Peoples' Vengeances

Ireland's Nice Referenda

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Part One: Referenda required to amend Irish Constitution. Referenda on accession to EEC, the Single European Act, Maastricht and Amsterdam. Development by courts of rules for fairness of referendum campaigns. Referendum Acts and Referendum Commission. Part Two: First Nice Referendum dominated by euro-anxiety, Irish neutrality and enlargement. Second referendum on same subject not unusual and acceptable according to domestic criteria. Concessions and clarifications. Effect on the Convention on the Future of Europe. Part Three: implications for the Constitutional Treaty.

Introduction

In this article, I explain how things went in Ireland after the first Nice referendum, highlighting the historical facts, political and constitutional, with a view to exploring the French '*Non*' and Dutch '*Nee*' to the Constitutional Treaty.[1]

Part One introduces the practice of referenda in Ireland, outlining the constitutional and political features of referendum processes. The constitutional reasons why EU referenda in Ireland are normal, and why Ireland uniquely held a referendum to ratify the Treaty of Nice are explained. I also examine the constitutional rules which aim to ensure that referenda are conducted fairly and impartially. The Irish Courts have sought to impose constitutional discipline on the conduct of referenda, and limits on European integration. The role of the body created to safeguard the constitutionality of the referendum process, the Referendum Commission, is also considered.

In Part Two, I turn to the *Nice I* and *II* referendum campaigns, synopsising the apparent reasons for the first 'no'-vote, and the reasons why a second referendum

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[1] As it happens, there is no single word in the Irish language for 'no' (or indeed 'yes' for that matter), although it is of course possible to make negative and positive statements.

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was deemed necessary and appropriate. The *Nice II* campaign in Ireland is frequently discussed in glowing terms, lauded as 'highly educative, an authentic exercise in active citizenship'.[2] I examine the response to the *Nice I* 'no'-vote, in particular the creation of the National Forum on Europe, new parliamentary scrutiny mechanisms, and safeguards for Irish neutrality. I also outline the impact of *Nice II* on Ireland's participation in the Convention on the Future of Europe.

Finally, in Part Three, I express some views on the lessons of the Nice ratification process for the Constitutional Treaty. First, I consider whether the ratification of a Constitutional Treaty raises different considerations to the ratification of Nice (or other previous EU Treaties). Secondly, I ask whether France and the Netherlands should be asked to vote a second time on the Constitutional Treaty. I conclude with some thoughts on the significance of ratification for democratic constitution-making, or even more ambitiously, democratisation through constitutional process.

Part One: Referenda in Ireland – frequent and fair?

Referenda in Ireland are a constitutional matter, that is, they are legally required in order to amend the Constitution.[3] There have been twenty-two amendments to the Constitution in total, each passed by referendum. In addition, seven proposed amendments have been defeated by referendum.[4] A referendum may only be initiated by way of a parliamentary bill, which in practice means by the government of the day. The 1922 Constitution did allow for a popular initiative but this was removed in 1928 and not included in the 1937 Constitution.

Many referenda entailed alterations to the political institutions. In 1959, a referendum to change the voting system from Single Transferable Vote to a British-style first past the post system was narrowly defeated. In 1972, the voting age was reduced from 21 to 18. In 1979, the rules on election to the Upper House, the *Seanad*, were altered. In 1984, the Constitution was altered to allow the franchise to be extended to non-citizens, with UK citizens in particular in mind (UK resident Irish citizens having always been allowed to vote in UK general elections). In 1997, the constitutional provisions on collective governmental responsibility were changed, in effect in order to alter a Supreme Court's interpretation which established a highly rigid understanding of cabinet confidentiality.[5] This is but one of many examples of constitutional jurisprudence being effectively altered by a referendum.[6] In 1998, the Belfast Agreement (also known as the Good

[2] P. Gillespie, 'Europe Thrives on National Debate' (Open Democracy, 23 Oct. 2002).

[3] Art. 46 Constitution. The Constitution also permits 'ordinary referenda', when the Government wishes to introduce a law that is of national importance, the *Seanad* [Upper House] and the *Dáil* [Lower House] can petition the President to call a referendum. This has never been used.

[4] *See* Appendix 1 for a table of all referenda in Ireland.

[5] *AG* v. *Hamilton* [1993] 2 *IR* 250.

[6] A further example is the 1996 Bail Referendum, which in effect altered constitutional jurisprudence on the right to liberty by permitting additional grounds for the refusal of bail.

Friday Agreement) led to major amendments, including the replacement of Articles 2 and 3 of the Constitution, substituting the previous territorial claim over the entire island of Ireland with an aspiration of Irish unity. This referendum was held on the same day as the one on the Amsterdam Treaty. (There was a simultaneous referendum in Northern Ireland on the Agreement.) In 1999 a minor amendment was passed dealing with local government. In 2004, a referendum was held removing automatic birthright citizenship from children born in Ireland to non-Irish parents.[7]

The Irish Constitution is unusual in that as well as embodying liberal-democratic values, it also has a distinct theocratic tenor and contains several provisions reflecting a particular view of the good. In 1972, the explicit reference to the 'special position' of the Roman Catholic Church was removed by referendum. In 1995, the constitutional prohibition on divorce was removed, a previous attempt in 1986 having failed.

The issue of abortion has been the subject of five referenda. The Eighth Amendment introduced the constitutional prohibition on abortion in 1983, partly due to fears that an activist Supreme Court might discover a constitutional right to abortion.[8] Since its adoption, a number of attempts have been made to clarify or undo its judicial interpretation. There were two failed attempts (in 1992 and 2002) to strengthen the ban, but two successful attempts to limit its impact (both in December 1992). The two failed amendments arose from a ruling of the Supreme Court in March 1992, in the case of the *Attorney General* v. *X*[9] (the 'X case'), that a mother is entitled to an abortion where there is a risk to her life from suicide. The Thirteenth and Fourteenth Amendments guaranteed that the ban on abortion would not compromise the right to obtain information about, or freedom of travel to avail of, abortion services available abroad. This latter issue came to dominate the Maastricht referendum, as discussed below.

EU referenda

Only in Ireland and Denmark are referenda the normal, rather than the exceptional, form of EU Treaty ratification. The Irish Constitution makes no provision for the ratification of treaties by any means other than parliamentary assent. However, explicit constitutional change was required to join the EEC,[10] in light of the Constitution's various provisions relating to national sovereignty (such as vesting

[7] *See* C. Costello, 'Accidents of Place and Parentage: Birthright Citizenship and Border Crossings', in *The Citizenship Referendum: Implications for the Constitution and Human Rights* (Dublin, Law School TCD 2004) p. 5.

[8] In 1974 in *McGee* v. *The Attorney General* [1974] *IR* 284 the Supreme Court held that the Constitution protected the unenumerated right to privacy.

[9] *Attorney General* v. *X* [1992] *IR* 1.

[10] Art. 29.4.3 now provides 'The States may become a member of the European Coal and Steel Community …, the European Economic Community ... and the European Atomic Energy Community….'

the sole and exclusive lawmaking power in the *Oireachtas* (Parliament)).[11] The referendum to join the EEC in 1972 was passed on a 5 to 1 margin.

In addition, in contrast to the founding member states, the Irish Constitution in effect accommodates the supremacy of EC law, by precluding domestic constitutional scrutiny of EU measures. Indeed, the immunity from scrutiny extends to national acts 'necessitated' by EU membership.[12] The term 'necessitated' has a broad autonomous constitutional meaning, the Irish courts having held, for example, that the general practice of implementation of EC directives by way of ministerial regulation rather than parliamentary legislation is 'necessitated' by the need to ensure swift implementation of EU obligations.[13] In effect, as one Supreme Court judge explained at the time,

> It is as if the people of Ireland had adopted Community law as a second but transcendent Constitution, with the difference that Community law is not to be found in any single document – it is a living growing organism…[14]

From a purely domestic constitutional point of view, EU law applies in Ireland by virtue of the constitutional guarantee in Article 29. In Ireland, as well as elsewhere in Europe, national courts accept European law on their own terms – it applies within the limits of national constitutionality – notwithstanding the fact that the ECJ's case-law is based on a model of a new autonomous EU legal order.[15]

The Crotty *Case*

At the time of the Single European Act, the official view was that the original constitutional amendment was of sufficient breadth to permit the Single European Act's ratification without any further changes. However, this view was challenged legally. Two features of the Irish Constitution are pertinent. First, the constitutional standing rules are broad, and permit challenges in most circumstances. A concerned citizen brought the challenge in order to prevent ratification

[11] Art. 15.1 Constitution.

[12] Art. 29.4.10 now provides: 'No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or the institutions thereof, or by bodies competent under the Treaties established by the Communities, from having the force of law in the State'.

[13] *Meaghar* v. *Minister for Agriculture and Food* [1994] 1 *IR* 329; *Maher* v. *Minister for Agriculture and Food* [2001] 2 *IR* 139.

[14] S. Henchy, 'The Irish Constitution and the EEC', *DULJ* (1977) p. 20, at p. 23.

[15] On the implications of these possible tensions, *see* D.R. Phelan, *Revolt or Revolution – The Constitutional Boundaries of the European Community* (Dublin, Roundhall 1997) and in contrast G. Hogan and A. Whelan, *Ireland and the European Union: constitutional and statutory texts and commentary* (Dublin, Sweet & Maxwell 1995).

of the Treaty by Act of the *Oireachtas*. Secondly, the fact that the ratification decision was a foreign affairs matter was constitutionally insignificant. Article 29.4.3 was judicially recognised as a license to join a dynamic evolving entity, being

> an authorisation given to the State not only to join the Communities as they stood in 1973 but also to join in amendments of the Treaties so long as such amendments do not alter the essential scope or objectives of the Communities .. To hold that the [Constitution] does not authorise any form of amendment to the Treaties after 1973 without a further amendment of the Constitution would be too narrow a construction; to construe it as an open-ended authority to agree, without further amendment of the Constitution, to any amendment of the treaties would be too broad.[16]

The various institutional changes contained in the Single European Act were held to fall within the permissible range of changes, including the creation of the Court of First Instance and most notably, the move to qualified majority voting in key areas. On this latter issue, the Supreme Court noted that the Community was a 'developing organism with diverse and changing methods for making decisions and an inbuilt and clearly expressed objective of expansion and progress, both in terms of the number of its Member States and in terms of the mechanics to be used in the achievement of agreed objectives'.[17] However, Title III of the Single European Act on European Political Co-operation was found to go beyond what was constitutionally permissible, as it would undermine the Government's constitutional obligation to conduct foreign policy in the national interest. The Supreme Court was criticised for failing to appreciate that the mode of European Political Co-operation was intergovernmental, so that although it did represent a new area of EEC activity, it did not represent a pooling of sovereignty in this field.[18] The other new competences, in the social and environmental fields, in contrast, were held not to alter the scope of the 'essential scope or objectives of the Communities'. The ambiguities of the judgment mean that referenda on EU Treaty change are now the default position.

The Treaty on European Union – Maastricht

In 1992, the Maastricht referendum took place 16 days after the first Danish 'no'-vote. There was a considerable campaign, but the contentious issue of abortion

[16] *Crotty* v. *An Taoiseach* [1987] *IR* 713 at p. 767.
[17] Ibid., p. 769-770.
[18] *See* K. St C. Bradley, 'The Referendum on the Single European Act', (1987) *ELRev.* p. 301.

dominated the debate. In order to prevent abortion from entering the debate, the Irish government had secured the insertion of a special protocol, providing that nothing in EU law would affect the application in Ireland of the Irish constitutional guarantee of the 'right to life of the unborn child'. The Protocol, which was obviously of greater interest for Ireland than other provisions, protocols or declarations to which Ireland agreed, was inserted without public or parliamentary debate or consultation.[19] Early in 1992, the Supreme Court ruled that the constitutional 'right to life of the unborn child' might preclude a right to travel outside Ireland for an 'unconstitutional' abortion, but that abortion was constitutionally permissible in limited circumstances. After the *X* case, a new government tried to have the Protocol removed, but only succeeded in securing a Declaration to clarify that it was not intended to interfere with women's right to travel, and that should the insulated article of the Constitution be amended, the Protocol would also be changed.[20] The pro-choice side opposed the Abortion Protocol, on the basis that it could preclude the right to travel to another EU member state while the 'pro-life' campaign felt it would copperfasten the *X* case in EU law, with which they disagreed as it had countenanced abortion in circumstances where the right to life of the mother was at risk from suicide. Both groups ended up campaigning for a 'no'-vote.[21] Nonetheless, the Treaty passed.

The Treaty of Amsterdam

In 1998, the Amsterdam referendum was passed. The new variable geometry provisions in the Treaty required the addition of a new domestic constitutional formulation.[22] Indeed, the government initially foresaw that it would be able to have a normal constitutional licence to exercise these opt-ins, but was pressurised to adopt a measure to require assent of both houses of the *Oireachtas* in order to

[19] F. Murphy, 'Maastricht: Implementation in Ireland', *ELRev.* (1994) p. 94-104 at p. 96.

[20] 'That it was and is their intention that the Protocol shall not limit freedom either to travel between Member States or in accordance with the conditions which may be laid down, in conformity with Community law, by Irish legislation, to obtain to make available in Ireland, information relating to services lawfully available in Member States.

At the same time the High Contracting Parties solemnly declare that, in the event of a future constitutional amendment in Ireland which concerns the subject matter of Article 40.3.3. of the Constitution of Ireland and which does not conflict with the intention of the High Contracting Parties hereinbefore expressed, they will, following the entry into force of the Treaty on European Union, be favourably disposed to amending the said Protocol so as to extend its application to such constitutional amendment if Ireland so requests'.

[21] M. Holmes, 'The Maastricht Treaty Referendum of June 1992', *Irish Political Studies* (1993) p. 105-110 at p. 106.

[22] 'The State may exercise the options or discretions provided by or under Articles 1.11, 2.5 and 2.15 of the [Amsterdam Treaty] and the second and fourth Protocols set out in the said Treaty, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas'.

exercise opt-ins. These related in particular to the EC competence on visas, asylum and immigration and some EU measures under the reformed Third Pillar on police and judicial co-operation in criminal matters. The campaign on the Amsterdam Treaty was overshadowed by the more salient issue of the Belfast Agreement. As Tonra notes, just 10 days before the referendum, more than half of the electorate insisted that it did not have enough information to evaluate the Treaty.[23] This was despite the role of the Referendum Commission in the campaign.

Further Referendum Litigation

Bills instigating referenda cannot be legally challenged, as the Constitution does not provide for *ex ante* control of legislation,[24] although it is possible to challenge the conduct of referendum campaigns.[25] For example, applicants unsuccessfully sought to injunct the passing of the Bill to instigate the Maastricht referendum, on the basis that insufficient information had been provided.[26] The bulk of legal challenges to the conduct of referendum campaigns have been unsuccessful. For example, in a case brought by Patricia McKenna, Green MEP and later opponent of the Nice Treaty, *McKenna* v. *An Taoiseach no 1*[27] the High Court (*per* Costello J.) refused to be drawn into the issue of the spending of public funds in the conduct of a referendum, stating:

> [N]ot every grievance can be remedied by the courts. And judges must not allow themselves to be led, or indeed, voluntarily wander into areas calling for adjudication on political or non-justiciable issues. They are charged by the Constitution with exercising the judicial power of government and it would both weaken their important constitutional role as well as amount to an unconstitutional act for judges to adjudicate on such issues.[28]

This expression of constitutional restraint no longer represents the constitutional position. In three key cases, *McKenna II*, *Hanafin* and *Coughlan* important constitutional principles were articulated which continue to dictate the conduct of referendum campaigns.[29] In *McKenna II*, the Supreme Court held that there had

[23] B. Tonra, 'Ireland and the Amsterdam Treaty', Paper presented at the Conference on the Amsterdam Treaty, Maastricht, 31 March-1 April 2000, citing the *Irish Times*, 16 May 1998.

[24] With the exception of a special procedure under Art. 26 which allows the President to refer Bills to the Supreme Court.

[25] *Riordan* v. *An Taoiseach (No. 2)* [1999] 4 *IR* 343; *Morris* v. *Minister for the Environment* [2002] 1 *IR* 326.

[26] *Slattery* v. *An Taoiseach* [1993] 1 *IR* 286.

[27] *McKenna* v. *An Taoiseach No. 1* [1995] 2 *IR* 1.

[28] Ibid., at p. 5.

[29] For discussion, *see* A. Sherlock, 'Constitutional Change, Referenda, and the Courts in Ireland', *Public Law* (1997) p. 125 and B. O'Neill 'The Referendum Process in Ireland', *Irish Jurist* (2000) p. 305.

been an unconstitutional interference with the people's right to 'reach their decision in a free and democratic manner'[30] in the context of the second divorce referendum as:

> The use by the Government of public funds in a campaign designed to influence the votes in favour of a 'Yes' vote is an interference with the democratic process and the constitutional process for the amendment of the Constitution and infringes the concept of equality which is fundamental to the democratic nature of the State.[31]

Various concepts , such as equality and fair procedures, were invoked to condemn the practice of spending public monies to advocate a specific result in a referendum. This made it difficult to interpret the practical implications of the ruling. The decision in *McKenna II* was handed down a week before the divorce referendum, which passed by a slim majority (818,842 votes to 809,728).

A challenge was then brought to the outcome of the referendum, on the basis that the government's unconstitutional campaign had tainted the result. The Supreme Court (*per* O'Flaherty J) held that each voter must be taken to have been 'sufficiently enlightened' as the government's constitutional wrong was evident at the time of voting. Moreover, there was no evidence that it had affected voting.[32] The Court also clarified the scope of the *McKenna II* ruling, namely that the unconstitutionality was in the spending of public funds to achieve a particular result, rather than advocating a particular result *per se*. The Chief Justice spoke in the following general terms in relation to the necessity for the referendum process to respect:

> the constitutional rights of the citizen to participate therein and, in particular, ... the right of the people to be informed with regard to the nature of the issue involved and its implications; the right to freedom of discussion thereon; the right of the people to persuade and to be persuaded; the right of the people to campaign either individually or in association, in favour or against the proposal.[33]

The *McKenna II* principles were applied in a case brought by Anthony Coughlan (a veteran anti-EU campaigner) *Coughlan* v. *Broadcasting Complaints Commission*[34] concerning political broadcasts advocating a particular referendum result

[30] [1995] 2 *IR* 10 at p. 42.
[31] Ibid.
[32] *Hanafin* v. *Minister for the Environment* [1996] 2 *IR* 321, at p. 437.
[33] Ibid., at p. 422.
[34] [2000] 3 *IR* 1.

on RTÉ, the state broadcaster. All the political parties had supported a 'yes'-vote in the campaign. RTÉ permitted them to make party political broadcasts airing these views. In addition, two other non-party political groups made referendum broadcasts, one against, one for, the amendment. The Broadcasting Complaints Commission rejected Coughlan's complaint. In contrast, the Supreme Court held that the imbalance was such as to violate the Constitution. In part as the Constitution has potential horizontal application, the issue of RTÉ's quasi-private status was not pressed. Indeed, Keane J stated that it would be remarkable if a statutory body such as RTÉ 'differed from the Oireachtas or the Government in enjoying a freedom to interfere with the result of a referendum by allowing political parties and other bodies which supported a particular outcome a considerable advantage in the broadcasting of partisan material'.[35]

Referendum Commission

There are two key effects of this case-law on the conduct of referenda. First, minority voices may be greatly amplified as the case-law is unclear as to whether equal or equitable distribution of airtime. Even if all major political parties support a given proposal, on a formal reading, equal attention should be given to both sides. Secondly, the case-law led the government to attempt to depoliticise referendum campaigns and ensure compliance with these constitutional provisions.

The practical response was the establishment of an independent Referendum Commission by the Referendum Act 1998 as the only body entitled to spend public funds on the conduct of referendum campaigns. The Act of 1998 provides that the Chairman of the Commission shall be a former judge of the Supreme Court or the High Court or a judge of the High Court. The other members of the Commission shall be the Clerk of the *Dáil* [Lower House], the Clerk of the *Seanad* [Upper House], the Ombudsman and the Comptroller and Auditor General. The Referendum Commission is to be independent in its actions. It is *ad hoc*, in that whenever a referendum falls to be held, the establishment of a Referendum Commission is at the discretion of the Minister for the Environment and Local Government. A Commission is created by means of an Establishment Order issued by the Minister in respect of the proposed referendum. Once the Commission completes its functions, it reports to the Minister and then ceases to function.

Under the Referendum Act 1998 the Commission initially had the role of setting out the arguments for and against referendum proposals, having regard to submissions received from the public. However, this role proved problematic. The

[35] Ibid., at p. 57.

McKenna II judgment contained a laudable principle as regard the fair conduct of referenda. However, its mechanistic interpretation led to the rigid allocation of equal funding and airtime to 'yes'- and 'no'-campaigns, and to the reliance on the politically neutral Commission to engage voters. This interpretation was not a necessary one. For example, the Constitutional Review Group suggested that public funding be channelled through civic society groups instead.[36]

Criticisms were raised at the time of referenda on the Belfast Agreement and the Amsterdam Treaty (held on the same day). The Commission's information was described as 'indigestible and poorly targeted'.[37] Its use of actors to voice the arguments for and against the Treaty and its generally apolitical role precluded identification with the speakers, undermining the cues and identification that are part of political debate.[38] *Nice I* also raised serious concerns about the overreliance on the Referendum Commission as a substitute for genuine political engagement. The All-Party *Oireachtas* Committee on the Constitution concluded that the 'engagement of the Commission directly in the campaign tends to weaken the sense that the political parties and the interest groups should be protagonists in the debate. The referendum campaign on the Nice Treaty illustrates how reliance on a Commission to create a lively debate is misplaced'.[39]

This led to the passing of the Referendum Act 2001, removing the Commission's statutory functions of putting arguments for and against referendum proposals and fostering and promoting debate or discussion on referendum proposals. The current primary role of the Referendum Commission is instead to explain the subject matter of referendum proposals, to promote public awareness of the referendum and to encourage the electorate to vote at the poll.

Part Two: Nice I and II

Nice I

The first referendum on the Treaty of Nice was run along with two other proposals, on the ratification of the International Criminal Court and the constitutional

[36] It recommended the amendment of Art. 47 so as to permit the public funding of campaigns '*provided* that the manner of equitable allotment of such funding is entrusted to an independent body … Such a constitutional safeguard meets the principal objection to the old funding arrangements identified in the *McKenna* case by ensuring that the Government does not spend public money in a self-interested and unregulated fashion in favour of one side only, thereby distorting the political process', p. 404-405. *See* also All-Party *Oireachtas* Committee on the Constitution, *Sixth Progress Report: The Referendum* (Dublin, Official Publications, 2001).

[37] L. Mansergh, 'Two Referendums and the Referendum Commission', *Irish Political Studies* (1999) p.123-131 at p. 129.

[38] 'New approach needed on referendums', *Irish Times* 17 June 1999.

[39] *Supra* n. 36.

prohibition of the death penalty. Initially a fourth issue was also submitted to referendum, but was withdrawn.[40] In light of the *Crotty* judgment, it was debatable whether a referendum was constitutionally required. Unlike *Maastricht* or *Amsterdam*, *Nice* did not endow the EU or EC with substantial new competences. Much of *Nice* concerned the so-called 'Amsterdam leftovers'. Thus, it might have been contended the Nice Treaty was within the scope of any existing licence. However, as Hogan and Whyte note, a 'complicating factor is that the Nice Treaty expressly amended provisions of the Amsterdam Treaty which themselves were expressly enumerated as "options and discretions" in Article 29.4.6 [of the Constitution]'.[41] On the advice of the Attorney General, the government decided to hold the referendum.

The first Nice referendum in 2001 resulted in a particularly low turnout. The government wanted Ireland to be the first country to ratify the Treaty in order to remove it from the agenda for the 2002 general election. In light of the previous easy ratifications of more contentious treaties, the government did not anticipate difficulties. A mere three weeks was given to the campaign. All the major political parties, except the Green Party and *Sinn Féin*, supported the Treaty and the 'yes'-campaign was lacklustre with few political inputs. As O'Mahony notes:

> What was noticeable during the campaign was the silence of many government ministers and politicians and the reluctance of some political parties to spend money to promote a 'yes'-vote (wishing to save money for the upcoming general election), which in turn could be a contributing factor to the notably low turnout level.[42]

The 'no'-campaign was an informal coalition of varied political hues, which was thus able to portray itself as anti-establishment.

Three issues came to dominate the campaign. The 'no'-side raised general euro-anxiety and concerns about Irish neutrality and exploited ambiguity about EU enlargement.

[40] The Twenty-second Amendment Bill (2001) proposed to establish a body for the investigation of judges and to amend the procedure for the removal of judges. It was not passed by the houses of the *Oireachtas*, due to pressure from opposition parties who thought it warranted greater time and attention.

[41] G. Hogan and G. Whyte, *JM Kelly: The Irish Constitution* (Dublin, Butterworths, 4th edn., 2003) p. 520. *See* also G. Hogan, 'The Nice Treaty and the Irish Constitution', *European Public Law* (2001) p. 565.

[42] J. O'Mahony, 'Not so Nice: The Treaty of Nice, the International Criminal Court, the abolition of the death penalty – the 2001 referendum experience', *Irish Political Studies* (2001) p. 201-213 at p. 209.

Euro-anxiety

The euro-anxiety arguments tapped into concern about the complexity and pace of change of EU developments, encapsulated in the slogan *If you don't know, vote no*. Indeed, this exploited the general lack of awareness and poor media coverage of EU issues in Ireland, which made generally high support for the EU until *Nice I* fragile and passive.[43] More nebulous sovereignty concerns were embodied in the leading slogan *You will lose! Power, Freedom, Money! Vote No to the Treaty of Nice!* In many respects, *Nice I* prompted the first real attempt to publicly articulate EU democratic deficit concerns. For example, John Rogers SC, a respected former Labour Attorney General, wrote an influential (if confused) *Irish Times* article, in which he argued:

> It is not my purpose to suggest that the consequences of the Nice Treaty are apocalyptic. But it is clear that the capacity of an Irish citizen to influence decisions which will intimately affect his/her life will be significantly reduced by the impact of the Nice Treaty.[44]

In terms of the content of the Nice Treaty, the issue of 'losing a Commissioner' was much discussed.[45] In addition, the very modest provisions on closer co-operation were objected to on the basis that they would herald a second-class status for many member states. A general anxiety about the disempowerment of smaller member states was repeatedly raised.[46]

Irish Neutrality

Irish neutrality has been a policy of Ireland since independence in 1922. However, it is far from traditional neutrality. The Irish government voiced political support for the Kosovo military intervention and the invasion of Afghanistan. It did not formally approve of the 2003 invasion of Iraq, although it continues its practice of allowing US military planes to refuel. Irish neutrality is not a clearly formulated doctrine, but rather a practice of ensuring careful consideration of whether to participate in military activity, embodied in the so-called triple-lock,

[43] K. Gilland, 'Ireland's (First) Referendum on the Treaty of Nice', (2002) *Journal of Common Market Studies*, p. 527 at p. 534.

[44] *Irish Times* 19 May 2001.

[45] Gallagher and Temple Lang (both former high level Commission officials from Ireland) argued that the rotation of Commissioners was 'a serious flaw' in the Nice Treaty, and is in no way necessary to facilitate EU enlargement. E. Gallagher and J. Temple Lang, *What Sort of European Commission Does the European Union Need?* (19 December 2001)

[46] For example, a flyer of Green MEP Patricia McKenna entitled *No to Nice for a Better Europe* begins with the heading 'A first and second class EU – giving up power and influence' and goes on to cite re-weighting of votes in the Council and enhanced co-operation.

which requires a UN mandate (UN Security Council or General Assembly authorisation), and government and Oireachtas approval. However, despite the absence of a clear UN mandate, Ireland did agree with the Kosovo intervention. Despite (or perhaps because of) its ambiguity, 'Irish neutrality' has considerable resonance. As Keatinge and Tonra write:

> [F]or many people in Ireland … it evokes important general values in international life, such as the rejection of the use of force (for some, under any circumstances) and an empathy with the victims of power politics pursued mainly by the larger states. It may even be seen to represent the foreign policy aspect of Ireland's national identity – it appears to be 'part of what we are'.[47]

The issue of Irish neutrality emerged as usual in the debate. The incremental development of EU competence and capacity on security and defence facilitated speculative arguments. Many focused on the Rapid Reaction Force, although this was foreseen and indeed approved in Amsterdam. The 'no'- campaign was also able to exploit much general anti-militarist feeling. A graphic poster of a wounded soldier bore the slogan *No to NATO, No to Nice.* Some second order effects were also in play, as chagrin at the government's u-turn on participation in the Partnership for Peace arrangements was influential. (The *Fianna Fáil* party had given a 1997 election pledge that Ireland would not participate in the NATO-led Partnership for Peace, but once in government in 1999, it went ahead and approved it months after being re-elected.)[48]

Nice and Enlargement – Exploiting Ambiguity

Initially, none of the significant 'no'- campaign groups overtly opposed EU enlargement. The feeling was that Ireland had benefited much from membership, and that it would be distasteful in light of its new prosperity to oppose enlargement. This is encapsulated in the European Movement's slogan *Give others the chance that Europe gave us – Vote Yes to Nice*'.[49] Later in the *Nice II* campaign, the 'no'-campaign split on this issue, with some groups raising the prospect of a 'flood'

[47] P. Keatinge and B. Tonra, *The European Rapid Reaction Force* (Dublin, Institute of European Affairs 2002) p. 18.

[48] As Keatinge and Tonra note 'The controversy which occurred in Ireland, from 1995 to 1999, over the significance of PfP was not reflected in any other European neutral country. Ireland's eventual participation in PfP is concerned with cooperation on peacekeeping, humanitarian operations, search and rescue, protection of the environment and marine matters. The emphasis is on military interoperability and training in these fields – there is no question of binding commitments to participate in actual operations. Finland and Sweden undertook a similar programme more than five years before Ireland subscribed to it late in 1999'. *Supra* n. 47 at p. 21

[49] European Movement, Submission to the Referendum Commission, 15 May 2001.

of immigrants from new member states, but the Greens and *Sinn Féin* distanced themselves from these arguments. In Ireland, the prevalence of EU referenda means that they are not generally conceived of in all or nothing terms, and in that sense as opening up the issue of EU membership itself. In fact, many *No to Nice*-activists were pro-EU and pro-enlargement.

However, many 'no'-campaigners also disputed the necessity of Nice for enlargement. Widespread confusion on this issue was evident in the first referendum. Although *Nice I* was the second European referendum under the 1998 Referendum Act and the *McKenna* and *Coughlan* jurisprudence, clarity on this key issue was lacking. In particular, some Referendum Commission materials were criticised for failing to mention enlargement.[50] Even in *Nice II*, such confusion continued, with an unhelpful intervention from the President of the European Commission, Romano Prodi, immediately after the *Nice I* result.[51] Indeed, his statement was showcased by the Irish Greens in their submissions on *Nice II*, who supported enlargement but opposed Nice.[52]

Nice I Result and Impact

The Treaty was defeated by 54% to 46% on a low turnout of 34%. In the aftermath of the referendum the European Commission funded a survey into the outcome of the referendum.[53] It found that those more likely to abstain were working class persons, farmers, those living in rural areas, and the young. Similar variables tended to correlate with a 'no'-vote, with women also more likely to vote 'no'. The

[50] The Referendum Commission *Information Booklet* (on the three 2001 referendum proposals) does not mention enlargement in its explanation of the Treaty of Nice. In contrast the more detailed *Arguments for and Against the Treaty of Nice* sets out arguments and counter-arguments on recto and verso sides on a leaflet. On the verso, setting out arguments in favour of the Treaty, it states 'The Treaty of Nice facilitates enlargement of the EU and this will be good for Ireland and good for Europe' while the recto side (arguments against the Treaty) it states that 'The Treaty is not necessary for the Enlargement of the EU'.

[51] *See* 'Prodi confuses sceptical Ireland' available at <news.bbc.co.uk/1/hi/world/europe/1400187.stm> (21 June 2001). He stated 'Legally, ratification of the Nice Treaty is not necessary for enlargement. It's without any problem up to 20 members, and those beyond 20 members have only to put in the accession agreement some notes of change, some clause. But legally, it's not necessary. This doesn't mean the Irish referendum is not important. But from this specific point of view, enlargement is possible without Nice'.

[52] *See* submission of Patricia McKenna MEP, 'EU Enlargement and the Nice Treaty' Submission to the Oireachtas Joint Committee on European Affairs' (11 February 2002), available at <www.pmckenna.com/agenda/treaty/Submission.doc>. It opens with Prodi's quote above and goes on to say '[T]he Nice Treaty is not specifically about enlargement, far from it. It is about shifting power to the larger Member States, and restructuring the EU into a two-tier system'.

[53] R. Sinnott, *Attitudes and Behaviour of the Irish Electorate in the Referendum on the Treaty of Nice* (2001), available at <www.ucd.ie/dempart/workingpapers/nice1.pdf>.

'no'-vote was attributed to a growing independence sentiment, with increasing numbers identifying with the statement: 'Ireland should do all it can to protect its independence from the EU'. The 'no'-vote brought about some consideration of the role of the Referendum Commission. It also reflected a break in the era of permissive consensus on the EU – in the wake of the referendum, several politicians expressed eurosceptic views, one admitting in a confidential discussion which was later leaked to the press, to have voted 'no', despite campaigning for a 'yes'-vote.

The decision to have a second referendum

Nonetheless it was quickly agreed that a second referendum would be held. Obviously, the Danish Maastricht precedent was influential. Maastricht was defeated in Denmark by a slim majority on high turnout. In light of the low turnout, short campaign time and widespread misinformation about the Treaty, the case for a second referendum in Ireland was even easier to make. Domestically, repeat referenda on several issues (STV, divorce, abortion) had already taken place, so the arguments about the undemocratic nature of refusing to accept the first result were quelled. The decision to have a second referendum was acceptable, or at least palatable, largely according to domestic criteria.

To an outside observer, events at the EU level were probably decisive. It was very quickly made clear that there was no question of Treaty renegotiation and that ratification in other member states would continue. A cursory examination of the history of non-ratification reveals the importance of *Realpolitik* here. Clearly the size and age (in terms of EU membership) of the member state matters greatly. When the *Assemblée Nationale* refused to ratify the European Defence Community Treaty in 1954, that was that. It was not until 1990 that political integration returned to the agenda, with the joint Maastricht intergovernmental conferences on political and economic union. In contrast, the response to the Danish 'No' to Maastricht was to continue the ratification process. Despite the reality that some member states are more equal than others, this argument was not palatable in the Irish context. The notion that little Ireland should not block the rest of the EU was thus not to the fore in the domestic debate.

Concessions and clarifications

After *Nice I*, a number of changes were introduced, in order to pave the way for the second referendum.

The Seville Declarations

Two declarations were appended to the Nice Treaty after *Nice I* at the Seville European Council. The 'National Declaration' by Ireland states that 'Ireland is not a party to any mutual defence commitment' and that 'Ireland is not a party to any plans to develop a European army'.[54] It makes the triple-lock policy explicit,[55] and so is a re-statement of the status quo. The Declaration of the European Council states that 'Ireland's policy of military neutrality is in full conformity with the Treaties, on which the European Union is based, including the Treaty of Nice and that there is no obligation arising from the Treaties which would or could oblige Ireland to depart from that policy'. In addition, the government inserted in the proposed amendment to the Constitution that 'the State shall not adopt a decision by the European Council to establish a common defence … where that common defence would include the State'.[56] This is the first explicit domestic constitutional statement relating to the policy of Irish neutrality.

National Parliamentary Scrutiny

Traditionally, the *Oireachtas* is a weak parliament. Governments, although they often have small parliamentary majorities, can generally call on strong support due to cultural factors, the electoral system and a very strong whip system. Consequently, mechanisms to hold ministers accountable to parliament even for domestic decisions are weak, perhaps the weakest in the EU. Unsurprisingly, scrutiny of EU decisions is even weaker. New procedures were put in place in the June 2002 EU (Scrutiny) Act, in the form of powers for the new Select Committee for European Affairs. A subcommittee of the Select Committee (the EU Scrutiny Committee) acts as a sifting body, and identifies those EU proposals that warrant parliamentary scrutiny. Early indications are that the Scrutiny Committee does a good job, but that the sectoral committees to which it refers proposals are less adept at clarifying the impact of the proposal and the government's position thereon.

[54] Seville European Council, 21 and 22 June 2002, Presidency Conclusions, Annex III, Brussels 24 Oct. 2002, Doc. No. 13453/02, to be found at <ue.eu.int/ueDocs/cms_Data/ docs/ pressData/en/ec/72638.pdf>, last consulted July 2005.

[55] National Declaration: '6. Ireland reiterates that the participation of contingents of the Irish Defence Forces in overseas operations, including those carried out under the European security and defence policy, requires (a) the authorisation of the operation by the Security Council or the General Assembly of the United Nations, (b) the agreement of the Irish Government and (c) the approval of Dáil Éireann, in accordance with Irish law'.

[56] 'The Nice Treaty: Explaining the Issues – Irish Neutrality and European Security', Institute of European Affairs, available at <www.iiea.com/files/nice/nice9.pdf>.

The National Forum on Europe

The National Forum on Europe was established after the 2001 referendum, and met regularly throughout the country from October 2001. It continued its work by shadowing the Convention on the Future of Europe and the subsequent intergovernmental conference, and it was foreseen that it would have a central role in the referendum on the Constitutional Treaty. It is composed of all political parties represented in the *Oireachtas* and has an observer pillar of interested civil society groups. A key practice is to invite speakers from outside Ireland – experts, politicians and officials – to address subject-specific sessions. On the issue of enlargement, for example, representatives from the candidate countries were invited to address the body. This was particularly important in light of the fact that 'no'-campaigners were often pro-enlargement, and claimed to be acting in the interests of the candidate countries in saving them from the 'bad deal' that was Nice.[57]

A new context?

It would be easy to be underwhelmed by these three changes. A cynical reading would regard the Seville declarations as the expression of an existing policy position, parliamentary scrutiny as window-dressing and the National Forum on Europe as the establishment of a talking shop. As Shaw described it, 'a meeting of the European Council ... made appropriate soothing noises and allowed the adoption of strictly non-binding declaratory measures intended to make the Treaty more palatable to the electorate',[58] as allegedly occurred with the Danish *No* to Maastricht.[59]

Tempting as the cynical reading may be, I take a different view. All three reflect a level of political maturity in that they embody Irish official recognition that how Irish citizens interact with the EU is a matter of domestic political responsibility. The Seville Declaration and new constitutional provisions clarify the scope and extent of EU mutual defence obligations. The EU (Scrutiny) Act was a welcome development in that it reflected an acknowledgement that many concerns about EU decision-making were due to the way that successive Irish governments had conducted themselves in the Council, and that these problems were best addressed through domestic accountability mechanisms. The National Forum on Europe

[57] P. Doyle, *Ireland and the Nice Treaty. ZEI Discussion Paper* (2002 *C 115*) available at <www.zei.de/download/zei_dp/dp_c115_doyle.pdf>, p. 7.

[58] J. Shaw, 'The Constitutional Treaty and the Question of Ratification: Unscrambling the Consequences and Identifying the Paradoxes', *European Policy Brief* (Federal Trust April 2005) p. 5.

[59] *See*, however, Helle Krunke, A long journey from Maastricht to Edinburgh: The Danish Solution to the Maastricht-referendum, in this issue of the European Constitutional Law Review.

contributed to opening up debate on *Nice II* (and beyond) in order to ensure that this national decision was taken in European context.

The Nice II Referendum

Once the Seville Declarations, the new parliamentary scrutiny arrangements and the National Forum on Europe were in place, the second referendum was scheduled for 19 October 2002. The campaign itself lasted about five weeks, but debate had been on-going since *Nice I*, as the need for a second referendum was quickly acknowledged. The main political parties devoted much more time, money and energy to the campaign, with *Fianna Fáil* putting the minister for foreign affairs in charge of the campaign.[60] Indeed, Keohane and O'Brien describe *Nice II* in rapturous terms:

> As the poll approached, the EU was discussed as never before. In the media and in public meetings, advocates and sceptics debated arcane matters – qualified majority voting, enhanced co-operation, veto power, defence obligations … – that would not be voiced even at European Parliament elections. By polling day the issues were understood and fears assuaged. The end result was a turnout of 50% and a doubling of the vote in favour. The treaty was passed by a close to two-thirds majority.[61]

Particularly important was the large civil society campaign, with a large, broad-based non-party political 'yes'-group in the form of the Ireland for Europe Alliance.[62] In addition, a general sense of urgency was created.[63] In *Nice II*, although the 'no'-vote remained constant, the 'yes'-vote doubled and the proposal passed comfortably on the second occasion. The empirical evidence reveals that the referenda were genuinely concerned with EU issues, rather than being second-order national elections. '[B]oth Irish referendums on the Nice Treaty were closer to being processes of deliberation on EU issues than to being plebiscites on the incumbent government'.[64] This is embodied in the (opposition) Labour Party's slogan *Hold Your Fire. Fianna Fáil Can Wait. Europe Can't*. In particular, attitudes to

[60] Katy Hayward, ' "If at first you don't succeed...": the second referendum on the treaty of Nice, 2002', *Irish Political Studies* (2003) p. 120.

[61] D. Keohane and D. O'Brien, 'Why Europe Needs referenda', (Open Democracy 13 June 2003), at p. 2.

[62] B. Laffan and A. Langan, 'Securing a 'Yes' from Nice I to Nice II', Notre Europe Policy Paper No 13, p. 10-11. *See* material on <www.irelandforeurope.org>.

[63] Ibid., p.7-8.

[64] J. Garry, M. Marsh and R. Sinnott, ' "Second Order" versus "Issue-Voting" Effects in EU Referendums', *EU Politics* (2005) p. 201-221 at p. 215. *See* also R. Sinnott, *Attitudes and Behaviour of the Irish Electorate in the Second Referendum on the Treaty of Nice* available at <www.ucd.ie/dempart/workingpapers/nice2.pdf>.

enlargement were much stronger predictors of the vote in *Nice II* than in *Nice I*. Empirical evidence supports the view that 'the more vigorous the campaign, the greater the effect of the key substantive issue relating to the referendum – in this case attitudes to EU enlargement – and the less the effect of second-order considerations'.[65]

The *Nice II* referendum in Ireland illustrates that citizens acting in a national context, indeed in the Irish constitutional setting, exercising a sacrosanct popular sovereignty, can make decisions taking into account needs and interests beyond the statist paradigm. At the very point when we would expect the public sphere to contract and become inward-looking, the opposite occurred. The referendum genuinely increased understanding and encouraged participation. In light of the limited salience of EU issues on a day-to-day basis, the referendum put Europe centre-stage. It offered an opportunity to expose common myths about European integration. The subtle but significant shift from *Nice I* and *Nice II* related to a *national* taking of responsibility for the manner of engagement with the EU, and yet a Europeanisation of the frame of reference of the debate.

Further Impact of Nice Referenda

The post-Nice process began long before Ireland had completed ratification. Ratification was completed in October 2002 and the Convention on the Future of Europe had already started in February 2002. While the grandiose Future of Europe debate got underway, Ireland was still debating the arcane detail of Nice. Ireland came late to the debate. In addition, the Nice referenda led to a particularly cautious approach in the Convention. Irish members of the Convention reported and appeared before the National Forum on Europe on a regular basis, and national parliament any representatives at the Convention reported to the Joint *Oireachtas* Committee on European Affairs.[66] Ireland was well-represented at the Convention, with former *Taoiseach* [Prime Minister] John Bruton TD, one of the national parliamentary representatives, in the Praesidium. However, Irish members tended not to act as a national group, or even liaise effectively. This led to accusations that a poor strategy was being pursued.[67] 'In brief, the Irish priority, on the European front, was to consolidate rather than innovate – coupled with a widespread feeling that the Future of Europe agenda was developing too fast and going ahead of popular opinion'.[68]

[65] Ibid., at p. 215.

[66] A. Vergés Bausili, 'The Constitutional Convention and Ireland', Federal Trust Online Paper 21/03 (July 2003).

[67] 'Bruton warns of isolation from the EU', *Irish Times*, 22 Oct. 2002; 'Open contempt for Convention on the Future of Europe may cost Irish dear', *Irish Times*, 29 Nov. 2002.

[68] Vergés Bausili, *supra* n. 66, p. 4.

No Plan B?

One feature of the Nice debates was the reluctance to engage in discussion about the consequences of a 'no'-vote. In EU (and indeed international) law, the Treaty could not enter into force without ratification by all the member states. In addition, referendum outcomes are sacrosanct under the Irish Constitution.[69] Historically, this is due to the desire to emphasise popular sovereignty in contrast to British parliamentary sovereignty.[70] The Courts have affirmed the principle of popular sovereignty which underlies the referendum process, such that the power to amend the Constitution is virtually limitless, speaking of 'the fundamental and supreme law of the State representing as it does the will of the People'.[71] This is in contrast to the views of the German Constitutional Court and indeed even more clearly those of the Indian Supreme Court, countenancing the possibility of an unconstitutional constitutional amendment.[72] Of course, the notion of popular sovereignty safeguarding decisions to become part of an entity such as the EU is question-begging, and the limits of European integration from this perspective have not been subject to judicial consideration, in contrast to the German Constitutional Court's *Maastricht* judgment.[73]

Throughout the Nice debates, the political mantra became 'There is no Plan B.' David O'Sullivan, the Secretary-General of the European Commission (and an Irishman) stated it as follows:

> There is no Plan B. Not because we are trying to hide something or aren't clever enough to devise one, but because a 'no'-vote will create a political crisis with consequences that we can't foresee.[74]

[69] *Hanafin* v. *Minister for the Environment* [1996] 2 *IR* 321.

[70] Eamon de Valera, the architect of the Constitution, famously stated 'If there is one thing more than another that is clear and shining through this whole Constitution it is the fact that the people are the masters'. Quoted in B. Chubb 'Government and Dáil: Constitutional Myth and Political Practice', in B. Farrell (ed.), *DeValera's Constitution and Ours* (Dublin, Gill and Macmillan 1998), p. 98.

[71] *Re Article 26 and the Information (Termination of Pregnancies) Bill 1995* [1995] 1 *IR* p. 1 at p. 43. This is so, notwithstanding judicial endorsement of a natural law view of the Constitution, treating the Bill of Rights as a non-exhaustive expression of natural rights, antecedent to positive law. However, one Irish judge, writing extracurially, wrote as follows: '[T]he Irish Constitutions remains unique among the constitutions of the world … [because] … there is a law superior to all positive law, which is not capable of being altered by legislation, or even by a simple amendment of the Constitution itself'. R. O'Hanlon, 'Natural Rights and the Irish Constitution', *Irish Law Times* (1993) p. 8 at p. 10. Accordingly, he argued that the 13th and 14th amendments to the Constitution did not have the 'character of law' because they violated 'natural law.' This argument was rejected by the Supreme Court in this case.

[72] *See* R. O'Connell, 'Guardians of the Constitution: Unconstitutional Constitutional Norms', *Journal of Civil Liberties* (1999) p. 48.

[73] *Brunner* v. *European Union Treaty (Maastricht Decision)*, 1 *CMLR* [1994] p. 57.

[74] Quoted, *inter alia*, in *Time*, 13 Oct. 2002, available at <www.time.com/time/europe/magazine/2002/1021/eu/ireland.html>.

Nonetheless, the refusal to articulate alternative outcomes always rang a little hollow. There were murmurings that the effect of a 'no'-vote would be that Ireland's relationship with the EU would be altered, and that some legal mechanism would be found to allow the other member states go ahead in an advanced EU, leaving Ireland behind. At the very least, the idea was mooted (by those on both sides of the Nice campaign) to extract those parts of the Treaty related to enlargement and put them into the accession treaties with new member states. The assumption (possibly dubious given the ambiguity of the *Crotty* precedent) was that these accession treaties would not require a referendum in Ireland.

Part Three : Implications for the Constitutional Treaty

Ratification of the Constitution – Plan C?

In the event, *Nice II* passed and the need to explore Plan B was avoided. How would a similar scenario with regard to ratification of the Constitutional Treaty pan out? While the actual changes to be introduced by the Constitutional Treaty are substantial, they are not qualitatively different from changes introduced through previous intergovernmental conferences. The significance lies elsewhere than in the material changes.

The Constitutional Treaty retains the requirement for unanimous ratification by all the member states in order to enter into force, and for subsequent amendments. In this, it is clearly more Treaty than Constitution. There is only a minor shift to a more flexible amendment procedure in the *clauses passerelles*.[75] The Council may by unanimous decision alter law-making procedures to qualified majority voting and co-decision, without having to go through the normal Treaty amendment process.[76] In Ireland, even this minor loosening of the ratification reins proved controversial.[77]

A Declaration to the Constitutional Treaty provides that if within two years of signature, four-fifths of the member states were to ratify it, and the others 'encounter difficulties' with ratification, the European Council would have to consider what to do. While the Declaration is of no legal significance, as Auer notes,

[75] Art. IV-444 and Art. IV-445.

[76] *See* B. de Witte, 'Revision', *EuConst* (2005) p. 136-140.

[77] Due widespread criticism from the opposition parties and media commentators, the Irish government altered the proposed referendum wording, which would have allowed Ireland to agree to such changes with approval of the *Oireachtas*. The Government feared that this issue would cloud the referendum. 'The Government is sensitive to the political argument that the scope of the procedure might be exaggerated in a referendum campaign, and is now tending to the view that arrangements for ratification, even of such limited treaty change, should remain as at present – namely a decision would be taken on a case-by-case basis as to whether a referendum would be necessary'.

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it may be an invitation to take a dramatic, indeed legally revolutionary step, namely to orchestrate the entry into force of the Constitutional Treaty notwithstanding some member states' non-ratification. As he puts it, '[The Declaration] is not a revolutionary act by itself but an invitation to adopt, if necessary, such an act. There are, after all, far more examples of constitutions based on some singular revolutionary act allowing them to enter into force than of constitutions that are enacted according to the formal requirements of international law'.[78] The shift to an explicitly *Constitutional* Treaty may nudge us in this direction. There is a (highly strained) legal argument that can be made to avoid the requirement for ratification by all the member states unanimously, which exploits the fact that the Constitutional Treaty creates a new European Union, the successor of the existing Union.[79] Moreover, as Weiler notes, 'Simply calling it a constitution will make it more difficult in the case of a rejection by an individual member state to enlist sympathy for such intransigence in the face of a European majoritarian constitutional will'.[80] The oft-cited example is that of the US Articles of Confederation. They required unanimity to be amended, but not all thirteen colonies immediately ratified the Constitution.

Indeed, Fossum and Menéndez see evidence of the shift to constitutional mode of ratification in how the Maastricht and Nice *no's* were handled:

> [The] tendency to provide alternative solutions in the case of negative votes might be said to point to the evolving constitutionalism that has emerged out of the IGC model. In federal or federal-type systems, constitutional amendments generally require some kind of a qualified majority of states or provinces to enter into effect whereas amendments to the charters of international organisations can only be effected through unanimous ratification in all the Member States. The *ad hoc solutions* arbitrated in the Maastricht and Nice processes might suggest a further step in the EU's gradual transition from that latter to the former model of law making.[81]

[78] A. Auer, 'Adoption, Ratification and Entry into Force', *EuConst* (2005) p. 131 at p. 135.

[79] Art. IV- 438(1): 'The European Union established by this Treaty shall be the successor to the European Union established by the Treaty on European Union and to the European Community'.

Art. IV-437(1): 'The Treaty establishing a Constitution for Europe will repeal the Treaty establishing the European Community, the Treaty on European Union, and under the conditions laid down in the Protocol on the acts and treaties having supplemented or amended those previous treaties, the acts and treaties which have supplemented or amended them subject to paragraph 2 of this Article'.

[80] J.H.H. Weiler, 'On the power of the Word: Europe's Constitutional Iconography', *I.CON* (2005) p. 173 at p. 182.

[81] J.E. Fossum and A. José Menéndez, 'The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union', *ELJ* (2005) p. 380 at p 399.

This is a plausible, but not compelling, reading of *Nice I* and *Nice II*. The aftermath of a second *'no'* would have been the true test of Plans B and indeed C. In the Irish case, the decision to have a second referendum was easily justified in accordance with national constitutional practice. The decision was acceptable on national terms, however inevitable it seemed from the outside point of view. Thus, Plans B and C remain to be truly explored.

Should France and the Netherlands vote again?

Nice II illustrates that, under certain conditions, a second referendum can be a truly beneficial enterprise. Whether France and the Netherlands vote again is clearly tied up with national political interests and strategic considerations. However, the Irish experience may provide some lessons. It suggests that voting again can be a positive experience, under certain (admittedly quite particular) conditions. These include, but are by no means limited to, the following. First, it must be possible to justify the decision to vote a second time in accordance with domestic considerations, which do not impugn or undermine the democratic credentials of the entire national ratification process. Secondly, some contextual changes must be possible, which genuinely serve to clarify or even clear-up issues and ideally, take national responsibility for certain matters. Thirdly, the stance of the remaining member states as regards the continuation of the ratification process should be clear. It is doubtful whether these conditions are met in France or the Netherlands. Obviously, the decisions whether to vote again are theirs.

Since the rejections by France and the Netherlands, Luxembourg has approved the Constitutional Treaty by referendum (56.5% YES, 43.5% NO) becoming the 13th country to ratify the Treaty. Malta then ratified parliamentarily. The Irish referendum however has been postponed, although officially Ireland remains committed to hold it. These developments seem likely to keep some life in the Constitutional Treaty yet. However, there is no unambiguous message from the EU on this, and it appears that two *No's*, in particular when it includes a French *Non*, may stick. The decision of the leaders of member states present at the European Council of 16 and 17 June 2005 to have a 'period of reflection' 'designed to generate interest' seems likely to dissipate interest only. The ambiguity of the statement: 'We are agreed that the timetable for ratification in different Member States will be altered if necessary in response to these developments and according to the circumstances in these Member States' and the decision to return to the matter in early 2006, seem unlikely to promote debate.[82]

[82] *Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty establishing a Constitution for Europe* (European Council, 16 and 17 June 2005) (Brussels, 18 June, SN 117/05).

Conclusion

What lessons for democratic constitution-making in the EU or, even more ambitiously, EU democratisation through constitution-making? The current emphasis on the process of formal constitution-making to enhance EU legitimacy is by no means self-explanatory. Indeed, there is a certain irony in trying to democratise through constitutionalisation, given that the tension between constitutionalism and democracy is hardly resolved within the nation-state paradigm, let alone at EU level.[83] In Ireland, it is apparently resolved through a judicial acceptance of unlimited popular sovereignty as the source of constitutional legitimacy. Of course, this is theoretically implausible, but is a useful judicial fiction.

EU legitimacy cannot be derived solely from its capacity to solve common problems, nor from its member states alone. So process, in particular constitutional process has become of great interest.[84] Fossum and Menéndez divide the democratic process of constitution making around five phases:

– Signalling;
– Initial deliberation;
– Drafting;
– Agenda-settled deliberation;
– Ratification.[85]

The ratification stage, based on national constitutional procedures, appears at first glance to undermine attempts at creating a European public space. However, my argument here is that this is not *necessarily* so. National ratification need not be a wholly inward-looking exercise, as *Nice II* illustrates. National ratification through referenda has distinct practical and theoretical advantages.[86] Under the correct conditions (at least some of which were evident in *Nice II*), it can help create the conditions for an open deliberative process, by raising the salience and understanding of the EU. The final decision, while not the litmus-test for the democratic credentials of constitution-making, is the culmination of that wider process. However, the brief history of EU referenda in Ireland provided here shows that the quality of debate in *Nice II* was exceptional. Earlier EU referenda were

[83] *See*, M. Wilkinson, 'Postnationalism, (Dis)organised civil society and Democracy in the European Union: Is Constitutionalism Part of the Solution or Part of the Problem', *German Law Journal* (2002).

[84] *See* for example the special edition of the European Law Journal on 'Deliberative Constitutional Politics', *ELJ* (2005) p. 379.

[85] Fossum and Menéndez, *supra* n. 81, p. 385.

[86] In particular, as reflective of the principle of constitutional tolerance as extolled by Weiler. *See* J.H.H. Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg', in J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge, Cambridge University Press 2003) p. 7.

dominated by domestic issues, and failed to contribute significantly to understanding of or interest in the EU.

In particular, *Nice II* shows that debate needs a sense of urgency, which is likely to be dissipated in this current phase. The EU constitution cannot, indeed, should not aspire to a settled *finalité*, and will remain contested. Ambiguity of this order is an endemic feature of the EU. Thus Shaw, influenced by Tully, has argued that a constitution needs to be the subject of continuous critical reflection. As such, it should be seen more as a set of interlocking processes rather than as a single one off event or document.[87] Nonetheless, urgency is needed in order to crystallise deliberative processes into a decision. While contestation and debate are constitutive of a democratic polity, including the multi-level European polity, a respite from constitution-talk may be desirable at some point.

The development of a European public space *and* this requisite sense of urgency could have been enhanced by having simultaneous national ratifications of the Constitutional Treaty. This would have helped ensure greater interaction and seepage between national debates. Simultaneous referenda might have been more decisive in outcome. At the end of the 17-18 June 2004 summit, Bertie Ahern said of the Constitutional Treaty 'you'll get a few generations out of it.'[88] Would that this were so.

[87] J. Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism: The Challenge of the Convention on the Future of Europe' (London, Federal Trust, June 2002).

[88] Quoted in N. Walker, 'The EU as a Constitutional Project', Federal Trust Online Paper 19/04 (Sept. 2004) p. 1.

Appendix 1: Referenda in Ireland

Date	*Proposal*	*Yes %*	*No %*	*Turnout*
1. 7.37	Approve Bunreacht na hÉireann (Irish Constitution)	56.5	43.5	68.3
17. 6.59	Abolish STV electoral system	48.2	51.8	56.1
16.10.68	Abolish STV electoral system	39.2	60.8	62.9
16.10.68	Allow over-representation of rural voters	39.2	60.8	62.9
10. 5.72	Permit membership of EC	83.1	16.9	70.3
7.12.72	Lower voting age from 21 to 18	84.6	15.4	48.0
7.12.72	Remove 'special position' of RC church	84.4	15.6	47.9
5. 7.79	Legalise contested adoptions	99.0	1.0	27.9
5. 7.79	Reorganisation of graduate representation	92.4	7.6	27.4
7. 9.83	Insert 'pro-life' (anti-abortion) amendment	66.9	33.1	53.4
14. 6.84	Allow votes for non-citizens	75.4	24.6	45.5
26. 6.86	Allow legalisation of divorce	36.5	63.5	60.5
26. 5.87	Ratify Single European Act	69.9	30.1	43.9
18. 6.92	Permit ratification of Maastricht Treaty	69.1	30.9	57.3
25.11.92	Restrict availability of abortion	34.6	65.4	64.9
25.11.92	Affirm freedom to travel (abortion-related)	62.4	37.6	65.3
25.11.92	Affirm freedom of information (")	59.9	40.1	65.2
24.11.95	Allow legalisation of divorce	50.3	49.7	62.0
28.11.96	Greater judicial power to refuse bail	74.8	25.2	29.1
30.10.97	Regulate confidentiality of cabinet	52.6	47.4	44.0
22. 5.98	Permit ratification of Amsterdam Treaty	61.7	38.3	55.0
22. 5.98	Approve Northern Ireland Agreement	94.4	5.6	55.6
11. 6.99	Recognise existence of local govt	77.8	22.2	47.2
7. 6.01	Permit ratification of Nice Treaty	46.1	53.9	34.3
7. 6.01	Permit ratification of ICC	64.2	35.8	34.2
7. 6.01	Delete references to death penalty	62.1	37.9	34.3
6. 3.02	Restrict availability of abortion	49.6	50.4	42.7
19.10.02	Permit ratification of Nice Treaty	62.9	37.1	49.3
11.6.04	Citizenship Referendum	79.17	20.83	59.9

Note: Turnout is measured as valid votes as a percentage of electorate.
Source: Updated from M. Gallagher 'Referendum Campaigns in Ireland' Paper presented at the 8th international SISE conference on 'Le campagne elettorali' Venezia, 18-20 December 2003, in turn updated from J. Coakley 'Appendices', in J. Coakley and M. Gallagher (eds.) *Politics in the Republic of Ireland* (3rd edn. London, Routledge and PSAI Press 1999) p. 364-86.

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