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The Nice Treaty and the Irish Referendum: What Values are at Stake

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Abstract

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1. Introduction

On 8 June 2001, the Irish electorate voted on the ratification of the Treaty of Nice. The treaty was agreed, after much acrimony, at the European Council meeting in Nice, in December 2000. It represents the latest revision of the charter of the European Union (EU) and will have to be ratified by all member countries before it can take legal effect. The deadline for ratification is 31 December 2002. Ireland was the only one of the fifteen member states that was legally obliged to put the matter to its citizens in a referendum, the consequence of which was a rejection of the treaty by 54 per cent of those who voted.

The outcome of the referendum has provoked varying reactions. To those who had been opposed to the Nice Treaty, it was a vindication of democracy and signaled the death of the treaty. To those who supported the treaty (including all the governments of the EU member states), the result was viewed as an undesirable setback and some doubt was cast on its democratic validity. Three days after the referendum, the conclusions of a meeting of the General Affairs Council (EU foreign ministers) expressed their regret at the result of the referendum and *"excluded any reopening of the text signed in Nice"*.¹ The Presidency conclusions of the subsequent European Council indicated their support for the conclusions of the General Affairs Council and indicated *"..a willingness to contribute in every possible way to helping the Irish government find a way forward"* (Presidency Conclusions: Göteborg European Council 15 and 16 June 2001). The low level of voter turnout (35 per cent) was also cited as somehow casting doubt on the legitimacy of the democratic exercise. More recently, the former Irish Taoiseach John Bruton stated that it would be *"..more democratic to vote twice than to try and find a way round enlargement"*. He added *"We are a nation of just 4 million citizens, but we are affecting a Union of 470 million people"*. He has also suggested ending the practice of putting each new EU treaty to the popular vote.²

¹2356 Council-GENERAL AFFAIRS Press Release, Luxembourg (11/6/2001)-Press: 226 Nr: 9398/01
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The background to the Irish referendum, the outcome of the referendum and the reaction of the political establishment in Ireland and the EU raises very interesting questions about the conduct of meaningful democracy. Is democracy served by a plebiscitary vote in only one of the 15 member states? If not, is the solution a referendum among all EU citizens and some other formula for determining the outcome, such as, for example, the requirement for a double majority (a majority of EU voters and EU member states)? The suggestion that Irish referenda on EU treaties be discontinued would appear to imply that when direct democracy (as opposed to representative democracy) is absent in 14 of the 15 member states, the cause of democracy is best served by weakening democracy in the one member state where its application is strongest. This is quite a perverse argument if the objective is more meaningful democracy in the EU.

Voter confusion and a lack of understanding of the issues contained in the Nice Treaty have also been advanced as a justification for a second referendum on an unchanged treaty. In a survey conducted on behalf of the European Commission Representation in Ireland, it was revealed that 63 per cent had only at most a vague idea of what were the issues in the treaty. (Sinnott, 2001). This begs the question as to the reasons for a uninformed citizenry? One objective of this paper is to highlight the complexity of some of the issues contained in the treaty and to show that even legal opinion was divided on the outcome of certain provisions (for example, enhanced co-operation). Furthermore, some of the decisions taken at the Nice summit appear to have been done in such a way as to hinder clarity on the pertinent issue (I'm thinking of European Security and Defence Policy). This points to a political failure at EU level to present the issues in a clearer way and a political failure of the Irish government to devote the necessary time and energy to explaining the issues to the Irish electorate. As the social theorist Jurgen Habermass has pointed out, true democracy requires a critically aware public if the exercise of political domination, through, among other means, media manipulation, is to be truly accountable. (Habermass, 1962).

It may also be the case that many citizens voted against the Nice Treaty for reasons to do with fundamental values that they do not feel are sufficiently protected within the EU as currently constructed. For some of the groups opposed to the treaty (like

Sinn Fein and the National Platform), national sovereignty was an important issue. National sovereignty may be considered an end value in itself or an instrumental value, in the sense that democratic accountability is best preserved within the nation state and hence any steps toward a supranational state are to be resisted. If the real end value at stake is democratic accountability, then one has to address how this can best be preserved within the EU. It must also be recognised that different values can conflict. A single market and currency and a centralised bureaucracy may have certain efficiency benefits but the cost of those benefits is less democratic control. The recent upsurge in anti-globalisation protests serves as a timely reminder that many people are not as apathetic and de-politicised as is commonly presumed. Furthermore, it reveals the frustration felt by many citizens at their inability to influence the political agenda or to participate politically in a meaningful way. Finally, it underlines how important meaningful democracy is to the maintenance of social order.

The rest of this paper looks at the background to the Irish referendum, some of the contentious issues in the treaty and the aftermath of the vote in terms of its democratic implications. Other questions regarding values (and how they might conflict) will be addressed in the ultimate section.

2. Legal context of the Irish referendum

Ireland was the only member state of the EU, where citizens, in the form of a referendum, got to vote on the ratification of the Treaty of Nice. Our exceptional democratic practice could be regarded as a matter of public concern for citizens of the EU. Referenda, while not practicable where all matters of policy are concerned, are certainly feasible and desirable where what is being voted on will have a major impact on the lives of the citizens. Voting on a complex treaty may not be an example of democracy in its most positive and participative sense, but it still adheres to the fundamental liberal idea that sovereignty resides with the people.

The necessity of a referendum in Ireland derived from the protection of sovereignty provided by Article 6 of the Constitution and the surrender of sovereignty inherent in

our increasing integration within the EU. However, from the perspective of an active, functioning citizenry, it is salutary to remember that the preservation of this democratic procedure was as a consequence of the successful Supreme Court challenge by one individual (Raymond Crotty) on the Single European Act (1987). Since then, the Irish public has voted on all changes to the European Community/European Union Treaties, such as the Treaty on European Union (1992), the Amsterdam Treaty (1998) and the Treaty of Nice (2001).

One of the critiques of the liberal concept of democracy and its notion of political equality among persons is that it ignores the reality of the inequality of influence that derives from unequal resources, where the latter are information, finance and organisational capacity. Removing the capacity for the exercise of disproportionate influence on the electorate can only be regarded as a step in the direction of the democratisation of the political process. As far as Irish referenda are concerned, this right was strengthened by the Supreme Court decision in the McKenna case (1995), which declared unconstitutional the use of public funds to present one side (the government side) of a referendum. This led to the 1998 Referendum Act in which the Dail provided for the setting up of a Referendum Commission, whose task it is to inform citizens of the subject of the referendum and to set out the main arguments in favour and against the proposed amendments to the constitution. In a related case (Coughlan 2000), the principle of free uncontested broadcast coverage, or 50:50 coverage by the National Broadcast Agency was confirmed by the Supreme Court.

What events in Ireland illustrate is that direct democracy has been preserved due to the existence of certain rights contained in a written constitution and the vigilance and commitment of some citizens who, at considerable financial risk to themselves and their supporters, appealed to the judicial system to uphold these rights. However, it could be argued that a healthy functioning democracy should be more robust and its institutions should facilitate awareness and activity among a more sizeable portion of the electorate. Furthermore, the financial risk factor associated with such actions can only serve to discourage citizens from taking active steps to preserve what are ultimately basic citizen rights.

A former Attorney General, John Rogers had claimed that if the Nice Treaty is eventually ratified, it will probably be Ireland's last referendum on how the EU should develop. This is due to the provisions on enhanced co-operation that will be discussed subsequently. This can only be a matter of concern if one believes that the referendum process is an important cornerstone of a functioning (as opposed to a formal) democracy.

3. Economic and Social Context of the Irish Referendum

According to the standard indicators of economic prosperity, Ireland's economy has not only flourished in recent years, it has converged on and surpassed the EU average. The remarkable nature of the economy's growth is further emphasised when juxtaposed with the economic performance of the other peripheral and poorer EU member states (see table 1).

Table 1: GDP per capita relative to the EU (15) average
EU = 100

	Ireland	Portugal	Spain	Greece
1983	64	55	71	62
1993	80	69	78	65
1995	90	70	76	64
1997	100	70.4	77	64
2000	118	77	80	68

Source: Eurostat

Ireland has benefited directly from EU transfers via the Structural Funds and the Cohesion Fund. The former was directed at regions where income per capita was less than 75 per cent of the EU average and the latter was aimed at the four countries in table 1, to help them prepare for monetary union. Ireland was considered one region for the purpose of Structural Funds until the year 2000. Table 2 shows the extent of

such transfers on a per capita basis, revealing in the process the relatively favourable position that Ireland enjoyed vis a vis other Objective 1 regions. It is expected that the country will become a net contributor to the EU budget after 2006.

Table 2: EU Aid per capita by Objective 1 (Ecu)

	1989-93	1994-99
Ireland	252	262
Portugal	171	235
Spain	91	188
Greece	150	225
EU	123	169.5

Source: Eurostat

Very few commentators would dispute the centrality of the EU to Ireland's economic success. This is not to minimise the role played by foreign direct investment (FDI) and the domestic policy environment (in particular, social partnership and low corporate taxes) but it would be foolhardy to dispute that a prime motivating factor behind multinationals locating in Ireland was access to the EU market. In survey conducted after the Nice referendum, 72 per cent of the Irish adult population believed that Ireland's membership of the EU was a "good thing", a level of support that is 25 percentage points above the European average. (European Commission, 2001).

The percentage who turned out to vote on the Nice Treaty was less than 35 per cent of those eligible to vote and the Yes vote registered was 46 per cent. In 1972, when Ireland voted to join the European Economic Community, the turnout was 71 per cent and the Yes vote recorded was 83 per cent. The trend in the intervening years has been generally for lower levels of voter participation and lower levels voting Yes compared to 1972.

It is a spurious though tempting exercise to attribute changed Irish attitudes to the EU to our improved economic situation and our imminent change of status from net beneficiary of EU fiscal transfers to net donor to the EU budget. Yet this view was widely articulated in the aftermath of the referendum.³ Its articulation in the foreign press is unsurprising given the Taoiseach's statement in advance of the referendum that "*Neither our present partners nor the applicant countries would be able to understand why Ireland rejected the treaty when Europe has been so positive for us*" and "*...it would be mean-spirited in the extreme to deny the applicant countries...*"⁴ The idea that the country was morally obligated to support the treaty is an affront to the value of freedom of choice and antithetical to the ideal of a Union in which all member states are legal equals. One reason for this interpretation of the motivation of the Irish electorate can be attributed to the presentation of the treaty as one necessary to allow for the enlargement of the EU, to incorporate the poorer economies of Eastern Europe. Yet most of the principal groups advocating a No vote claimed to be in favour of enlargement. Central to their varied positions was that the Nice treaty was not about enlargement but about, inter alia, militarisation of the EU, fear of a two tier Europe and loss of sovereignty. It was mentioned in the aftermath of the referendum that those advocating a No vote did not want to *be seen* (my emphasis) to oppose enlargement (Laffan, 2001). Questioning the motivation of the No campaign in such a way is neither fair nor scientific. What has been revealed about Irish attitudes to enlargement is that only 15 per cent of those surveyed were opposed to it. (Sinnott, 2001). What needs to be explained is the high proportion of the electorate that did not vote, the rejection of the treaty by the majority that did vote allied with general public support for enlargement. This brings us back to the issues raised in the introduction regarding lack of understanding of the issues, a lack of comprehension that was not resolved by the debate between the opposing camps who claimed that the treaty was about wholly different things.

³See for example the editorial in the *Guardian Weekly* June 14-20, 2001.

4. Some of the contentious issues

4.1 Is the Nice Treaty necessary for enlargement?

The stated aim of the Treaty of Nice was to introduce institutional changes in order to prepare the EU for enlargement. This was also how the treaty was presented by politicians advocating a Yes vote. The Irish Referendum Commission made no reference to enlargement in the information booklet that it produced, an omission that earned it the criticism of some of the politicians calling for a Yes vote. The No campaign claimed that enlargement was legally possible under existing EU law. They emphasised that the institutional changes contained in the Nice Treaty would come into force (if the treaty was to be ratified), even if none of the applicant countries gained admittance. They claimed vindication of their position when subsequent to the referendum, the European Commission President, Romano Prodi stated that ratification of the Nice Treaty was not **legally** necessary for enlargement.⁵ He later stated that ratification was **politically** necessary for enlargement to proceed.

4.2 Does the Nice Treaty militarises the EU for the first time and endanger Irish neutrality?

It is now widely accepted that the defence and security aspect of the treaty, and its implications for Irish neutrality, were a key reason behind many citizens voting No. Politicians supporting the treaty also vehemently dispute the claim that ratification would compromise Irish neutrality. Forty per cent of those surveyed in the aftermath of the referendum favoured strengthening Irish neutrality. (Sinnott, 2001). The principal argument of advocates of the treaty was that its defence and security provisions did not represent a major advance on what is contained in existing treaties.⁶ They pointed to the fact that the European Rapid Reaction Force (ERRF), to which Ireland will contribute 850 troops, was established prior to the Nice treaty and also dispute that the force is a European army. Conditions attached to Irish participation

⁵ *Irish Times*, 21 June 2001.

⁶ See for example, Daniel Keohane, "Ireland should embrace military non-alignment", *Irish Times*, 12

in ERRF activity are that it will only happen for military actions sanctioned by the United Nations and will also be subject to approval in the Dail. The treaty provides for a new Political and Security Committee (to replace the existing Political Committee) and gives it, under the authorisation of the Council, "political control and strategic direction of crisis management situations". In addition, many of the references to Western European Union (which to date has been responsible for EU defence policy) have been eliminated. These changes are considered necessary to improve the EU's procedures and effectiveness in the security field.

Concern about the increased militarisation of the EU and its implications for Irish neutrality if the Nice treaty was to be ratified, was most clearly expressed by Andy Storey of the advocacy group, Action from Ireland (AFRI). It was asserted that non-participation in a mutual defence pact is too narrow a definition of neutrality and that the outcome of the Nice summit included, in addition to the treaty, a Declaration on European Security and Defence Policy (ESDP), a Presidency report on ESDP and Annexes on the military capabilities of the ERRF and relationships with NATO. Furthermore, government guarantees regarding Irish troop deployment were considered insufficient to ensure that such operations would genuinely contribute to international peace and security (Storey, 2001). The Irish government's record on Ireland's participation in NATO's partnership for peace (PfP) did not help its credibility with the electorate.

It is not an easy task to evaluate both sides of the argument. It would appear both sides of the debate are proceeding from a different definition as to what constitutes neutrality and what are the implications of the Nice summit. The pro treaty side define neutrality as non-participation in a mutual defence pact and view the proceedings of the Nice summit as simply the Treaty. The anti treaty side call for a more meaningful (meaning broader) definition of neutrality and view the outcome of ratification of the treaty as conferring legitimacy on, in addition to the treaty, the Nice Council Presidency report on ESDP, its Annexes and the Declaration. One question that needs to be asked is why it was necessary to codify defence and security policy in such an inaccessible way and why all proposals could not have been contained in the treaty (or in a protocol to the treaty). Lack of transparency on

the issue does not make for an informed electorate. It raises doubts as to whether clarity on the future direction of European Security and Defence Policy was desired by EU heads of State. Another example of the secrecy and lack of accountability that pervades defence and security issues was the attempt to classify all EU documents that related to or referred to NATO.⁷

4.3 Does enhanced Co-operation create a two tier Europe?

This provision (introduced in the Treaty of Amsterdam) allows a subset of member states to use the institutions and laws of the EU to further co-operation and deepen integration amongst the group of self-selected member states. The Nice treaty amends the existing arrangement in a number of important respects, but principally by removing the veto at European Council on Community matters and stipulating that the arrangement will require a minimum of eight member states (under Amsterdam it was at least a majority). The conditions for its use stipulate that it should be a last resort measure, it must further the objectives of the Union, it must respect the *acquis communautaire* and it cannot undermine the internal market or economic and social cohesion. Any Member State may join the enhanced co-operation that is in operation.

The legal debate surrounding the implications of this provision for the future evolution of the EU illustrates the challenge the average citizen faces in trying to make an informed judgement on an important issue. Defenders of the provision claim that it is necessary to introduce elements of flexibility into a union that is becoming increasingly diverse and heterogeneous, in order to maintain the momentum of ever closer integration. Critics view it as one of the more pernicious elements of the treaty, which will herald a departure from the concept of the EU as a union of legal equals and instead divide membership into first and second class.

Jacques Delors, the former Commission President perhaps unwittingly reinforced these fears when he spoke of "...a Federation for the avant-garde".⁸ The apparent openness of the arrangement to all member states does not allay fears, as some

⁷ Nuala Ahern, *www.ireland.com*, 5 June 2001

countries may have neither the will nor the capacity to participate. This is especially true for the accession states and it fundamentally changes the terms of their membership compared to existing incumbents. The application of the flexibility principle contained in the enhanced co-operation provision would also result in countries being bypassed. Deeper integration could proceed without the necessity of a fundamental change in the treaties of the EC/EU. This is why the former Attorney General John Rogers asserted that if the Nice Treaty were to be ratified, it would be the last time that the Irish electorate would get to vote on fundamental changes to the EU. The increased use of flexibility would also add to the complexity of EU structures, with negative implications for transparency. (Gillespie, 2001).

4.4 Do the new institutional measures reduce the sovereignty of the smaller states?

The new institutional measures proposed in the Nice Treaty would have an impact on how decisions are made in the EU. It is proposed to re-weight the votes in the Council of Ministers in favour of the larger member states, to extend the number of areas where decisions in Council are taken by qualified majority vote (QMV) and to change the rules as to what constitutes a legitimate majority or blocking minority in the Council. Furthermore, it is proposed to reduce the number of Commissioners to less than the number of member states, when the EU's membership reaches 27 countries. The rotation of Commissioners among member states will be on an equality basis. The Commission President will be selected by QMV in Council (presently unanimity applies) and will have increased powers.

Despite the detail regarding voting weights and what constitutes a qualified majority or blocking minority, this appears to be one aspect of the Nice Treaty where it should be easier for the citizen to make an informed judgement. The conflict between both sides is clearly one of values as opposed to differing interpretations as to the implications of certain provisions. Smaller countries at present have a voting weight in the Council of Ministers that is greater than their population weight in the EU. The proposed new measures would marginally rectify that imbalance. The extension of QMV means that a country can be outvoted in Council. The increased powers of the

Commission President indicates greater centralisation of executive action. For those who regard as fundamental the primacy of national government in political decision making, the reweighting of votes and the further limitations of the use of the veto, represents an unacceptable erosion of national sovereignty. For those more concerned with democratic accountability, independent of the sovereignty issue, the challenge is one of transparency of decision making and the existence of checks and balances. Centralised bureaucracy and the extension of QMV may make political decision making more efficient and dynamic but that is a different value to the value of democratic accountability.

5. Values

What are the values that define the European Union at the beginning of the third millennium? An examination of its structures and practices is more revealing than the rhetoric. The single market and single currency initiatives and the increasing momentum to liberalise all services reveals a value that assumes that the extension of the market into more areas of social activity is a positive development. The presumption is that it will result in increased levels of economic activity, which may or may not improve the quality of life for EU citizens. Apart from the presumed efficiency effects of the market (which can be challenged), it is an empirical fact that social inequality is greater in societies where markets are less regulated. Whether markets are a panacea for material poverty is a more open question. A narrow libertarian interpretation of individual liberty views the extension of the market as the best means of protecting such liberties from coercive government. A broader definition of liberty, as the capacity of the individual to be autonomous, is more compatible with a progressive social agenda, which calls for more, not less, government. A social system that encourages individuals to view their interests as being individual rather than collective, is unlikely to be conducive to social solidarity. Confining individual choice to the private sphere of consumption, as opposed to facilitating citizen participation in the public sphere, serves to reinforce an individualistic and materialistic ethos. The narrowing of economic and social policy options because of the perceived constraints of globalisation has recently resulted in citizens bypassing a

political structure that they perceive to be not susceptible to democratic controls. This has not proved conducive to social order. Democracy is one way by which society mediates among competing values. It is a value that can be defended on basis of self-government; that is to say, a citizen accepts the rules imposed upon her because she agreed to the procedures by which those rules were determined. These rules will have more democratic validity if they are the collective outcome of a critically aware public. At a minimum, respect for the value of democracy means respecting the outcome of a democratic procedure (like the Nice referendum result). The rejection of the Nice Treaty, despite being supported by all the major political parties, the social partners, the church and the media highlights the limitations, in a representative sense, of democracy mediated by bureaucratic and often hierarchical organisations. It also raises questions about the internal democracy of such groups (including political parties) and the accountability of their leadership, if the group position is so out of touch with their membership, as must have been the case.

The institutional challenge of a more transparent and accountable Union is now finally being acknowledged with the establishment of the Convention on the future of Europe. However, meaningful democracy will necessitate a departure from empirical superficiality, which conflates what exists with the limits of what is both possible and desirable. Above all, politicians need to remember the words of the political philosopher Hannah Arendt to the effect that democracy is inherently fragile. The response of EU politicians in the immediate aftermath of the Irish referendum result revealed, at best a major public relations error, or at worst, the manifestation of deeply undemocratic elements in the operation of the EU.

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