

HUMBERT SUMMER SCHOOL

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LIFE AFTER LISBON : SOVEREIGNTY & JUSTICE

by

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‘Spin reinforced a vicious circle of suspicion in politics, while a calculating politician, a cynical media and a distrusting public reinforced one another to hollow out the national conversation.’

Alpha Dogs by James Harding

We are in a very serious situation. 160 of our 166 TDs urged us to vote Yes. Some were more vocal in their urgings than others. Six TDs recommended a No vote. 862,415 people voted No and 752,451 voted Yes. The importance of the Lisbon Treaty was initially downplayed. The Minister for Foreign Affairs described the changes under the Treaty as *‘minuscule’*. The reality of course is far different. The changes are significant far-reaching and in many respects unclear in their implications long-term. There is no doubt that the Treaty was a big deal.

Therefore the rejection by the people of the recommendation of the Government and largest opposition parties can fairly be described as a vote of No confidence in those parties on an issue of vital national importance. It is not unreasonable to suggest that the proper course of action in these circumstances would be to have general election so that the breakdown in trust between the electorate and the elected representatives could be assuaged.

Of course we are not going to have a general election however merited in principle it would be. Instead what appears to be happening is that our Government is engaged in feverish furtive attempts to bypass or reverse the effect of the sovereign decision of the people. I will say a little bit about the particular stratagems later.

To begin lets briefly recall some salient facts.

The Treaty of Lisbon was a major document in every sense. We are told it was the product of seven years' negotiations. If so then the negotiations may have overlooked the small matter of bringing the people along with the process. As Oscar Wilde said '*to lose one parent may be regarded as a misfortune; but to lose both looks like carelessness*'. The product of these years of negotiations whether in the form of the Constitutional Treaty or the Lisbon Treaty has now been rejected by the electorate in no fewer than three countries, France, the Netherlands and Ireland. It is commonly recognised that it would be rejected in many others if the opportunity was given to their electorates to vote on it.

'The most striking change [between the Lisbon Treaty and Constitutional Treaty] is perhaps that in order to enable some governments to reassure their electorates that the changes will have no constitutional implications, the idea of a new and simpler treaty containing all the provisions governing the Union has now been dropped in favour of a huge series of individual amendments to two existing treaties. Virtual incomprehensibility has thus replaced simplicity as the key approach to EU reform. As for the changes now proposed to be made to the Constitutional Treaty, most are presentational changes that have no practical effect. They have simply been designed to enable certain heads of government to sell to their people the idea of ratification by parliamentary action rather than by referendum'. Garret FitzGerald, *Irish Times*, 30 June 2007

I respectfully agree with Dr FitzGerald's view although of course I disagreed with his recommendation to vote Yes.

A remarkable feature of the Lisbon campaign and one that received little attention, was the mulish refusal of Government to refuse to tell the electorate why a referendum was necessary. In other words what was it that Lisbon would change in our Constitution that required us to ratify it by way of a constitutional amendment. The Government had advice on this precise point from the Attorney General but refused to divulge it to the public who had paid for it. The public was instead presented with a deliberately cynical strategy which the Government wrongly thought would stampede people into voting Yes in sufficient numbers. That strategy, as well including the withholding of essential basic information about why we were asked to vote on this, also included withholding final confirmation that there would in fact be a vote by way of referendum until shortly before the Referendum Bill was put through the Dáil. While people assumed they would have a vote, if you look closely at the official position you will see that this was never confirmed until very late in the day and as I say, this was then done without explaining to people why a referendum was necessary.

We had the astonishing report (leaked through the British Foreign Office) of discussions between our Department of Foreign Affairs and the British Foreign Service about elements of this strategy which were very disturbing. The overall picture was one of a Government ganging up with other interests against its own people. The situation was truly shocking.

People are not naïve and the Irish electorate is one of the most sophisticated in Europe. They saw what was going on and they knew that it was wrong and they voted accordingly.

They did this after a campaign in which the Government failed completely to give any reasoned justification for a Yes vote and confined itself to personalised vicious attacks on anyone who dared

to put their head above the parapet and call for a No. Dissent was not to be tolerated. It was to be rendered unthinkable. Apart from abuse, the other tack taken by the Government came in the form of vague platitudes to the effect that we needed to '*remain at the heart of Europe*' where we '*punch above our weight*' whatever that may mean.

Well we all now know the outcome. In Mayo 18,624 voted Yes and 30,001 voted No. In every part of the country, urban, rural, north, south, east and west people turned out to vote this Treaty down in unprecedented numbers.

We joined the people of France and the Netherlands in having expressed our view on the Lisbon type formula which sees greater centralisation of power in the EU and in the hands of the individual ministers of government who make up the Council of Ministers.

The promoters of the Treaty do not like being opposed and moves are now afoot to overcome the irritation of our No vote.

The proud Scot Sean Connery in his book *Being a Scot* recalls how the first big break in his life came when he was five years old. He says he did not realise it for another 70 years. Age five was when he learned to read. Reading the Lisbon Treaty was something we were told we did not need to do. We simple needed to trust the judgement of our betters and do as we were told. That is never a wise course of action particularly when our betters are seeking to improve their powers and job prospects at our expense. Mr Cowen and Mr McCreevy could have saved themselves some embarrassment had they learned the lesson so eloquently expressed by Sean Connery on the wisdom of reading.

I work as a solicitor concentrating currently in the areas of environmental and planning law. These are areas of practice that have significant European law components. One of the basic needs in any civilised society is an effective system of access to justice. Without that the powerful can trample on the powerless with impunity. Traditionally the Irish legal system has striven to ensure that access to justice is as widely available as possible. In part access depends on formal rights such as the standing to bring a court case and availability of legal aid. Equally it depends on more intangible factors such as the availability of a body of lawyers equipped to argue cases competently across a broad range of areas. The issues of access to justice are problematic at EU level for reasons that are clear enough once we look at the history of the EEC.

Initially established to serve an organisation dealing primarily with trade and market issues the European Court of Justice had a limited remit. although it had a vocational role in enlarging its scope and powers, and those of the communities it was set up to serve. The ECJ's role was to resolve rows between the EC's institutions and member states. Big corporations which were directly affected by Community decisions also have a right of access to the ECJ. However, the access of individual citizens to the ECJ in general depends on the grace and favour of our Supreme Court to refer a case to the ECJ, or on a decision by the Commission to act on a complaint.

In the early stages, it may have been appropriate for individuals effectively to have been shut out from having any right of access to the ECJ. As time goes on and the role of the European Community and the Union and the ECJ expands, this exclusion of people from direct access to justice is indefensible. The informal complementary problem has also become more severe, namely the difficulty in finding accessible affordable legal advice from people equipped to give that advice in areas involving the interplay of European and Irish law. Compartmentalisation and specialisation are accompanied by increasing remoteness from people. The Lisbon Treaty by expanding further

the areas of competence of the EU and ECJ would have compounded these problems but even without the Treaty, these remain real problems in need of urgent attention.

The Government is now attempting somewhat desperately to find a way out of its proper role which would be to effectively represent the people and to do so by respecting and vindicating the decision to reject the Lisbon Treaty.

The British Foreign Secretary made it clear before the summit which followed the No vote that Brian Cowen had the right to bury the Lisbon Treaty. Mr Cowen chose not to do so and instead appears to have been put into a position of adversary to his own people. The current straws in the wind indicate that there are two possible avenues being explored by Government and its acolytes to bend us to their will.

One is the suggestion that the Treaty really did not need a referendum at all and that therefore it will be possible to ratify it by resolution by the Dáil and Seanad.

We had a referendum because it was necessary legally to have referendum. It was not held as an optional extra. While it would have been courteous to the electorate to explain why it was necessary and to publish the Attorney General's advice in that regard, failure to do so does not change that essential fact. By the same token, attempting or purporting to ratify the Lisbon Treaty by the Oireachtas would be illegitimate and would precipitate a constitutional crisis. The fact that normally serious commentators have actively promoted this idea does them no credit. If the Government attempt this they can expect trouble.

The second method under consideration is simple rejection of the validity of the No decision by ignoring it and asking us to try again. As a fig leaf there is a talk of declarations being somehow

tacked onto the Treaty as if these would have any meaningful effect in law. Of course they would not. Declarations are of no legal significance when it comes to Treaties of this kind. They are not part of the Treaty and they do not affect its content or interpretation by the European Court. That is what differentiates them from the text of the Treaty itself or Protocols appended to the Treaty which do have those effects. Presenting the Lisbon Treaty with as many declarations as they like is, in legal terms, simply asking us to vote again on the same legal document. The Government has the capacity to do this in that they control the legislature and can pass as many referendum bills as they like. That does not make it legitimate to do so. In fact it would be an unprecedented breach of faith with the citizens of a most egregious nature.

The EU/EC has many virtues and many failings. Like any organisation there are people involved at its core who spend much mental energy devising ways to aggrandise their positions and enhance their influence. Lisbon is part of that process and it has been soundly thrashed now three times. The EEC/EU is beginning to resemble a multinational HSE, a body stuck in perpetual efforts to restructure itself instead of concentrating on the job it is paid to do. This must stop. It is time to get back to work.

If a case for sensible constructive change exists and can be shown to exist then let us hear it. We have not heard it so far. Meanwhile let's have some respect for the people of Europe in whose decisions commonsense and wisdom reside.

The dilemma facing Europe is not an Irish dilemma. It is a European wide dilemma of constitutional legitimacy. We are told that we gain by pooling our sovereignty in the EEC. No doubt there is truth in that. However, sovereignty must be accompanied at all stages with its partner justice. *'Without Justice'* St Augustine asked *'what is Sovereignty but organised robbery?'*

Thanks to our Irish constitution, born of our historical experience which gives the right to individuals to restrain efforts by elected representatives to abuse their powers, or to enlarge those powers or give them away, Irish people had the opportunity to vote on the Treaty. Deliberate obfuscation as Garret FitzGerald described, succeeded in depriving other European citizens of that opportunity. This is all the more ironic when we read the fine words in Lisbon:

‘Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen’ (Article 8.A.3 Treaty of European Union as it would have been amended by the Treaty of Lisbon).

Ireland has preserved for the European Community and Union the opportunity now to come to its senses. It is time to address the practical problems that need to be faced in a way that will ensure the organisation’s survival into the future.

End.