

## Foreword

At the time of writing the Lisbon Treaty is stalled, if it is not already dead. What are the consequences and where do we go from here? But first, what is the significance of the Irish referendum? Was it a peculiarly Irish phenomenon, or a symptom, manifested in one member state, of something deeper and more far-reaching?

The Irish vote may be attributable in part to factors peculiar to Ireland and in part to dissemination of absurd travesties. But many people from other countries say that if their citizens had been given the opportunity to vote in a referendum, the result would probably also have been No. Various reasons are advanced including the obscurity and indigestibility of the Lisbon text; the lack of any coherent explanation of its content and its importance; and a general unease about the effect of 'globalisation'. These may explain the phenomenon but they do not really explain its causes.

The paradox is that there has been much talk over the last 20 years or more about the 'democratic deficit', the overweening power of Brussels bureaucracy, the arrogance of a political élite and the secretive ambitions of unelected judges. Yet here was a proposal reached after years of public discussion by democratically elected politicians, widely reported and available on the Internet. It was supported by all but one of the main political parties in Ireland south of the border at least. It was approved by the European Parliament and the Parliaments of most of the member states. And it would have reinforced Parliamentary control of the EU institutions, notably by giving a wholly new role to national Parliaments.

Eurobarometer polls suggest that "Europe should do more" and there is indeed a clamant need for a better co-ordinated common approach to the problems of climate change, cross-border crime and many others. To meet these challenges in suitably democratic fashion, the powers of the European Parliament, and the prerogatives of elected heads of state and government in the European Council, have been enhanced. They would have been further enhanced by Lisbon, at the expense,

notably, of the 'bureaucratic' Commission. As for *l'Europe des juges*, the 'heroic period' of the Court of Justice is said to be over.

Yet the net result, as far as the average citizen is concerned, is a loss of confidence and a lack of trust in the machinery of democracy. To the question, "What is democracy?" the popular answer seems to be, "Democracy is something more than permitting us to choose, every few years, between candidates selected by self-electing party machines. *We wish to be heard.*"

It is true that popular preferences are neither clear nor consistent. On the one hand, there seems to be a demand for governments that 'deliver' – seen in an extreme form in the preference of the Russian people for the authoritarian rule of Mr Putin and his chosen lieutenants rather than the (flawed) democratic processes that put them in place. On the other hand, national parties whose only common bond is a narrow chauvinism gain ground at the expense of parties proclaiming a traditional, doctrinally-based programme of what they will deliver.

But there is nothing new under the sun. Who wrote this, and when?

"During forty years, faith in parliamentary government has suffered an extraordinary decline or, as some would say, a temporary eclipse. This change is visible in every civilised country. ... Parliamentary government may under favourable circumstances go a great way towards securing such blessings as the prevalence of personal liberty and the free expression of opinion. But neither parliamentary government nor any form of constitution, either which has been invented or may be discovered, will ever of itself remove all or half the sufferings of human beings. Utopias lead to disappointment just because they are utopias. ... We now know for certain that while popular government may be under wise leadership a good machine for simply destroying existing evils, it may turn out a very poor instrument for the construction of new institutions or the realisation of new ideals. We know further that party government ... inevitably gives rise to partisanship, and at last produces a machine which may well lead to political

corruption and may, when this evil is escaped, lead to the strange but acknowledged result that a not unfairly elected legislature may misrepresent the permanent will of the electors. ... The above considerations taken as a whole afford some explanation of a demand for that referendum which, though it originates in Switzerland, flourishes in reality, though not in name, in almost every state of the American Commonwealth. ... It is probable, if not certain, that any one, who realises the extent to which parliamentary government itself is losing credit from its too close connection with the increasing power of the party machine, will hold with myself that the referendum judiciously used may ... by checking the omnipotence of partisanship, revive faith in that parliamentary government which has been the glory of English constitutional history."

The author is Dicey, writing in the Introduction to the last edition published in his lifetime of *The Law of the Constitution* (8<sup>th</sup> edition, 1915, pages xcii-c). Put shortly, Dicey's message is that the unwelcome result of a referendum may be a necessary shot across the bows of the modern political dreadnought. If we claim to be democrats, we cannot, on the one hand, accept rejection of the Constitutional Treaty by the French and the Dutch and, on the other, insist that the Irish must think again about Lisbon.

So what are the consequences and where do we go from here? There are fears that there will be a loss of institutional efficiency when it is most needed and a lurch towards protectionism. Perhaps most damagingly from the point of view of personal liberty, there is the loss of parliamentary and judicial control over governmental activity under the Third Pillar. These concerns are genuine and important.

Nevertheless, the EU works surprisingly well as it is - indeed it is surprising, in many respects, that it works at all. There is much of value in the Lisbon Treaty that can, with good will, still be achieved without treaty change, though it is important in doing so to beware of proving that the Brussels juggernaut rolls on irrespective of the will of the people.

For some Community lawyers at least, there is the consolation that they will not have to deal with confusing, and potentially damaging, amendments of the Treaty texts – notably loss of the Treaty ‘objectives’ and blurring of ‘competition’, ideas that have guided the Court’s case law over fifty years.

Now, in particular, is the time to plead for a clearer focus on the legally-enforceable internal market as the cornerstone of the European enterprise. The internal market is *not* just an aspect of “the functioning of the Union”. It is something more far-reaching than a free market and, whatever the attractions of Putinesque ‘delivery’, it is better to live in a society governed by known laws impartially administered.

The young people of Ireland voted No in the proportion of 2:1. Properly presented, the internal market has a moral component that should appeal to the young. It is about individual rights, social as well as economic, however imperfectly they may be understood and appreciated by those who enjoy them, and however unwelcome they may sometimes be to those in authority. It is, in short, about the right of individuals to choose their own destiny – to go where they want, to live where they like, and to trade and to work where they can.