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Referendum Re-runs and the EU's Commitment to Participative

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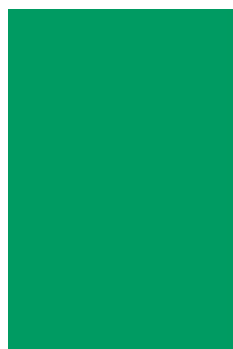
A Fatal Contradiction?

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Referendum Re-runs and the EU's Commitment to Participative Democracy-

## A Fatal Contradiction?

Since the foundation of the European Economic Community with the Treaty of Rome in 1957, the growth in European economic co-operation has always carried with it the notion that Europe is a force for democracy and the promotion of the rights of the citizen. European co-operation was not only the symbol of post-war reconciliation but also the antidote to the barbarism of the dictatorships which had ravaged the continent. As the European project evolved and elaborated a political framework through the various treaties, the notion of participative democracy was a touchstone for European values. The integration of the Mediterranean former dictatorships in the 80s and most recently of the former Communist countries of Central and Eastern Europe symbolically placed democracy at the heart of the European project. Europe, as the cradle of democracy, welcomed its prodigal children back into the democratic community by extending to them membership of the European Union. However, for all its vaunting of its unyielding commitment to democratic values, the European Union has often been criticised, across the spectrum from Federalist to Eurosceptic, for its notorious “democratic deficit”. These critiques have centred on the dearth of participative democratic action in the Union’s institutional life, ruled over by appointed bureaucrats with minimal input from directly elected politicians. This paper intends to take a new approach to the analysis of the gap between the democratic rhetoric of the European Union and the reality of its policy, not by exploring the well worn path of the institutional democratic deficit, but rather by examining the specific cases of EU policy and the referendum re-runs in Ireland. Beginning with a brief explanation of the context of the defeats of the first Nice and Lisbon referendums and the subsequent successful re-runs, this paper will then examine the contrast between the commitment to participative democracy expressed in the Union’s founding treaties and the policy pursued by EU leaders following both referendum defeats. This policy will then be compared and contrasted with that which the Union’s leaders pursued in the wake of the defeat of referendum for the European Constitution in the Netherlands and France. Finally, we hope to draw some conclusions from this analysis which could help inform future EU interaction with direct democracy.

### IRISH REFERENDUM RE-RUNS

While superficially the defeats of the first Nice and first Lisbon Treaty referendums seem indicative of a wider phenomenon in Irish electoral history, further analysis shows significant differences between both No votes.

The rejection of the Nice Treaty in June 2001 was largely the result of an extremely high level of abstention (66%).<sup>1</sup> In fact the No Vote, as a percentage of the total electorate (18.5%), was actually down on the previous successful referendum on the adaptation of the Single European Act.<sup>2</sup> This high level of abstention seemed to be the product of a combination of apathy and a lack of understanding of the issues at stake, widely ascribed to a lacklustre campaign by the government parties.<sup>3</sup> However, given that Ireland has no requirement for a quorum of participation in order to validate a referendum, the victory of the No Vote was constitutionally valid. Political, and to a lesser extent public, opinion was mobilised around the idea of a re-run by the fact that the referendum was considered to have been defeated by the abstention of a confused or apathetic silent majority. Following the lead of the only other country to have defeated and then successfully re-run an EU referendum, the Danes who had rejected and then subsequently passed the Maastricht Treaty, the

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<sup>1</sup> Richard Sinnott and Johan A. Elkink ‘Attitudes and Behaviour in the Second Referendum on the Treaty of Lisbon’ *Geary Institute and School of Politics and International Relations University College Dublin* Report prepared for the Department of Foreign Affairs July 2010 p.3

<sup>2</sup> ‘Attitudes and Behaviour of the Irish Electorate in the Referendum on the Treaty of Nice’ *Irish Marketing Surveys Limited in association with EOS Gallup Europe* carried out for the European Commission Representation in Ireland p.ii

<sup>3</sup> *Ibid* p.iv

Irish government secured a specific recognition of Irish neutrality, which had been a central concern of No voters, in the Seville Declaration. Romano Prodi, President of the European Commission, travelled to Ireland and sought to engage with Irish public concern. However, no significant change was made to the institutional framework set out in the Treaty and the rejection was largely ascribed to a failed governmental campaign. When the referendum was re-run the following year participation increased to 49.5% with a clear victory for the Yes side (62%).

The defeat of the first Lisbon Treaty referendum represented a much more significant threat to the hegemonic view of the European project. Unlike the first Nice referendum, abstention (at 47%) could not be used to undermine the integrity of the No Vote. The decisive issue was the increase in No voters as a proportion of the total electorate (from 18% at Nice 2 to 28% in June 2008), rather than Yes voters staying at home – which was the key difference between the first and second Nice referenda.<sup>4</sup> No voters tended to come from younger age groups and less privileged socio-economic backgrounds reflecting an active as opposed to an apathetic disconnect with the hegemonic project of the EU among lower middle-class, working-class and young voters.<sup>5</sup> According to post-referendum surveys, government dissatisfaction had little to do with the final result, and if this rejection can be classed as a protest vote, it is the European Union, not the Irish government, that was the subject of the protest.<sup>6</sup> Unlike the Nice referendum, in which neutrality was a central preoccupation of No voters, opponents of the Lisbon Treaty were centrally focused on the loss of sovereignty (22%) or considered the whole Treaty as ‘a bad idea in general’ (26%).<sup>7</sup> However both defeated referendums were defined by voters rejecting the Treaty due to a lack of understanding of the questions involved (Nice I 39% and Lisbon I 40%). In the wake of the defeat of the first Lisbon Treaty referendum, the Irish government once more secured concessions, ensuring the retention of a Commissioner for each country, protecting national primacy in areas of tax policy, neutrality and abortion. EU leaders, such as prominent commissioner Margot Wallstrom, considered the government’s failure to explain the provisions of the Treaty as symptomatic of a wider failure within the Union’s institutions to communicate with the public, but did not question the fundamental institutional framework elaborated in the Treaty. The subsequent successful campaign focused centrally on employment and investment and managed to overturn the rejection by slightly increasing the turnout and winning over many wavering No voters.

Having established the context behind the re-runs of the referendums, this paper will now specifically explore the contrast between the EU’s self-proclaimed commitment to democratic principles and its policy faced with the rejection of the Nice and Lisbon treaties.

## EU DEMOCRATIC PRINCIPLES AND REFERENDUM RE\_RUNS

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<sup>4</sup> ‘Post Lisbon Treaty Referendum Research Findings’ Millward Brown September 2008 p.2

<sup>5</sup> Sinnott and Elkind ‘Attitudes and Behaviour in the Second Referendum on the Treaty of Lisbon’ p.12

<sup>6</sup> Ibid p.11

<sup>7</sup> Ibid p.6

The central foundational texts of the European Union, which not only dictated the institutional and legal framework but also sought to place the Union's workings in a historical and moral context, trumpet the commitment to democracy as the key value of the European project. These aspirations are clearly outlined in Title II of the Treaty on the European Union (Maastricht) 'Provisions on Democratic Principles. Article 10 declares:

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. 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.

The commitment to democracy is further reinforced in Article 11:

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.

As these articles show, the Union seeks to validate its decision by relying on the democratic mandate given it by European citizens. However, Article 10.2 is central to the conflict within the Union's democratic mechanisms. When, as occurred with both the defeated referendums, the opinion of the Member State, as represented in this case by the Irish government, clashes with that of the citizens of the State, as expressed by popular referendum, the EU's founding principles do not establish precedence for either. The spirit of democracy would seem to favour the directly expressed will of the people; the EU policy has always favoured that of the government. While there was no question of the Union's leaders repressing opposition or suppressing unfavourable results, there was in Brussels a palpable sense of anger at governmental incompetence, disbelief at Irish 'stubbornness' and 'ingratitude' and even arrogance that these defeats showed that Irish experiments in 'plebiscitary democracy' confirmed that the elites knew best. The use of the referendum for the ratification of European Treaties, a constitutional prerogative established by the Irish Supreme Court in 1976, would appear to be a prime example of participation of the citizen in the democratic life of the Union and a paradigm of the closeness between decision-making and the citizen envisioned in Article 10.3. However, this practice is often portrayed in Brussels as an undesirable quirk, even flaw, of the Irish constitutional system, the replication of which is to be avoided as far as possible elsewhere in the Union. The referendum, which appears to comply fully with the spirit of Article 11.1, giving citizens an opportunity to "make known and publically exchange their views" is considered impractical and has been associated in political and press attacks on the Irish result with the plebiscitary tendencies of Bonapartism and even National Socialism. While many politicians condemn the referendum on the basis of its supposed impracticality and the institutional paralysis it may induce, the central bone of contention seems to be the infelicitous tendency of referendums generally, and in Ireland particularly to throw up an answer the EU leaders did not want to hear. It seems the only time the EU leaders are keen to consult the citizenry via referendum is when they have already given the 'wrong' answer in a previous referendum.

The very principle of the referendum re-run has a dubious democratic and legal justification. For the Second Nice referendum, while the absence of a required quorum did not offer a legal argument, the low participation offered a moral argument to proponents of a re-run. The relatively high participation in the first Lisbon referendum offered no such moral justification. In both cases the high level of abstainers and no voters who based their decisions on a lack of knowledge or understanding of the substantive issues was mobilised a justification for the re-running of the referendums. The fact that EU leaders openly embraced this argument shows a wide acceptance within the governing elites of the Union that it has failed to fulfil the fundamental goals of Article 11.2 & .3, which commit the institutions to transparency and open dialogue with the citizenry. However, despite much navel-gazing and public promises to remedy the inaccessibility of the institutions in the wake of both referendum defeats, little progress seems to have been made. Unwilling or unable to fundamentally alter its institutional basis, the EU has instead focused on promoting and explaining the institutions as they exist, thus refusing to engage with the malaise and disconnect between citizen Union, of which the referendum defeats are but one example. More worrying, however, is the growing perception, nourished, at least in Ireland, by the referendum re-runs, of an elitist cabal in Brussels dictating the legal and moral systems for European societies not only with little regard for but even in open contempt of popular opinion. By re-running the referendums, the European Union has opted for short-term gain over long-term credibility, undermining its own proclaimed commitment to representative democracy and increasing popular rejection of its perceived anti-democratic agenda.

## REJECTION OF THE EUROPEAN CONSTITUTION IN THE NETHERLANDS AND FRANCE

The policy pursued by EU leaders following the rejection of the European Constitution in 2005 by popular referendum in France and the Netherlands contrasted drastically with that pursued following the Irish rejections of Nice and Lisbon. Far from there being any question of a re-run, the Constitution was immediately removed from the agenda in favour of a “period of reflection” in order to determine the next course of action. Interestingly, as will be discussed later, this action in fact contradicted a provision introduced in preparation for the ratification process, which catered for the eventuality of a No vote in some countries without derailing the project of the Constitution. Indeed, it would appear that the significance of the No vote by France and the Netherlands was considered so great as to undermine the validity of the Constitution, despite the fact that some resistance was expected. This contrasts sharply with the reaction to Irish rejection of Nice and Lisbon, which were treated as insignificant enough to revise.

The Treaty Establishing a Constitution for Europe was signed by EU officials in October 2004, and then voted in by the Parliament in January 2005. Before the Treaty could come into effect, however, it had to be ratified by each member state according to their constitutional requirements and public preferences. Although Ireland is the only member state legally obliged to hold a public referendum in order to make any changes to the constitution, other member states (Czech Republic, Denmark, France, Luxemburg, the Netherlands, Poland, Portugal, Spain, UK) also planned to hold referendums. When EU leaders signed the treaty in October of that year, they added a provision stating that if, in two years time, four-fifths of member states had ratified the Constitution but some had “encountered difficulties”, an EU summit would be held to consider the situation.

The ratification process seemed to get off to a strong start, and by May 2005 ten states had already ratified the Constitution, including a 76% “Yes” vote in the Spanish referendum. However, in May

and June 2005 both France and the Netherlands delivered resounding “No” votes, despite support for the Constitution from the countries’ main political parties. The results were definitive: France offered a 55% “No” vote with a very high turnout rate (roughly 70%), and in the Netherlands 61.5% voted “No”. Despite the provision outlined above, the result of this unexpected vote was the cancellation of all subsequent referendums and votes (although Luxemburg went ahead with theirs anyway and produced a 56% “Yes” vote), and a “period of reflection” was called for. No further action was taken and in 2007 an Intergovernmental Conference decided to simply amend current treaties and abandon the Constitution.

Reasons for the rejection of the European Constitution in both France and the Netherlands found common roots in social issues. Indeed, the most cited reason for the “No” vote in France was dissatisfaction over the provision for social welfare and fears over the ultra-liberal economic approach that the European Constitution was felt to promote. In the Netherlands, the gist of the “No” campaigns anthem was that the Constitution created a Europe for big businesses and not for the people. One argument that has been made several times is that the “No” vote reflected the desire of citizens for the EU to relate better to member state’s various domestic political and social arrangements. Comparing the French and Dutch “No” votes to the Irish “No” votes from this perspective points to a definite gap in the level of involvement of citizens: the French and Dutch presented an informed opposition, whereas the Irish rejections of Nice and Lisbon had been characterised by a lack of understanding and abstention.

However, a closer examination of the French reasons for voting “No” reveal an extremely high level of misinformation, as well as a strong desire to rebel against Chirac’s unpopular government and an undesirable domestic situation. 52% cited “dissatisfaction with the current economic and social situation in France” as their main reason for rejecting the Constitution, 32% saw it as a “threat to France’s identity”, and 31% claimed to vote “No” in order to deliberately “manifest discontent with French politicians”. Many feared that the Constitution paved the way for Turkey’s accession. In a similarly divergent way, 42% of the “Yes” voters declared they voted that way because they feared a “No” vote would reduce France’s influence in the EU.<sup>8</sup> A similar voting pattern is apparent in the Netherlands, where the major point of the “Yes” campaign was that a “No” vote would weaken the Netherlands’ position in the EU, and 30% of “No” voters did so in order to express dissatisfaction with the current government.

Thus can be seen that whereas the Irish “No” vote was rejected on the grounds of too little information, the French and Dutch “No” vote was accepted – and even served to override previous provisions made for correct protocol in the event of “No” votes – even though it was largely based on hostility directed towards domestic governments and misinformation regarding the content and meaning of the Constitution. In the following section, we shall explore EU principles regarding equality between member states and address the issue of the apparent imbalance present in inter-state dealings.

## EU PRINCIPLES REGARDING THE EQUALITY OF EU MEMBER STATES

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<sup>8</sup> Franck, R. 2005. “Why Did the Majority of French Voters Reject the European Constitution?”, *European Journal of Political Economy* 21(4), pp. 1077 – 1084.

In accordance with Article 4.2 of the Treaty of the European Union, all member states are equal before Treaties:

“The Union shall respect the equality of member states before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

The practice of qualified majority voting, whereby each member state has a certain weight depending on its population size, is becoming ever more widespread within European Union decision making processes. Nevertheless, a certain number of particularly sensitive policy areas remain subject to unanimity, meaning that all member states meeting within the Council must be in agreement before a proposal can be adopted. In the cases of the Nice and Lisbon Treaties, due to their status’ as amendments to founding Treaties, and the European Constitution, due to its importance, unanimous ratification was required in order for them to enter into force.

However, as we saw in the previous section, the commitment to unanimity was respected only when France and the Netherlands rejected the Constitution, but not when Ireland rejected the Nice and Lisbon Treaties. France and the Netherlands both have a QMV higher than Ireland’s, as well as more symbolic gravitas due to their roles as founding members and their geographical location on the heart of the continent. This paper does not attempt a normative analysis of the situation, and does not attempt to argue whether it was right or not for Ireland’s vote to be appealed. Rather, we are simply highlighting departures from democratic commitments made by the Union to member states. The reason why it was decided that unanimity was necessary in the cases of Nice and Lisbon was because they made fundamental changes to Treaties already signed by member states and entailed changes to member states’ domestic structures and constitutions. With the gravity of the subject matter agreed on, it can only be assumed that it was the gravity of the member state in question, i.e. Ireland, which was seen as debatable. This logic constitutes a significant departure from both the principle of unanimity, and the commitment made in Article 4.2 to the equality of member states.

## CONCLUSION AND RECOMMENDATIONS

The most minimal definition of democracy requires that elections and referendums be characterised by ex-ante uncertainty and ex-post irreversibility<sup>9</sup>. In the case of Ireland, it would appear that the latter was not observed at the time of the second Nice or Lisbon referendums. In the case of the Netherlands and France, however, their defeat of the European Constitution was treated as irreversible. Thus emerge two independent problems: principles laid out by the European Union itself regarding the responsiveness of their institutions are not being respected, but moreover, the commitment made in Article 4.2 to the equal weight of each member state is not being respected.

As much as a democratic institution is required to represent the interests of its citizens, it is also required to engender consent and engagement from its citizens. Even if it is accepted that Ireland

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<sup>9</sup> Przeworski, A., M. Alvarez, J. Cheibub and F. Limogi. 2000. *Democracy and Development: Political Institutions and Well-Being in the World 1950-1990*. Cambridge: Cambridge University Press.

voted “No” out of lack of understanding and lack of engagement with EU mechanisms, this is as much a reflection of the failure of the EU in its democratic mandate as was the French and Dutch “No”s which argued a lack of representativeness. By its own principles, set out in the Treaty on the European Union, the EU is in breach of its commitment to both democracy and equality of the Member States, which leads us to the inevitable question: Is a democratic Union incompatible with a Union of equal states? Can Europe only renew if it bypasses the narrow interests of squabbling governments and consults the citizens directly?

In the midst of the great economic and political crisis which is shaking the foundations of the European project, there is the opportunity to reanimate, reinvigorate and reconnect the Union with its citizens. While ‘plebiscitary democracy’ has historically proven to be an oxymoron, the use of the referendum held on a Europe-wide basis, sparingly and only for radically transformative treaties, offers an opportunity to re-engage the citizenship and finally realise a pan-European moment of democracy. Can Europe be brave enough to accept the notion of a Europe-wide majority by popular referendum, perhaps qualified by a quorum, as a means of accepting or rejecting treaties? It is doubtful but not impossible. What this potted history of EU interaction with popular referendums has shown us is that policy has largely been motivated by a fear of public opinion and even a subversion of the legally expressed democratic will of the people. By re-engaging this democratic will, by opening the Union to the reforms desired by those who have rejected EU treaties, the Union can create a European political culture based not on the fear of isolation but rather on the cohesiveness of spirit. If the Union continues to ignore, subvert and undermine the will of the ordinary citizens, it may find itself overcome by the rising tide of disillusionment and extremism. Radical reform of the institutions, ensuring that the EU is government of, by and for the people, needs the legitimacy of a mass experiment in democracy, not the petty politics which has surrounded Irish referendum re-runs.