

Editorial

To mark the 50th Anniversary of the signing of the Treaty establishing the European Economic Community, signed in Rome on March 25, 1957, the Law Faculty at NUI Galway organised a conference on September 29, 2007. The conference's objective was to critically discuss the transformation of the European Community since 1957 with an emphasis on the constitutional and substantive aspects of this transformation. The *Irish Society of European Law* committed to publishing the proceedings in this special 50th Anniversary volume.

While excellent scholarship on the European Community and the European Union, itself a creation of the Maastricht Treaty, is not in short supply, this special issue of the *Irish Journal of European Law* offers a rather unique set of studies which should help specialists and non-specialists alike look at the "broader picture" from three different angles: the Community/Union as *a constitutional system*, *a common market* and *a global actor*. The authors were advised not to treat all aspects of their subject exhaustively but rather to offer a critical (and accessible) synthesis of the past and current achievements of the Community/Union as well as some reflections on the challenges ahead. It should therefore be a valuable source for anyone interested in the "European project" and may help citizens decide for themselves as to whether this project is nothing less than – as we believe it is – an extraordinary successful venture which transformed Europe for the better.

There is a wonderful variety and selection of eight articles appearing in this volume. For example, Neil Walker considers the question whether sovereignty is no longer an exclusive attribute of the nation states that make up the EU, and examines whether it can now, in some measure, be plausibly claimed by the EU itself without the states themselves having renounced or significantly modified their own claims. He argues that the "sovereignty surplus" underscores the democratic deficit in three ways. It is, first, the deep cause of the democratic deficit. Secondly, the very gravity and divisiveness of what is at stake renders the question of the proper diagnosis and treatment of the ensuing democratic deficit highly controversial. Finally, the sovereignty surplus also makes the question of *praxis* difficult if not intractable.

Nathan Gibbs' contribution considers the notion of "constitutionalism" with a view to elaborating a conception of that idea capable of clarifying its perennial role within the European project. Examining the generally accepted ways of conceptualizing the nature of a constitution - the idea of a constitution in the "formal" or "material" senses respectively, he then considers the limitations of these ways of understanding constitutionalism and an alternative understanding of constitutionalism is proposed.

Laurent Pech further explores these notions. He argues that regardless of

the tragic fate of the Treaty establishing a Constitution for Europe and the European Council's proclaimed abandonment of the "constitutional concept", the existing EU and EC Treaties can already be said to be "constitutional" from a material or functional point of view and that by substantially amending and reorganising the contents of the existing EC and EU Treaties, the Lisbon Treaty further "constitutionalises" the EU. Yet he contends that the EC and EU Treaties, viewed as a whole, can be best described and understood as constituting a "treaty-constitution" and that this hybrid nature is no transitional aberration.

Focusing on the European Court of Justice's move from initial reticence towards embracing the protection of fundamental rights as part of the European Community legal system, Henry Abbott highlights the sometimes uneasy balance between fundamental rights protection and competing Community objectives, looking at several important examples. He also reflects on certain political and constitutional developments stemming from or, in turn, complementing, the Court's fundamental rights jurisprudence and some challenges facing the Court in the fundamental rights area.

Niamh Nic Shuibhne examines the legal principles that underpin the Internal Market and the changing influence and priorities of the EU institutional actors within that process. As part of this process, she also considers the role and significance of the Internal Market within the *current* EU framework. Its durability *beyond* is also questioned, bearing in mind that the EU as a polity presents a radically evolved and deeply complex structure relative to that within which the Internal Market project was originally embedded.

Brendan Flynn considers the fact that while the Treaty of Rome did not mention the notion of environment, yet in a testament to the robustness of the Treaty, the legal dynamic which that Treaty created has led to many effective environmental laws. While some authorities on EU environmental policy have stressed the importance of the Single European Act 1986 in providing a specific legal base for the environmental sector, he argues that it may not have been as critical as is commonly assumed. What has arguably mattered as much, have been the general dynamic competences of the EU institutions, and he argues that we should see European environmental law and policy as having been an evolutionary and cumulative process.

Rafael Leal-Arcas argues that trade policy must become more democratic by empowering the European Parliament, national parliaments, and through citizens' participation. This is of critical importance in modern democracies, given that trade policy is omnipresent. Analysing the evolution of the EC's external trade relations, as well as its common commercial policy competence through the years, he starts with the Treaty of Rome up until the EU Constitutional and Lisbon Treaties, as a background for understanding the EC's present role in the World Trade Organisation framework.

Ben Tonra examines the debates surrounding the nature of the European Union's international capacity, starting with the early idea of the Union as a civilian actor, which has now evolved to one in which the Union continues to

be posited as a new kind of international actor, one which is somehow uniquely capable or uniquely configured as an effective exporter of norms and values in the international system.

It is important to point out that the articles in this volume were finalised well before Ireland's "No" vote to the Lisbon Treaty on June 12, 2008. As is well-known, following two negative referenda in France and the Netherlands in 2005, the European Council reluctantly agreed in June 2007 to abandon the "constitutional concept" and to draw up a new Treaty which will amend rather than supersede Europe's two founding Treaties: the 1957 Treaty establishing the European Community and the 1992 Treaty on European Union. If this were not confusing enough, the new Treaty, signed in December 2007 in Lisbon (Portugal), initially branded as the "Reform Treaty" or "Simplified Treaty", is now known as the "Lisbon Treaty".

In the early Spring of this year (2008), most people still expected Ireland to ratify the new Treaty and authors were requested to make reference to the most significant changes contained in the new Treaty with respect to their subject. Alas, history repeated itself, and to paraphrase Karl Marx, this time as farce. Ireland's failure to initially ratify the Nice Treaty in 2001 was mostly and reasonably explained by a lack of information. This time around, information abounded and voters were bombarded with brochures and pamphlets. This proved not to be enough to convince a majority of the Irish electorate, which rejected the Lisbon Treaty by 53.4% to 46.6% with a "respectable" – in light of previous similar consultations in Ireland – turnout of 53 per cent. Rather than a lack of information, Irish voters mostly expressed their unease with respect to the unintelligible nature of the Lisbon Treaty, which, in turn, allowed the usual suspects to argue against ratification on the basis of ludicrous arguments and/or issues not related to the actual contents of the Treaty.

Rather than the outcome of Ireland's Lisbon referendum itself, EU scholars can only be but disappointed with the quality of the public debate. There is now no doubt following research on the conduct of the referendum campaign, that the Irish domestic requirement that equal public broadcasting airtime be given to the Yes and No sides contributed to the implanting in the public consciousness of the No campaign's many spurious claims in furtherance of the No vote. But this cannot be the sole reason for the failure of the Treaty to pass. Of equal or even more seriousness, is the failure of the combined efforts of the academic, business and political communities to clearly communicate to the general public the nature of the EU's unprecedented system of government. With respect to the unintelligible nature of the Lisbon Treaty, which we will not deny, voters were not receptive to the argument that the Lisbon Treaty is in fact no more complex than a typical constitutional amendment bill and this complexity actually merely reflects Member States' insistence on maintaining the strictest control over the evolution of law-making at EU level. In other words, it is precisely because the EU is *not* a "superstate" but a unique system of government by, of, and for the Member States, with *conferred* and *limited*

powers, which is perfectly democratic in light of what one may describe as its “consociational” nature, that it possesses a complicated rule-book in the form of dense and voluminous treaties. This means that domestic analogies do not always make sense and should be carefully used. For instance, it is absurd to compare European treaties to the Irish Constitution or to argue for the adoption of a “pocket-sized” document in the image of the US Constitution. Not only do these analogies fail to take into account the fact that the EU is neither a state nor a nation, their authors fail to realise that were the EU’s fundamental law shorter and more reminiscent of a national constitution from a stylistic point of view, the more authority and legitimacy the EU could derive from it, at the likely detriment of its founding entities, the Member States.

One can also be surprised to see advocates of Irish sovereignty oppose the Lisbon Treaty on the grounds that it both reinforces the EU’s alleged “democratic deficit” and undermines the influence of “small” countries. For a start, the more “democratic” the EU becomes in the conventional sense, the more “State-like” it will become. Indeed, if one pleads on the one hand for the preservation of as much authority as possible for the Member States, it is entirely contradictory to plead on the other hand for a more democratic EU, as that would certainly lead to a more powerful and independent Union. That is the dilemma. In other words, the EU’s alleged democratic deficit could actually be democratically justified as long as European citizens want the EU to remain the product of its constituent parts (the Member States) and an entity which acts in an extremely consensual manner in the name of the peoples of Europe. In fact, if any Member States have a right to complain about a lack of “democracy”, it is the largest States. As a rule, “small” Member States, including Ireland, benefit from an overwhelming overrepresentation in the EU’s decision-making processes. Without the EU, it seems reasonable to argue that they would have no say in either European or World affairs. Irish “sovereignists” would therefore be well advised to be careful what they wish for.

Regardless of the arguable merits of the EU or of the Lisbon Treaty, this latest ratification debacle plainly confirms that the referendum vehicle is not the most appropriate ratification method for European treaties, or at least those which contain complex and voluminous amending provisions dealing with institutional matters. Such treaties do not correlate in easily communicable terms to the routine of the citizens’ daily life. This is obviously the case with the Lisbon Treaty. To understand and assess it, a great deal of knowledge about the current functioning of the EU is required. The problem is that the most *virtuoso* EU scholar would have a hard time devising a concise and accurate account of the likely impact of the Lisbon Treaty – a rather dull, multi-dimensional and technical amending text – on the EU institutions and the Member States. Unfortunately, critics of the EU, in Ireland and elsewhere, tend not to feel constrained by facts, consistency or knowledge. And with no obvious price to be paid in case of a “No” vote, it is not entirely utterly surprising that a majority of Irish voters saw the referendum as a perfect occasion to express

their frustration about many different things, while some also naively hoped to secure an undefined “better deal” for the vanishing Celtic tiger.

Leaving the case of Ireland aside, one vital lesson is that unanimity in an EU of 27 countries or more does not work. It allows any one, or a small number of countries, to hold up all the others on such a crucial issue of the EU’s basic rules and institutional reform. Furthermore, it plunges the EU into periodic and anguished uncertainty and is the best recipe for lowest-common denominator compromises between the Member States for which the EU is, alas, ultimately blamed. It is time for national governments to seriously reconsider the current EU regime of treaty amendment. We would personally favour, in the name of enhancing democracy at EU level, the setting up of a democratically elected “Constituent Assembly” to draft any new EU Treaty. This is not to say that the “Convention method” – an ad hoc body known as the European Convention was set up in 2002 to draw up the Constitutional Treaty – was not an improvement by comparison to the traditional method of treaty revision whereby an “Intergovernmental Conference”, bringing together representatives of the governments of the Member States, negotiates any new treaty behind closed doors. By contrast, the European Convention achieved new levels of openness and inclusiveness by bringing together representatives of the governments of the Member States but also representatives of their national parliaments, of the European Parliament and of the European Commission as well as observers from the Committee of the Regions and the European Economic and Social Committee, of the European social partners and the European Ombudsman. Yet it would seem nonetheless preferable to offer citizens the chance to directly select their representatives to any “European Convention” to enhance the legitimacy of any radical or significant revision of the founding European Treaties. Regarding the conditions governing the entry into force of European treaties, some mechanism to overcome the unanimity problem should also be negotiated. For instance, Europeans may want to consider “importing” the US practice with respect to constitutional amendment where a super-majority (three-fourths) of the legislatures of the US States suffices. Another (and better) option, in particular when a new treaty contains radical reforms, would be to hold an EU-wide referendum on the same day in all the Member States. The required majority for ratification could then be defined as (for example) at least two-thirds of the Member States, comprising at least two thirds of the EU population.

It would also be useful to articulate beforehand what would happen to the Member State(s) which will be unable to ratify any new EU treaty on this basis. One may suggest, for instance, that the Member States unable to proceed further should be given the choice to vote again, seek an ad hoc exemption from the application of the new rules or exercise their right to withdraw from the EU. As Ireland’s “No” vote clearly shows, it is too easy under current rules to convince national voters that there is nothing to lose by vetoing a new treaty and that, on the contrary, a negative result may well lead to a “better deal” for the country.

Such a reform could in turn lead to a genuine pan-European public debate and increase the chance of having a discussion focusing on the merits and actual substance of the proposed text rather than issues of domestic politics. Any reform would in fact be preferable to the current situation where unanimity formally applies, yet it in reality only seems to be enforced when a “large” and traditionally pro-European Member State says No!

It is a shame that we may have to wait for the Irish to reject the Lisbon Treaty in an eventual second referendum before having a meaningful discussion on what is the most democratic way to ratify new European treaties. Irish anti-Treaty advocates must however realise that the more “democratic” the EU, the less influence Ireland will have at the European level.

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