

*Legal issues arising from the proposed Constitutional amendment
and from the Lisbon Treaty.*

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As this national debate draws to a close it is timely to summarise a number of issues that have a legal as well as a political aspect. It is now possible to assess the claims from both advocates and opponents of the constitutional amendment of which we will vote on Friday, and on the Lisbon Treaty.

Preliminary

It is important to recall that legally we are voting on Friday on whether to adopt a proposal to amend Bunreacht na hÉireann. The text of the amendment is as follows, with some words in square brackets being added by me: -

1° The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government. [unchanged]

2° For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern. [unchanged]

3° The State may become a member of the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). [trimmed by eliminating references to EEC, ECSC and SEA]

4° Ireland affirms its commitment to the European Union within which the member states of that Union work together to promote peace, shared values and the well-being of their peoples.

[new]

5° The State may ratify the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on the 13th day of December 2007 (“Treaty of Lisbon”), and may be a member of the European Union established by virtue of that Treaty. [new]

6° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union referred to in subsection 5° of this section or of the European Atomic Energy Community, or prevents laws enacted, acts done or measures adopted by—

i the said European Union or the European Atomic Energy Community, or by institutions thereof,

ii the European Communities or European Union existing immediately before the entry into force of the Treaty of Lisbon, or by institutions thereof, or

iii bodies competent under the treaties referred to in this section,

from having the force of law in the State. [modification of present text]

7° The State may exercise the options or discretions—

i to which Article 20 of the Treaty on European Union relating to enhanced cooperation applies,

ii under Protocol No. 19 on the Schengen acquis integrated into the framework of the European Union annexed to that 25 treaty and to the Treaty on the Functioning of the European Union (formerly known as the Treaty establishing the European Community), and

iii under Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, so annexed, including the option that the said Protocol No. 21 shall, in whole or in part, cease to apply to the State, but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas. [new]

8° The State may agree to the decisions, regulations or other acts—

i under the Treaty on European Union and the Treaty on the Functioning of the European Union authorising the Council of the European Union to act other than by unanimity,

ii under those treaties authorising the adoption of the ordinary legislative procedure, and

iii under subparagraph (d) of Article 82.2, the third subparagraph of Article 83.1 and paragraphs 1 and 4 of Article 86 of the Treaty on the Functioning of the European Union, relating to the area of freedom, security and justice, but the agreement to any such decision, regulation or act shall be subject to the prior approval of both Houses of the Oireachtas. [new]

I will examine some of the new elements of the amendment in more detail later.

The essential purpose of the amendment is to give permission to the government to ratify the Lisbon Treaty which was signed in the name of Ireland by then Taoiseach Bertie Ahern in Lisbon on 30th December 2007. Mr. Ahern's autograph is now engraved in a stone tablet on a footpath in Lisbon outside the building where the signing ceremony took place.

It is legally significant that the amendment wording before us on this occasion is different to the wording presented to us on June 12th 2008. No explanation has been tendered by the government or indeed by the Referendum Commission for the difference in wording. Again I will comment further on some particular aspects of the difference below.

As a final preliminary comment, I share the view expressed by the members of the Referendum Commission currently constituted and previous Referendum Commissions to the effect that their ability to carry out their role is severely constrained by the ridiculous limitations both in terms of time and other resources given to them for that purpose. It is undeniably the case that the government decision taken after the first no to Nice to effectively trammel the Referendum Commission has had an adverse effect on all subsequent Commissions.

“Guarantees and Assurances”

The “Guarantees and Assurances” presented by the Government as a justification for seeking a different answer from the Irish people to that which was delivered by 862,415 voters just over a year ago consists of the so called “Guarantees and Assurances”. These relate to

matters which one party in the controversy – namely the Government – chose for its own self serving purposes to select as reasons why the other party in the controversy – the majority of the Irish people – had chosen to reject last year’s constitutional amendment proposal. The opinion poll was a closed question poll, where respondents had to pick from a limited pre-determined list of ‘reasons’. The process was fatally biased from the start.