out a number of reasons why it considered it inappropriate for the courts to intervene in circumstances such as those of the applicants’ cases. In the most trenchant of the judgments, Hardiman J. set out his views on why “the courts should not assume the policy making role in relation to the multitude of social and economic issues which form the staple of public debate”:<sup>23</sup> first, this would involve a significant transfer of power from the political branches to the courts contrary to the constitutionally ordained separation of powers and the courts were not democratically responsible in the way that the political branches of government are; in any event, courts would be taking decisions in areas in which they had no special qualifications or experiences and which were not suitable for decision-making by adversarial court procedures.

While subsequent decisions suggest that the Supreme Court may not have completely shut the door on the recognition of certain economic and social rights in exceptional circumstances,<sup>24</sup> these decisions, and in particular the decision in *T.D.*, offer very limited prospect of the Courts stepping in to recognise economic and social rights which have not already been recognised under the Constitution.

In approaching the issue which the Convention is considering today, it is important to emphasise that, in the cases of *O’Reilly* and *T.D.*, the Courts were considering the question of whether to recognise and enforce a right which was not expressly enshrined in the Constitution as it currently stands, a very different question from whether such rights could or should be incorporated into the Constitution, ultimately by reference to the People in a referendum.

While some of the concerns raised by members of the Court – such as the concern that the recognition of such rights might involve a significant transfer of power from the political organs to the courts – are undoubtedly relevant to this question before the Convention today, it is important to emphasise there is a wide range of views on this issue,<sup>25</sup> some of which will canvassed later in these proceedings.

#### **IV. The Wider Constitutional Framework: the Charter of Fundamental Rights of the European Union**

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<sup>23</sup> *T.D. v. Minister for Education* [2001] 4 IR 259, at 361.

<sup>24</sup> *Re Article 26 and the Health (Amendment)(No. 2) Bill 2004* [2005] 1 IR 105.

<sup>25</sup> For example, Prof. Gerry Whyte has challenged many of the arguments raised by Mr. Justice Hardiman, in his judgments and extra-curially, in his article, “The Role of the Supreme Court in our Democracy: A Response to Mr Justice Hardiman” (2006) 28 *DULJ* 1.

Before concluding, it is important to refer to one additional dimension of the Irish constitutional framework which has become increasingly important over the past 40 years: that is European Union law. By virtue of Article 29.4 of the Constitution, the European Union Treaties form part of Irish law and indeed prevail over conflicting Irish law, including Irish constitutional law. Since the coming into force of the Treaty of Lisbon on 1st December 2009, the Charter of Fundamental Rights of the European Union has the same legal value as the Treaties themselves: Article 6 TEU. This means that, within EU law, like the Treaties, it prevails over any conflicting secondary EU legislation or national law.

The Charter is a wide-ranging catalogue of rights and principles: containing classic civil and political rights, citizenship rights as well as an extensive range of economic, social and cultural rights. Thus, for example, the Charter recognises the right to education (Article 14), the freedom to choose an occupation and the right to engage in work (Article 15), the right to fair and just working conditions (Article 31) and the right to engage in collective bargaining and action, including strike action (Article 28). The Charter also recognises the entitlement to social security and assistance (Article 34) and the right to health care (Article 35). Of course, as with Irish constitutional rights, these rights are subject to certain limits. Moreover, many of these rights and principles are defined by reference to existing law and practice at the EU or national level.

In accordance with Article 51 of the Charter, its provisions are addressed to the EU institutions and “to the Member States only when they are implementing Union law”. As the Court of Justice has made clear in its recent decision in *Åkerberg Fransson*, this means that the Charter is “applicable in all situations governed by European Union law, but not outside such situations”.<sup>26</sup> As the scope of EU law has expanded, this brings the Charter into play in an ever-increasing range of areas traditionally covered by Irish law and the Irish Constitution alone. But in the many areas which still fall outside EU law, the Charter is not applicable and forms no part of the constitutional framework. Thus, depending on whether or not a matter falls within the sphere of EU law, different sets of rights and principles may apply as a matter of Irish and EU constitutional law.

Yet the protection of economic, social and cultural rights must be understood against the backdrop of Article 52(5) of the Charter, which was added to the Charter, not without controversy, at the time of Lisbon Treaty negotiations. This declares:

*The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.*

In the explanations to the Charter, to which the EU courts must have due regard in interpreting its provisions, it is stated that principles may be implemented through legislative or executive acts and it is only in the interpretation or review of such acts that they become significant for the courts. However, they cannot give rise to a direct claim for positive action by the Union or its Member States. What is problematic, however, is that it is

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<sup>26</sup> C- 617/10, *Åklagaren v. Hans Åkerberg Fransson*, paragraph 19.

not always clear whether a particular Charter provision embodies a right or a principle. While the explanations offer a number of examples of principles, two of these are in fact framed in terms of rights (Article 25 on the rights of the elderly and Article 26 on the rights of persons with disabilities); moreover, the explanations recognise that some provisions – such as the entitlement to social security and assistance in Article 34 – may contain elements of both. Guidance from the Court of Justice<sup>27</sup> will be necessary to shed light on the extent to which Article 52(5) – which has faint echoes of Article 45 of the Constitution – limits the justiciability – or the right to invoke – certain economic, social and cultural rights before the EU courts.

In sum, the Charter represents an important contribution to the protection of economic, social and cultural rights in the wider Irish constitutional framework. However, as discussed above, whether or not an Irish citizen can invoke these rights and principles depends on whether their situation falls within the scope of EU law.

## V. Conclusion

Reflecting the era of its adoption, the Constitution of Ireland 1937 makes only limited express reference to economic, social and cultural rights and its drafters clearly envisaged that the issues to which such rights give rise would primarily fall within the remit of the political branches of government, not the courts. Although the Courts have confirmed that a limited number of economic, social and cultural rights are protected under the Constitution, mindful of the separation of powers under the Constitution, they have stopped short of recognising further far-reaching socio-economic rights, such as the right to an adequate standard of living, as being implicit in the Constitution. And while the Charter of Fundamental Rights contains important, albeit not unqualified, protection for such rights, these rights are confined to situations falling within the scope of EU law and their justiciability may be limited. Assessed by the standards of Ireland's current international and European commitments, the protection of such rights in the constitutional text is incomplete.

At the same time, although the Constitution's protections may be incomplete, economic, social and cultural rights are not alien or anathema to the Irish constitution. In considering the inclusion of further economic, social and cultural rights, arguably the real issue is not the desirability in principle of declaring or formally recognising such rights; it is defining those rights and their limits with due care, and developing effective methods for their enforcement.

Enshrining economic, social and cultural rights in the Constitution raises complex and challenging issues, including relating to the proper roles of the political organs and the courts under the Constitution. Ireland is not alone in facing these issues and the experience of other jurisdictions – which will be addressed in the next presentation – can shed light on the different options that may be open to Ireland in approaching these issues.

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<sup>27</sup> The only consideration to date has been in Case C- 176/12, *Association de médiation sociale*. See the comments of Lenaerts, currently Vice-President of the CJEU, "Exploring the limits of the EU Charter of Fundamental Rights" (2012) 8(3) *E.C.L. Review* 375, at 399-401.

### 4.3. Models of Constitutional Economic, Social and Cultural Rights *Prof. Aoife Nolan (University of Nottingham)*

#### 1. Introduction:

The purpose of this paper is to sketch different models for including economic, social and cultural rights (ESCR) in constitutions and, especially, making them partially or wholly justiciable. It draws from comparative models (i.e. approaches used in other countries).

#### 2. Three Approaches to Including ESCR in Constitutions (Based on Comparative Models):

The three principal approaches are:

- I. Inclusion of justiciable ESCR (see, e.g., South Africa, Brazil, Kenya, Finland, Argentina, Ecuador, Colombia, Spain, Hungary and a number of United States state constitutions)
- II. Inclusion of non-justiciable ESCR or directive principles of social policy (see, e.g., Ireland, India, Bangladesh, Ghana)
- III. Inclusion of initially non-justiciable ESCR which become enforceable before the courts after a period of time<sup>28</sup>

These models are not mutually exclusive. For instance, many constitutional models contain both justiciable ESCR and directive principles dealing with other aspects of such rights (e.g., Ireland, Namibia, and Malawi).

#### *Advantages of (1):*

- The imposition of broad obligations on government to give effect to ESCR in its law- and policy-making
- Provision of a remedy to claimants whose ESCR are not being given effect to
- Makes it clear that ESCR and civil and political rights are of equal status and importance

#### *Concerns:*

- Potential for judicial interference with economic and social policy and budgetary matters
- The potential complexities of defining the scope of such rights and ensuring their enforcement through the courts

#### *Advantages of (2):*

- Provides a guiding framework with government while not limiting government decision-making powers
- May serve as a useful aid in judicial interpretation of rights such as the right to life or the right to bodily integrity

#### *Concerns:*

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<sup>28</sup> See, e.g., the decision of the Indian Supreme Court in *Unni Krishnan, JP and others v State of Andhra Pradesh and others* 1993 AIR 217, in which the Indian Supreme Court held that the passage of 44 years since the enactment of the Indian Constitution had effectively converted the non-justiciable right to education of children under 14 contemplated under the Directive Principles chapter into a fundamental right enforceable under the law)

- Due to their non-enforceable nature, governments are not obliged to give effect to Directive Principles and may ignore them, thereby rendering them meaningless. This has frequently been the experience in countries with Directive Principles, including Ireland
- Risk that no effective remedy will be available to those whose ESCR are violated

*Advantages of (3):*

- Gives elected branches of government time to conform ('breathing space') prior to being held judicially accountable

*Concerns:*

- Risk of lack of effective recourse for current ESCR violation victims?
- How to determine appropriate time limit?

Of the models, Model 1 has been the most common in terms of 'new' (post-1990) constitutions or ESCR-related constitutional amendments.

### 3. Models of Justiciable ESCR:

There are a variety of approaches that could be adopted to the incorporation of incorporating justiciable ESCR into constitutions. Those set out below are based on comparative models..

(1) The first model is one where **ESCR generally are to be progressively realised subject to the state's maximum available resources but then particular groups are identified whose ESCR should be realised immediately** (e.g., vulnerable groups such as children or people with disabilities). This is the approach that has been adopted within the Colombian constitutional framework.

(2) The second model is one where **ESCR generally are to be progressively realised subject to the state's maximum available resources but then specific obligations are identified that must instead be realised immediately**. For instance, the right to primary education or the right to emergency medical treatment, which are immediate obligations in terms of international human rights law. A version of this model is used in some of the ESCR provisions in the South African Bill of Rights where the state's obligation is generally to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of such rights. However, under the same instrument, certain ESCR are immediately realisable, for instance the right to basic education.<sup>29</sup>

(3) The third model would be to make **all ESCR subject to progressive realisation and the extent of the state's maximum available resources, with no mention of immediate obligations at all**.

(4) Another option would be to make **all ESCR obligations immediately enforceable for everyone in all instances**.

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<sup>29</sup> A similar approach was adopted in the context of the Kenyan constitution. See Articles 43, 20(5) and 21 of that instrument.

## 5. Panel Discussion

A panel discussion took place involving: Michael McDowell SC; Mr. Colm O’Gorman, Amnesty International; Ms Mary Murphy, Irish Human Rights Commission; Mr. Mike Allen, Focus Ireland; and Rossa Fanning BL; and with contributions from Convention members. The debate got to the very heart of the issue around ESC rights and the role of the Constitution. The excellent contributions from panel members were of considerable benefit to Convention members, many of whom afterwards said that it greatly assisted their subsequent roundtable discussions and described it as one of the highlights of the plenary meeting.

During the debate on a number of key questions emerged. What rights were involved? How should those rights be specifically defined? How could they be best protected? And who should make decisions about resources?

It was argued that the Convention was dealing with the issue in the abstract and in the absence of precise definitions, clear proposals and, importantly, a considered view on the potential implications such changes might have in any particular circumstance – described as a requirement to ‘look around the corners’. In these circumstances, it was suggested that it would be unwise for the Convention to make definitive recommendations for the insertion of additional rights into the Constitution.

The whole area of ESC rights is a complex one with some rights already protected by the Constitution, whether expressly or by implication, and other rights set out in the form of non-justiciable principles under Article 45. Article 45, which sets out the guiding principles of social policy, was created to ensure that the Oireachtas had the exclusive role in deciding on public policy, including on housing. What could be more appropriate, it was suggested, than the present constitutional position whereby those charged with making and being accountable for often difficult decisions on the allocation of resources are the People’s elected representatives?

A number of states had been cited whose constitutions include ESC rights, for example India, South Africa and Germany. However, it was pointed out that very few states with the same common law system as Ireland’s (e.g. UK, Canada and New Zealand) have done so. In the Irish system the system of direct judicial review already gives judges very significant powers.

Fears were expressed that the inclusion of ESC rights into the Constitution would effectively and, it was argued, inappropriately place responsibility for policy-making in the hands of the judiciary. The counter-argument was that the courts would focus on the overall protection of rights and on setting out the legal parameters within which decisions are made rather than on specifics. In other words, a judge would adjudicate on whether decisions by the government had been determined in a transparent way, based on reliable evidence, and had ensured that the rights of citizens had been protected during that process. Such an approach, it was proposed, would result in better administrative processes and outcomes and better governance.



The debate should not be about whom we trust more, judges or politicians, it was said. The Irish Constitution is a 'republican constitution' with sovereignty vested in the people. Therefore, it is the People who will decide, through the representatives that they elect, what rights should be protected and how they should be best protected.

Another viewpoint given was that the inclusion of ESC rights in the Constitution would create a 'justiciable framework' within which the government would operate and be accountable for the decisions it takes in the allocation of available resources. The separation of powers between government and judiciary would still be maintained.

An interesting question was posed. If ESC rights had been in our Constitution, would this have made a difference to how the Irish government managed the economic and financial crisis and subsequent fiscal adjustments? In reply reference was made to the experience of the Latvian government whose negotiation position with international lenders was strengthened as a consequence of obligations to protect specific rights under its constitution.

As for fears expressed that the inclusion of ESC rights would bankrupt the State, the Convention was reminded that an absolutist approach was not being proposed. The International Covenant for ESC Rights (ratified by Ireland in 1989) includes the principle of 'progressive realisation', acknowledging that states are subject to resource constraints. In other words, states are expected to act as best they can within the means available to them, a concept perfectly in accordance with any constitutional obligations on ESC rights. The same principle would apply in the case of the Irish Constitution.

The creation of a 'judicial framework' might also be advantageous in the context of the development of housing policy. Our society's position on the right to a house, the right to a home is a reflection on our value system and should be considered in the context of broader ESC rights. It has been done in other common law jurisdictions and could be achieved in Ireland.

Governments struggle to deal with housing policy issues, including homelessness, adequate housing provision, etc. The point was made that the outcomes of housing policy initiatives in Scotland have been better and more cost-effective than in this jurisdiction because the political drive to tackle housing issues there is underpinned by the existence of housing rights. It is an anomaly in the Irish Constitution that, while the right to property is protected (Art 40.3.2), no similar protection exists for the right to a home. In other words, in certain circumstances where property is at issue, the courts will regard a lending institution as having precedence over the occupier or home 'owner'. This imbalance in our values needs to be redressed.

The difficulty is how to define ESC rights in a way that does not undermine a government's role in determining the allocation of public expenditure. An example given was the right in the Constitution to 'free primary education' (Art 42.4). Could this be interpreted as including the right to free text books or laptops or access to the internet? If this should be the case then it has to be borne in mind that someone will have to meet the costs involved.

Placing ESC rights at the centre of the Constitution was advocated as being in tune with the vision of a more progressive and equal society. It was also argued that this vision could be realised under Article 45 of the Constitution, perhaps requiring an updating of the language used and the inclusion of additional rights and/or by making Article 45 itself justiciable.

## **6. Convention Discussion**

The roundtable discussions looked at arguments in favour of and against inserting new provisions on economic, social and cultural rights into the Constitution.

Arguments in favour consisted of the idea that the new rights would lead to, or would allow the creation of, a fairer and more equal society, particularly if they were to be justiciable rights. The rights in question would be made inalienable if inserted into the Constitution, it was argued. Others argued that no group should be allowed to fall below a certain minimum standard of living. Another point was that it would improve public access to services. Some members supported the idea as a means of pressuring the government to fulfil the rights in question, and to change the culture of public administration. Many voices were in support of the aspiration behind the proposal.

Arguments against the insertion of the provisions centred around the difficulty of implementing and realising the rights even if they were to be constitutional. The question of financial resources was raised. It was suggested that making the rights constitutional could create false expectations about their fulfilment. Some members supported the aspiration behind the proposals, and were open to broad guiding principles, but were not supportive of allowing the rights to become the possible subject of specific case actions. Others stated that some problems cannot be solved, that a good deal is being done already to tackle the problems. Some raised concerns around giving the courts extra powers to the detriment of the legislature, with a consequent weakening of democratic powers.

Members were asked what scope there might be for strengthening the protection of ESC rights without making them constitutional. Raising better public awareness of services available and the cultural rights of minorities was one suggestion, along with more education about rights in schools. Others suggested a greater degree of personal responsibility was needed. It was proposed that the principles in question should rest in the domain of the legislature, while guided by the Constitution, while others said that EU and international law should be fully implemented, with the example given of the UN Convention on the Rights of People with Disabilities and the EU Charter of Fundamental Rights. The parliamentary system should be strengthened, with more powers given to the Opposition to help achieve greater protection for the rights in question, while others expressed concern as to the cost of taking cases in the court. Some members said they were unsure and wanted to hear more arguments and examples in relation to the issue before they could make up their minds.

In the afternoon session members were asked their views again, on leaving things as they are versus strengthening the protection of ESC rights and making them enforceable, and they looked at what scope existed for something in between the two. In terms of the first, the argument was made that some rights are already protected, and that the rights that

already exist in the Constitution should be addressed, with some saying that the issue can be dealt with through legislation, and that it would motivate people to vote and push politicians to act. There was concern about the lack of resources available to effect ESC rights, and another concern about too much litigation. Some said that ESC rights are aspirational, and that the issue is a complex one. Others worried for the unintended consequences that might flow from inserting ESC rights into the Constitution, with some saying there was risk attached to such a move. Some suggested that Article 45 remain as it is, while others argued that it could be tweaked to enhance the language.

Arguments in favour of strengthening and protecting ESC rights in the Constitution included the suggestion that it would represent a framework for governments and make them more accountable. Some argued it would strengthen in particular the rights of the most vulnerable. It would, said others in a similar vein, provide basic standards, and would be superior than leaving it to politics, which provides insufficient voice for such members of society. It would also protect minorities. Further, it reduces the element of political delay and foot-dragging by governments, and would not leave rights to the whim of politicians. Another argument in favour was that it would reflect the changed, more multicultural society Ireland has become since the Constitution was written in 1937. Another view was that specific ESC rights, i.e. housing, health and welfare, should be included in the Constitution and mentioned specifically.

In terms of options in between the two approaches above, the main proposal was that Article 45 should be tweaked, for example its language modernised. To prevent a 'floodgates' effect in terms of court cases, a suggestion was that all cases relating to ESC rights and Article 45 would have to go through an Independent Ombudsman first. Others said that general principles should be outlined in the Constitution. Another suggestion was to address specific issues in a subsequent Constitutional Convention, while others argued that the convention could look at the work of the Constitutional Review Group. A different approach was to address the political system, reforming the Dáil, allowing it to better address such issues, with some arguing for legislation. Others simply felt that they did not think there were midway options between the first and second approaches, as outlined above.

## Appendix A: Convention on the Constitution – Terms of Reference

<p>“Go gceadaíonn Dáil Éireann:</p> <p>Coinbhinsiún ar an mBunreacht a ghairm chun breithniú a dhéanamh ar na nithe seo a leanas agus chun cibé moltaí a dhéanamh is cuí leis agus chun tuairisciú do Thithe an Oireachtais:</p> <p>(i) téarma oifige na hUachtaránachta a laghdú go cúig bliana agus é a chur ar comhfhad leis na toghcháin áitiúla agus leis na toghcháin don Eoraip;</p> <p>(ii) an aois vótála a laghdú go 17 mbliana;</p> <p>(iii) an córas toghcháin don Dáil a athbhreithniú;</p> <p>(iv) an ceart a thabhairt do shaoránaigh a bhfuil cónaí orthu lasmuigh den Stát chun vótáil i dtoghcháin Uachtaráin in ambasáidí de chuid na hÉireann, nó ar shlí eile;</p> <p>(v) foráil maidir le pósadh comhghnéis;</p> <p>(vi) leasú a dhéanamh ar an gclásal i dtaobh ról na mban sa teaghlach agus rannpháirteachas níos mó ag mná sa saol poiblí a spreagadh;</p> <p>(vii) rannpháirteachas na mban sa pholaitíocht a mhéadú;</p> <p>(viii) an cion arb é diamhaslú é a bhaint as an mBunreacht; agus</p> <p>(ix) tar éis na tuarascálacha thuas a chríochnú, cibé leasuithe iomchuí eile ar an mBunreacht a bheidh molta aige; agus</p> <p>go dtugann sí dá haire:</p> <p>— gur 100 duine mar a leanas a bheidh i gcomhaltas an Choinbhinsiúin:</p> <p>— Cathaoirleach a bheidh le ceapadh ag an Rialtas;</p> <p>— 66 shaoránach atá i dteideal vótáil i reifreann, arna roghnú go hamasach sa chaoi go mbeidh siad ionadaitheach do shochaí na hÉireann i gcoitinne;</p>	<p>That Dáil Éireann:</p> <p>approves the calling of a Convention on the Constitution to consider the following matters and to make such recommendations as it sees fit and report to the Houses of the Oireachtas:</p> <p>(i) reducing the Presidential term of office to five years and aligning it with the local and European elections;</p> <p>(ii) reducing the voting age to 17;</p> <p>(iii) review of the Dáil electoral system;</p> <p>(iv) giving citizens resident outside the State the right to vote in Presidential elections at Irish embassies, or otherwise;</p> <p>(v) provision for same-sex marriage;</p> <p>(vi) amending the clause on the role of women in the home and encouraging greater participation of women in public life;</p> <p>(vii) increasing the participation of women in politics;</p> <p>(viii) removal of the offence of blasphemy from the Constitution; and</p> <p>(ix) following completion of the above reports, such other relevant constitutional amendments that may be recommended by it; and</p> <p>notes that:</p> <p>— membership of the Convention will consist of 100 persons as follows:</p> <p>— a Chairperson to be appointed by the Government;</p> <p>— 66 citizens entitled to vote at a referendum, randomly selected so as to be broadly representative of Irish society;</p>
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<p>— comhalta de Thionól Thuaisceart Éireann as gach páirtí de na páirtithe polaitíochta sa Tionól a ghlacfaidh le cuireadh ón Rialtas; agus</p> <p>— comhaltaí de thithe an Oireachtais, chun ionadaíocht neamhchlaonta a dhéanamh ar na Tithe;</p> <p>— féadfar ionadaithe a cheapadh faoi réir na gcritéar roghnóireachta thuas, agus beidh na hionadaithe sin in ann páirt a ghlacadh sna himeachtaí agus vótáil faoina n-ainm féin;</p> <p>— comhaontóidh an Coinbhinsiún a rialacha níos imeachta féin d’fhonn a ghnó a sheoladh go héifeachtach ar shlí a bheidh chomh heacnamúil agus is féidir;</p> <p>— beidh aird chúig ag an gCoinbhinsiún ar Chomhaontú Aoine an Chéasta agus ar Chomhaontú Chill Rímhinn;</p> <p>— tráth nach déanaí ná dhá mhí tar éis dháta na chéad éisteachta poiblí a thionólfaidh an Coinbhinsiún tabharfaidh an Coinbhinsiún tuarascáil do Thithe an Oireachtais agus déanfaidh sé moltaí dóibh ar gach ceann de na nithe atá leagtha amach ag (i) agus (ii) thuas;</p> <p>- tuairisceoidh an Coinbhinsiún do Thithe an Oireachtais agus déanfaidh sé moltaí dóibh ar gach ní eile a luaithe a bheidh a phléití críochnaithe aige agus, in aon chás, tráth nach déanaí ná bliain amháin ó dháta na chéad éisteachta poiblí;</p> <p>— féadfaidh an Coinbhinsiún aighneachtaí a iarraidh agus glacadh leo ó chomhlachtaí leasmhara agus lorgóidh sé cibé comhairle shaineolaíoch is dóigh leis is inmhianaithe;</p> <p>— déanfar gach ní a bheidh os comhair an Choinbhinsiúin a chinneadh trí thromlach de vótaí na gcomhaltaí a bheidh i láthair agus a vótálfaidh, seachas an Cathaoirleach a mbeidh vóta cinniúna aige nó aici i gcás comhionannas vótaí; agus</p>	<p>— a member of the Northern Ireland Assembly from each of the political parties in the Assembly which accepts an invitation from the Government; and</p> <p>— members of the Houses of the Oireachtas, so as to be impartially representative of the Houses;</p> <p>— substitutes may be appointed subject to the selection criteria above, who will be entitled to contribute to the proceedings and vote in their own name;</p> <p>— the Convention will agree its own rules of procedure for the effective conduct of its business in as economical manner as possible;</p> <p>— the Convention will have appropriate regard to the Good Friday Agreement and the St. Andrews Agreement;</p> <p>— not later than two months from the date of the first public hearing held by the Convention, the Convention will make a report and recommendation to the Houses of the Oireachtas on each of the matters set out at (i) and (ii) above;</p> <p>— the Convention will report and make recommendations to the Houses of the Oireachtas on each remaining matter as soon as it has completed its deliberations, but in any event not later than one year from the date of the first public hearing;</p> <p>— the Convention may invite and accept submissions from interested bodies and will seek such expert advice as it considers desirable;</p> <p>— all matters before the Convention will be determined by a majority of the votes of members present and voting, other than the Chairperson who will have a casting vote in the case of an equality of votes; and</p>
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<p>— tabharfaidh an Rialtas freagra san Oireachtas laistigh de cheithre mhí ar gach moladh a dhéanfaidh an Coinbhinsiún agus, má tá sé chun glacadh leis an moladh, cuirfidh sé an creat ama in iúl ar lena linn atá sé ag brath aon reifreann gaolmhar a sheoladh.</p>	<p>— the Government will provide in the Oireachtas a response to each recommendation of the Convention within four months and, if accepting the recommendation, will indicate the timeframe it envisages for the holding of any related referendum.”</p>
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## **Appendix B: Rules and procedures**

### **1. Timing, Frequency and Openness of meetings**

Meetings of the Convention will generally take place in a hotel at weekends (Saturdays and Sundays) during 2013. At least one meeting will be held outside Dublin. It is proposed to hold one meeting per month, with the exception of July and August. Members of the public will not have access to the meetings but the plenary sessions will be streamed live at [www.constitution.ie](http://www.constitution.ie).

### **2. Role and duties of the Chairperson**

The Chairperson shall be the sole judge of order and shall be responsible for the smooth running of the Convention in accordance with these rules and the terms of the Resolution of the Houses of the Oireachtas of 10 July, 2012. He shall engage such support services as are necessary for the effective administration of the forum and, from time to time, make such recommendations to the Convention on the management of business as he sees fit.

### **3. Work Programme**

The work programme shall be agreed by the Convention on foot of a proposal by the Chairman. The programme shall be reviewed regularly but any subsequent changes shall only take effect with the agreement of the Convention.

### **4. Steering Group**

A Steering Group shall be established to support the Convention in the efficient and effective discharge of its role and functions. In practice, the Group shall assist with planning and operational issues associated with the work programme. The Steering Group shall consist of the Chairperson and representatives from the political parties, the public members and such other representatives as the Convention sees fit.

### **5. Debates/speaking arrangements**

The format and structure of speaking arrangements shall be agreed in advance and as a general principle, all contributions by members should be brief, respectful and non-repetitive. Any member wishing to speak should indicate and will be called upon by the Chairperson, who will endeavour to ensure fairness in the allocation of speaking time to all members. In an effort to make most efficient use of time in plenary session, members are encouraged to use the opportunity of roundtable discussions to express their views, ask further question of the experts and deliberate with one another. These discussions can be reflected in a brief report to the plenary session.

### **6. Tabling and Circulation of Papers**

All documents received by the Convention secretariat shall be made available to all members of the Convention via the [www.constitution.ie](http://www.constitution.ie) website. Alternative arrangements will be made for those members who are not in a position to access the site. Deadlines for receipt of submissions and circulation of documents in advance of plenary meetings should be agreed by the Convention.

## **7. Presentations to the Convention**

Following receipt of submissions on any matter, the Convention may choose to hear oral presentations from any representative group or individual to assist in its deliberations. For the efficient administration of the process, the Steering Group may wish to make recommendations in relation to the selection of interested bodies to present to the Convention. Invitations shall be issued by the Chairperson on behalf of the Convention.

## **8. Voting**

Votes, if required, shall be by secret ballot of the members present and voting. Votes shall be overseen by the Chair with the support of at least 2 members of the Convention.

## **9. Advisory Panel**

The Convention shall establish an advisory panel of academics, constitutional lawyers and others with demonstrated expertise, for access to such expert advice as it considers desirable. The process for selection and appointment of any such advisers shall be agreed by the Convention, on the advice of the Steering Committee.

## **10. Irish language facilities**

A simultaneous translation service from Irish into English will be available for all plenary sessions of the forum.

## **11. Press and Communications**

Authorised members of the media shall be permitted to attend plenary sessions of the Convention, subject to such terms and conditions as may be laid down by the Convention. As a general principle, the Chairperson shall act as spokesperson in relation to administrative or procedural matters.

## **12. Reports**

Reports of the Convention shall be published as soon as practicable after a decision has been reached at each meeting. It shall be possible to finalise the detail of the content of each report other than in plenary session, subject to the agreement of the Convention.

## **13. Review of Procedures**

The Chairperson shall consult with members of the Convention and other interested parties and conduct such reviews of the procedures and administration of the Convention as he sees fit.

## **14. Convention secretariat**

The Chairperson shall have direction and control over the staff of the secretariat and other supports and resources available, subject to the wishes of the Convention.